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Case Number 220,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAMONTE BUTLER,	)	
Defendant-Below,	)	
Appellant	)	
	)	**NO. 220, 2013**
v.	)	
	)	
	)	
STATE OF DELAWARE	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE COUNTY

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NATURE AND STAGE OF THE PROCEEDINGS

On May 7, 2012, Lamonte Butler, ("Butler"), was indicted on Attempted Robbery First Degree and ten other offenses. A-1, 8. Later, the State amended the lead charge to Robbery First Degree. A-4, 30.

On Tuesday, December 4, 2012, a jury was sworn for a trial to begin that day and end on or by Friday, December 7, 2012. A-26. Later that same day, a different judge was assigned to the case. She said that her schedule would require the trial to continue into Monday. She questioned the already sworn jury about their availability to serve through that day. She also asked a couple of other questions. After this second round of *voir dire*, the judge indicated she would dismiss four of Butler's sworn jurors. Thus, we could not have a trial in front of the first empaneled jury. A-36-39, 94, 98-99. He requested a mistrial which was granted. A-39. Because a retrial would violate principles of double jeopardy, he filed a Motion to Dismiss which was denied.[1] Both parties filed a Motion to Recuse which was denied.[2]

After Butler's second trial, he was convicted of all but one weapon offense. Subsequently, he was sentenced to 11 years in jail followed by probation.[3] This is his opening brief in support of this timely-filed appeal.

[1] *See* Order denying Motion to Dismiss, att. as Ex.B.
[2] *See* Order denying Motion to Recuse, att. as Ex.C.
[3] *See* Sentence Order, att. as Ex.A.

SUMMARY OF ARGUMENT

1. The trial judge intentionally goaded Butler into requesting a mistrial through her deliberate actions which prevented him from proceeding to trial with his first empaneled jury.

2. Judge #2 abused her discretion when she denied Butler's motion to recuse herself from deciding his motion to dismiss without conducting the required analysis under *Los v. Los*, 595 A.2d 381, 385 (Del. 1991).

STATEMENT OF THE FACTS

At approximately 3:56 A.M. on March 13, 2013, Wilmington Police received a 911 call from Richard Baldwin, ("Baldwin"), who stated that he had just been assaulted and robbed on the 1200 block of Elm Street. Baldwin was in the area with a friend to buy "dippers"[4] from his drug dealer. A-101, 128, 130. At trial, he admitted that he was high on heroin at the time. A-129. He claimed that after purchasing and smoking the dipper, two black males came up from behind and smacked him in the back of the head with a gun. A-129. When he first spoke with police Baldwin said the two assailants were his drug dealers. A-130-131, 135.

Around the same time as police received Baldwin's call, they also received a 911 call from Segundo Rodriguez, ("Rodriguez"), who lived on the 1200 block of Elm Street. He claimed that from his bedroom window he saw three men on the street. A-116. According to Rodriguez, one black male was beating another male with a silver gun. However, he could not completely see the third male. A-116. Once the incident ended, the two assailants quickly walked away. A-117.

[4] "Dippers" are cigarettes or marijuana blunts dipped in PCP. A-128-129, 135.

When police arrived in the area, they saw two black males who fit the general description they had been given when they were dispatched. A-101-102. The men were walking east on Chestnut Street when they turned toward and saw the officers in their marked police car. They then turned back and continued to rapidly walk east and turn onto the 200 block of Harrison Street. A-102. The men then split up. A-102. While one suspect walked up a set of steps to a house and tried to go inside the other suspect kept walking south on Harrison Street. A-102-103. Police got out of the car and pursued the two men. After the men resisted, each was taken into custody. A-103-104.

According to police, they found a silver Colt special combat government model .45 caliber handgun in the pant leg of one of the suspects who was later identified as Lamonte Butler, ("Butler"). A-108. The gun was purportedly loaded with 4 rounds of ammunition. A-108-109. However, police did not discover this weapon until after three separate "pat downs" by three different officers. A-104-109. Butler was also found to be in possession of 12 small Ziploc bags containing a green leafy substance that tested positive for Marijuana and one clear plastic bag containing an off-white chunky substance that tested positive for crack cocaine. A-105. No

paraphernalia or drug quantities indicative of drug dealing was found. A-136.

