

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA)	CRIMINAL NO. 3:98CR0082
)	
v.)	
)	
)	<u>ORDER</u>
JOHN SANDALIS)	
)	
&)	
)	
MICHELLE SANDALIS)	JUDGE NORMAN K. MOON

This matter comes before the Court on Defendants’ motions for a new trial. For the reasons stated in the attached Memorandum Opinion, Defendants’ motion is DENIED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record and to strike this case from the docket of the Court.

ENTERED: _____
U.S. District Judge

Date

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UNITED STATES OF AMERICA)	CRIMINAL NO. 3:98CR0082
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JOHN SANDALIS)	<u>MEMORANDUM OPINION</u>
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MICHELLE SANDALIS)	JUDGE NORMAN K. MOON

I.

This matter comes before the Court on Defendants’ motion for a new trial. Defendants’ John and Michelle Sandalis (“the Sandalises”) own and operate Dalis Painting (“Dalis”), a Virginia corporation. In December of 1998, the Sandalises were indicted on six counts of criminal tax fraud and tax evasion, relating both to their personal tax returns and the corporate tax returns of Dalis Painting. In March of 2000, after a two-day jury trial in this Court, the Sandalises were found guilty on all counts.

Defendants appealed their convictions, arguing that the Court erred by failing to conduct an evidentiary hearing into allegations of juror bias, pursuant to Remmer v. United States, 347 U.S. 227 (1954). Specifically, the Sandalises alleged that Elizabeth Braswell, the foreperson of the jury, was unduly prejudiced against Defendants. Ms. Braswell works for the University of Virginia at the Miller Center of Public Affairs, located in the Faulkner House. Dalis Painting worked on a lead abatement project in the Faulkner House, in and around Ms. Braswell’s office,

from January to August 1999. According to the affidavits of several Dalis employees, Ms. Braswell was a chronic complainer who disapproved of the amount of noise and dust that created by the project.

The Fourth Circuit held that a defendant is entitled to an evidentiary hearing if he can make “a threshold showing that improper external influences came to bear on the decision-making process of a juror.” United States v. Sandalis, No. 00-4748, 2001 WL 867389, at *2 (4th Cir. Aug. 1, 2001). Once a defendant meets this initial burden, the district court “should not decide and take final action ex parte..., but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.” Id. (quoting Remmer, 347 U.S. at 229-30). Based on the affidavits presented by the Sandalises, the Fourth Circuit concluded that Defendants had met their initial burden and therefore were entitled to a Remmer hearing.

The Fourth Circuit instructed this Court to conduct the hearing as follows. Ms. Braswell was to be questioned and the Sandalises would “bear the burden of proving that Braswell’s prior business dealings with the Sandalises compromised her ability to render a fair and impartial verdict.” 2001 WL 867389, at *3. It was left for this Court to determine whether any other jurors should be interrogated. The Court directed the Clerk to summon all jurors who would be available on the date of the Remmer hearing. In summoning additional jurors, the Court sought to determine whether these jurors had any sense that Ms. Braswell might be particularly committed to a finding of guilt, or whether Ms. Braswell injected any external evidence that might have improperly affected the decision-making process of the jury. Nine jurors, including Ms. Braswell, attended the hearing and were questioned by Defendants’ counsel and by the government. The

remaining three jurors could not be contacted, or were not available on the date of the hearing.

Following the Remmer hearing, attorneys on both sides filed supplemental briefs. Defendants requested an additional hearing on the issues raised in these supplemental briefs, which the Court held on December 12, 2001. In addition, Defendants filed a motion with the Court asking for criminal background checks to be performed on each of the jurors. The Court granted the motion in part, permitting the disclosure of criminal background checks of those jurors who testified at the initial Remmer hearing. Those background inquiries revealed that one of the jurors pled guilty in 1979 to the charge of petit larceny of merchandise valued at less than \$100, which resulted in a sentence of twelve months confinement, all but thirty days suspended, and that to be served on weekends only. In addition, that same juror was arrested in July of 2001 and charged with possession of a controlled substance and solicitation of prostitution. Those charges arose after the Sandalises' trial, and have not been resolved.

Based on the above evidence, Defendants contend that they are entitled to a new trial because: (1) Ms. Braswell was actually biased against them; (2) she would have been excluded from the jury at *voir dire* had her prior experiences with Dalis Painting come to light; and (3) she introduced improper, extraneous evidence into the jury's deliberation process. For the reasons stated below, this Court disagrees, and Defendants' motion for a new trial is DENIED.

