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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1859-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLY EMMANUEL, a/k/a,
WILFREDO MANUEL, WILL
EMMANUEL, WILLIAM BROWN,
WILLIAM BROWN, JR., WILLIAM
DIAZ, WILLIAM DIAZ, JR.,
WILLIAMS BROWN, WILLIE
EMMANUEL, WILLY EMANUEL,
WILLY EMMANUEL, JR., WILLY J.
EMMANUEL, and WILLY JAQUIM
EMMANUEL,

Defendant-Appellant.

Argued April 16, 2018 – Decided May 9, 2018

Before Judges Sabatino, Ostrer and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No. 12-
12-0847.

Elizabeth C. Jarit, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Elizabeth C. Jarit, of counsel and on the
brief).

Michele C. Buckley, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Michael A. Monahan, Acting Union County Prosecutor, attorney; Milton S. Leibowitz, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

This matter returns following our remand to develop the record more fully concerning whether the judge who presided over defendant's criminal trial was disqualified because of her previous employment as a supervisory assistant county prosecutor. State v. Emmanuel, A-4452-13 (App. Div. June 6, 2016). Because the expanded record shows the judge's contact years ago as an assistant prosecutor with two of defendant's earlier cases was minimal and non-substantive, we reject his claim that she was obligated to recuse herself in the present case. We therefore affirm his conviction.

I.

We incorporate by reference the chronology set forth in our prior opinion. We briefly reiterate certain facts for ease of the reader.

In December 2012, a Union County Grand Jury indicted defendant Willy Emmanuel for third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of a controlled dangerous substance with intent

to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (count two); second-degree possession of a controlled dangerous substance with intent to distribute on or within 500 feet of public property, N.J.S.A. 2C:35-7.1 (count three); third-degree distribution of a controlled dangerous substance, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (count four); and second-degree distribution of a controlled dangerous substance on or within 500 feet of public property, N.J.S.A. 2C:35-7.1 (count five).

Realizing the possibility that a need for her disqualification might exist because she had previously served as a Union County Assistant Prosecutor, Judge Regina Caulfield asked her secretary to search the criminal docketing system (known as "Promis Gavel") for any prior criminal cases involving defendant in which she may have been involved. State v. Emmanuel, slip op. at 5. The secretary initially found at least one entry in which the judge's name appeared in a criminal case involving defendant. Id. at 6. During a pretrial conference in open court, Judge Caulfield, sua sponte, identified the potential conflict, stating:

I don't have any recollection of this case at all And most likely, because I was trial supervisor, I may have stood in for an arraignment. It could have been a pre-trial [conference] on behalf of one of the trial team assistant prosecutors.

[Id. at 6-7 (alterations in original).]

Defendant acknowledged he likewise did not have any recollection of the judge, and did not request her recusal. Ibid.

Following a two-day jury trial in October 2013, defendant was found guilty on all counts. On January 24, 2014, at the sentencing hearing, defendant argued for a new trial, asserting that the verdict was against the weight of the evidence and that he was prejudiced by certain remarks made by the prosecutor during summation. Judge Caulfield denied defendant's motion and sentenced him as a persistent offender to an aggregate term of fourteen years, subject to a seven-year parole ineligibility period on count three and a concurrent eight-year sentence on count five.

On direct appeal, defendant principally argued he was entitled to a new trial because Judge Caulfield had been involved in his prior cases when she was a Union County Assistant Prosecutor. Id. at 2. He further contended that he was unduly prejudiced by certain comments made by the State during summation and that his sentence was excessive. Ibid.

After initially reviewing the disqualification issue, we determined "the record [was] incomplete and unenlightening concerning why the judge's name appears in at least two docket entries for one of defendant's prior indictments." Id. at 13. As such, we "remanded for further inquiry and a hearing, in an effort

to explore more deeply and definitively the judge's actual role in defendant's prior prosecution(s), with a specific focus on whether the judge had any 'direct involvement' in any of those cases within the meaning of the [Disqualification of Judges in Criminal Matters, Administrative Directive (Sept. 19, 1983) ('the Directive')]."
Id. at 14-15. Further, we instructed that defendant would have the burden of persuasion on remand to demonstrate the judge's direct involvement in prior cases. Id. at 15. Lastly, we rejected as without merit defendant's other arguments for reversal. Id. at 16-17.

On remand, Judge Caulfield conducted a one-day evidentiary hearing to explore the disqualification issue. The discussion at the hearing revolved around two separate matters in which Judge Caulfield's name had been mentioned: Indictment Nos. 03-11-1187 and 09-03-0272.

