

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
VS. : CP-14-CR-2421-2011
GERALD A. SANDUSKY : CP-14-CR-2422-2011

OPINION AND ORDER

Dated: November 18, 2016

FILED FOR RECORD
2016 NOV 18 AM 8:33
DEBRA C. LAMMEL
PROTHONOTARY
CENTRE COUNTY, PA

The purpose of this opinion is to explain the reasons why I have entered the attached order in which I recuse myself from presiding over any further proceedings in this case.

The defendant's attorneys have impugned the competence and integrity of essentially everyone associated with the grand jury's investigation into the defendant's conduct, the defendant's trial and conviction, and these post-conviction proceedings. Now they have chosen to impugn the integrity of the court itself.¹

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- ¹ Prosecutor Joseph McGettigan "lied to the jury." 2nd PCRA at 33, and engaged in "prosecutorial misconduct." Id. at 20.
 - Prosecutor Jonelle Eshbach "lacked candor...or may have committed perjury." (Defendant's brief 11/14/16, fn. 5 at 19).
 - Defense Attorney Joseph Amendola "committed perjury" (Id. fn.8, p 25). He placed "his own interests in publicity above the interests of his client." (Id. fn. 10 at 29).
 - Grand Jury Supervising Judge Norman A. Krumenacker's ruling is criticized for its "incredulity." (Id. fn. 16, at 67).
 - The Superior Court judges who decided the appeal from the verdict and sentence "had decided the case prior to oral argument or the author had at least circulated a proposed decision in advance." (2nd PCRA fn. 13, at 23.)
 - Grand Jury Supervising Judge Barry Feudale was "unfairly biased" and he and "the Commonwealth acted in concert to deprive" the defendant of Brady material. (2nd PCRA, at 63).

These collective accusations directed at attorneys, judges, jurors, investigators and victims, based on what can only be characterized as diaphanous evidence, is a form of advocacy that transcends the traditional boundaries of an honored profession. Such advocacy should not be permitted by courts, and should merit the attention of the Disciplinary Board.

After hearing the witnesses called by the defendant's attorneys in support of their Post Conviction Relief Act ("PCRA") petition, counsel were ordered to submit their final briefs by November 14, 2016 on the issues on which evidentiary hearings had been held.

In their Brief on Evidentiary Hearing Issues, the defendant's attorneys addressed, among other issues, the issue identified as "Issue 11 in Second Amended PCRA Petition." As stated in the Petition their contention is:

"Trial counsel rendered ineffective assistance in waiving Mr. Sandusky's preliminary hearing and failing to use that proceeding for both discovery and to cross-examine the witnesses who had given numerous prior inconsistent statements."

The brief proceeds to address the issue raised by stating that by waiving the preliminary hearing trial counsel Joseph Amendola was inadequately prepared to cross-examine the victims at trial; that he had not discussed with the defendant the

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- "Governmental officials involved in the Sandusky investigation intentionally leaked grand jury information" which was "a deliberate act by the prosecution and its agents." (2nd PCRA, at 54).
 - "Only a member of the Office of Attorney General could have caused the presentment to be made available online when it was supposed to be under seal." (Addendum to Grand Jury Leak Claim, 7/14/16, at 2).
 - "The fairness of all the jurors selected can be questioned," including two jurors specifically said to have been "biased." (2nd PCRA, at 78-79).

advantages and disadvantages of waiving the preliminary hearing; and that he had not told the defendant that there was an agreement with the Commonwealth regarding the waiver. (Brief, at 23-26).

At that point counsel's brief then veers off into an entirely unanticipated argument in which they contend that I violated the Rules of Judicial Conduct (Id. fn. 9, at 26) and Pennsylvania case law (Id. at 34) by my "participation" in "negotiations regarding the plea waiver" (Id. at 33, 34, 36) which were conducted at a "night-time" "unprecedented off the record meeting at a hotel conference room" (Id. at 26) and that "it violates a defendant's due process rights for a court to be involved in the negotiation of waiver of important rights." (Id. at 33).

Upon reading that portion of counsel's brief it became apparent that counsel had chosen to base their argument on what, because of my May 10, 2016 Memorandum and Order, they knew was an incomplete account of what happened at the meeting. Instead of asking me to revisit my recusal order and thereby obtain my testimony, they elected to rest on an a clearly misleading record.