II.

The first question before the Court is whether Defendants have proven that Ms. Braswell was biased against them. The Sandalises contend that she was actually biased. In addition, they suggest that even if the Court finds that she was not actually biased, that the Court should impute

bias to her. The Court will consider both arguments.

A.

A defendant is entitled to a new trial if, after a post-trial hearing, he can prove actual bias on the part of any one of the jurors. A mere showing of possible bias, on its own, is insufficient to require a new trial. “[T]he participation of a juror whose impartiality is suspect for reasons not known to defense counsel at the time of *voir dire* does not *per se* require a new trial. Instead, the verdict may be set aside if a post-trial hearing demonstrates that the juror was actually biased.” United States v. Malloy, 758 F.2d 979, 982 (4th Cir. 1985). As the Supreme Court has stated, “[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation....Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” Smith v. Phillips, 455 U.S. 209, 217 (1982).

At the post-trial hearing, the defendant has “the burden of proof to show actual prejudice.” Malloy, 758 F.2d at 982. To show actual bias, a defendant must: (1) present evidence of an express admission by the allegedly biased juror; or (2) present specific evidence that shows “such a close connection to the circumstances at hand that bias must be presumed.” United States v. Perkins, 748 F.2d 1519, 1532 (11th Cir. 1984) (internal quotations omitted). Ms. Braswell did not admit any bias. She testified at the Remmer hearing that she felt “totally neutral” towards Dalis Painting and the Defendants. Therefore, this Court will focus its attention the whether the specific facts Defendants have presented are sufficient to allow a

reasonable fact-finder to conclude that Ms. Braswell was actually biased.

Before reviewing the evidence at hand, it is useful to survey two examples wherein a defendant attempted to show actual bias. In Fitzgerald v. Greene, the defendant was charged with raping two teenagers and murdering two other individuals. 150 F.3d 357 (4th Cir. 1998). The trial was bifurcated into guilt and penalty phases. The jury first voted to convict on all counts and then proceeded to the penalty phase. During deliberations on sentencing, one of the jurors commented that he had “no sympathy for rapists because his granddaughter had been molested as a child.” Id. at 363. Based on this statement, the defendant sought habeas corpus relief. The Fourth Circuit denied the defendant’s petition, upholding the state court’s determination that the juror was being honest when he stated that “his granddaughter’s molestation had no effect on his voting to convict or sentence Fitzgerald for any of his crimes.” Id. at 364.

In contrast, in United States v. Perkins, the Eleventh Circuit found that a defendant was entitled to a new trial because of juror bias. Perkins was convicted on obstruction of justice charges relating to certain banking practices of a Savings and Loan Association that he had organized. 748 F.2d 1519, 1529-30 (11th Cir. 1984). After almost twenty hours of deliberation, the jury returned a verdict of guilty.

Immediately after the trial, two jurors contacted the defendant to inform him that the verdict was not their verdict. Additionally, one of the jurors reported that a third juror, Juror Goad, was especially committed to a finding of guilty. Id. at 1529-30. During *voir dire*, Goad admitted that he recognized the defendant “facially” but that he did not know him personally. Id. at 1530. At a post-trial hearing, it was uncovered, after much questioning, that Goad had in fact

served on a committee with Perkins. The rest of the jury also testified at the Remmer hearing, and eight of them stated that Goad had told them during deliberations that he knew the defendant and/or had served on a committee with him. Id.

After that revelation, the court asked the jurors if any of them had been a plaintiff or defendant in a civil suit. Although he was initially reluctant to respond, Juror Goad did admit that he as a party to a divorce case “about forty-two or three years ago.” Id. at 1530. The court asked Goad if he had been a party to any other suit, and Goad denied that he had been involved in any other matters. After the court recited the name of a case in which he had been a named defendant, Goad replied, “Since you brought that up, I do remember that.” Id. That case, Snider v. Allstate Administrator, Inc. (M.D. Fla. No. 69-237), involved charges of misappropriation of funds, similar to the charges against Mr. Perkins. The Court followed up with Mr. Goad again, asking him if there were any other cases in which he had been involved, either as a party or as a witness. Again, he claimed not to remember any other lawsuits in which he had taken part. Finally, after considerable prodding, Juror Goad admitted that he had testified as a witness on behalf of the government in third case. Id. at 1530-31.