As to Indictment No. 03-11-1187, the State showed that Judge Caulfield had not been involved in any aspect of prosecuting defendant. In that case, defendant entered a guilty plea, was sentenced, and then moved to be transferred to a drug treatment facility. The State explained that, once the case was closed, the court routinely would have sent the prosecutor's trial supervisor, who was then-Assistant Prosecutor ("then-A.P.") Caulfield, a notice of motion and a scheduling letter. The scheduling letter

was addressed to then-A.P. Caulfield and defendant's attorney. In addition, the name "Eileen Walsh" was handwritten on the letter. Then-A.P. Caulfield's secretary indicated that it was her handwriting on the letter. Furthermore, a follow-up letter dated August 24, 2006 listed Eileen Walsh as the assigned prosecutor. Thereafter, defendant withdrew his motion, and as such, there is no further documentation.

Judge Caulfield confirmed this series of events, stating on the record that her name only appeared on Promis Gavel notes for this indictment because, as the trial supervisor, she administratively received notice of defendant's motion. The Promis Gavel entries reflected the matter was then handled by A.P. Walsh until the point when defendant withdrew the motion.

In the second prior case in question, Indictment No. 09-03-0272,¹ defendant was charged with drug-related offenses. The State indicated it did not uncover any involvement by then-A.P. Caulfield in this case. However, Judge Caulfield pointed out that her own research had revealed that her name had appeared in case notes for this indictment in Promis Gavel. Specifically, an entry dated January 26, 2009 stated, "to/from P.A. Rich Adams to [pre-disposition conference] per Gina[,]" the latter which the judge

¹ This indictment is sometimes referenced as Docket No. 08-00-4402 or the "2009 case."

indicated was her nickname. Another entry on that same date stated, "file from P.A. Rich Adams to A.P. Caulfield" A later February 2, 2009 entry stated, "[f]ile to A.P. Simon from A.P. Caulfield." Further entries indicated the file was then assigned for handling to other attorneys in the prosecutor's office.

Judge Caulfield explained that, in her former capacity as a trial supervisor with the prosecutor's office, she was "responsible for case management, meaning expediting a movement of cases from the complaint stage to pre-disposition conference." She "often reviewed files to see if they contained necessary police reports. And then [she] would give the file to someone else basically to secure those reports."

With respect to the docket entries bearing her name, Judge Caulfield elaborated:

As I look at these notes, I know exactly what happened. The case came up. It looked like there were not reports in the file. Oftentimes judges would say they would dismiss a case if the case was not ready for [pre-disposition conference]. . . .

So I clearly gave the file to Mr. Adams to secure reports. In fact, I would often leave him notes. I can see his desk when I close my eyes. I was there constantly. I would pull files, glance at them to see if it contained police reports. Then I can see here that the file went to A.P. Simon. That's Tom

Simon. He's retired. He was assigned to the P.D.C. [pre-disposition conference] Unit.

The judge further explained, "I would have had almost no contact with the file except to say . . . we need reports. We have to get them so that the file could then successfully move to the [pre-disposition conference] unit."

Judge Caulfield placed on the record defendant's extensive criminal history. She noted that, after examining Promis Gavel for each one of defendant's prior criminal cases, her name did not appear again.

At a continuation of the remand hearing several days later, the State pointed out that, in Indictment No. 09-03-0272, then-A.P. Caulfield had handwritten her initials ("R.C.") next to the docket entry that stated "file to T. Simon." Judge Caulfield agreed that it was her handwriting, and again explained the circumstances surrounding the entries. The judge elaborated as follows:

1/26/09, which is two days before [pre-detention conference], file from P.A. Rich Adams.

P.A. is an abbreviation to my knowledge for prosecutor's agent. Rich Adams . . . is a retired captain from the Union Police Department. Came to work at the Prosecutor's Office years ago and has been there since

He would be the person to go literally to the police departments to pick up the reports. He'd be the person, the liaison if you will, between the police departments and the prosecutor's office. He was at the time anyway. Who'd get the reports, put them in the file. If necessary, report back to me if there was an issue.

And the file would be moved on to P.D.C. [pre-disposition conference], ultimately as the case notes indicate to grand jury. So file to/from P.A. Rich Adams to P.D.C. per Gina. That's a nickname for me. That was 1/26/09.

Then it says 1/26/09 file from P.A. Rich again to A.P. Caulfield. And then 2/2/09, . . . file to A.P. Simon from A.P. Caulfield. I would have given Tom Simon, who was in P.D.C., the file once the reports were received.

That's the only time I had the file. There was no, again, substantive connection between me and any of the Defendants of the file except do[es] it have reports[?]

