

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)

v.)

GREGORY GRIFFIN,)
Defendant)

Case No. 0901000941)

Submitted: September 29, 2009

Decided: October 8, 2009

Marsha J. White, Esq.
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**On Defendant's Motion to Vacate Conviction
And Grant a New Trial**

Defendant Gregory Griffin moves this Court pursuant to Court of Common Pleas Criminal Rule 33 to vacate his conviction and grant a new trial in the interest of justice. Following a bench trial on July 9, 2009, Defendant was found guilty of Assault Third Degree, in violation of 11 *Del. C.* §611; Endangering the Welfare of a Child, in violation of 11 *Del. C.* §1102; and Malicious Interference with Emergency Communications, in

violation of 11 *Del. C.* §1313. Defendant was found not guilty of Terroristic Threatening, in violation of 11 *Del. C.* §621(a)(1); Endangering the Welfare of a Child, in violation of 11 *Del. C.* §1102; Offensive Touching, in violation of 11 *Del. C.* §601; and Disorderly Conduct, in violation of 11 *Del. C.* §1301(1)(a). In essence he was found guilty of three (3) offenses and not guilty of four (4) offenses. Following the convictions, the Court ordered a pre-sentence investigation to obtain information regarding the Defendant to assist the Court with sentencing.

During the pre-sentence investigation it was brought to the Court's attention that the Defendant was the son of my Judicial Secretary. A hearing was scheduled on August 28, 2009 to give the parties an opportunity to address this issue. Prior to this hearing, Defense Counsel filed this Motion to Vacate the Conviction and Grant a New Trial. The State filed a response on September 8, 2009 and oral argument was heard on September 9, 2009.

Defendant argues that his conviction must be vacated because under Delaware Judge's Code of Judicial Conduct Rule 1.2(A), "A Judge should act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary and should avoid impropriety and the appearance of impropriety in all activities." He further argues that Rule 2.11(A) provide, "A judge should disqualify himself or herself in a

proceeding in which the judge's impartiality might be reasonably questioned." Therefore he concludes that because his mother's employment creates an apparent challenge to the Judge's impartiality the interest of justice requires the conviction be vacated.

The State opposes the motion and argues that the Defendant was found not guilty of four of the seven offenses charge therefore; one can hardly conclude that the Judge was not impartial. The State also relies on Delaware Judge's Code of Conduct, Rule 2.11 and argues, the rule requires that the Judge subjectively be satisfied that he is free of bias or prejudice concerning a case.

The language of the Delaware Judge's Code of Conduct, Rule 2.11 Disqualification provides:

- (A) A Judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

The prohibition which requires disqualification of the judge presupposes that the judge has knowledge that a conflict or a potential conflict exists. In these proceedings, this Defendant was one of forty-three (43) defendants on the Domestic Violence Trial Calendar. At the time of trial, I was not aware of this relationship nor did any of the attorneys bring this issue to the Court's attention. To raise the issue post trial, the Defendant would have the Court conclude that its Court impartiality is subject to

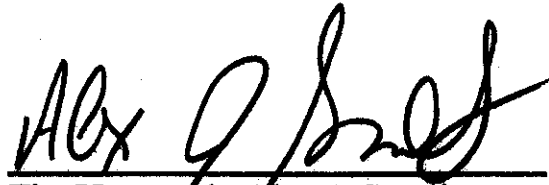
question because he was found guilty of three (3) offenses. However, the contrary could be argued by the State because the Defendant was found not guilty of four (4) offenses. Rule 1.2 "Promoting Confidence in the Judiciary" states that "a judge should act all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and should avoid impropriety and the appearance of impropriety." The commentary to this rule states:

"The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Applying that test to these circumstances I fail to see how a reasonable person could conclude that there was impartiality or the appearance thereof when I had no knowledge of the Defendant's relationship to my secretary. Accordingly, the Motion to Vacate the Conviction and Grant a New Trial is **DENIED**.

However, since I am now aware of the relationship there is the potential for appearance of impartiality by my further participation in this case. Therefore, I recuse myself from further participation in this matter and the case will be transferred to another judge for further proceedings.

IT IS SO ORDERED.


The Honorable Alex J. Smalls