The court concluded “that actual bias must be presumed” because of: (1) his concealment of his prior relationship with the defendant; and (2) his “tenacious effort to deny involvement” in any other court proceedings. Id. at 1532. Additionally, the court was swayed by the fact that Goad had injected extraneous information about the defendant into jury deliberations that “had remained hopelessly deadlocked” for two days. Id. at 1534.

After considering all of the evidence, this Court concludes that Ms. Braswell was not biased against Defendants. First, there is the testimony of several Dalis employees, each of

whom testified that Ms. Braswell was a “chronic complainer.” Whether or not this testimony is believed, it does not contradict Ms. Braswell’s testimony, which this Court finds to be credible. Ms. Braswell stated that she had talked with L.T. “Spike” Weeks, the University officer who hired and managed Dalis Painting, but that she did not remember making any complaints to him or to anyone else. She added that she might have mentioned a complaint about noise or dust to her co-workers, but she did not recall voicing those complaints formally. Comparing the evidence from Ms. Braswell to the evidence from the Dalis employees, it is likely that Ms. Braswell, simply does not see herself as a chronic complainer. As a result, while Dalis employees may not have been fond of Ms. Braswell, she bore no ill will towards them, or towards Dalis Painting.

This view of Ms. Braswell is supported by the testimony of the other jurors. Eight jurors other than Ms. Braswell testified at the hearing. None of them perceived Ms. Braswell as being committed to a finding of guilt. She was described by her fellow jurors as quiet and reserved. Two of the eight jurors stated that Ms. Braswell “had an interest” in being foreperson of the juror, but most of the jurors felt that she was randomly chosen for what was described as a “secretarial” position. The eight jurors were unanimous in their belief that Ms. Braswell was not biased against the Defendants.

Defendants have tried to impeach the credibility of one of these jurors, who was convicted in 1979 of petit larceny of merchandise valued at less than \$100, and who has since the Sandalis trial been charged with illegal possession of a controlled substance and solicitation of prostitution. While the past conviction and pending charges might make this juror a less reliable witness than the other jurors, the fact remains that his testimony is completely consistent with their testimony. Like the rest of the jury, he did not perceive Ms. Braswell to be biased.

Defendants also contend that the prior larceny conviction should have come out during *voir dire*. However, potential jurors were only asked if they had been convicted of a crime punishable by more than one year of prison time. This juror's thirty days of confinement more than twenty years ago did not disqualify him from jury service in this case.

In addition, Defendants point to the testimony of one juror, Juror Fix, who remembered Ms. Braswell mentioning something about Dalis Painting. According to Juror Fix, Ms. Braswell recognized the name "Dalis Painting" as being on work trucks outside of her office building. Juror Fix asserted that Ms. Braswell did not give any impression one way or the other on her feelings about the Sandalises' company. She merely mentioned that she had seen the name on the trucks.

This testimony does not support the assertion that Ms. Braswell was actually biased against Defendants. To compare it to previous cases, it is far less significant than the testimony of the eight jurors in Perkins who remembered the biased juror discussing his relationship with the defendant. Similarly, it is not damning in the way that the statement by the juror in the Fitzgerald case was. In Fitzgerald, the juror told the entire jury during deliberations that he "had no sympathy for rapists" because his granddaughter had been sexually assaulted. At the time of his comment, the jury was deciding on a recommended sentence for the rape charges in that case. In contrast, Ms. Braswell's comment to Juror Fix was apparently made to him alone, and was unrelated to the question of guilt or innocence. She did not say, for example, that she had "no sympathy" for Dalis Painting. She did not offer her impressions about the company at all – whether positive or negative.

Finally, there are the affidavits of John and Michelle Sandalis, as well as the affidavit of

Spike Weeks. Spike Weeks, in his affidavit, asserts that Mr. Sandalis “is a very hands on person who comes to job sites frequently.” Mr. Weeks believes that he and Mr. Sandalis came to the work site in Ms. Braswell’s office building “at least a dozen” times. In short, Defendants contend that Ms. Braswell should have recognized the Defendant’s face when he stood up during *voir dire*. Additionally, Defendants contend that Ms. Braswell called them directly to complain about the lead abatement project. Michelle Sandalis has stated in her affidavit that she specifically remembers the name “Ms. Braswell” as someone who called asking for her husband. She then remembers passing the phone to her husband, who answered by saying, “This is John Sandalis can I help you?” John Sandalis, in his affidavit, claims to remember the details of this conversation, as well as a second telephone conversation with Ms. Braswell.

