LEXSEE

Analysis
As of: Jul 29, 2010

[*1] **The People of the State of New York, against Juana Ventura, Defendant.**

5693

JUSTICE COURT OF NEW YORK, VILLAGE OF WESTBURY, NASSAU COUNTY

2007 NY Slip Op 52232U; 17 Misc. 3d 1132A; 851 N.Y.S.2d 73; 2007 N.Y. Misc. LEXIS 7717; 238 N.Y.L.J. 107

November 15, 2007, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PRIOR HISTORY: People v. Ventura, 17 Misc. 3d 1113A, 851 N.Y.S.2d 66, 2007 N.Y. Misc. LEXIS 6932 (2007)

CORE TERMS: recusal, recuse, mandatory, presided, sua sponte, defense counsel, search warrant, warrant application, probable cause, appearance of impropriety, discretionary, respectfully, arraignment, prosecutor's, signing, bail, matter of law, fair and impartial, jury trials, disqualification, uncomfortable, disqualified, reputation, suppress, overrule, preside, bias, sit, best interests, involvement

HEADNOTES

[**1132A] [***73] Judges--Recusal.

COUNSEL: For the Village: Dwight D. Kraemer, Esq., Village Attorney and Prosecutor, Westbury, NY.

For the Defendant: Henry Lung, Esq., Attorney for Defendant, Mineola, NY.

JUDGES: Hon. Thomas F. Liotti, Village Justice.

OPINION BY: Thomas F. Liotti

OPINION

Thomas F. Liotti, J.

This Court first concerned itself with the issue of recusal when the wife of a former opponent for Village Justice came before me as a defendant and stated that: "[she thought that I could] be fair." This was in response to my inquiry of her as to whether she would like me to recuse myself. I then, *sua sponte,* recused myself and referred the matter to my Associate Justice without further comment. See *People v. T & C Design Inc. and Carmela Cardoza,* 178 Misc 2d 971, 680 NYS2d 832 (1998). My actions in that case were in the nature of a discretionary recusal.

In this case I signed a search warrant, received the

Ex 9

return on the warrant and then presided over the arraignment and bail proceedings, wherein I established a scheduling order for the making of motions, if any. See *People v. Juana Ventura,* 17 Misc. 3d 1113(A), 851 N.Y.S.2d 66, 2007 NY Slip Op 51949(U). The defendant was charged with multiple building code violations. The Court also stated that if either party or their counsel wanted this Justice to recuse himself that he would do so. Defense counsel declined and the prosecutor stated that if defense counsel filed a motion to suppress the evidence seized pursuant to the search warrant, the Court would have to recuse itself, thereby suggesting that the recusal would be mandatory. This also put defense counsel into an uncomfortable position of having to weigh what degree of advocacy to deploy at the possible risk of offending the Judge, forcing his recusal or even losing a Judge where he might prefer that the Judge remain on the case due to, as defense counsel has stated: "the Court's reputation of fairness."

[*2] The first question to be decided is whether this Judge must recuse himself as a matter of law since he heard the *ex parte* search warrant application and signed the warrant, essentially finding, among other things, that there was probable cause for the search. Do these actions by the Court require mandatory recusal by the Court? Also, is the Court obligated to recuse itself for the entire case? For the reasons set forth hereinafter, this Court believes that he should recuse himself. The signing of a warrant based upon probable cause clearly shows a pre-judgment or disposition by the Court which would preclude the Court, as a matter of law, from fairly deciding that issue anew, either on motion papers following a pre-trial hearing or during the trial itself. This Court has no jurisdiction over felonies or misdemeanors. It does not preside over jury trials. Thus, it is both a finder of fact and a Judge on the law and the facts. Accordingly, this Court believes that recusal is mandatory under these nonjury circumstances, but takes no position as to whether recusal would be warranted on the trial of a case before a jury after the signing of a warrant. Defense counsel would be asking the Court to overrule itself or later decide that it did not have probable cause to issue the warrant. See *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961). Even if the Court could intellectually separate its earlier determination from the suppression issues on trial itself, that Chinese Wall would come tumbling down by virtue of the appearance of impropriety that such mental gymnastics would create. This Court and all others are fallible. We should not be the least bit offended if attorneys dare to challenge our rulings. Indeed, it should be encouraged as the very embodiment of democracy and the adversarial system of jurisprudence. As Aristotle once wrote, "The brave man is the man who faces or fears the right thing for the right purpose in the right manner at the right moment." [1] If trial Judges were perfect then we would not need juries or appellate courts. This Court says "Bring them on!" and it praises the attorneys who question its authority. The last thing that a healthy, vibrant court system needs are unctuous attorneys bowing and scraping at its feet. [2] For as Benjamin Disraeli noted, "The spirit which does not soar is destined to grovel." Rather than a collegial parroting or echo of its rulings by "yes men and women", the Court would prefer colloquy that addresses constitutional concerns bringing us closer to justice and equality.

1 Aristotle, *Nichomachean Ethics,* 3.7.

2 "I have lived my life and I have fought my battles, not against the weak and the poor- anyone can do that- but against power, against injustice, against oppression, and I have asked no odds from them and I never shall." -Clarence Darrow.

This Court finds that the signing of a warrant by it precludes the Court from any further involvement with the case. Under the circumstances, the Court finds that its recusal is mandatory, not discretionary. Indeed, while this Court presided over the arraignment of the defendant including a bail hearing, in the future, it will not preside over a case once the warrant has been signed, executed and returned. While this Court will not reconsider its own decision on bail, the defendant is free to present those issues to Associate Justice Pessala, *without prejudice.* Therefore, I respectfully refer this matter to my learned colleague, Hon. Elizabeth Pessala, Associate Justice.

