United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Judge Zagel	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 CR 888 - 4	DATE	November 23, 2011
CASE TITLE	UNITED STATES v. WILLIAM F. CELLINI, SR.		

DOCKET ENTRY TEXT:

Defendant's "Emergency Rule 33 Motion for New Trial on Counts II and IV Based Upon Egregious Juror Misconduct" [845] is entered and continued pending an evidentiary hearing.

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A jury found Defendant William F. Cellini guilty of conspiracy to commit extortion and aiding and abetting the solicitation of a bribe. The Defendant moves for a new trial under Federal Rule of Criminal Procedure 33. The basis for the motion is the post-verdict discovery that one of the twelve jurors who found Defendant guilty has two felony convictions that she failed to disclose on jury questionnaires and in *voir dire*.

28 U.S.C. § 1865 governs juror qualifications for federal trials. In relevant part, the statute states that any person is qualified to serve "unless he . . . has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored." 28 U.S.C. § 1865(b)(5).

A threshold issue bears brief discussion. The parties argue at length over the last clause of the disqualification statute. Defendant argues forcefully that the juror's rights have not been restored in Illinois, pointing primarily to the fact that fines she owes in connection with her convictions have not been paid. This, according to Defendant, casts doubt on whether her sentence is truly over. In Defendant's view, this means that the juror is disqualified under § 1865(b)(5) because her civil rights cannot have been restored if her sentence lingers. The Government counters that, under Illinois law, the civil right to serve on a jury is never taken away in the first place. *See* 730 ILCS § 5/5-5-5(a).[1] The Government highlights that what civil rights are taken away are restored automatically. *See id.* at (b)-(d). Finally, the Government argues that outstanding fines are not considered part of the relevant sentence under Illinois law.

I need not decide the issue, because neither the Defendant's nor the Government's view would dispose of the case at this juncture. If the Defendant is correct that the juror's background would have brought her under the § 1865(b)(5) disqualification, an automatic mistrial is not warranted as will be explained below. If,

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on the other hand, the Government is correct that juror has had her rights restored and therefore does not come under § 1865(b)(5), there remains the issue of her failure to disclose her criminal background on questionnaires and in *voir dire*. That scenario, too, points to further proceedings to cast light on the juror's reasons for non-disclosure.

That brings us to the only pertinent question on the state of the record and briefings so far: when a felon slips through the juror screening process does that felon's service on the jury lead to automatic mistrial? Every federal court of appeal that has addressed this issue has answered "no"–neither the Sixth Amendment nor 28 U.S.C. § 1865(b) requires automatic mistrial. Instead, the courts of appeal have held that the proper course of action is to hold an evidentiary hearing where the defendant has an opportunity to prove "actual bias." *See U.S. v. Bishop*, 264 F.3d 535 (5th Cir. 2001); *U.S. v. Pelullo*, 105 F.3d 117 (3rd Cir. 1997); U.S. *v. Langford*, 990 F.2d 65 (2nd Cir. 1993); *U.S. v. Boney*, 977 F.2d 624 (D.C. Cir. 1992); *U.S. v. Humphreys*, 982 F.2d 254 (8th Cir. 1992); *U.S. v. Currie*, 609 F.2d 1193 (6th Cir. 1979); *U.S. v. Vargas*, 606 F.2d 341 (1st Cir. 1979)(rev'd in part on other grounds).

In this case, Defendant seeks to invoke a mandatory mistrial. I enter and continue the motion pending an evidentiary hearing. While our court of appeals has yet to consider the question, I am persuaded that the conclusion reached by other circuits is correct and an accurate prediction of the policy to be adopted in this circuit.

Apart from automatic mistrial, there remains the possibility of a claim of actual bias. Several courts have given guidance on this question, none in this circuit. Yet there is great uniformity among the courts of appeal; the defendant ultimately carries the burden of showing actual bias and much hinges on the nature and credibility of the juror's explanation for uttering a falsehood. *Bishop*, 264 F.3d 535. If the juror offers an innocent explanation that is simply not credible then bias may be shown and a new trial should be granted. *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998); *Green v.* White, 232 F.3d 671 (9th Cir. 2000); *Bishop*, 264 F.3d 535, 554-55 (discussing *Dyer* and *Green*). If, on the other hand, a juror offers a bias-free explanation which the courts find credible–such as confusion or embarrassment about admitting to felony convictions before a large audience in open court–then bias cannot be presumed and the party seeking mistrial must point to other facts demonstrating actual bias before a new trial will be granted. *Bishop*, 264 F.3d at 555-56.