Ms. Braswell stated that she does not remember ever calling the Sandalises, and she further insists that she does not recognize him from the job site at her office. On these points, the Court finds Ms. Braswell’s testimony credible. Therefore, evidence of phone calls that Ms. Braswell cannot recall does not support Defendants’ assertion that Braswell was actually biased against them.

The evidence does suggest, however, that Defendants might have waived their right to a new trial. Based on the evidence of the Sandalises’ affidavits, it appears that Defendants should have recognized Ms. Braswell, both by face as she sat in the jury box, and by name as they read the jury list before the trial began. Both Defendants specifically remember the name “Ms. Braswell” from these phone conversations. Yet when asked by their attorney to look at the jury list to see if there was anyone they knew, neither of them mentioned anything about Elizabeth Braswell. The fact that Ms. Braswell listed the University of Virginia as her employer – and the

fact that Dalis Painting does considerable work for the University – apparently did not ring any bells for Defendants. Instead, they claim that they did not notice Ms. Braswell’s name on the jury list because she listed the “Miller Center at the University of Virginia” as her place of work, and the lead abatement project had been performed at the Faulkner House at the University of Virginia. They contend that they did not know that the Miller Center is housed in the Faulkner House.

In addition to the affidavits of Defendants, there is the testimony of Michael Ripley, an employee of Dalis Painting. Mr. Ripley mentioned that he came to the courtroom to watch the trial, and that he recognized Ms. Braswell on the jury. He said he was surprised to see her there because he believed that as a defendant, “you weren’t supposed” to have someone you knew on the jury. Mr. Ripley further testified as follows.

Q [Government’s Counsel]: How soon did you tell [Mr. Sandalis] that you were surprised [Ms. Braswell] was on the jury?

A: Probably, I guess, as soon as we left, I assume.

Q: Of the first day?

A: Yeah. Yes sir.

Defendants did not take the stand or present any evidence – either at the initial Remmer hearing or at the later December 12th hearing – to contradict Mr. Ripley’s testimony or to suggest that his memory of this conversation is unreliable. Therefore, from Mr. Ripley’s testimony and from the evidence in Defendants’ own affidavit, it is probable that Defendants recognized Ms. Braswell on the jury while the trial was still in progress. Perhaps because they thought that a former client of Dalis Painting would be sympathetic to their case, Defendants chose not to strike

her from the jury. In making this choice, Defendants have likely waived their right to a new trial. See United States v. Breit, 712 F.2d 81, 83 (4th Cir.1983).

Regardless of the issue of waiver, however, the defense has not met its burden to prove actual bias. Defendants have failed to point to specific facts that show “such a close connection to the circumstances at hand that bias must be presumed.” Perkins, 748 F.2d at 1532. This Court finds Ms. Braswell’s testimony to be credible and consistent with the testimony of the other jurors. It is the ruling of the Court, therefore, that Ms. Braswell was not biased against Defendants.

B.

Having failed to show actual bias on the part of Braswell, Defendants suggest that they are entitled to a new trial based on a claim of implied bias. In Smith v. Phillips, the Supreme Court held that the law will not impute bias to a juror who is in a compromising position. See 455 U.S. at 215. Justice O’Connor filed a concurring opinion, expressing her view “that the [majority] opinion does not foreclose the use of ‘implied bias’ in appropriate circumstances.” Id. at 221. Those circumstances are “extreme situations,” such as “a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.” Id. at 222. See also United States v. Tucker, 243 F.3d 499, 509 (8th Cir. 2001).

The Fourth Circuit has followed Justice O’Connor’s guidance, and applies the doctrine of implied bias only in “‘exceptional’ and ‘extraordinary’ situations.” Fitzgerald v. Greene, 150 F.3d

357, 365 (4th Cir. 1998). The Sandalises' case is not the kind of "egregious situation" envisioned by Justice O'Connor or the Fitzgerald court. Id. Ms. Braswell was not closely related to anyone in the case, and she was not a witness to any of the events of the crime. Her scenario does not rise to the extreme level necessary to support an allegation of implicit bias. Defendants' motion, therefore, must fail on this point as well.

III.

