UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ROBERT L. SWINTON,

Defendant.

DECISION AND ORDER

6:15-CR-06055 EAW

INTRODUCTION

Following a jury trial, Defendant Robert L. Swinton, Jr. ("Defendant"), who appeared *pro se* with standby counsel, was convicted of the following four offenses: (1) possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2; (2) use of premises to manufacture, distribute, and use controlled substances, in violation of 21 U.S.C. § 856(a)(1), and 18 U.S.C. § 2; (3) possession of firearms in furtherance of drug trafficking crimes, in violation of 18 U.S.C. § 924(c)(1)(A)(i) and 18 U.S.C. § 2; and (4) possession of firearms and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (Dkt. 180).

On December 20, 2017, the Court sentenced Defendant to 270 months of imprisonment, followed by six years of supervised release. (Dkt. 217 at 3-4). The Court also ordered Defendant to pay a fine of $400 and a special assessment of $400. (*Id.* at 7). Judgment was entered on December 28, 2017. (*See* Dkt. 217). Defendant timely filed a notice of appeal on January 2, 2018. (Dkt. 218). Defendant's appeal remains pending. (*See* 2d Cir. 18-101).

Presently before the Court are two motions filed by Defendant. In the first motion, filed on July 27, 2018, Defendant requests to modify and correct the record pursuant to Fed. R. App. P. 10(e), and to produce the audio recordings of all transcribed proceedings to the Second Circuit, Defendant, and the Government. (Dkt. 259). Defendant argues that "the transcripts submitted in this case are not consistent with his memory of events, and vital omissions have taken place." (*Id.* at 2). Additionally, he contends that certain letters that he sent to Magistrate Judge Payson are missing from the docket and asks that the letters be docketed so that they are available for appellate review. (*Id.* at 5). By letter dated August 13, 2018, the Government stated that it had no objection to Defendant's request to produce the audio recordings.

In the second motion, filed on August 20, 2018, Defendant requests recusal of the undersigned, arguing that this Court was involved in the alleged omissions from the transcripts and that it would be biased in the adjudication of his motion requesting audio recordings. (Dkt. 262).

For the reasons set forth below, the Court denies Defendant's motion for recusal. (Dkt. 262). The Court grants Defendant's other motion to the extent that he seeks free copies of certain electronic audio recordings in this case and to the extent that he seeks to make certain letters part of the record, and denies it in all other respects. (Dkt. 259).

MOTION FOR RECUSAL

I. Legal Standard

A judge must recuse herself "in any proceeding in which h[er] impartiality might reasonably be questioned," 28 U.S.C. § 455(a), and/or "[w]here [she] has a personal bias

or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," *id.* at § 455(b)(1). "[R]ecusal motions are committed to the sound discretion of the district court. . . ." *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992). In deciding whether to recuse, a judge considers whether "a reasonable person, knowing all the facts, [would] conclude that the trial judge's impartiality could reasonably be questioned[.]" *Id.*

II. Application

Recusal is not warranted in this case. Defendant's motion for recusal is based only on his conclusory assertion that the undersigned was complicit in the omission of certain information from the transcripts in this case and therefore cannot be impartial when considering his motion to produce the audio recordings of the proceedings in this case. (*See* Dkt. 262). Defendant's speculative claims of bias lack any factual basis and fail to provide grounds for the undersigned's recusal. He points to no facts or circumstances that would allow a reasonable person to conclude that the undersigned's impartiality could reasonably be questioned. *See Lovaglia*, 954 F.2d at 815. Moreover, to the extent that Swinton disagrees or anticipates disagreement with the undersigned's legal conclusions in this case, that disagreement is insufficient to warrant recusal. Judicial rulings are "[a]lmost invariably . . . proper grounds for appeal, not for recusal." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also Mills v. Poole*, Nos. 1:06-cv-00842-MAT-VE, 1:11-cv-00440, 2014 WL 4829437, at *6 (W.D.N.Y. Sept. 29, 2014) ("Petitioner's claims of bias and impartiality on the part of the undersigned . . . are both conclusory and based entirely on his disagreement with the Court's decisions. This is an insufficient basis for recusal.").