Attorneys should not have to give a second thought to whether an application for recusal will offend the Judge or in some way, hurt their client. The system of recusal is deliberately [*3] flawed because applications for recusal must go before the Judge presiding over the case. This procedure remains in effect because our judiciary wishes to discourage recusal motions by a process of systemic intimidation wherein it considers such motions to be a monkey wrench thrown into the works of its turnstile. When a Judge's fairness might reasonably be questioned or when a Judge is being asked

to overrule himself, to change the law of the case or to alter an interlocutory ruling, then recusal should be a forethought instead of an afterthought.

In this case, defense counsel has been told by the prosecutor that if he files a motion to suppress the warrant that the People will seek the recusal of the Judge. This puts defense counsel into the unenviable position of trying to figure out what is in his client's best interests. In other words, is it best to file the motion and face the prosecutor's application for mandatory recusal of the Judge or, is it best to not file a motion and either try to negotiate the best possible plea bargain or go to trial? While lawyers are always in the business of second guessing themselves, this Court feels compelled to relieve them of some of that responsibility by recognizing that its continued involvement in a case where it has signed a search warrant, creates an appearance of impropriety, evident from that fact, and requiring recusal.

This Court has previously expressed its strong sentiments regarding the need for *sua sponte* recusal and referring matters to other jurists for all purposes and without comment. See *People v. T & C Design Inc. and Carmela Cardoza,* 178 Misc 2d 971, 680 NYS2d 832 (1998). Commendably some judges will recuse themselves because it is mandatory. See Judiciary Law § 14. Others will take every case as an existential opportunity to consider their own "personal bias or prejudice" regarding a party or "personal knowledge of disputed facts." See Code of Judicial Conduct, Cannon 3C(1)(a); 22 NYCRR § 100.3(E)(1)(a)(i) and (ii) and Morris, *et al.,* Village, Town and District Courts in New York § 16:69 (Thomson West, 1995-present). Some unfortunately use recusal or the denial of it as a weapon against counsel whom they dislike or choose to embarrass or inconvenience for other reasons. See *U.S.A. v. Oluwafemi,* 883 F. Supp. 885 (E.D.NY, 1995) and *Grievance Comm. for the Ninth Judicial Dist. v. Mogil (In re Mogil)*, 97-04366, Supreme Court of New York, Appellate Division, Second Department, 250 A.D.2d 343, 682 NYS2d 70 (1998).The law in New York and federally still requires that parties or attorneys seeking recusal must do so before the very judge before whom recusal is sought. This absurd requirement causes attorneys to have to second guess themselves and decide whether they wish to make an application thereby incurring the judge's wrath and possibly tainting the remainder of the proceedings with a judge who harbors animosity because an attorney or litigant dared to suggest even the potential of unfairness on the part of the judge.

Ideally, judges should search their consciences each day to determine their ability to be fair and impartial to all parties and their counsel. Where there is a potential for bias, prejudice or the appearance of impropriety, judges would be wise to seize the burden and, if possible, act before counsel is put into the uncomfortable position of having to make that application.

Here the Court is acting *sua sponte* in recusing itself because it presided over an application for a warrant and determined that there was probable cause for its issuance. The Court reviewed certain documentary evidence in support of the warrant application and also reviewed the return on the warrant and presided over the arraignment. This Court recognizes that all judges have "a duty to sit where not disqualified, and that duty is as strong as the duty not to sit where disqualified. Only a *bona fide* disqualification should remove the obligation to hear and decide a matter." *Laird v. Tatum,* 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed2d 50 (1972). It has [*4] long been considered to be the better practice for judges to continue on cases instead of disqualifying themselves, where disqualification is discretionary rather than mandatory. 9 NY St. Adv. Comm. On Judicial Ethics, Op. 92-75. This Court respectfully disagrees with the later advisory opinion. Judging is not an endurance contest where a court must show its metal by ignoring the dilemma that recusal presents. The so-called "excusal of recusal" or alternatively the ostrich mentality that some judges use to ignore obvious recusal issues, are both unacceptable.

An attorney or a party making the recusal application or creating the legal issue which forces the court to consider same should not be viewed as the enemy. Some judges see recusal applications as a threat to their security as judges or their integrity or even as a challenge to their competence or alleged reputation for fairness. Since these feelings cannot be removed from the judicial mind set, some judges such as this one will follow the better course and recuse themselves *sua sponte,* and based upon the *bona fide* reasons set forth herein. *See, People v. Latella,* 112 AD2d 324, 491 NYS2d 774 (2d Dept, 1985)["the Judge properly declined to recuse himself upon determining that he could proceed in a completely fair and impartial manner, despite his knowledge of the defendant's criminal history"] and *People v. Burch,* 142 AD2d 586, 530 NYS2d 241 (2d Dept, 1988) ["the mere fact that the Justice who presided over the joint pretrial

Huntley hearing and jury trial of the defendant's accomplice also presided at the defendant's bench trial did not constitute an abuse of discretion"].

This Judge holds today that he must recuse himself *sua sponte* in any matter where he has presided over a warrant application. Henceforth this will be a standing order of recusal by this Judge once a search warrant has been signed, executed and returned. This Court is acting with *bona fide* and has already issued four opinions in this case. This Court has no need to dodge a silver bullet, but is simply acting in the best interests of fairness and an appearance of propriety.

This matter is therefore respectfully referred to my most able colleague, Associate Justice Elizabeth Pessala, for all purposes.

Dated: Westbury, New York

November 15, 2007

ENTER:

Hon. Thomas F. Liotti

Village Justice