IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE LEE F. JANTZEN
DIVISION 4
DATE: MAY 6, 2015

COURT ORDER/NOTICE/RULING

STATE OF ARIZONA,
Plaintiff,

NO. CR-2014-01193

vs.

JUSTIN JAMES RECTOR,
Defendant.

The Court has reviewed Defendant's recent motions and rules on the following

1. *Defendant's Pretrial Motion for Disclosure of Any Possible Basis for Judicial Qualification*

The Court has reviewed Defendant's Pretrial Motion for Disclosure of Any Possible Basis for Judicial Qualification, and the State's response. For the reasons that follow, the Court denies the motion.

The Defendant asks this Court "to thoughtfully reflect and reexamine any core beliefs, predispositions or feelings, and reveal on the record any possible basis for [] recusal...." (Motion at 1). The Court notes that the Defendant is not filing this motion pursuant to Rule 10.1, Ariz.R.Crim.P., and does not allege any specific grounds for removal of this Court based upon cause. Indeed, he states that "he makes no allegation against this particular judge." (*Id.* at 2). The Court finds that without any specific allegation, there is nothing upon which to rule. The Court can summarily dismiss a claim of alleged bias based on mere generalizations and unsubstantiated claims. *See, State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994), cert. denied 514 U.S. 1118 (1995)(It is movant's responsibility to allege and prove interest or prejudice, and presiding judges are required to grant hearing only when defendant's motion alleges facts which, if taken as true, would entitle movant to relief).

"Judges are presumed to be impartial, and the party moving for change of judge must prove a judge's bias or prejudice by a preponderance of the evidence." ***State v. Ellison***, 213 Ariz. 116, 128, 140 P.3d 899 (2006)(capital murder Defendant failed to show that judge who presided over Co-Defendant's trial was improperly biased); *State v. Smith*, 203 Ariz. 75, 79, 50 P.3d 825 (2002)(finding capital murder Defendant, who failed to

provide evidence of actual bias, did not meet his burden of proof under Rule 10.1). Overcoming this burden means proving "a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." ***State v. Cropper***, 205 Ariz. 181, 185, 68 P.3d 407 (2003). "It is generally conceded that the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case." *State v Greenway*, 170 Ariz. 155, 163, 823 P.2d 22 (1991).

As noted, the Defendant is not claiming that this Court cannot be fair and impartial. In its response, the State discloses that this Court was the direct supervisor of both the current prosecutor, Mr. McPhillips, and defense co-counsel, Mr. Gilleo, when all three were employees of the Mohave County Attorney's office around 1999. Defense counsel has been notified that this Court and Mr. McPhillips continue to see other socially, but do not discuss cases or work-related matters. Such contact does not constitute a deep-seated favoritism or antagonism that would make fair judgment impossible. *See, generally*, Arizona Supreme Court Judicial Ethics Advisory Opinion 90-08 ("A lawyer appointed to the bench is not expected to sever all personal relationships he had prior to becoming a judge. It is expected that the judge will maintain previous existing friendships. Only when the personal relationship creates the appearance of partiality must recusal occur. '[F]riendships within the bench and the bar do not, of themselves, cause prejudice.' *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453, 456 (1983).").

IT IS THEREFORE ORDERED denying Defendant's Pretrial Motion for Disclosure of Any Possible Basis for Judicial Qualification.

2. Defendant's Motion to Compel Law Enforcement Gather, Preserve and Tender All Evidentiary Items and All Case Information to the Prosecutor's Office

The Defendant seeks "a protective and prophylactic order" compelling all law enforcement agencies to provide all material gathered in the investigation of this case to the State so that "complete discovery" can be provided to the defense. (Motion at 1-2). As he notes in his Reply, he apparently intends his motion to be advisory:

> Lets [sic] be exceedingly clear: the Defense makes no claim against Mr. McPhillips, the Mohave County Attorneys [sic] Office or any of the listed agencies. The Defense is not seeking the State redisclose what has been disclosed. Again...this is simple. If the Prosecution has provided all documents on this case generated by any of the listed agencies above, we are done.
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> ***
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> The Defense must trust the Prosecutors [sic] office to do the right thing. To date, the Defense has no reason to think otherwise. ... Before we proceed...the Defense simply asks these agencies double check. Make sure Mr. McPhillips has been provided everything possible on this case.
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> ***

> The Defense appreciates the Prosecution has likely made every effort to be complete in disclosure. The defense trusts Mr. McPhillips to do the right thing. It simply asks now, before anything missing is potentially destroyed, we are certain all documentation of this investigation is protected, secured, and shared.
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> (Reply at 3-4, 6).

The discovery rules set forth the requirements of both parties respecting disclosure of material and information in the case. Both parties have a continuing duty to disclose because it is understood that investigation is not static but usually continues until trial and sometimes during trial. *See* Rule 15.6, Ariz.R.Crim.P. The Court does not become involved until a party shows both a substantial need for the material or information and an inability without undue hardship to obtain the substantial equivalent by other means. Rules 15.1(g) & 15.2(g), Ariz.R.Crim.P. The Defendant has not made this showing.

The Court finds that the Defendant's request is unnecessary in light of the State's disclosure obligations. The Court expects that both parties understand their obligation to comply with the discovery rules, and will confer with each other and attempt to resolve any disputes before filing motions pursuant to Rule 15.

IT IS THEREFORE ORDERED denying Defendant's Motion to Compel Law Enforcement Gather, Preserve and Tender All Evidentiary Items and All Case Information to the Prosecutor's Office

3. *Defense Motion Requesting Access to View/Inspect/Photograph/Measure/Document Alleged Crime Scenes as Part of Independent Defense Investigation of Case*

The Defendant seeks an order from the Court allowing the Defense "to view (in person), inspect, photograph, measure, and otherwise document the alleged crime scenes as part of the defense investigation of the case and preparation for trial." (Motion at 1). Defendant does not identify these "scenes," whether they are public or private property, and whether he has been denied access before seeking this order. He argues only that because the State obviously investigated these scenes, he also should be allowed to conduct his own independent investigation.

The Court finds that based on this general and speculative request, Defendant has failed to demonstrate specifically how accessing the crime scenes would produce material and relevant evidence not otherwise provided to him. He references no specific evidentiary purpose for which he needs this evidence to present his defense at trial. Likewise, he has failed to elaborate why viewing, photographing, or sensing the crime scenes is essential to the defense trial strategy. The Court agrees with the State that in this respect, the defendant's motion is not ripe. *See* Rule 15.1(g), Ariz.R.Crim.P. (Defendant must show that he has a substantial need for the information requested, and

that he is unable, without undue hardship, to obtain the substantial equivalent by other means before the court may order disclosure).

IT IS THEREFORE ORDERED denying Defense Motion Requesting Access to View/Inspect/Photograph/Measure/Document Alleged Crime Scenes as Part of Independent Defense Investigation of Case.

4. Defendant's Motion for Preservation of All Evidence/and Defendant's Motion to Order State to Provide Notice to Defense Before Disposal of Any Evidence in Case

Defendant seeks a protective order requiring the State to preserve all physical evidence in this matter. The State responds that it intends to do so unless the evidence will be consumed in the testing process.

Rule 15.1(e), Ariz.R.Cr.P. provides that, upon written request, the prosecutor must "make available to the Defendant for examination, testing, and reproduction" any items disclosed as evidence. Rule 15.1(e) also provides, however, that "[t]he prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody to protect physical evidence produced under this section." As noted, the State asserts that it intends to abide by the disclosure rules and has disclosed numerous items of physical evidence to the defendant.

Under the United States and Arizona Constitutions, unless the Defendant can show bad faith on the part of the State, the failure to preserve potentially useful evidence does not constitute a denial of due process. *Arizona v. Youngblood*, 488 U.S. 51 (1988); *State v. Youngblood*, 173 Ariz. 502, 844 P.2d 1152 (1993). The defendant does not claim that the State has acted in bad faith in failing to preserve any evidence. Rather, he asks this Court to conclude, without any factual support, that any subsequent destruction of evidence is indicative of the State acting in bad faith.

