

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

:

v.

:

3:01CR216(AHN)

PHILIP A. GIORDANO

:

RULING ON DEFENDANT'S SECOND MOTION FOR RECUSAL

Defendant Philip A. Giordano ("Giordano") has filed a second motion for recusal pursuant to 28 U.S.C. § 455(a) [doc. # 141].¹ Earlier in this proceeding, the court issued two separate, sealed rulings pursuant to the Bail Reform Act, 18 U.S.C. § 3142, in which it denied two motions filed by Giordano to release him from pretrial detention. In these orders, the court found that the Government had established by a preponderance of the evidence that if Giordano were released on bail, no combination of conditions would reasonably guard against flight or danger to the community. Giordano appealed the denial of the second motion to the Second Circuit Court of Appeals ("Second Circuit"), which affirmed the court's ruling.

At oral argument before the Second Circuit, the

¹ The court has previously considered and denied Giordano's first motion to recuse, which sought to preclude this court from presiding over a motion to suppress evidence that involved evidence derived from, among other sources, Title III wiretapping activities authorized by the court.

Government disclosed that the court's second order had included the factual finding that Giordano was a "sexual predator," which a Connecticut newspaper subsequently reprinted in a published article. As a result, Giordano now asserts that this public disclosure would lead a reasonable, objective observer to question the court's impartiality because the factual finding of "sexual predator" improperly "represents the legal conclusion of guilt at a time when the defendant is presumed to be innocent and where his trial has not even begun." Giordano Memorandum ("Giordano Mem.") at 3. Defendant, however, has not alleged that this court has relied upon knowledge acquired outside of this proceeding or has displayed a deep-seated bias against him.

For the reasons discussed below, Giordano's second motion for recusal is DENIED.

FACTS

Giordano has been charged in a fourteen-count criminal indictment alleging, among other things, (1) that he deprived two minor victims of their due process liberty rights to be free from sexual abuse in violation of 18 U.S.C. § 242; (2) that he conspired to knowingly initiate the transmission of the minor victims' names by using facilities and means of interstate and foreign commerce in violation of 18 U.S.C. §§

2425 and 371; and (3) that he knowingly initiated the transmission of the minor victims' names by using facilities and means of interstate and foreign commerce with the intent to entice, encourage, offer, and solicit them to engage in sexual activity in violation of 18 U.S.C. § 2425. The State of Connecticut also has charged the defendant with six counts of first degree sexual assault, six counts of risk of injury to a minor, and six counts of conspiracy.

On the government's motion, Giordano was detained without bond after his arrest. In analyzing whether to detain him before trial, the court considered the following statutory factors: (1) the nature and circumstances of the crimes charged; (2) the weight of evidence against the defendant; (3) the history and characteristics of the defendant, including family ties, employment, community ties, and past conduct; and (4) the nature and seriousness of the danger to the community or to an individual, if the defendant were released. See 18 U.S.C. § 3142(g).² Based upon a consideration of these

² In rendering its decision on the pretrial detention motion, the court considered the four factors enumerated in 18 U.S.C. § 3142(g), which reads:

- (g) Factors to be considered.--The judicial officer shall, in determining whether there are conditions of release that will reasonably assure . . . the safety of any other person and the community, take into account the available

factors, the court issued a sealed, written ruling that ordered defendant's continued detention pending trial. See Ruling on Mot. For Pretrial Detention Filed Under Seal, Aug. 7, 2001.

information concerning--

- (1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including--
 - (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release

18 U.S.C. § 3142(g).

Giordano subsequently filed a second motion for release from pretrial detention. In response, the government submitted additional evidence in opposition and presented a supplemental report that included recent interviews with the defendant's wife and family members. Based upon this information, the court determined the following: (1) that the nature of the crimes with which the defendant was charged weighed heavily against release; (2) that the evidence demonstrated that the defendant had a propensity to threaten violence in order to achieve his objectives; (3) that the defendant posed a danger to the community at large, not just to the victims in this case; and (4) that no conditions could reasonably assure the safety of the community and the presence of the defendant at trial. Thus, in a sealed ruling, Giordano's second motion for release was denied.

Giordano then appealed the denial of his second motion for release to the Second Circuit Court of Appeals. At oral argument, the Government revealed that the court's sealed ruling included the factual finding that the defendant was a "sexual predator." A major Connecticut newspaper quoted the Government's statement in a front-page article and the accompanying headline. See Lynne Tuohy, Giordano Labeled 'Sexual Predator', Hartford Courant, August 7, 2002, at A1.

In light of this disclosure, Giordano contends in his instant motion that the court should recuse itself because a reasonable person would question its impartiality.