Defendant argued at the remand hearing that because Judge Caulfield had been a trial supervisor, she was more akin to a county prosecutor than an assistant prosecutor, which would have required her recusal as a judge in the present case. The judge rejected this contention. The judge further concluded defendant had failed to meet his burden of demonstrating her direct substantive involvement in his prior cases. Regarding Indictment No. 03-11-1187, Judge Caulfield found she had not been involved at all. Concerning Indictment No. 09-03-0272, the judge found that while she had "direct involvement," her role was simply

administrative, noting she did not assist in formulating the plea offer, but rather simply obtained the police reports and handed the file to the P.D.C. prosecutor.

Consequently, the judge concluded after the remand hearing that she had not been disqualified in presiding over defendant's present case. The judge accordingly left his conviction and sentence unaltered. This appeal ensued.

In the sole point in his brief, defendant argues:

BECAUSE THE JUDGE HAD DIRECT INVOLVEMENT IN [DEFENDANT'S] PROSECUTION IN A PRIOR CRIMINAL CASE SHE WAS MANDATORILY DISQUALIFIED FROM PRESIDING OVER HIS TRIAL, REQUIRING REVERSAL OF HIS CONVICTIONS.

We affirm, for the reasons that follow.

II.

Generally, a motion for recusal lies in the sound discretion of the trial judge whose recusal is sought. Panitch v. Panitch, 339 N.J. Super. 63, 66 (App. Div. 2001) (citations omitted). This determination is subject to an abuse of discretion review. State v. McCabe, 201 N.J. 34, 45 (2010) (citing Panitch, 339 N.J. Super. at 66). "Moreover, judges are not free to err on the side of caution; it is improper for a court to recuse itself unless the factual bases for its disqualification are shown by the movant to be true or are already known by the court." State v. Marshall, 148 N.J. 89, 276 (1997) (citing Hundred East Credit Corp. v. Eric

Schuster Corp., 212 N.J. Super. 350, 358 (App. Div. 1986) and Clawans v. Schakat, 49 N.J. Super. 415, 420-21 (App. Div. 1958)). In other words, a judge generally has a duty to preside over a case unless the circumstances require his or her disqualification. See, e.g., In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2d Cir. 1988) ("A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is."); Hundred East Credit Corp., 212 N.J. Super. at 358 ("It is not only unnecessary for a judge to withdraw from a case upon a mere suggestion that he is disqualified: it is improper for him to do so unless the alleged cause of recusal is known by him to exist or is shown to be true in fact.").

As this court noted in its previous opinion remanding this matter, "[s]everal well-established principles guide the disqualification analysis." State v. Emmanuel, slip op. at 8. Pursuant to Canon 3.17(B) of the Code of Judicial Conduct, "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." A judge must also disqualify herself if she "has been attorney of record or counsel in the action." R. 1:12-1. Likewise, our statutes provide that a judge is disqualified if she "[h]as been attorney of record or counsel for a party" in the action. N.J.S.A. 2A:15-49(b).

"One of the primary functions of the rules governing judicial disqualification 'is to maintain public confidence in the integrity of the judicial process, which in turn depends on a belief in the impartiality of judicial decision making.'" State v. Kettles, 345 N.J. Super. 466, 469-70 (App. Div. 2001) (quoting United States v. Nobel, 696 F.2d 231, 235 (3d Cir. 1982)). "The rule recognizes that the fairness and integrity of the judgment is as important as the correctness of the judgment." Id. at 470 (citing State v. Tucker, 264 N.J. Super. 549, 554 (App. Div. 1993)).

In our prior opinion, we directed the trial court to apply the 1983 Directive, to determine if Judge Caulfield should have been disqualified to preside over defendant's case. State v. Emmanuel, slip op. at 14-15. The Directive was promulgated by the Supreme Court as a guideline concerning disqualification for a judge who had previously served as a prosecutor, public defender, or as an assistant in one of those offices.

1. Except in extraordinary circumstances, a judge should disqualify himself or herself in a criminal matter which was pending in his or her office when he or she was the prosecutor or county public defender, whether or not he or she actively participated in the investigation, prosecution, or defense of the case, or had actual knowledge of it.

The reason for this is that as the prior head of either office, the judge would have had the

overall responsibility for the conduct of the case.

2. A judge should disqualify himself or herself from hearing a criminal matter involving a defendant who the judge, in his or her previous capacity, had personally prosecuted or defended, or had represented in a civil matter in the past.

The reason for this is that the appearance of judicial impartiality must be preserved.

3. A judge need not disqualify himself or herself from hearing a criminal matter which was pending at the time when the judge served as an assistant prosecutor or assistant public defender, if the judge had no direct involvement with the matter.

