J-A15020-17 & J-A15021-17

2017 PA Super 334

COMMONWEALTH OF PENNSYLVANIA v. JALENE R. MCCLURE APPEAL OF: RETIRED JUDGE BRADLEY P. LUNSFORD	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1982 MDA 2016

Appeal from the Order Entered November 22, 2016
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0001778-2012

COMMONWEALTH OF PENNSYLVANIA v. JALENE R. MCCLURE APPEAL OF: RETIRED JUDGE BRADLEY P. LUNSFORD	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3 MDA 2017

Appeal from the Order Entered December 9, 2016
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0001778-2012

	PENNSYLVANIA
Appellee	
v.	
JALENE R. MCCLURE	
Appellant	No. 145 MDA 2017

Appeal from the Order Entered December 22, 2016
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0001778-2012

BEFORE: MOULTON, J., SOLANO, J., and MUSMANNO, J.

OPINION BY SOLANO, J.: **FILED OCTOBER 20, 2017**

In 2014, Jalene R. McClure was convicted by a Centre County jury of assault and other offenses relating to injuries to a child at a daycare center that McClure operated. In 2016, we reversed McClure's conviction and remanded for a new trial. ***Commonwealth v. McClure***, 144 A.3d 970 (Pa. Super. 2016). This case returns to us as a result of proceedings on remand in which McClure has sought to preclude retrial on double jeopardy grounds. Part of her argument in support of that relief is that there was misconduct during her trial on the part of the Centre County prosecutors and the presiding judge, the Honorable Bradley P. Lunsford.

During the trial court proceedings on her preclusion motion, McClure issued two subpoenas to former Judge Lunsford to obtain documents and testimony from him. Lunsford's motions to quash those subpoenas were denied, and this opinion addresses Lunsford's appeals at Nos. 1982 MDA

2016 and 3 MDA 2017 from the November 21, 2016[1] and December 9, 2016 orders denying those motions. While those appeals were pending, the trial court proceeded with the case and ultimately denied McClure's double jeopardy motion. The second part of this opinion addresses McClure's appeal at No. 145 MDA 2017 from the December 22, 2016 order denying her motion to preclude retrial. Subject to instructions set forth in this opinion, we affirm in part the November 21, 2016 order denying Lunsford's first motion to quash; we vacate the December 9, 2016 order denying Lunsford's second motion to quash; and we vacate the December 22, 2016 order denying McClure's motion to preclude retrial.

The charges relate to McClure's operation of her daycare business out of her home in August 2010. On August 18, 2010, the mother of five-month old P.B., one of the children entrusted to McClure's care, picked up her daughter from the daycare and was told by McClure that P.B. was sick and had vomited. While driving home, the mother noticed that P.B. was losing consciousness and took her to the hospital, where it was determined that P.B. had sustained head injuries, including a fractured skull and retinal hemorrhaging.

Police Detective Dale Moore and a Children and Youth Services (CYS) employee interviewed McClure on the evening of the incident. McClure

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[1] The order dated November 21, 2016 was entered on the docket on November 22, 2016. For ease of reference, we refer to it as the November 21, 2016 order.

insisted during that interview that nothing had happened to P.B. at the daycare facility that day, but in an interview with Moore and the CYS employee five days later, on August 23, 2010, McClure gave verbal and written statements in which she said that she had tripped while carrying P.B. and fell, hitting P.B.'s head on a car seat.

After further investigation, McClure was charged with assault and other offenses, and was tried on September 8-11, 2014, before Judge Lunsford and a jury. During the trial, an expert testified that P.B.'s injuries were consistent with a child who was shaken, and he opined that the injuries were sustained at McClure's daycare facility on August 18, 2010. At the conclusion of the trial on September 11, 2014, the jury found McClure guilty of aggravated assault, simple assault, two counts of endangering the welfare of a child, and recklessly endangering another person.[2]

On October 13, 2014, prior to her sentencing, McClure moved for the recusal of Judge Lunsford. McClure alleged that Judge Lunsford had personal friendships with District Attorney Stacy Parks Miller, who was the lead prosecutor in her case, and with Parks Miller's co-counsel, Assistant District Attorney Nathan Boob. According to McClure, Judge Lunsford and the prosecutors engaged in text messaging, phone calls, social media contacts, and personal contacts outside of the courthouse. As examples of the personal relationships, McClure averred that:

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[2] 18 Pa.C.S. §§ 2702(a)(1), 2701(a)(1), 4304(a)(1), and 2705.

- On September 14, 2014, three days after McClure's trial ended, Judge Lunsford was pictured with ADA Boob and other members of the district attorney's office who had been at an event called the "Color Run." Those pictures, showing Judge Lunsford at Champs Bar, were posted on social media, but later removed.

- On September 20, 2014, Judge Lunsford and his staff were at the Maryland shore. A picture of that event posted on social media showed Judge Lunsford with ADA Boob. Parks Miller posted comments about the picture.

The photo of Judge Lunsford and ADA Boob at the Maryland shore on September 20, 2014, and the comments about the photo by Parks Miller were attached as exhibits to McClure's motion.

McClure's motion also described a September 24, 2014 conversation initiated by Judge Lunsford with McClure's attorney, Bernard Cantorna, regarding McClure's trial. McClure alleged that "[b]oth the manner in which the trial was conducted and rulings from the trial court gave the appearance of a bias towards the prosecution and prejudice against the defense." Mot. for Recusal at ¶ 8. McClure alleged that during her trial:

> [I]t appeared to courtroom observers that deference was given to the district attorney's office, Stacy Parks Miller and Nathan Boob in the management of the trial, which did not appear to be extended to the defense.
>
> On numerous occasions, the court allowed the district attorney to engage in conduct in front of the jury that called into question the credibility and character of defense counsel and Ms. McClure's case. The manner in which the court made its rulings, whether intentional or not, imparted the appearance of partiality to the prosecution and a negative inference of defense counsel and [McClure]'s case.

Id. at ¶¶ 11-12 (numbers omitted). McClure listed examples of the court's allegedly biased rulings. ***Id.*** at ¶¶ 12-18. She also attached to her motion

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