Accordingly, I entered an order on November 15, 2016 directing counsel to either "notify me of their intent to call me as a material witness regarding a meeting at the Hilton Garden Inn the evening before the defendant's preliminary hearing, or formally withdraw footnote 9 on page 26 and any argument related thereto." On November 16th, counsel informally notified me that they would do neither, and filed their formal response the next day. They stated they would not withdraw footnote 9 and the related ethics argument because they did not want to waive that issue on appeal; and they would not call me was a witness because of the disingenuous argument that they are precluded from doing so by Pa.R.E. 605.

On May 3, 2016, during a meeting in chambers with PCRA counsel and the prosecutor, I informed counsel that I had attended a meeting during the evening of December 11, 2011 with Magisterial District Senior Judge Robert E. Scott, and prosecution and defense counsel the evening before the defendant's preliminary hearing. At that meeting Judge Scott and I were informed the defendant would be in court to waive his preliminary hearing that was scheduled for the following morning. The next day, May 4, 2016, I electronically transmitted to the attorneys the handwritten notes I had made during the December 11, 2011 meeting.

On May 9, 2016, PCRA counsel filed a one and one-half page motion requesting my recusal stating as the grounds:

"....At this off-the-record meeting at the Hilton Garden Inn, certain representations appear to have been made by both the Commonwealth and Mr. Amendola and an unofficial agreement was reached regarding waiver of Mr. Sandusky's preliminary hearing that was to transpire later. This agreement is extra-record and pertains to Mr. Amendola's decision to waive Mr. Sandusky's preliminary hearing which involves a specific claim of ineffectiveness in Mr. Sandusky's PCRA petition.

"In light of the unusualness of a trial judge being present for a non-record discussion regarding a decision to waive a preliminary hearing, resulting in the PCRA court becoming a fact witness, a conflict of interest exists and Mr. Sandusky is constrained to request this Honorable Court to recuse itself and a new jurist be appointed forthwith." (Motion 5/9/16 at 1-2.)

Significantly, the motion nowhere suggests, or even intimates, that I participated in any negotiations concerning the defendant's decision to waive his preliminary hearing or that my attendance at the meeting was in any way unethical.

In response to the motion, on May 10, 2016, I filed a Memorandum and Order which is attached as an exhibit to this opinion. In denying their motion for recusal I recounted in detail my recollection of the circumstances surrounding the meeting. I

specifically said: "Counsel stated they had reached an agreement that the Defendant would waive the preliminary hearing." (at 4). I did not say that either Judge Scott or I had participated in any way in any negotiations, because we had not; and, in any event, whether we had done so did not appear at the time to be an issue based on the ground raised in the recusal motion.

My Memorandum supporting my denial of the recusal motion notes the "obvious issues arising from a judge being a witness in a proceeding over which the judge is at the same time presiding," but that those concerns are implicated only if the "judge is the single source of the information available to counsel, or if the facts themselves are disputed." (at 6, emphasis added.)

At the time of my ruling, which was before any of the participants in the meeting had testified in the PCRA hearings, it appeared the relevant facts regarding the meeting were not in dispute. The legal issue presented by the PCRA petition was whether Mr. Amendola's decision to advise the defendant to waive the preliminary hearing had some reasonable basis designed to effectuate his client's interest. The terms of the agreement between the prosecution and defense, and how it had been arrived at, were not in question. Therefore, any testimony I might have provided regarding the meeting itself seemed immaterial and provided no basis for recusal.

However, I left the door open. The Memorandum states that "Barring some subsequent representation by counsel" there did not appear to be a need for my testimony but "Obviously, I am making my ruling on the current state of the record. If subsequent events should demonstrate either that others cannot testify regarding the meeting or if their recollections differ materially from mine, then I will revisit the issue." (at 6, emphasis added).

In subsequent hearings, PCRA counsel questioned defense attorney Amendola (N.T. 8/12/16 at 101) and prosecutors Eshbach, McGettigan and Fina (N.T. 8/23/16 at 3, 27 and 47) about the meeting at the Hilton Garden Inn. The testimony of all four was somewhat vague on the specific details except that all testified that counsel had agreed the defendant would waive the preliminary hearing in return for an agreement that the prosecution would not seek an increase in bail if the charges were bound over or new charges were filed. PCRA counsel did not ask any of the witnesses whether the court "participated" in the "negotiations." And no one testified that either Judge Scott or I did so.