In *U.S. v. Boney*, Judge Randolph wrote a dissent in which he advocated against post-verdict hearings to determine actual bias in favor of automatic reversal. *U.S. v. Boney*, 977 F.2d at 637. (Randolph, J. dissenting). He argued that the majority's approach was misguided because the exclusion of felons from juries under 28 U.S.C. § 1865 is not done out of concern for actual bias (i.e. the felon favoring one party over another), but is based on a more intangible social determination, deeply rooted in history, that felons are generally unfit for jury service. *Id.* at 641-42 (felons excluded from juries "not because of an inference, arising out of the identities of the parties and other circumstances of a particular case, that he will be biased for one side or against the other, but rather because Congress determined he ought not sit on *any* jury, determine the fate of *any* party, under *any* circumstances, in *any* case.). Thus, even if it were possible to hold a reliable hearing on the juror's motivations for lying about previous felony convictions (which Judge Randolph doubts given the juror's past misrepresentations to the court and inability to conform herself to lawful conduct), the inquiry would be off target. Judge Randolph argues that our society's general doubt in felons' ability to faithfully "honor the juror's oath, and to comply with the trial judge's instructions" creates an "implied bias" that can only be overcome with a new trial. *Id.* at 642.

Judge Randolph's position is written against the absence of any federal court of appeals adopting this

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automatic reversal approach based on "implied bias." It is very difficult to square Judge Randolph's "implied bias" approach with *McDonough v. Power Equipment, Inc., v. Greenwood*, 464 U.S. 548 (1984). In *McDonough*, the Supreme Court stressed that post-verdict inquiries into a juror's failure to disclose pertinent information during *voir dire* must focus on actual bias, and expressed a clear "hostility to unnecessary new trials." *Boney*, 977 F.2d at 633; *McDonough*, 464 U.S. at 556 ("The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."). As the majority in *Boney* recognized, in light of McDonough, "[a] per se rule would be appropriate....only if one could reasonably conclude that felons are always biased against one party or another. But felon status, alone, does not necessarily imply bias." 977 F.32d at 633. The upshot is that the Supreme Court has essentially adopted a harmless error standard when it comes to the Constitutional guarantee of an impartial jury, and every court of appeal that has addressed the issue has extended this standard to the statutory bar on felon-jurors.

Nor is there evidence in 28 U.S.C. § 1865(b)'s text or legislative history suggesting that automatic reversal is required when an unqualified juror has participated in returning a verdict. If in fact the felon-juror bar reflects some axiom that a defendant simply cannot obtain a fair trial with a felon on the jury, as Judge Randolph suggests, one would expect Congress to say that a new trial was the only acceptable remedy. Judge Randolph's position is further belied by the tiny window that Congress has afforded both sides for raising challenges to compliance with juror selection procedures. Surely, if Congress believed that the presence of a felon-juror necessarily results in an impartial jury, it would have afforded more than seven days from the time the complaining party discovered, or could have discovered by the exercise of diligence, to raise a challenge. *See* 28 U.S.C. § 1867; *Boney*, 977 F.2d at 633 ("The strict procedural limitations of § 1867....make abundantly clear that other values, such as judicial efficiency and finality, tempered Congress' desire to bar felon-jurors and led Congress to reject a rule of per se reversal.").

In its initial motion, the defense essentially asks this court to skip the evidentiary hearing and rule for an automatic reversal because, it claims, the juror cannot possibly offer a plausible explanation for her dishonesty that does not evince bias. The government claims the facts of this case point to an equal yet opposite result - immediate denial of the defendant's motion.

Both sides are incorrect–there is no legal basis for skipping the evidentiary hearing. The return of a verdict triggers interests in judicial efficiency and finality, and it is Defendant's burden to cast sufficient doubt on the juror's impartiality before these interests will be upended. *See Boney*, 977 F.2d at 633. The defense also argues that it is entitled to a new trial without a hearing because it can satisfy the *McDonough* two-part test: 1) that the juror failed to answer honestly a material question; and 2) that a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). In fact, the whole purpose of holding an evidentiary hearing is to get to the heart of the *McDonough* holding that "the motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *Id.* at 556. *See Boney*, 977 F.3d at 633 ("a per se rule requiring a new trial whenever it turns out that a felon served on a jury seems inconsistent with *McDonough's* hostility to unnecessary new trials."); *Langford*, 990 F.2d at 68-69 (interpreting *McDonough* as extending to cases of deliberate nondisclosure and misstatements and rejecting per se rule).

The case will be set for a status hearing on or after December 1st to discuss the ambit of further proceedings on this issue.

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1. I note also that Illinois' Jury Act does not automatically exclude felons. *See* 705 ILCS § 305/2 ("Jurors must be:(1) Inhabitants of the county.(2) Of the age of 18 years or upwards (3) Free from all legal exception, of fair character, of approved integrity, of sound judgment, well informed, and able to understand the English language, whether in spoken or written form or interpreted into sign language.(4) Citizens of the United States of America.").