The other black male arrested that night was Kaala Collins ("Collins"). A-126, 133-134. In exchange for his testimony against Butler, the State allowed Collins to enter into a favorable plea agreement. A-118-119. He was originally charged with Attempted Robbery First Degree, Assault Second Degree, two counts of Possession of a Firearm During the Commission of a Felony, Conspiracy Second and a misdemeanor Resisting Arrest. These charges exposed him to between 9 years and 86 years in prison. A-118-119, 124. He pled to Attempted Robbery Second Degree and Conspiracy Second Degree. A-124. As a result of the plea, he was released from jail after 5 months and was placed on probation. A-124-125.

At trial, Collins stated that he participated with Butler in the robbery, but, he also claimed that the robbery was Butler's idea and that Butler was the one who "pistol whipped" Baldwin. A-120-121. Collins testified that neither he nor Butler sold him drugs. A-127. Collins said that after he got Baldwin's wallet, Butler continued to hit Baldwin in an effort to obtain his cell phone. A-120. Then, while the two men walked away, Collins threw the wallet in the trash. A-120-121. They then encountered police. A-122.

After Butler was arrested, police took him about a block and a half over to the ambulance where Baldwin was being treated for lacerations on his nose and head. A-109-110, 130. Police pulled Butler out of the car and shined a spot light on him. He was about 15 feet away from Baldwin. A-110. Baldwin claimed that Butler was his assailant. A-111.

Police tested the gun for fingerprints and found none of any value. A-112-113. Because there was blood on the gun, police swabbed it for DNA. After testing at the medical examiner's office, it was determined that the DNA samples were consistent with Baldwin's' profile. A-112, 114-115.

I. THE TRIAL JUDGE INTENTIONALLY GOADED BUTLER INTO REQUESTING A MISTRIAL THROUGH HER DELIBERATE ACTIONS WHICH PREVENTED HIM FROM PROCEEDING TO TRIAL WITH HIS FIRST EMPANELED JURY.

Question Presented

Whether retrial is barred after a defendant is goaded into requesting a mistrial as the result of the trial court's deliberate actions which results in the defendant not being able to proceed to trial with his first empaneled jury. A-42, 100.

Standard and Scope of Review

This Court reviews "claims alleging an infringement of a constitutionally protected right, including the right not to be subjected to double jeopardy, *de novo*." *Sullins v. State*, 930 A.2d 911, 915 (Del. 2007).

Argument

The First Empaneled Jury

Both Butler and the State were prepared for trial on Tuesday, December 4, 2012. Counsel met with the first assigned judge, (Judge #1), that morning and agreed the trial would take approximately 3 days but, out of an abundance of caution, they would *voir dire* the jurors for a four-day trial that would end on Friday, December 7, 2012. A-30. Judge #1 and

counsel selected a jury which contained 12 jurors and 4 alternates. A-43. The jury was sworn and opening statements were scheduled for after a lunch recess. A-26. However, during the recess, the trial was reassigned to Judge #2 for purely administrative reasons. A-43, 91-92, 96-97.

Judge #2's Unreported Conferences Regarding Plea Negotiations, Scheduling And Additional Voir Dire

After the reassignment, counsel were summoned to Judge #2's chambers for a conference. One prosecutor requested a court reporter, however he was told that one was not necessary because they would only be discussing the issue of scheduling. A-87, 901-92. Despite the absence of a court reporter, Judge #2 "pressed" the parties on a plea agreement. A-92, 97. After the parties told the judge that a plea agreement was no longer an option, the judge "continued to press, asking what the prior plea offer was." A-92-93. Counsel explained the substance of the prior plea offer and explained that Butler had rejected it. The judge suggested that the parties resolve the case with a plea to Robbery Second Degree and Possession of a Firearm During the Commission of a Felony and "let the Court take care of it." A-93. The State then told the judge that it would not, on the day of trial, offer the same or a better plea. A-93.

The judge then asked whether a colloquy had been conducted with Butler to determine whether he made his decision to go to trial knowingly,

intelligently and voluntarily. She was told that no colloquy had been conducted. A-93.