Defendants also claim that they are entitled to a new trial because the Court would have excused her for cause on *voir dire* had her experiences with Dalis Painting been known. They assert that she was "dishonest by omission" for refusing to inform the Court of her past interactions with Defendants' business. The Supreme Court has held:

[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. 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.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984). This test has been adopted by the Fourth Circuit for use in criminal cases. See Fitzgerald, 140 F.3d at 362.

In this case, Braswell was asked at *voir dire* whether she knew the Defendants, John and Michelle Sandalis. She was not asked whether she recognized the name Dalis Painting, and she stated that she did not make the connection between "Dalis" and "Sandalis" until late in the trial. It is not clear exactly when she made the connection, but in any event, it had become clear to her by the last day of the trial, when Dalis Painting employees entered the courtroom in their "Dalis Painting" t-shirts.

As to the first prong of the McDonough test, there is no evidence that Juror Braswell answered any of the questions posed to her dishonestly. She was asked if she recognized the Defendants, and by her silence at *voir dire* she indicated that she did not. The Court finds that her answer at that time was an honest, good faith response to the question. Defendants contend, however, that Ms. Braswell's dishonest omission occurred after *voir dire*. Once she made the connection to Dalis Painting, they contend, she was obligated to come forward with that information. Yet Ms. Braswell held no bias towards Defendants; therefore, it is difficult to fault her for not saying she recognized the "Dalis Painting" name.

However, as the Supreme Court commented, "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." McDonough Power Equipment, 464 U.S. at 556. On this question of fact, the Court does not believe that Ms. Braswell was motivated to conceal her connection to Defendants by a desire to see them found guilty. Rather, the Court finds her statements at the Remmer hearing telling. She stated, "I wish [that someone during *voir dire*] had asked, "Have you ever heard of Dalis Painting." She wished she had been asked about Dalis Painting because she would have answered yes, and then possibly would have avoided jury service altogether. She then added that she "would love not to have been on the jury and been able to stay all day at work."

Therefore, it is the opinion of the Court that she would not have been dismissed for cause at *voir dire* had her connection to Dalis Painting been revealed. If, during *voir dire*, the Court had asked Ms. Braswell about Dalis Painting, she would have answered, as she did at the Remmer hearing, that she had "tuned out" the Dalis Painting employees, went about her own business, and was "totally neutral" towards Dalis Painting. Based on these statements, the Court is confident

that Ms. Braswell would have been able to put her past dealings with Dalis Painting aside and decide the case impartially, solely on the facts admitted into evidence. As a result, while Defendants or the government might have chosen to use one of their peremptory strikes on Ms. Braswell, the Court would not have stricken her for cause. The Sandalises have failed to meet the requirements of the McDonough test.

IV.

As a final matter, Defendants argue that they are entitled to a new trial because of extraneous evidence injected into the jury proceedings by Ms. Braswell. “In order that it may determine the extent, if any, of any prejudice of evidence improperly brought before the jury, a district court must evaluate whether there is a ‘reasonable possibility that the jury's verdict was influenced by the material that improperly came before it.’” United States v. Seeright, 978 F.2d 482, 849 (4th Cir. 1992) (citing United States v. Barnes, 747 F.2d 246, 250 (4th Cir.1984)).

In this case, the only extraneous evidence is Ms. Braswell’s lone statement to Juror Fix that she had seen the Dalis Painting logo on work trucks. As discussed above, Juror Fix testified that Braswell did not share any impression she may have had about Dalis Painting with him. As a result, this Court is confident that her isolated comment did not influence the jury’s verdict. Defendants motion for a new trial based on this extrinsic evidence must fail.

Additionally, Defendants have made a motion asking this Court to subpoena the three remaining jurors who were unavailable on the day of the Remmer hearing. That motion was denied by this Court in an Order and Memorandum Opinion dated December 7, 2001. On remand, the Fourth Circuit asked this Court to conduct a hearing at which Ms. Braswell would be

questioned. It was left for this Court to determine whether any other jurors should be summoned to testify. As explained in the December 7th Memorandum Opinion, this Court, in its discretion, does not believe that anything would be gained by subpoenaing these three additional jurors. Defendants' motion on this point is therefore denied.

V.

In conclusion, after conducting a full and fair post-trial hearing to investigate claims of potential juror bias, this Court concludes that no such bias existed. As a result, Defendants' motion for a new trial is DENIED.

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion to all counsel of record, and is further instructed to strike this matter from the docket of this Court.

ENTERED: _____
U.S. District Judge

Date