IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	**I.D. No. 0201017168**
	)	
TYRONE PHILLIPS	)	
Defendant	)	

Submitted:April 14, 2003
Decided:July 3, 2003

UPON DEFENDANT'S MOTION FOR RECUSAL
DENIED.

Donald Roberts, Esquire and Maria Knoll, Esquire, Deputy Attorneys General for the State.

Jennifer-Kate Aaronson, Esquire, for the Defendant.

ABLEMAN, JUDGE

Before the Court is a Motion to Recuse this Judge from presiding over any further matters in this criminal case based solely upon a conversation that former defense counsel allegedly had with the Defendant prior to Defendant entering a plea of guilty to the charge of Murder by Abuse and/or Neglect. That conversation, which apparently concerned aspects of this Judge's personal life, is now the basis for Defendant's request for this Judge to recuse herself. Since Defendant's claim of prejudice on the part of this Judge is wholly unfounded and unsupported, the Motion to Recuse is hereby denied.

PROCEDURAL BACKGROUND

Defendant entered a plea of guilty to the indicted charge of Murder by Abuse and/or Neglect in the First Degree on November 26, 2002, only one week prior to the scheduled trial. The guilty plea was in connection with the death of Cynthia Ferris, a two-year-old child. The Court conducted an extensive colloquy with Defendant whereupon it was satisfied that the Defendant's plea was entered knowingly, intelligently, and voluntarily.[1]

[1]Prior to entering his guilty plea, defendant completed the Truth In Sentencing Guilty Plea Form wherein he indicated that he was freely and voluntarily accepting the plea agreement, that he had not been threatened or forced by his attorney, the State, or anyone to enter the plea, and that he was satisfied with his attorney's representation of him. During the plea colloquy with the Court, the defendant acknowledged that (1) he had carefully reviewed the Truth In Sentencing Form; (2) was freely and voluntarily pleading guilty; (3) that he had not been forced or threatened into pleading guilty; (4) that he was satisfied with his legal representation; (5) that no one had promised him what his sentence would be; and (6) twice confirmed the voluntariness of his plea.

In a letter, dated December 30, 2002, Defendant wrote the Court concerning his desire to withdraw his guilty plea. Counsel were notified of the substance of Defendant's communication with the Court and substitute counsel, Kate Aaronson, Esquire, was appointed by the Court to represent Defendant in connection with his request to withdraw his guilty plea. The Court also ordered the preparation of a transcript of the guilty plea proceeding prior to scheduling a hearing on the issue.

In order to understand more fully the substance of defense counsel's discussions with the defendant, the Court requested and received an affidavit from Assistant Public Defender David Facciolo, who represented defendant prior to and during the entry of the plea. In his affidavit, Mr. Facciolo sets forth in scrupulous detail the events, strategy, and discussions leading up to defendant's guilty plea. While the bulk of the facts contained therein relate to the question of defendant's application to withdraw his guilty plea, the comments that pertain directly to the instant motion to recuse reflect that defense counsel did in fact advise defendant that "God had not blessed her [the Judge] with children. He further confirms in his affidavit that this statement was in response to inquiries posed by the defendant regarding how the Judge might sentence him.

CONTENTIONS OF THE PARTIES

In the instant motion to recuse, Defendant submits that he intends to raise as a basis for withdrawal of the guilty plea that the plea was not voluntarily entered because of statements made by trial counsel "specifically involving intimate details of the personal life of the judge." He submits that he was induced in part to plead guilty, based upon information about this Judge's personal life and prejudice toward defendants charged with particular crimes" which would result directly in the imposition of a life sentence if Defendant exercised his constitutional trial rights and was convicted at trial.

The Defendant submits that his Fifth Amendment right to have a neutral and detached judge preside over this case has been compromised by former counsel s statements to him, and that this Judge should disqualify herself because the Court s impartiality might reasonably be questioned. Even if the Court is subjectively certain of its lack of bias or prejudice towards this defendant, defense contends that even if there is an "appearance of bias" as he contends exists here, the Court must recuse herself.

In its Response to the motion, the State vigorously urges the Court to deny the Motion to Recuse because it is "based upon a subjective and totally unreasonable extrapolation of an innocuous (albeit stupid)

comment by trial counsel in response to a question from the defendant." The State argues that defendant has failed to demonstrate how the comment could have "induced him to enter a guilty plea and has further failed to explain why, if so induced, he did not seek recusal prior to the entry of the plea. In applying the applicable law regarding judicial recusal, the State maintains that defendant simply cannot establish an adequate legal basis to justify the relief he now seeks.

