IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	I.D. No. 9812007273A
	)	
RONALD N. JOHNSON,	)	
	)	
Defendant.	)	

Submitted: July 1, 2011
Decided: August 5, 2011

ORDER

Upon Appeal from Commissioner's Order Denying
Recusal and Expansion of the Record.
Affirmed in Part and Remanded.

James T. Wakley, Esquire, Department of Justice, Wilmington, Delaware; attorney for the State of Delaware.

Mr. Ronald N. Johnson, *pro se*

WITHAM, R.J.

This is an appeal from a Commissioner's order denying Defendant's motion that she recuse herself and to expand the record. For the reasons set forth in this order, the Commissioner's decision is affirmed in part and remanded for further proceedings.

FACTS

Ronald Nelson Johnson ("Defendant") is an incarcerated habitual offender. He is pursuing a second post-conviction motion in Superior Court. He has filed a motion requesting that Commissioner Andrea M. Freud recuse herself. The asserted basis for the motion is that the Commissioner had demonstrated a bias against him by issuing prior adverse rulings. The Commissioner denied Defendant's motion in an order issued on June 29, 2011.

Standard of Review

A party may appeal a Commissioner's order to Superior Court pursuant to Superior Court Criminal Rule 62. Case-dispositive issues are reviewed *de novo*; non case-dispositive evidentiary issues are reviewed for clear error and abuse of discretion.[1]

DISCUSSION

A. Recusal

The Supreme Court of Delaware articulated the standard for recusal in *Los v. Los*.[2] The Court must conduct a two-part analysis: (1) whether there is any objective

[1] Super Ct. Crim. R. 62.

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

evidence for finding that the judicial officer is objectively biased against the party; and (2) whether the judicial officer is subjectively biased against the party.[3] On appeal, the Court will review the objective bias analysis and defer to the judicial officer's finding of no subjective bias as long as it is clearly articulated.[4]

In this case, the Commissioner did not expressly apply *Los*; although, she appears to have addressed both prongs of the *Los* analysis. The Commissioner found that there was no objective basis for Defendant's claim. She noted that Defendant had not presented any evidence of bias, except for the fact that she had denied his previous motions. As the Supreme Court of Delaware explained in *Los*, prior contact between a judicial officer and a defendant in the same or a different proceeding does not, in itself, require recusal.[5] Rather, the supposed bias must have an extra-judicial origin.[6] Defendant has not articulated a supportable basis to explain the Commissioner's alleged bias. Therefore, the Court finds that the Commissioner correctly determined that there is no evidence of objective bias.

It can be inferred from the Commissioner's order that she determined that there is no subjective basis for recusal. However, she did not expressly apply the *Los* analysis, and she did not directly state that she finds no subjective bias. Defendant

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[3] *Id.* at 384.

[4] *Id.*.

[5] *Id.*

[6] *Id.*

has seized on that fact as the basis for his appeal.

The Court does not find any reason to believe that the Commissioner is biased against Defendant. However, it is necessary to ensure that Defendant receives his full due process. Therefore, the Court finds that the order must be remanded so that the Commissioner may expressly apply the *Los* analysis.

B. Motion to expand the record

A request to expand the record in a rule 61 hearing is discretionary.[7] Consequently, it is reviewed for abuse of discretion.[8] In this case, Defendant moved to expand the record in order to compel his trial counsel to give live testimony regarding her alleged failure to provide effective assistance. He also proposed to use the evidentiary hearing to challenge various other asserted shortcomings of his trial including: the trial court's decision to instruct the jury regarding lesser included offenses, and the Department of Correction's alleged confiscation of Defendant's legal materials.

The Commissioner denied the motion because she found that: (1) Defendant had already supplemented his second motion for post-conviction relief, and (2) Defendant's motion to expand the record was untimely because it was submitted after the State's reply. For the reasons stated herein, the Commissioner's decision was

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[7] Super Ct. Crim. R. 61(h). *See Outten v. State*, 720 A.2d 547, 551 (Del. 1999) (finding that the Court need not grant an evidentiary hearing if it appears from the record of the prior proceedings that the movant is not entitled to relief).

[8] 595 A.2d at 384.

correct.

First, there is no need for further testimony from Defendant's trial counsel. The critical issue is whether her actions or omissions resulted in inadequate representation and whether that caused actual prejudice to Defendant.[9] Counsel's actions and omissions are already apparent from the trial record, and thus it would be wasteful and unnecessary to conduct a hearing. Additionally, the Court finds that the Commissioner was well within her discretion to deny an untimely motion to expand the record when Defendant had previously obtained a similar expansion. Defendant did not have a right to a late, second expansion of the record. Moreover, he has not shown that the proposed expansion would be necessary to support his motion.

CONCLUSION

For the foregoing reasons, the order is **AFFIRMED IN PART** and **REMANDED** for further proceedings consistent with this order.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Mr. Ronald N. Johnson, *pro se*
James T. Wakley, Esquire

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[9] *Strickland v. Washington*, 466 U.S. 688 (1984).