
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PHILLIP KAY LYMAN, MONTE
JEROME WELLS, SHANE MORRIS
MARIAN, and FRANKLIN TRENT
HOLLIDAY,

Defendants.

ORDER OF RECUSAL

Case No. 2:14-CR-00470-RJS-BCW

Honorable Robert J. Shelby

Magistrate Judge Brooke C. Wells

On July 20, 2015, Defendant Phillip Kay Lyman filed a Motion to Disqualify, arguing that the court should recuse from this case pursuant to 28 U.S.C. § 455(a). (Dkt. 164.) Briefing on Mr. Lyman's Motion was complete on August 5, 2015.¹ Having now reviewed all the briefing and the relevant authorities, I conclude it is appropriate to recuse myself from further proceedings in this matter. I ask that the appropriate assignment card equalization be drawn by the Clerk of Court's office.

BACKGROUND

The United States initiated this case on September 17, 2014 by filing a Misdemeanor

¹ The United States filed a Response to Mr. Lyman's Motion on July 28, 2015 (Dkt. 169), and Mr. Lyman filed his Reply on August 5, 2015 (Dkt. 175).

Information charging Mr. Lyman and four other Defendants² with:

- 1) Conspiracy to Operate Off-Road Vehicles on Public Lands Closed to Off-Road Vehicles in violation of 18 U.S.C. § 371; and
- 2) Operation of Off-Road Vehicles on Public Lands Closed to Off-Road Vehicles in violation of 43 U.S.C. §§ 1701, 1733; 43 C.F.R. § 8341.1(c); and 18 U.S.C. § 2.

The United States alleged that in early 2014, the Defendants conspired to operate off-road vehicles on land closed to them in an area of San Juan County, Utah known as Recapture Canyon.

Defendants Mr. Lyman, Monte Jerome Wells, Shane Morris Marian, and Franklin Trent Holliday proceeded to a four day jury trial beginning on April 28, 2014. On May 1, 2014, the jury returned its verdict. (Dkt. 149.) The jury acquitted Marian and Holliday, but found Lyman and Wells guilty of both charges against them. Lyman and Wells are scheduled to be sentenced on September 15, 2015.

On July 20, 2015, Mr. Lyman filed his Motion to Disqualify. (Dkt. 164.) The next day, the undersigned asked Chief Judge David Nuffer to assign another district judge to resolve the Motion. (Dkt. 165.) Judge Clark Waddoups received that assignment. (Dkt. 167.) Notwithstanding that Judge Waddoups has the Motion under advisement, having now reviewed the briefing and materials submitted by the parties, the undersigned independently concludes that recusal is appropriate for the reasons stated below. The court reaches this conclusion without

² The United States named as Defendants in the initial Misdemeanor Information (Dkt. 1) Mr. Lyman, Monte Jerome Wells, Jay Demar Redd, Shane Morris Marian, and Franklin Trent Holliday. In November 2014, the court dismissed Mr. Redd pursuant to a motion filed by the United States. (Dkts. 33 and 35.) The United States later filed a Superseding Misdemeanor Information, omitting Mr. Redd as a Defendant. (Dkt. 41.)

awaiting a decision from Judge Waddoups on Mr. Lyman's Motion.

DISCUSSION

Mr. Lyman moves for the court's disqualification under 28 U.S.C. § 455(a), which provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Mr. Lyman argues the court's personal relationship with Steve Bloch, Legal Director of the Southern Utah Wilderness Alliance, would lead a reasonable person to question the court's impartiality in this case.

Section 455 is meant "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1310 (10th Cir. 2015) (citations omitted). The statute sets forth an objective standard under which disqualification is appropriate where "the reasonable person, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *Id.*

The objective review required under § 455(a) begins with the inquiry "whether a reasonable factual basis exists for questioning the judge's impartiality." *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (citations omitted). A judge has a "continuing duty to recuse before, during, or, in some circumstances, after a proceeding, if the judge concludes that sufficient factual grounds exist to cause an objective observer reasonably to question the judge's impartiality." *U.S. v. Cooley*, 1 F.3d 985, 992 (10th Cir. 1993) (citations omitted).