STANDARD

A district court is required to recuse itself pursuant to 28 U.S.C. § 455(a) when its "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The Second Circuit has articulated the following standard for recusal under § 455(a): "Would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned? Or phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?" United States v. Bayless, 201 F.3d 116, 126 (2d Cir.) (quoting Diamondstone v. Macaluso, 148 F.3d 113, 120-21 (2d Cir. 1998)), cert. denied, 529 U.S. 1061 (2000). This inquiry is "to be determined not by considering what a straw poll of the only partly informed man-in-the-street would show[,] but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge." Id. at 127 (internal quotation marks omitted). Furthermore, "[a] judge is as much obliged not to recuse himself when it is

not called for as he is obliged to when it is." In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1312 (2d Cir. 1988), cert. denied sub nom. Milken v. SEC, 490 U.S. 1102 (1989).

Most importantly, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . [and] [o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555 (1994) (emphasis added). In addition, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." Id.; see also United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981) (holding that knowledge acquired by the judge while he performs judicial duties does not constitute grounds for disqualification), cert. denied, 456 U.S. 916 (1982). As a general rule, the alleged bias must stem from an "extrajudicial source" - that is, the alleged prejudice cannot derive solely from the court's rulings or statements from the bench. See Liteky, 510 U.S. at 555; see also United States v.

Grinnell Corp., 384 U.S. 563, 583 (1966) ("[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case") (citation omitted).

DISCUSSION

Giordano's motion falls far short of satisfying the § 455 standard for recusal. First, his argument directly conflicts with the Supreme Court's holding in Liteky that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky, 510 U.S. at 555 (emphasis added). In this case, there is no dispute that the court made the factual finding of "sexual predator" in the context of ruling on Giordano's motion for release from pretrial detention. As required by 18 U.S.C. § 3142, the court properly considered the relevant evidence, and made appropriate factual findings and legal conclusions. Moreover, because the court based its ruling entirely on evidence adduced with respect to defendant's motion, Giordano has not and cannot claim that the court based its ruling on information acquired outside the scope of the judicial proceeding. See United States v. Arena, 180 F.3d 380, 398 (2d Cir. 1999) (affirming district court's denial of defendant's

recusal motion that was partly based on court's previous denial of defendant's bail application), cert. denied, 531 U.S. 811 (2000); United States v. Diaz, 176 F.3d 52, 111 (2d Cir.) (affirming district court's denial of recusal motion based on defendant's contention that court had heard "inadmissible hearsay evidence of a conspiracy" while reviewing and authorizing wiretaps), cert. denied, 528 U.S. 875 (1999). Notably, Giordano has not alleged that the court's findings are unsupported by the evidence or that the court improperly deviated from the procedure mandated by 18 U.S.C. § 3142.

Second, Giordano's motion fails to satisfy the recusal standard in § 455 because he has not alleged - nor could he allege - that the court's factual finding of "sexual predator" manifests a "deep-seated and unequivocal antagonism that would render fair judgment impossible." Liteky, 510 U.S. at 556. On the contrary, defendant's theory of recusal is that a reasonable person who was previously unaware of the "sexual predator" finding would now question the court's impartiality. Giordano, however, has provided no case law to support this novel argument, and the court is unaware of any such authority. Furthermore, the court's factual finding of "sexual predator," which was based entirely on evidence

presented with respect to Giordano's pretrial detention motion, bears little resemblance to those situations in which courts have demonstrated a "deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555; see also United States v. Edwardo-Franco, 885 F.2d 1002, 1005 (2d Cir. 1989) (judge's statements regarding alleged drug traffickers who were immigrants that "they should have stayed where they were" and that "[n]obody tells them to come and get involved in cocaine"); United States v. Antar, 53 F.3d 568, 573 (3d Cir. 1995) (judge's statement that "[m]y object in this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others").

Moreover, even if one were to construe the court's comments as reflecting disapprobation of Giordano, this still would not be a sufficient ground for recusal. Such comments are simply "expressions of . . . dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." Liteky, 510 U.S. at 555-56; see In re J.P. Linahan, Inc., 138 F.2d 650, 654 (2d Cir. 1943) ("If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render

decisions.”)

Finally, there is no merit to Giordano’s claim that the court’s factual finding of “sexual predator” somehow indicates that the court has determined he is guilty of the offenses charged in the indictment. The question of a defendant’s guilt or innocence is not for the court to decide, but will be determined by a jury. See United States v. Wilson, 77 F.3d 105, 110 (5th Cir. 1996) (affirming the district court's refusal to recuse itself where the court's comments concerned the defendant's guilt or innocence, which is a matter to be decided by the jury, not by the court).

CONCLUSION

For the reasons discussed, the motion for recusal [doc. # 141] is DENIED.

SO ORDERED this _____ day of November, 2002, at Bridgeport, Connecticut.

Alan H. Nevas
United States District Judge