For as long as evidence has been collected, it has been the Executive Branch authorities that have maintained and analyzed the evidence pursuant to their powers to investigate and prosecute crimes. That executive power is checked by the Rules of Criminal Procedure and the Rules of Evidence that govern admission of any test results in court. The Executive's power is not absolute. Under the Due Process Clause and the Sixth Amendment, this Court has the power to create a remedy for the destruction of exculpatory evidence, as guided by the U.S. Supreme Court in *Youngblood*. However, as noted, those circumstances are not present here. Defendant makes no proffer or allegation regarding the State's conduct in preserving evidence.

IT IS ORDERED denying Defendant's Motion for Preservation of All Evidence/and Defendant's Motion to Order State to Provide Notice to Defense Before Disposal of Any Evidence in Case.

The Court urges the parties to confer with each other and attempt to resolve any disclosure concerns before filing motions pursuant to Rule 15.

5. Defendant's Motion for Production of Daily Court Transcripts of Proceedings

Defendant requests that the Court order production of daily transcripts of all court proceedings in this case. He claims that "daily transcripts are necessary to guarantee the reliability of the verdict and the sentencing procedure, and to ensure the constitutional effectiveness of defense counsel." (Motion at 2). The State responds that such production is not necessary, not feasible, and an undue expense.

Defendant cites no specific authority requiring production of daily transcripts, either of pretrial proceedings or trial proceedings. The Arizona Supreme Court has upheld the denial of a request for daily transcripts in a capital case. *State v. Gretzler*, 126 Ariz. 60, 91, 612 P.2d 1023, 1064 (1980). The Defendant relies on *Britt v. North Carolina*, 404 U.S. 226 (1971), to support his alleged entitlement to daily transcripts. However, *Britt* does not require that a Capital Defendant be provided with transcripts of each day's testimony as trial proceeds. "Common experience informs us that it is entirely practicable to present an effective defense in a criminal case without daily copy, however convenient daily copy undoubtedly is." *United States v. Sliker*, 751 F.2d 477, 491 (2nd Cir. 1984). The Constitution does not require that indigent Defendants be furnished with every possible legal tool, "no matter how speculative its value, and no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources." *United States v. MacCollom*, 426 U.S. 317, 330 (1976)(Blackmun, J., concurring). *See also*, *Gardner v. California,* 393 U.S. 367 (1969)("To be sure, a transcript of [a] prior [habeas corpus] hearing may be an incidental convenience - so, too, would a daily transcript at a criminal trial - but the Fourteenth Amendment does not require a State to furnish an indigent with every luxury that a wealthy litigant might conceivably choose to purchase.").

The Defendant argues only that his need for a thorough and ongoing investigation and trial preparation, adequate defense, the seriousness of the offense, the severity of his potential punishment, and his constitutional right to confrontation, justify his need for daily transcripts. The Defense team consists of two lawyers, a mitigation specialist, and an investigator. The Court assumes that more than one member of this team will be present at court proceedings and that they can rely on their notes and collective recollection of the events of those proceedings to provide substance for an ongoing investigation, trial preparation, and defense. The Court finds that the defendant has made an insufficient showing of the need for daily transcripts.

IT IS ORDERED denying Defendant's Motion for Production of Daily Court Transcripts of Proceedings.

6. Defense Motion for Full Recordation of All Proceedings

Defendant requests that the Court direct the official court reporter to record and transcribe all court proceedings in this case. The State responds that such an order is not required. The Court agrees. The Court intends that all proceedings be recorded, as is the usual practice in criminal cases.

IT IS ORDERED denying Defendant's Motion for Full Recordation of All Proceedings.

cc:

Mohave County Attorney*

Gerald Gavin*
Attorney for Defendant

Mohave County Legal Defender*
Attorney for the Defendant

Mohave County Jail*

Honorable Lee F Jantzen
Division 4