But "[r]umor, speculation, beliefs, conclusions, innuendo, suspicion, opinion and similar non-factual matters" are "not ordinarily sufficient to require § 455(a) recusal." *Nichols*, 71 F.3d

at 351 (citations omitted). Rather, “outward manifestations and reasonable inferences drawn therefrom” are relevant in this inquiry, and “the judge’s actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue.” *Id.* (citations omitted). The court must consider how these outward manifestations would appear to “a well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person. The reasonable observer is not the judge or even someone familiar with the judicial system, but rather an average member of the public.” *Mathis*, 787 F.3d at 1310 (citations omitted). This analysis under § 455(a) “is extremely fact-driven,” meaning cases “must be judged on their unique facts and circumstances more than by comparison to situations considered in prior jurisprudence.” *Nichols*, 71 F.3d at 351 (citations omitted). If the question is a close one, “the balance tips in favor of recusal.” *Id.* at 352 (citations omitted).

With this guidance in mind, the court turns to Mr. Lyman's Motion to Disqualify. Mr. Lyman submits that his Motion is motivated by a disclosure the undersigned made in a separate proceeding. On May 26, 2015, the undersigned presided with Judges Clark Waddoups and David Nuffer over a joint status conference in a set of consolidated civil cases in this District. (*In re Jointly Managed R.S. 2477 Roads Cases Litigation*, Case Nos. 2:10cv1073 and 2:11cv1045.) In advance of the hearing, the undersigned learned that Mr. Bloch had appeared in at least one of the R.S. 2477 roads cases on behalf of SUWA. Mr. Bloch also attended the status conference in his role as a SUWA representative and counsel of record in cases over which the undersigned is not presiding. His attendance at the hearing in the consolidated civil cases prompted a disclosure from the undersigned on the record at the outset of the status conference concerning a personal

relationship the undersigned has had with Mr. Bloch and his family for several years.

Mr. Lyman contends the following facts warrant disqualification in light of the court's May 26 disclosure:

- SUWA urged Mr. Lyman's criminal prosecution in the first instance;
- SUWA was the subject of a voir dire question during jury selection in this case;
- Mr. Bloch attended Mr. Lyman's trial; and
- Following Mr. Lyman's conviction, SUWA joined three other conservation groups in writing to the court in advance of sentencing to advocate for "punishment that reflects the egregiousness of [Lyman's] crimes."

(Dkt. 164 at 2-3.)

Mr. Lyman emphasizes in his Motion that the court did not make the same disclosure in this case regarding its relationship with Mr. Bloch that it made in the Roads Litigation, and that Mr. Lyman thus did not know of the relationship until after his criminal trial ended. (Dkt. 164 at 3.) Mr. Lyman particularly argues that the voir dire in this case—including a question to potential jurors about any affiliation with a number of conservation groups, including SUWA—should have prompted "disclosure and disqualification."

It bears noting that it was the Defendants who asked the court to inquire of potential jurors about their affiliation with conservation groups, including SUWA. The parties stipulated to this question, and the court agreed to allow it.

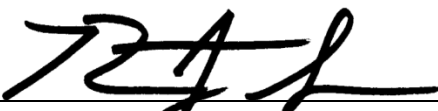
More importantly, insofar as Mr. Lyman argues that the same disclosure should have been made in both cases, he necessarily raises the inference that the court was aware of SUWA's pretrial involvement in this case—particularly SUWA's urging of Mr. Lyman's prosecution—but that it

nevertheless failed to make a disclosure. But until Mr. Lyman filed his disqualification Motion, the court was unaware of any involvement in this proceeding by SUWA—which is not a party to this case. And Mr. Lyman identifies no factual basis upon which “a well-informed, thoughtful, and objective observer” with “knowledge of all the circumstances” could reach that conclusion.

Nevertheless, SUWA and other groups submitted to the court following Mr. Lyman’s conviction a letter seeking to influence the court’s sentencing decision in this case. This post-trial activity, together with the record now developed in the briefing on Mr. Lyman’s Motion, lead the court independently to conclude that recusal will promote confidence in these proceedings and avoid even the appearance of impropriety in connection with the court’s sentencing duties. For this reason, the court recuses, and directs the Clerk of Court to draw the appropriate assignment card equalization.

SO ORDERED this 28th day of August, 2015.

BY THE COURT:



JUDGE ROBERT J. SHELBY
United States District Court