DISCUSSION

It is of course a fundamental tenet of the administration of justice that no judge should preside over a case in which he or she is not disinterested or impartial. To that end, Canon 3(c)(1) of the Delaware Code of Judicial Conduct sets forth the test for a member of the Judiciary to recuse herself as follows:

> Disqualification.
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
> (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
> (b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> (c) He knows that he, individually or as a fiduciary, or his spouse or minor child

> residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding or the lawyer is affiliated with a law firm with which a lawyer relative of the judge is affiliated;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) Is to the judge s knowledge likely to be a material witness in the proceedings;

While Canon 3(c)(1) codifies the two-fold considerations of due process and the appearance of impartiality that are critical to our jurisprudence, if the specified reasons for recusal are not applicable in a particular case, the Delaware Supreme Court has held that the designated instances prompting disqualification in Canon 3(c) are not exhaustive.[2] Thus, there may be other circumstances in a particular case where a judge's impartiality might reasonably be questioned, in addition to those specified in the Canon.[3]

In the *Los* case, the Delaware Supreme Court set forth a two-part test for determining whether a judge should disqualify herself or himself.

[2] *Los v. Los*, Del. Supr., 595 A.2d 381 (1991).
[3] *Id.*

Los was a Family Court case wherein the parties had been engaged in extensive, protracted and acrimonious litigation concerning property division following divorce, custody, visitation, and child support. Los had filed a petition seeking review de novo of a child support order entered by a Master. As was the Court's policy, the matter was assigned to the same Judge who had presided over previous aspects of the ongoing domestic relations case.

Two weeks prior to the scheduled hearing, Los had filed a Federal District Court lawsuit naming his ex-wife, her attorney, the Attorney General of the Delaware and Judge Conner as defendants. The suit sought a declaration that Delaware Child Support Formula was invalid and that Family Court Civil Rule 26, which requires court approval before initiating discovery, was unconstitutional. Although Los' complaint sought actual and punitive damages, he made no claim concerning the conduct of Judge Conner apart from the discharge of his official duties in implementing Court rules or state law.

At the inception of the scheduled de novo hearing before Judge Conner, Los presented a written motion to recuse based upon his filing of the federal suit in which he had named Judge Conner as a defendant. Los alleged that "such circumstances create an insurmountable conflict of interest between petitioner [Los] and [Judge] Conner." Los also

claimed that the Judge was biased against him but did not identify any specific basis for his claim.

In refusing to disqualify himself from further proceedings in the *Los v. Los* matter, Judge Conner noted that he "bears no ill will or harbors any animosity toward Mr. Los" and that the mere filing of the federal litigation did not establish prejudice.

Upon Los' appeal to the Delaware Supreme Court, the Court set forth a two-part (both subjective and objective) test for judges faced with claims of personal bias or prejudice under Canon 3(c)(1). The Supreme Court ruled that the judge must first, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Secondly, even if the judge believes that he or she has no actual bias, the judge must undertake an objective analysis to ensure that there is not an appearance of bias reasonably sufficient to cast doubt upon the Court's impartiality.[4]

In finding no basis to disturb the Judge's discretionary decision not to disqualify himself, the Court was satisfied that the trial judge had sufficiently disclaimed any feelings of bias. The Court was further satisfied that the appearance of bias or lack of impartiality did not exist

[4] *Los* at 384-85; *State v. Walberg*, Wisc. Supr., 325 N.W.2d 687, 692 (1982).

merely because the judge had been named as an adverse party in another proceeding.[5] The Court thus affirmed Judge Conner's refusal to recuse himself.

In the case at bar, the defendant has established neither a subjective nor an objective basis under the *Los* test sufficient to require this Judge to recuse herself.

Turning first to the subjective prong, the Court can unequivocally state that it has no feelings of bias, prejudice, or ill-will against this defendant personally, and that nothing the defendant or his attorneys have done during the course of this litigation gives rise to any such feelings. The sole hearing in this case over which this Judge has presided was the defendant's entry of his guilty plea. At that proceeding, defendant was polite and respectful, and he gave every indication that he fully understood all of the potential consequences of his guilty plea, including the fact that it could subject him to life imprisonment. Since

[5]The Supreme Court went on to elaborate upon the compelling policy reason for a judge not to disqualify himself at the behest of a party who initiates litigation against a judge:

> While we find no abuse of discretion in the refusal to recuse in this case, we note that there is a compelling policy reason for a judge not to disqualify himself at the behest of a party who initiates litigation against a judge. In the absence of genuine bias, a litigant should not be permitted to judge shop through the disqualification process. The orderly administration of justice would be severely hampered by permitting a party to obtain disqualification of a judge through the expedient of filing suit against him. *Smith v. Smith*, 115 Ariz. 299, 564 P.2d 1266 (1977).

defendant has not identified any specific evidence of actual bias or prejudice, and since the Court is absolutely satisfied that it is free of bias or prejudice, and that it can be fair and neutral, this first part of the *Los* analysis does not require disqualification.

With respect to the second part of the recusal inquiry under *Los*, upon which the defendant's motion is primarily focused, the Court cannot conclude that defendant has established an objective basis to require this Judge s recusal. For purposes of the Court's inquiry under the second part of the *Los* test, the Court will accept defendant's contention that it must determine "whether an objective observer outside of the judicial system would question the Court's impartiality." Using this "objective observer" concept, in order to grant defendant's motion, the Court is required to decide, as previously stated, (1) whether there is an appearance of bias; and (2) whether the appearance of bias might reasonably be questioned.