Next, the judge turned her attention to scheduling. She stated that, due to other commitments, she could only preside over a trial for a few hours each day. A-93, 97. Thus, it was likely that the trial would now extend into Monday, December 10, 2012. A-93, 97.

The Second Empaneled Jury

After the off-the-record office conference, the judge and counsel went to the courtroom. The judge conducted a colloquy with Butler who made it clear that he wanted to go to trial. A-35-36. The court then conducted further *voir dire* of the already sworn jury, asking the following questions: "Can you serve through Monday; have you, a relative or close friend ever assisted or cooperated with the police or Attorney General in a civil or criminal investigation; and, are you a retiree." A-36-38, 88.

Five jurors responded affirmatively. Juror #7 said that he would be "traveling out of the country starting Monday afternoon for a vacation." A-37. The judge immediately responded, "Okay. I'm going to excuse you." Defense counsel tried to intervene but was cut off by the judge,

Defense Counsel: Your Honor.
The Court: What's the problem?
Defense Counsel: If we don't go through Monday—
The Court: Do you really want a juror that's going to rush

things?

Defense Counsel: No.

A-37.

Next, Juror #8 stated that he had retired from Delmarva Power. He also said that he has "had knives pointed at [him], guns pointed at [him]." A-37-38. Counsel were concerned that he did not provide this information in the first round of questioning when asked a relevant question. However, Juror #8 said he could be fair. The judge stated to counsel, "[p]ersonally, I'm not convinced." A-38. He was not immediately excused.

Juror #16 approached and said, "I have a hearing problem. When you're speaking, if not in a microphone, I can't hear you." Rather than asking any follow-up questions or discussing possible options, the judge immediately responded "I'm going to excuse you from the jury; all right?" A-38.

The judge and counsel then left the courtroom and went to a jury room to discuss the jury's status. A-38. While the discussion began on the record, the judge "suddenly waved her arm in front of the court reporter to go off the record. It was so abrupt that everyone paused and the reporter asked to clarify if it was off the record." A-94, 98. Conversations then took place off the record that led the parties to believe that the judge was going to

excuse 4 jurors. There would remain only 12 jurors; there would now be no alternates. A-94-95, 98-99.

Butler's Forced Request For A Mistrial

The judge and counsel returned to the courtroom and "went back on the record." At this point, the State relayed that the profile for Juror #11 revealed that he had an out-of-state record. A check of NCIC revealed that he had been charged in Pennsylvania in 2009 but that the charges were dismissed. A-38-39. The prosecutor noted, "that was a question, I think, basically phrased three different ways and it was not disclosed." A-39.

Defense counsel then engaged in a discussion regarding whether she should request a mistrial based on the situation as created by the judge. A-38-39. At this point, according to the prosecutors, "the judge looked at one of the prosecutors and mouthed the word "plea." A-95, 99. Ultimately, the judge ruled,

> all right. Based on all the reasons given, I'm going to grant a mistrial without prejudice, we need to set a new date. Can do it Thursday, maybe next Tuesday.

A-39.

Post Mistrial Motions

On January 3, 2013, Butler filed a motion to dismiss based on the principle of double jeopardy because the judge "goaded" him into asking for

a mistrial. A-42. Butler argued that he was forced to request the mistrial by the court's deliberate actions which led to the excusal of 4 sworn jurors with whom he had been content. A-42. The State responded that Butler was not "goaded" into requesting a mistrial and, thus, he could be retried. A-47.

Butler then requested that Judge #2 recuse herself from deciding his motion to dismiss because the motion was based on allegations concerning Judge #2's own conduct. A-84. The State also filed a Motion for Judicial Recusal requesting that Judge #2 recuse herself from ruling on the motion to dismiss. A-85. The State argued that the judge's "deliberate contravention of established law" by refusing to record the office conferences and her "unrecorded expression of opinion about the appropriate resolution of this case and pressure to reach that resolution" led to "an appearance of bias or partiality" and "ma[d]e it unlikely that this judge can preside over the trial with impartiality." A-89.