As an assistant, the judge would not have been charged with the overall responsibility for the conduct of the case; disqualification is therefore unnecessary absent direct involvement in the investigation, review or trial of the matter in question.^[2]

Our opinion remanding this matter added emphasis to prong three of the Directive, and its requirement of "direct involvement." Id. at 12. Furthermore, we directed that defendant would bear the burden of persuasion on remand to establish the judge had such

² Prior to oral argument on this appeal, defense counsel supplied us with a copy of a more recent 2017 Directive addressing such disqualification issues. Disqualification of Judges – Former Prosecutors/Public Defenders, Directive #31-17 (Nov. 14, 2017). Defense counsel argues the new Directive does not apply retroactively to this matter.

disqualifying "direct involvement" in his prior criminal cases. Id. at 15.

Applying these standards, we agree with the State that defendant has failed to establish sufficient direct involvement by the judge in either Indictment No. 03-11-1187 or Indictment 09-03-0272 to require her disqualification.

As to Indictment No. 03-11-1187, the judge merely received – in her supervisory role as an assistant prosecutor – notification of a motion that defendant filed after his case was already closed, seeking to be transferred to a drug treatment facility. Consistent with the practice at that time, Judge Caulfield received notice of the motion because of her then-position as a trial supervisor. Thereafter, as indicated by the secretary's handwriting and subsequent documentation, the matter was referred to the appropriate non-supervisory assistant prosecutor. Afterwards, defendant withdrew his motion.

Accordingly, Judge Caulfield had no meaningful "direct involvement" with this first matter. Rather, her name appeared in Promis Gavel simply because of her administrative position as trial supervisor. Indeed, defendant concurs with this conclusion in his appellate brief.

We now turn to Judge Caulfield's prior involvement with Indictment No. 09-03-0272. Defendant attempts to characterize the

judge's function as a former assistant prosecutor who checked a file for completeness (specifically, to see if it contained the appropriate police reports) as a disqualifying form of "direct involvement." We disagree.

In her limited capacity as a supervisor in the prosecutor's office, the judge received defendant's file, determined if it contained necessary police reports, and then referred it to another person to retrieve the missing reports. The judge performed no substantive role in carrying out these ministerial acts. The judge did not assist in formulating a plea offer. Nor did she decide whether one should be extended.

We do not find the judge's fleeting administrative involvement in the second case prohibited her under the 1983 Directive from presiding over defendant's unrelated trial many years later. The Directive recognizes that "[a]s an assistant [prosecutor], the judge would not have been charged with the overall responsibility for the conduct of the case; disqualification is therefore unnecessary absent direct involvement in the investigation, review or trial of the matter in question." Acting as an assistant prosecutor, the judge did not have overall responsibility for the conduct of the case. She did not investigate the charged offense, and did not have direct

involvement with the trial or with the substance of plea negotiations.

We acknowledge that, in the broadest and most literal sense of the term, the judge did briefly "review" defendant's file in the second case. She did so merely to determine if the file contained necessary police reports. We do not believe that very limited and non-substantive interaction suffices to mandate disqualification.

Defendant argues this matter is similar to Tucker, 264 N.J. Super. at 549. In Tucker, we reversed the defendant's convictions because the trial judge had been involved in a prior prosecution of the defendant. Id. at 555-56. There, the presiding judge had served as the assistant prosecutor who had presented one of the defendant's prior cases to a grand jury. Id. at 555. Furthermore, the judge "may have had personal responsibility for the prior prosecutions of the defendant, which meant that he may have participated in the plea bargaining process." Ibid. Accordingly, we "conclude[d] that such [previous] involvement ha[d] the capacity to undermine public confidence in the impartiality of the judicial system." Ibid.

Defendant's comparison to Tucker to the present matter is not persuasive. An assistant prosecutor's professional actions in presenting a case to a grand jury is deeply substantive. The

prosecutor in such a role is immersed in the facts of the case, the evidence, and the applicable law, and directly interacting with witnesses and grand jurors. No such concerns are present here.

Judge Caulfield did not present defendant's case to a grand jury, nor was she involved in formulating a plea bargain. If she had not conscientiously brought the potential conflict to defendant's attention, sua sponte, no one likely would have known about her behind-the-scene role. That role was simply ensuring reports were in the file before it was passed along to the attorney who was actually responsible for handling the matter. The judge was not the "attorney of record" in the case, nor did she function in such a role.

Lastly, it is noteworthy that this court ordered that, on remand, defendant would bear the burden of persuasion to demonstrate the judge's involvement in his prior cases. As the record reveals, defendant presented no evidence on remand to that effect. Rather, the State and Judge Caulfield constructed the entirety of the record, even though defendant was given additional time to research the matter.

In sum, we discern no reasonable basis from the now-expanded record to require the judge's disqualification, or to set aside defendant's conviction.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION