

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)
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 Plaintiff,)
)
 vs.)
)
 MARK DEORIO,)
)
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 Defendant.)
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)

CRIMINAL CASE NO. 2020-504

ORDER DENYING RECUSAL

Larry Wentworth
Associate Justice

Decided: January 20, 2021

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Motions – Unopposed

While the failure to oppose a motion is generally deemed a consent to the motion, the court still needs good grounds before it can grant the motion. FSM v. DeOrio, 23 FSM R. 126, 128 (Pon. 2021).

Courts – Recusal – Extrajudicial Knowledge

The general rule is, that to be disqualifying, the judge's knowledge of facts must have originated from an extrajudicial source or conduct, and extrajudicial means outside of court; outside the functioning of the court system or on some basis other than what the judge learned from his participation in the case. FSM v. DeOrio, 23 FSM R. 126, 128 (Pon. 2021).

Courts – Recusal – Extrajudicial Knowledge

Although a justice is barred from sitting on a case where he has personal knowledge of disputed evidentiary facts, knowledge that does not stem from an extrajudicial source is not disqualifying. FSM v.

DeOrio, 23 FSM R. 126, 128 (Pon. 2021).

Courts – Recusal – Extrajudicial Knowledge

A defendant's statement that the justice has gained personal knowledge of disputed evidentiary facts is incorrect when the justice has no personal knowledge of any facts in either case because the justice has no personal knowledge – no firsthand observation or experience – of any of the facts in either this case or a related case. FSM v. DeOrio, 23 FSM R. 126, 128 (Pon. 2021).

Courts – Recusal – Extrajudicial Knowledge

Generally, "personal knowledge" comes from firsthand observation or experience – of any facts or presence when any of them occurred. Personal knowledge is knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said. FSM v. DeOrio, 23 FSM R. 126, 128 (Pon. 2021).

Courts – Recusal – Extrajudicial Knowledge

When the judge's only knowledge of any facts either in this case or in a related case is solely from court proceedings, the judge has no personal knowledge of the case's operative facts or of any disputed evidentiary facts, and the judge cannot use 4 F.S.M.C. 124(2)(a) to disqualify himself from the case. FSM v. DeOrio, 23 FSM R. 126, 128 (Pon. 2021).

Courts – Recusal – Judicial Statements or Rulings

A judge's legal rulings made in the course of judicial proceedings, or a judge's rulings in a related case, do not provide grounds for recusal, but it would be unfair to a criminal defendant in a second criminal case if the judge has previously made findings about disputed evidentiary facts in one criminal case that are exactly the same as the disputed evidentiary facts in the second criminal case. FSM v. DeOrio, 23 FSM R. 126, 129 (Pon. 2021).

Courts – Recusal – Extrajudicial Knowledge

When a fact or a "finding" is not genuinely in dispute in either of two criminal cases, the court cannot make (or could possibly make in the future) any rulings on disputed evidentiary facts in one case that may also come before the court in another case. FSM v. DeOrio, 23 FSM R. 126, 129 (Pon. 2021).

Courts – Recusal – Judge's Duty

Except when the judge is disqualified under 4 F.S.M.C. 122 or 124, a judge is obligated to hear the cases assigned to that judge. This is because a judge must conscientiously exercise the power to recuse and cannot use it to avoid difficult or controversial cases or to merely accommodate nervous litigants or counsel. FSM v. DeOrio, 23 FSM R. 126, 129 (Pon. 2021).

Courts – Recusal – Judge's Duty

When it is not the judge's duty to disqualify himself from a case to which he has been assigned, it is the judge's duty to serve. FSM v. DeOrio, 23 FSM R. 126, 129 (Pon. 2021).

Courts – Recusal – Extrajudicial Knowledge

A disqualification motion must be accompanied by an affidavit stating the reasons for the belief that grounds for disqualification exist, and a disqualification motion may be denied solely on the ground that the moving party failed to accompany it with an affidavit setting forth the motion's factual basis. FSM v. DeOrio, 23 FSM R. 126, 129 (Pon. 2021).

Courts – Recusal – Procedure

A later filed supplement to a recusal motion that supplies a supporting affidavit stating the reasons for the belief that the grounds for disqualification exist cures the statutory defect of its absence in the original

disqualification motion, despite not accompanying the original motion. FSM v. DeOrio, 23 FSM R. 126, 129-30 (Pon. 2021).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On January 4, 2021, defendant Mark DeOrio filed his Motion for Recusal, in which he seeks the disqualification of the justice currently presiding over this case. The prosecution did not file a response and indicated during the December 29, 2020 hearing that it did not intend to oppose the motion. While the failure to oppose a motion is generally deemed a consent to the motion, FSM Crim. R. 45(d), the court still needs good grounds before it can grant the motion. FSM v. Semwen, 18 FSM R. 222, 224 (Chk. 2012); FSM v. Phillip, 17 FSM R. 595, 597 (Pon. 2011).

The motion is denied. The court's reasoning follows.

I.

DeOrio moves to disqualify the current justice because the justice has also been assigned to preside over Criminal Case No. 2020-503, in which his wife, Norleen Oliver, is the defendant. DeOrio submits that the facts of both cases are intertwined because the letter, which defendant DeOrio is charged with having purloined, was allegedly later given to his wife. DeOrio contends that this case's current justice "has heard several facts in the FSM v. Norleen Oliver . . . and had made rulings on such, or in other words the justice has now gained personal knowledge of disputed evidentiary facts." Mot. for Recusal at 2 (Jan. 4, 2021). DeOrio therefore argues that the current justice now "has more facts at hand that stretch beyond the affidavit of probable cause and the criminal charges" in his case. *Id.* DeOrio therefore seeks as relief that the current justice disqualify himself and that this matter be referred for assignment to a different judge.

II.

The general rule is, that to be disqualifying, the judge's knowledge of facts must have originated from an extrajudicial source or conduct, and extrajudicial means outside of court; outside the functioning of the court system or on some basis other than what the judge learned from his participation in the case. Halbert v. Manmaw, 20 FSM R. 245, 250 (App. 2015); Panuelo v. Sigrah, 22 FSM R. 341, 363 (Pon. 2019); Macayon v. FSM, 22 FSM R. 317, 320 (Chk. 2019). Although a justice is barred from sitting on a case where he has personal knowledge of disputed evidentiary facts, knowledge that does not stem from an extrajudicial source is not disqualifying. See Ruben v. Petewon, 14 FSM R. 141, 145-46 (Chk. S. Ct. App. 2006).

DeOrio's statement that the justice has "gained personal knowledge of disputed evidentiary facts" is incorrect. The present justice has no personal knowledge of any facts in either case. Generally, "personal knowledge" comes from firsthand observation or experience – of any facts or presence when any of them occurred. Macayon, 22 FSM R. at 320. Personal knowledge is "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." BLACK'S LAW DICTIONARY 951 (9th ed. 2009). The present justice has no personal knowledge – no firsthand observation or experience – of any of the facts in either this case or Oliver's. The judge's only knowledge of any facts either in this case or in Oliver's case is solely from court proceedings. When a judge has no personal knowledge of the case's operative facts or of any disputed evidentiary facts, the judge cannot use 4 F.S.M.C. 124(2)(a) to disqualify himself from the case. Macayon, 22 FSM R. at 320.

III.

A judge's legal rulings made in the course of judicial proceedings, or a judge's rulings in a related case, also do not provide grounds for recusal. FSM v. Wainit, 13 FSM R. 293, 295 (Chk. 2005). But it would be unfair to a criminal defendant in a second criminal case if the judge has previously made findings about disputed evidentiary facts in another criminal case that are exactly the same as the disputed evidentiary facts in the second criminal case.

The allegations in Oliver's case involve different acts and events that took place at a different time and in a different place than those alleged in this case. The only factual finding¹ the present justice made in Oliver's case that could conceivably relate to DeOrio's case is:

On May 28, 2020, Oliver wrote the President a letter, Def.'s Ex. A, about the government-instituted paving project, and expressed her concerns about proceeding with the road improvement project without first consulting with her family and indicating that the project infringed on their "rights as landowners and also on [their] source of drinking water." She did not receive an answer. . . .

Order Finding Probable Cause for Misdemeanor, FSM v. Oliver, 23 FSM R. 86, 88 (Pon. 2020). That fact or that "finding" was, or is, not genuinely in dispute in Oliver's case and is not disputed in this (DeOrio's) case either. Neither Oliver nor DeOrio denies the letter's existence or general contents. The court therefore cannot agree that it has made (or could possibly make in the future) "any rulings on such" disputed evidentiary facts in Oliver's case that may also come before the court in DeOrio's case.

IV.

Except when the judge is disqualified under 4 F.S.M.C. 122 or 124, a judge is obligated to hear the cases assigned to that judge. See Halbert, 20 FSM R. at 250; Hartman v. Bank of Guam, 10 FSM R. 89, 98 (App. 2001); George v. Palsis, 20 FSM R. 174, 177 (Kos. 2015); Berman v. Rosario, 15 FSM R. 337, 341 (Pon. 2007). This is because a judge must exercise the power to recuse conscientiously and cannot use it to avoid difficult or controversial cases or to merely accommodate nervous litigants or counsel. Fu Zhou Fuyan Pelagic Fishery Co. v. Wang Shun Ren, 7 FSM R. 601, 605 (Pon. 1996); FSM v. Skilling, 1 FSM R. 464, 471 (Kos. 1984), *aff'd*, 2 FSM R. 209 (App. 1986). "When it is not the judge's duty to disqualify himself from a case to which he has been assigned, it is the judge's duty to serve." Panuelo, 22 FSM R. at 364.

V.

Lastly, the court could have denied DeOrio's original motion solely because it because his motion was not accompanied by a supporting affidavit. The statute requires that a disqualification "motion shall be accompanied by an affidavit stating the reasons for the belief that grounds for disqualification exist" 4 F.S.M.C. 124(6). A disqualification motion may be denied solely on the ground that the moving party failed to accompany it with an affidavit setting forth the motion's factual basis. Jonas v. FSM, 2 FSM R. 238, 239 (App. 1986); Skilling v. FSM, 2 FSM R. 209, 216-17 (App. 1986); FSM Dev. Bank v. Christopher Corp., 20 FSM R. 225, 228 (Chk. 2015); Jano v. King, 5 FSM R. 266, 268 (Pon. 1992); see also Miju Mulsan Co. v. Carl-Worswick, 20 FSM R. 660, 662 (App. 2016).

¹ This factual finding was made after a preliminary hearing in Oliver's case over which a different justice presided. After this case was reassigned to the present justice, the present justice, at the parties' urging, listened to the tape of the hearing rather than conduct a new preliminary hearing before ruling. Moreover, the letter, and the testimony about it, was not particularly relevant to the issues in Oliver's case.

But attached to DeOrio's Supplemental Motion for Recusal (filed January 14, 2021), DeOrio supplies a supporting affidavit stating the reasons for the belief that the grounds for disqualification exist. That later filing cured the statutory defect in DeOrio's original disqualification motion, even though it did not accompany the original motion. The court has addressed those grounds in its ruling above.

VI.

Accordingly, DeOrio's motion to disqualify the present justice must be denied.

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