SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 66

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THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Indictment No. 1222/2010

BRUCE ADAMS, :

Defendant. :

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RUTH PICKHOLZ, J.

The defendant moves to set aside his sentence pursuant to CPL 440.20.

The defendant was convicted after trial of two counts of criminal possession of a weapon in the second degree. After the jury rendered its verdict I remanded the defendant pending sentence. As he was being led out of the courtroom defendant lunged at the assistant district attorney who had prosecuted the case, yelled an expletive at him, and spat in his face. I was still sitting on the bench at the time. He subsequently sent letters of apology to me and to the prosecutor. A week prior to sentence the prosecutor wrote a letter to defense counsel. He advised him that at the sentence proceeding he intended to refer to a telephone call that the defendant had made from jail sometime after the date of conviction. The prosecutor included a copy of the recording of the telephone call with his letter, but defense counsel was unable to play it.

On the day of sentence, after I orally denied a motion to set the verdict aside, defense counsel stated that his client stood ready for sentencing. The assistant district attorney then began his remarks by discussing the facts of the case, defendant's criminal record, including several

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cases which were still pending, and the spitting incident. He argued that there were no factors which justified showing him leniency, and opined that defendant's letters of apology were insincere. He drew the same conclusion from defendant's statements in his post-conviction telephone call, which he then played. After noting that defendant not only had shown no remorse, but still denied his guilt, he recommended a sentence of nine years in prison.

Defense counsel began his statement by asking me to preclude the assistant district attorney from representing the People at sentence. It appeared that he had taken umbrage at his adversary's comment that he (defense counsel) was going to deliver a "pitch" on behalf of the defendant. Adopting a tone which was immoderate to begin with and which grew increasingly loud, he argued that, as defendant had been separately charged with two misdemeanors in connection with the spitting incident in which the assistant district attorney was the complainant, it was improper for the assistant to make a sentence recommendation. After I denied his preclusion application he asked me to recuse myself, and I denied that application as well. At that point defense counsel apologized for yelling and made a lengthy and impassioned plea for leniency for his client. Defendant then spoke. At the close of his client's statement defense counsel spoke again, this time objecting to the playing of the tape recording earlier in the proceeding. When he concluded I imposed a sentence of eight years in prison and five years of post-release supervision.

Defendant now moves to set aside the sentence as illegally imposed .He argues that I should have granted his application to disqualify the prosecutor and to recuse myself, and that our participation at the sentence proceeding rendered it invalid as a matter of law. He also argues that

I should have granted him an adjournment to listen to the recording of defendant's telephone call prior to proceeding with the sentence, and that the sentence imposed was excessive.

There is no merit to defendant's argument that by presiding over his sentence I rendered it invalid. Although I was present in the courtroom when he spat at the prosecutor, his behavior did not prejudice me against him. It is not a rare occurrence for me to see a defendant exhibit a lapse in behavior while on trial. Additionally, like all judges who preside over criminal cases, I am routinely made aware that the defendants I am about to sentence are guilty of other criminal or blameworthy conduct. Not infrequently, the reported conduct is far more grievous than spitting at the prosecutor. The knowledge that I gain does not prevent me from being fair and does not require my recusal (*see* People v. Latella, 112 AD2d 324).

Judiciary Law §14 lists the circumstances which prevent a judge from presiding over a proceeding. It provides as follows:

> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But no judge of a court of record shall be disqualified in any action, claim, matter, motion or proceeding in which an insurance company is a party or is interested by reason of his being a policy holder therein. No judge shall be deemed disqualified from passing upon any litigation before him because of his ownership of shares of stock or other securities of a corporate litigant, provided that the parties, by their attorneys, in writing, or in open court upon the record, waive any claim as to disqualification of the judge.

None of the circumstances listed in the statute were present in this case. There existed no other reason or factor which prevented me from presiding over the sentence."Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal ... [and a] court's decision in this respect may not be overturned unless it was an abuse of discretion" (People v. Moreno, 70 N.Y.2d 403, 405-406; *see also* People v. Weeks, 46 AD3d 583). To the extent that the motion to set aside the verdict is based on my refusal to recuse myself, it is therefore denied.

The sentence was not rendered invalid by the participation of the prosecutor. Defense counsel initially stated that his client was ready for sentence and made no objection to the participation of the assistant district attorney until after the latter completed his remarks and made a sentencing recommendation . At that point whether the assistant should have been precluded from representing the People was a moot issue. If defendant had an objection to the prosecutor's participation, it was incumbent upon him to alert me to it earlier.

Defendant's argument is also substantively meritless. A prosecutor may be removed "to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence" (Matter of Schumer v. Holtzman, 60 N.Y.2d 46, 55) A defendant who seeks to disqualify a prosecutor must show more than a mere appearance of impropriety (*see* People v. Gigliuto, 22 A.D.3d 890, 892). A proceeding will only be considered infirm by reason of the participation of the prosecutor if the defendant can show that there was a

substantial likelihood of prejudice flowing from his actions (*see* People v. Paperno, 54 NY2d 294). In this case the assistant district attorney's participation did not prejudice the defendant. Before sentencing defendant I stated that although I was not blind to what had happened before me, I "was going to sentence the defendant in this case, as I do in every case before me, on the facts of the trial before me. That's what I'm sentencing him on." Moreover, this is not a case where the prosecutor was acting as a witness against the defendant. The rule which prohibits a prosecutor from being both an advocate and witness applies only where he or she testifies as to a "disputed material fact" (*see* People v. Paperno, 54 NY2d at 300). The spitting incident was neither disputed at the sentencing proceeding nor material to it.

Similarly, the sentence was not rendered infirm because I refused to grant defense counsel an adjournment to listen to the recording that defendant made from jail. Not only did defense counsel have an opportunity to listen to the recording in court when the prosecutor played it, but he afterward responded to the prosecutor's arguments concerning the inferences the import of defendant's statements. Additionally, the recording played no part in my sentencing decision. I reject the argument that the sentence that I imposed was excessive.

Accordingly, defendant's application is denied.

A.J.S.C.

Dated: June 21, 2011