Mr. Amendola testified regarding how the waiver agreement came about:

"....And the last thing I needed was Jerry in a jail cell perhaps really really disabled in terms of helping himself prepare his defense. And Jerry obviously did not want to be in jail, so I proposed to Mr. McGettigan if we waived the preliminary hearing, could we have a commitment from the Commonwealth, in the event there were other charges, other alleged victims there would be no increase in bail. And he came back, not right away, maybe the next day I believe and said he could make that commitment." (Tr. 8/12/16 at 121-122.)

Q (Mr. Lindsay): Was there approval of this deal?

A: Well, there were no objections if that's what you're asking. I don't know if there was an approval in the form of some sort of order generated.

Q: I'm not asking about an order, I'm asking whether or not this arrangement that you discussed you had with Mr. McGettigan was submitted to these two judges?

A: I don't think it was submitted, I think it was just explained that that's what we were doing." (Id. at 126-127).

I had assumed that the fact that counsel had met with Judge Scott and me the evening before the preliminary hearing was inconsequential as it related to the factual development surrounding whether or not Mr. Amendola had provided ineffective assistance of counsel to the defendant when he advised him to waive the preliminary hearing. It was not until after the PCRA hearings had been completed, the record had been closed and PCRA counsel had filed their Brief on Evidentiary Hearing Issues on November 14, 2016 that it became apparent to me, for the first time, that the meeting, which they characterized as an off-the-record nighttime meeting in a hotel conference room, had, in their view, taken on nefarious undertones.

PCRA counsel repeatedly recites in their brief that the court "participated in negotiations" (Brief, at 33) or was "involved in the negotiation" of the waiver (Id. at 33) or that Mr. Amendola was ineffective by "permitting the district magistrate and trial court to participate in such waiver negotiations." (Id. at 36.) Counsel has argued not only that the meeting between the lawyers and Judge Scott and me was unethical, but has also cast it in tones that would lead one to believe it was somehow sinister.

While PCRA counsel allege in their response to my December 15, 2016 order that they are precluded by Pa.R.E. 605² from calling me as a witness because I am presiding over the proceedings involving the defendant's PCRA petition, they ignore the fact that I specifically informed them that I would revisit the recusal issue based on any subsequent representation from them that my testimony might be required.

Had I at any time been informed that they intended to argue that either Judge Scott or I had unethically "participated" in "negotiations" regarding the defendant's

² "The presiding judge may not testify as a witness at the trial or other proceeding." Pennsylvania Rules of Evidence 605

decision to waive his preliminary hearing, and they believed some material factual dispute had developed during the hearings that merited my testimony, then assuredly I would have revisited the recusal issue and agreed that my testimony had become relevant.

Instead, PCRA counsel have elected to call into question my fairness and impartiality without requesting my testimony and, by doing so, have created a cloud over these proceedings. It would be imprudent to allow such a cloud to linger and to permit it to cast a shadow on the legitimacy of the court, or any decision I would make on the merits of the defendant's PCRA petition,³ especially when that cloud can be so easily dissipated by my voluntary recusal and by presenting my testimony before a judge appointed in my stead.

It might be argued that I should simply ignore counsel's allegations and proceed to address the PCRA petition on its merits.⁴ In the current national environment in which some have chosen to embroil the courts and judges in controversy for less than honorable motives, the reality is that courts must err on the side of demonstrating fairness. There is no doubt that such an approach virtually invites the evils of "judge shopping." How to address the evils of that larger issue I leave to others. Under the unique facts and circumstances of this case, however, I believe recusal is the proper course.

Accordingly, it is ordered as follows:

³ In my view, having studied all 34 issues raised in the petition and the applicable law, no grounds raised in the petition merit relief. Counsel in their brief engages in unwarranted speculation about the grounds on which I previously denied Issue 6. (see Brief, at 65).