Based on the record in this case, this Court concludes that no reasonable observer would question the undersigned's impartiality. Accordingly, Defendant's motion for recusal is denied. (Dkt. 262).

MOTION CONCERNING AUDIO RECORDINGS AND LETTERS

I. Request for Audio Recordings

As an initial matter, the Court notes that some proceedings in Defendant's case were memorialized only by transcripts, and those transcripts are the official record of those proceedings. With respect to those proceedings, there are no audio recordings available to be provided to Defendant. *See* Guide to Judiciary Policy, Volume 6: Court Reporting, Chapter 5, § 510.40.10 (stating that "[b]ackup recordings made by court reporters for their own convenience and not otherwise required by 28 U.S.C. § 753 are the personal property of the court reporter"). In other words, for any appearance in which a court reporter was present (including the trial and sentencing), no audio recording is available to be provided to Defendant. Therefore, to the extent that Defendant seeks audio recordings of proceedings memorialized only by transcripts, the Court denies that request.

Other proceedings in Defendant's case were digitally recorded in lieu of stenographic reporting by an official court reporter. Those audio recordings were later transcribed. (*See, e.g.*, Dkt. 245 (transcript of digitally recorded status conference)). According to this Court's public website, "[u]pon request, the court may reproduce electronic audio recordings onto compact discs (CDs) and may sell copies of electronic audio recordings made as the official record to the public at the prevailing rate prescribed by the miscellaneous fee schedule in effect." Document Requests, *available at*

http://www.nywd.uscourts.gov/document-requests. A party may request the copies of electronic audio recordings by completing the Audio Recording Order Form, AO 436. *See* Audio Recording Order, *available at* http://www.uscourts.gov/forms/other-forms/audio-recording-order. The fee for reproduction of electronic audio recordings is $31.00. *See* District Court Schedule of Fees, *available at* http://www.nywd.uscourts.gov/fee-schedule-0.

In his motion, Defendant does not raise the issue of whether he can afford to pay the fee for reproduction of electronic audio recordings. (*See* Dkt. 259). But because Defendant qualified for appointed counsel in this Court, and the docket in his appeal reflects that he has been granted *in forma pauperis* status, the Court presumes that he requests free copies of electronic audio recordings. (*See* Dkt. 29 (Financial Affidavit); Dkt. 35 (CJA Appointment); 2d Cir. 18-101).

The question of whether transcripts may be furnished at public expense is set forth in 28 U.S.C. § 753(f), which provides, in relevant part, as follows: "Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of moneys appropriated for those purposes." 28 U.S.C. § 753(f). The Second Circuit has instructed that "[i]ndigent defendants are entitled to free copies of transcripts only when they are *needed* to vindicate legal rights." *Leslie v. Matzkin*, 450 F.2d 310, 312 (2d Cir. 1971); *see also United States v. Agbodjan*, 871 F. Supp. 2d 95, 102 (N.D.N.Y. 2012) ("Free transcripts must be provided to an indigent defendant if they are necessary to vindicate a legal right and are otherwise

available for a fee."). "Two factors should be considered: '(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.'" *Id.* (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

In this case, written transcripts of the proceedings originally recorded by audio have been prepared. (*See* Dkt. 244; Dkt. 245; Dkt. 246; Dkt. 247; Dkt. 248; Dkt. 249; Dkt. 250; Dkt. 251; Dkt. 252; Dkt. 253; Dkt. 254; Dkt. 255; Dkt. 256; Dkt. 257; Dkt. 258). Nonetheless, Defendant contends that he needs the audio recordings in order to present his appeal. (*See* Dkt. 259 at 6 (stating that Defendant requires audio recordings "to verify the truth of the matter asserted by the defendant, to review all allegations made, and to give the defendant/appellant a record to proceed on appeal as these issues are sorted out")). Although the Court questions whether Defendant's conclusory allegations satisfy his burden to establish his right to the audio recordings free of charge, the Court will nonetheless exercise its discretion and grant Defendant's motion to the extent that he seeks free copies of certain electronic audio recordings in this case. The digitally recorded proceedings in this case are those that have been subsequently transcribed and filed at docket numbers 244 through 258. In accordance with this Court's rules, Defendant must complete the requisite form— Audio Recording Order Form, AO 436—and identify the proceedings for which he desires copies of the audio recordings. As discussed above, to the extent that Defendant seeks audio recordings of proceedings memorialized only by transcripts, the Court denies that request.