Despite the fact that both parties moved for recusal, Judge #2 ruled on the Motion to Dismiss. She denied the motion finding that Butler failed to establish that she, (Judge #2), had provoked a mistrial. The judge also found that she, (Judge #2), had not violated *Delaware Superior Court Criminal Rule* 26.1 which requires that all office conferences dealing with substantive

matters be recorded. Ex.B. As far as the dual motions to recuse, the judge simply denied the request as moot. Ex.C.

Butler's Right To Be Free From Double Jeopardy Was Violated By Judge #2's Conduct Which Goaded Butler Into Requesting A Mistrial

Butler had a right to have his trial before the first empaneled jury. *See Sullins v. State*, 930 A.2d 911, 915 (Del. 2007) ("A criminal defendant owns 'the valued right to have his trial completed by a particular tribunal.'"). Generally, when a defendant requests a mistrial, however, the principles of double jeopardy do not necessarily preclude a retrial. *Sullins*, 930 A.2d at 915-16. The principle of double jeopardy protects "a defendant against governmental actions intended to provoke mistrial requests[.]" *U.S. v. Dinitz*, 424 U.S. 600, 611 (1976). Thus, where the prosecutor or the court "goads" the defendant into requesting a mistrial, retrial is prohibited. Since Judge #2's conduct was intended to and did provoke a mistrial in this case, retrial is barred.

Typically, in determining whether there was an intent to provoke a mistrial, this Court must rely on findings of fact made by the trial court unless they are clearly erroneous. *Sullins*, 930 A.2d at 916. Thus, the findings of facts in the denial of the motion to dismiss are a significant factor in determining the issue of double jeopardy. Here, however, Judge #2 is the one whose conduct provoked the mistrial and, despite a request by both

parties, was the one who made findings about her own conduct. *Id.* at 915-16. Thus, for the reasons set forth in Argument II, *infra*, regarding bias and partiality, this Court cannot rely on those findings. And, the totality of the record supports a conclusion that Judge #2 did not intend for there to be a trial over which to preside on December 4th. A-92-93,97.

As the State pointed out in the court below, Judge #2 acted in "deliberate contravention of established law" when she chose to conduct two office conferences off the record. A-89. This choice violated *Delaware Superior Court Criminal Rule* 26.1 which provides:

> All sidebar conferences and chambers conferences during trial shall be recorded unless the trial judge determines, in advance, that neither evidentiary nor substantive issues are involved.

A-88 (*citing Stephenson v. State*, 606 A.2d 740, 741 n.2 (Del. 1992) ("The recording of all substantive sidebar and chambers conferences is and has been mandatory."). In *Suddler v. State*, a double jeopardy case, this Court was emphatic that it is unacceptable to not record proceedings where "the trial judge has taken irrevocable steps, related to or resulting from sidebar conferences, that effectively violated a fundamental right of the defendant. 611 A.2d 945, 947 (Del. 1992).

Additionally, as the State explained in its motion for recusal, the judge also made an "unrecorded expression of opinion about the appropriate

resolution of this case and pressure to reach that resolution." A-89. She later, inappropriately, mouthed to the prosecutor, "plea" when defense counsel was discussing the mistrial dilemma. She also made it clear that if the trial did begin, it would take longer as she could only preside over the case for a few hours each day. There is no indication why Judge #1, or any other judge for that matter, could have been assigned to the case in order for the trial to proceed as scheduled.

The further *voir dire* conducted went beyond the issue of the sworn jurors' extended availability and resulted in the excusal of 4 of those jurors. A-36-38, 88. The judge did this without making specific inquiries, considering other options or making any specific findings. *See Suddler*, 611 A.2d at 948 (finding excusal of sworn jurors due to availability to be an abuse of discretion as the judge's questions on that issue were superficial at best). For example, Juror #7 indicated that he would be leaving for vacation on Monday afternoon. The judge automatically excused him despite the fact the trial may well be over by then and despite Butler's attempt to explain that to the judge. A-37.

The judge also automatically dismissed a sworn alternate who simply explained she had a hard time hearing unless the speaker used a microphone. She then conducted another unrecorded conference where she indicated that

she would excuse two additional jurors. A-88. There is nothing in the record with her actual decision on those two jurors.