⁴ There seems to be no point in delaying the disposition even further by providing counsel with an argument on appeal, that has no merit, that I was not impartial in presiding on the defendant's PCRA petition.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION


COMMONWEALTH OF PENNSYLVANIA :
VS. : CP-14-CR-2421-2011
GERALD A. SANDUSKY : CP-14-CR-2422-2011

ORDER

And Now, November 18, 2016, in consideration of the foregoing, it is ordered as follows:

1. That I hereby recuse myself from presiding over any further matters involving the defendant's Post Conviction Relief Act Petition.
2. That I direct the Centre County District Court Administrator to inform the Court Administrator of Pennsylvania of this order and to request that another judge be appointed in my stead.

BY THE COURT:



John M. Cleland, S.J.
Specially Presiding

**ATTACHMENT TO OPINION AND ORDER
OF NOVEMBER 18, 2016**

Memorandum and Order dated May 10, 2016

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

VS. :

GERALD A. SANDUSKY :

CP-14-CR-2421-2011
CP-14-CR-2422-2011

DEBRA C. HASEL
PROTHONOTARY
CENTRE COUNTY, PA

2016 MAY 10 PM 4:06

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MEMORANDUM AND ORDER

Dated: May 10, 2016

Counsel for the Defendant has filed a motion asking that I recuse myself because I was a witness to certain events that underlie the PCRA claim that trial counsel rendered ineffective assistance when he waived the Defendant's preliminary hearing.

For reasons explained in more detail in this Memorandum, the Defendant's motion will be denied because, on the current state of the record, the facts involving the event to which I was a witness are not in dispute and there were other participants in the meeting who can testify if necessary regarding what transpired.

Factual Background:

Because any motion for recusal implicates concerns about the fairness and impartiality of the proceeding, it is appropriate to address at some length the reasons for my ruling.

After the argument held on May 2, 2016, I met with counsel in chambers and told them I was present at a meeting that took place the night before the Defendant's December 13, 2011 preliminary hearing and related my recollection regarding what happened at the meeting. The next day, I electronically delivered to counsel a photocopy of the notes that I made the evening of the meeting.

On November 28, 2011, I was appointed by the Chief Justice of Pennsylvania to preside over this case as the trial judge. Because all of the judges of the Court of Common Pleas of Centre County had recused themselves, my appointment as the trial judge also carried with it the administrative authority to address matters including location of the preliminary hearing, court and courthouse security, arrangements to accommodate the print and electronic media, and maintaining communication with county and community officials.¹

On November 30, 2011, in the exercise of that administrative authority, I held meetings with the Court Administrator, her staff, the Sheriff, police and fire departments, and representatives of both the print and electronic media associations, among others. I also held a meeting with the attorneys for the prosecution and defense to discuss, among other things, arrangements for the preliminary hearing.

¹ The source of the administrative authority includes Pa.R.Crim.P. 131 which provides, inter alia, that "For reasons of emergency, security, size, or in the interests of justice...a hearing...may be held...in another more suitable location within the judicial district." Accordingly, the preliminary hearing was held in the Centre County Courthouse rather than, as would have been customary, in the office of a Magisterial District Judge. In addition, then Rule 17 (now renumbered as Rule 605) of the Pennsylvania Rules of Judicial Administration gave me authority "to exercise general supervision and administrative authority over magisterial district courts within the judicial district." This resulted in the Decorum Order dated December 6, 2011 controlling the preliminary hearing.

The preliminary hearing was scheduled to be held on Tuesday, December 13, 2011, with Magisterial District Senior Judge Robert E. Scott, who also had been appointed by the Chief Justice of Pennsylvania, presiding.

The logistics for assuring the preliminary hearing proceeded smoothly required considerable planning by many people. It involved developing policies to assure the safety of participants and of those attending the proceeding, accommodating scores of print and electronic media reporters, and arranging parking for some two dozen television satellite trucks, all in addition to the customary provisions that must be made to conduct a hearing of this kind. To assure that if any last-minute problems arose I would be available to address them, I arranged to be at the Centre County Courthouse on December 12th and 13th.

On the evening of December 12th I was eating dinner at the Hilton Garden Inn in State College when I was notified that counsel for the prosecution and defense wanted to come to the hotel to meet with me and Judge Scott, who was also staying at the hotel. Arrangements were made to meet in a hotel conference room.