II. Letters to Magistrate Judge Payson

Defendant contends that certain letters are missing from the docket and requests, pursuant to Fed. R. App. P. 10(e), that they be made a part of the record and sent to Defendant and the Government. (Dkt. 259 at 5). He describes the missing letters as follows:

> The letters that were mailed to Magistrate Judge Payson[] concerned ineffective assistance of counsel complaints, criminal history complaints and institutional complaints made to the court in writing. These letters also support the accusations herein, and are relevant to the Second Circuit's evaluation of events occurring in the District Court. These letters were also addressed in open court, yet [the] substance of the letters was not addressed.

(*Id.*).

A review of the Clerk's Office file in this case reveals several letters written by Defendant to Magistrate Judge Payson between 2013 and 2015, which, with one exception, were written before Defendant was indicted on April 21, 2015. (*See* Dkt. 53). One of them is a letter from Defendant, written on a *pro se* basis and dated May 30, 2013, concerning issues in the relationship between Defendant and his retained counsel at that time.[1] The transcript of a proceeding before Judge Payson on June 7, 2013, reflects Judge Payson's receipt of that letter from Defendant. (Dkt. 234 at 2-3). Judge Payson stated that she did not provide a copy of that letter to the Government, and, as a result of the letter, she granted counsel's motion to withdraw as defense counsel. (*Id.* at 2-4; Dkt. 27).

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[1] Defendant was represented during this matter by three separate attorneys—one who was retained, and two who were appointed as CJA counsel—before electing to proceed *pro se* with standby counsel. (Dkt. 27; Dkt. 35; Dkt. 37; Dkt. 115).

The file also contains a letter dated October 3, 2014, from Judge Payson to Donald Thompson, Defendant's counsel at that time. Judge Payson enclosed letters, dated September 23 and 24, 2014, that Defendant had sent to Judge Payson on a *pro se* basis. In those letters, Defendant complained that he was having dental problems and could not access the law library, and his attorneys were not helping him. He also described post-conviction proceedings pending in a Florida state court. By letter dated October 30, 2014, Judge Payson sent Mr. Thompson a copy of a *pro se* letter she received from Defendant on October 28, 2014. In that letter, Defendant provided further details of his pending Florida state court proceedings. Although the Government was copied on Judge Payson's cover letters, the Government did not receive copies of the enclosures (Defendant's *pro se* letters).

Later, during a proceeding on November 7, 2014, Judge Payson acknowledged receipt of letters that Defendant wrote on a *pro se* basis to the Court, despite being represented by counsel at that time. (Dkt. 250 at 2-6). Judge Payson addressed various issues that Defendant raised in those letters—the pending Florida state court proceeding and Defendant's frustration with counsel—before telling Defendant that he could not write letters to the court while represented by counsel without disclosing them to the Government. (*Id.*). She informed Defendant that if he sent her additional letters, she would have to disclose them to the Government. (*Id.* at 6). Defendant confirmed that he had discussed the Florida proceedings with Mr. Thompson, that he understood that he had a right to a speedy trial (or indictment), and that he was satisfied with Mr. Thompson's representation. (*Id.* at 2-6).

The file also contains a *pro se* letter to Judge Payson, dated August 2, 2015, in which Defendant requests copies of all correspondence between him and Judge Payson, as well as copies of all correspondence between him and the U.S. Marshal Service. This communication to Judge Payson occurred after Defendant was indicted. Judge Payson responded by letter dated August 26, 2015, instructing Defendant that all requests of the Court should be made through his attorney since he was represented by counsel.