In the eyes and mind of the reasonable objective observer, there are simply no facts or circumstances that demonstrate an appearance of bias that would lead such a reasonable and objective observer to doubt the Court's impartiality. In the first place, defendant has apparently lost sight of this fact that the defendant himself is not the objective observer outside the judicial system contemplated by the *Los* analysis. It

should be emphasized that what the defendant personally believes or thinks – or even what he has been told – has no bearing upon whether an objective observer would view the Court as being impartial. A reasonable, objective observer – who is neither the defendant nor his counsel – assessing the facts of this case, would be extremely hardpressed to find any appearance of bias sufficient to question this Judge's impartiality.

Indeed, the only "appearance" of bias or prejudice that defendant is able to identify in this case is entirely of his own creation. Defendant's contrived belief that a childless judge is somehow more inclined to impose a harsher sentence than any other judge who has children is hardly a basis to question the Court's neutrality. It would be just as unreasonable and misinformed to conclude that the Judge has the appearance of bias against men because she is a woman, against redheads because she is blonde, against young defendants because she is old, and so forth.

If this conjured and illogical basis for recusal were taken to its extreme, any defendant could argue such things as: (1) a judge who is not wealthy could not impartially sentence a bank robber who stole millions of dollars; or (2) a female judge could not impartially sentence a rapist; or (3) a judge whose home had been unlawfully invaded could not

impartially sentence a burglar; or (4) a judge whose parents were alcoholics could not impartially sentence a defendant for Driving Under the Influence of Alcohol. The list could go on, and on, and on…

Besides his failure to establish any factual basis for questioning the Court's impartiality, it is significant that defendant has also failed to demonstrate any logical nexus between the Court's family status, i.e. lack of children, with the type of prejudice or bias he alleges. Specifically, neither this defendant, nor anyone for that matter, can reasonably know whether a judge with no children would be more or less likely to impose a harsher sentence. Indeed, one could speculate that the Court's personal life reflects precisely the contrary about which defendant is concerned. No defendant or attorney knows whether the Court deliberately chose not to have children, or did not want children, just as defendant or his counsel have no way of ascertaining whether the Court is actually disappointed by the lack of children. The critical point here is that the Court's family composition has absolutely nothing to do with the sentencing decision to be made in this case, whether or not it influenced defendant's decision to plead.

Moreover, defense counsel clearly misses the point when it suggests that it may need to call the Court as a potential witness on the truth or falsity of trial counsel's comments to the defendant prior to his

decision to enter a guilty plea. Whether the information imparted by counsel to defendant is true or false is simply not relevant to the issue of how an objective observer might view the appearance of impartiality. As stated before, defendant is clearly not the "objective observer" contemplated by the Delaware Supreme Court's *Los* test, and his own beliefs or feelings resulting from counsel's comments do not govern the Court's decision on this motion to recuse.

Moreover, defense counsel's suggestion that the "appearance of impropriety" is heightened by the Court's letter to trial counsel requesting his affidavit also misses the mark. Any judge, in any Court, in any jurisdiction, would find an attorney's willingness to provide details to a defendant about a judge s private life unacceptable, and perhaps even unethical. But that is strictly a matter between the Court and counsel. If this Court has expressed any dissatisfaction whatsoever concerning the disclosures that are at issue herein, it certainly places no blame on the defendant for his questions to counsel. And, more importantly, the Court s expressed concern over these revelations is purely an ethical matter between counsel and the Court and in no way evidences an appearance of impropriety sufficient to justify recusal.

Finally, just as the Supreme Court suggested in the *Los* case, there is a compelling policy reason for a judge not to disqualify herself at the

behest of a party who claims an appearance of prejudice, without a factual or reasonable objective basis to do so. In the absence of genuine bias, a litigant should not be permitted to shop for a judge of his or her choosing. If this defendant seriously believes that any judge, or any lawyer, or even any law-abiding citizen of this state, would not have strong personal feelings against the preventable death of an innocent two-year-old child, he will be hardpressed to find such an individual. And, if those strong feelings were ever to be a basis for recusal as claimed here there is not a judge in existence who would not be subject to disqualification. In short, the orderly administration of justice cannot be subject to a party s self-created, unsupported claims of prejudice or the appearance of bias.

CONCLUSION

For all of the foregoing reasons, the Motion to Recuse is hereby denied. The Court will schedule the Motion to Withdraw Guilty Plea at a time convenient for the Court and counsel.

IT IS SO ORDERED.

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PEGGY L. ABLEMAN, JUDGE

cc: Donald Roberts, Esquire
Maria Knoll, Esquire

Jennifer-Kate Aaronson, Esquire

Prothonotary