Though there still remained 12 jurors as required by the State constitution, they were not the original 12 jurors selected by Butler. Butler was content with the first 12 sworn jurors. In fact, he did not use all the preemptory strikes allotted to him for the selection of his jury. He now faced a second empaneled jury created by Judge #2's conduct and abuse of discretion. His sworn jurors had been whittled away through questioning that was not propounded to the entire jury panel during the selection process. Thus, even before Butler requested the mistrial he had already been deprived of this constitutional right to proceed before the first empaneled jury.

Because the trial court goaded Butler into requesting a mistrial, his convictions and sentences must be reversed and the State barred from retrying him.

II. JUDGE #2 ABUSED HER DISCRETION WHEN SHE DENIED BUTLER'S MOTION TO RECUSE HERSELF FROM DECIDING HIS MOTION TO DISMISS WITHOUT CONDUCTING THE REQUIRED ANALYSIS UNDER *LOS V. LOS*.[5]

Standard and Scope of Review

The standard for review of a trial court's decision on a motion to recuse is abuse of discretion. *Los*, 595 A.2d at 385.

Question Presented

Whether the trial court abuses its discretion when it denies a motion to recuse without conducting the analysis required under *Los v. Los*. A-84.

Argument

Criminal defendants have a constitutional right to a fair and impartial judge. *See Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997). That is because "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). *See Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir. 1982) ("Impartiality and the appearance of impartiality in a judicial officer are the *sine qua non* of the American legal system."). When ruling on a motion to recuse, the judge must take guidance

[5] 595 A.2d 381, 385 (Del. 1991).

from Cannon 3 C (1) of *The Delaware Judge's Code of Judicial Conduct* which states, in relevant part:

> A judge should disqualify h[er]self in a proceeding in which h[er] impartiality might reasonably be questioned[.]

In *Los*, this Court created a two-part analysis which a judge must conduct to determine whether recusal is appropriate. 595 A.2d at 384. First, the judge must be satisfied "as a matter of subjective belief" that she can proceed to hear the matter free of bias or prejudice. *Id.* at 384-385. Second, even if the judge believes that she is free of bias or prejudice, the judge must objectively examine whether the circumstances require recusal because "there is an appearance of bias sufficient to cause doubt as to the judge's impartiality." *Id.*

The application of the *Los* test to the circumstances in our case casts sufficient doubt on Judge #2's ability to be impartial in ruling on Butler's motion to dismiss. It is not alleged that recusal was required under the first, or subjective, prong of the *Los* test. However, the second, or objective, prong of the test did require recusal. *See Watson v. State*, 934 A.2d 901, 906-907 (Del. 2007) (holding that, while trial judge satisfied the subjective prong, there was a troubling appearance of bias when the judge tried defendant's back-to-back credibility cases).

Here, the basis of Butler's motion to dismiss was that Judge #2 intentionally engaged in conduct in order to provoke him into requesting a mistrial. In their respective motions, the parties each pointed to the allegations underlying Butler's motion to dismiss as a basis for presenting a serious question under the second prong of the *Los* analysis.

In deciding Butler's motion to dismiss the judge was required to determine if he was "goaded" into requesting a mistrial. So, in our case, the judge deciding the motion to dismiss was required to make findings regarding Judge #2's conduct. This Court is then required to rely on those findings on appeal. *Sullins*, 930 A.2d at 916. Thus, for Judge #2 to sit in judgment of her own conduct created, at least, an appearance of bias.

Not only did Judge #2 deny the motion to recuse, she did so without conducting any analysis. This Court has made it clear that "[o]n appeal of the judge's recusal decision, the reviewing court must be satisfied that the trial judge engaged in the subjective test and will review the merits of the objective test." *Los*, 595 A.2d at 385. Here, the Court cannot be satisfied as there was no analysis conducted. Instead, the judge claimed that the issue was moot as a different judge was going to handle the second trial. However, both motions were clear that the request was for her to recuse herself from deciding the motion to dismiss.

Because the judge abused her discretion in denying Butler's motion to recuse, his convictions and sentences must be reversed.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that Butler's conviction and sentence must be reversed.

\s\ Nicole M. Walker
Nicole M. Walker, Esquire

Date: August 20, 2013