Defendant makes his motion pursuant to Fed. R. App. P. 10(e), which governs correction or modification of the record on appeal. The record on appeal, according to Fed. R. App. P. 10(a), generally consists of the following: "(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." Fed. R. App. P. 10(a). Under Fed. R. App. P. 10(e)(1), "[i]f any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly." Fed. R. App. P. 10(e)(1). Under Fed. R. App. P. 10(e)(2)(B), "[i]f anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded . . . by the district court before or after the record has been forwarded." Fed. R. App. P. 10(e)(2)(B). "[T]he movant in a Rule 10(e) motion 'must demonstrate that the evidence to be supplemented was before the lower court in the course of its proceedings leading to the judgment under review and was mistakenly omitted from the record.'" *Natofsky v. City of New York*, No. 14 CIV. 5498 (NRB), 2018 WL

741678, at *1 (S.D.N.Y. Jan. 23, 2018) (quoting *Miro v. Plumbers & Pipefitters Nat'l Pension Fund*, No. 01 CV 5196, 2002 WL 31357702, at *1 (S.D.N.Y. Oct. 17, 2002)).

Judge Payson's treatment of Defendant's *pro se* letters was appropriate because he was represented by counsel when he wrote each of those letters. In other words, Judge Payson appropriately exercised caution when dealing with Defendant's *pro se* letters by not filing them on the docket or providing them to the Government, as the letters were primarily written pre-indictment and Defendant's uncounseled submissions could have prejudiced him in his defense. Indeed, a court is not obligated to accept a litigant's *pro se* submissions when that litigant is represented by an attorney. *See United States v. Williams*, No. 98 CR. 834 (JFK), 2010 WL 749817, at *1 (S.D.N.Y. Mar. 4, 2010) ("[T]his Court issued an order instructing [the defendant] that the Court does not accept pro se applications from criminal defendants who are represented by counsel and forwarded [the defendant's] application to his counsel. . . ."); *Mitchell v. Senkowski*, No. 9:01CV0570 LEKDRH, 2006 WL 3063464, at *2 (N.D.N.Y. Oct. 26, 2006) ("[T]he Court refuses to accept Plaintiff's *pro se* Motion to vacate because he continues to be represented by an attorney.").

Nevertheless, because Defendant now requests that his letters be made part of the record, and because Defendant's post-conviction status minimizes any potential prejudice to Defendant, the Court grants his request in an exercise of its discretion. To be clear, nothing in the record suggests that those *pro se* letters had any bearing on the decision-making of Judge Payson or this Court that might now be under review on appeal, and accordingly, Defendant's reliance on Fed. R. App. P. 10(e) appears misplaced. *See Natofsky*, 2018 WL 741678, at *1. Nevertheless, as a discretionary matter, the Court will

arrange for Defendant's *pro se* letters, summarized above, to be filed on the docket in this case.

CONCLUSION

For the reasons set forth above, the Court denies Defendant's motion for recusal (Dkt. 262) and grants in part and denies in part Defendant's motion concerning audio recordings and letters, as follows (Dkt. 259). The Court grants the motion to the extent that he seeks free copies of certain electronic audio recordings in this case and to the extent that he seeks to modify the record to include letters he wrote to Magistrate Judge Payson. The Court denies Defendant's motion to the extent that Defendant seeks audio recordings of proceedings memorialized only by transcripts.

The Clerk of Court is directed to send a copy of the Audio Recording Order Form, AO 436, to Defendant along with this Decision and Order. Further, upon receipt of Defendant's completed Audio Recording Order Form, AO 436, the Clerk of Court is directed to provide Defendant the requested audio recordings at no cost, consistent with this Decision and Order. The Clerk of Court is also directed to file on the docket the letters written by Defendant to Magistrate Judge Payson, consistent with this Decision and Order.

SO ORDERED.

ELIZABETH A. WOLFORD
United States District Judge

Dated: August 30, 2018
Rochester, New York