According to the notes I took that night, and which were given to defense counsel and are attached to the Defendant's motion, present at the meeting were Attorneys Joseph Amendola, Jonelle Eshbach, Joseph McGettigan, Judge Scott, and me.

At some point after the meeting had been requested, but before the meeting convened, I was surprised to learn that the purpose of the meeting was

to discuss the possible waiver of the preliminary hearing. Since the case had not yet been bound over to court, Judge Scott had the responsibility for conducting the meeting and I attended for the purpose of addressing any administrative issues that might arise.

At the meeting Mr. Amendola explained he had approached the prosecutors about waiving the preliminary hearing if there was an agreement that the Commonwealth would not seek an increase in bail even if new charges were filed. Mr. Amendola said the Defendant feared he would not be able to meet any increased bail amount and that he would be incarcerated pending trial. Counsel stated they had reached an agreement that the Defendant would waive the preliminary hearing; that the Commonwealth would not request an increase in bail; that the Defendant would remain on house arrest with electronic monitoring, but be able to leave for legal and medical appointments and to attend church; and that if new charges were filed, then the defendant would be permitted to turn himself in,² and bail conditions would remain the same.

It was then agreed that the Defendant would be present in court the following morning for the preliminary hearing as scheduled and that Judge Scott would conduct a hearing waiver colloquy.

At that point, I then held a brief discussion regarding next steps, including whether the Defendant intended to waive arraignment, proceeding with discovery, and possible trial dates.

² The Defendant had already been arrested twice and been subjected to two "perp walks."

As agreed, the next morning the Defendant appeared before Judge Scott and, following a colloquy, waived his preliminary hearing. Although I was present in the Courthouse, I did not attend the preliminary hearing.

Legal Principles:

Rule 2.11 of the Code of Judicial Conduct ("Code") provides that "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has...personal knowledge of facts that are in dispute in the proceeding." Code of Judicial Conduct Rule 2.11 (A).

This Rule implicates two concerns.³ First, that the judge should not bring to a proceeding knowledge about disputed facts regarding issues over which the judge sits as a fact finder; and second, that a judge cannot be a witness regarding disputed facts in a matter over which he or she is presiding.

Regarding the first concern: It is clear the "personal knowledge" referred to in the Code applies to "extrajudicial" information, that is information a judge has obtained from outside of the judicial proceeding. "The rule against prior personal knowledge only applies to knowledge garnered from extrajudicial sources. Knowledge about matters in a proceeding that has been obtained by a judge within the proceeding itself or within another legal proceeding is permissible and does not call for disqualification." Shaman, et al. **Judicial Conduct and Ethics**, 3rd ed. ¶ 4.11. (citations omitted). The information I am aware of regarding the

³ The Motion for Recusal does not allege the existence of any personal bias or prejudice concerning a party or a party's lawyer which are the other grounds for recusal listed in Rule 2.11(A)(1).

preliminary hearing waiver meeting is not "extrajudicial." In other words, it is not information I obtained from a source beyond the proceedings over which I am presiding. Accordingly, the first concern does not present a justification for my recusal.

The second concern implicates the obvious issues arising from a judge being a witness in a proceeding over which the judge is at the same time presiding. That eventually can arise, however, only if the judge is the single source of the information available to counsel, or if the facts themselves are disputed.

In the present status of the case neither of those issues appear to be problematic. Barring some subsequent representation by counsel, it appears that others who attended the meeting can be called to testify at any PCRA hearing regarding their recollection of what happened, thereby eliminating the need for any record testimony from me. And, further, it does not appear that there is any dispute about the facts as I recall them and as evidenced by my notes.

Obviously, I am making my ruling on the current state of the record. If subsequent events should demonstrate either that others cannot testify regarding the meeting or if their recollections differ materially from mine, then I will revisit the issue of recusal.

Accordingly, I enter the following:

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

VS.

: CP-14-CR-2421-2011
: CP-14-CR-2422-2011

GERALD A. SANDUSKY :

ORDER

AND NOW, MAY 10, 2016, in consideration of the foregoing, it is ordered
as follows:

The Defendant's Motion for Recusal is denied.

FILED FOR RECORD
2016 MAY 10 PM 4:06
DEBRA C. HASEL
PROTHONOTARY
CENTRE COUNTY, PA

By the Court:


John M. Cleland, Senior Judge
Specially Presiding