

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

FILED

No. 97-3893

DEC 09 1997

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREFF, Clerk

In re: David N. Bowman

Petitioner.

) ON WRIT OF MANDAMUS
) FROM THE UNITED STATES
) DISTRICT COURT FOR THE
) SOUTHERN DISTRICT OF
) OHIO

Before: MERRITT and BATCHELDER, Circuit Judges, and DOWD, District Judge.*

PER CURIAM. Because District Judge Susan Dlott's sister-in-law was appointed interim U.S. Attorney after a jury convicted him of tax fraud, petitioner David N. Bowman seeks a writ of mandamus directing Judge Dlott to recuse herself from any further proceedings in his case. For the following reasons, we grant the requested writ of mandamus and direct that another District Judge promptly be assigned to Bowman's case for sentencing and consideration of his release pending sentencing and appeal.

On January 11, 1996, Bowman was indicted for tax fraud on one count of corruptly endeavoring to obstruct the due administration of the Internal Revenue Code, in violation of 26 U.S.C. § 7212, one count of filing a false document with the Internal Revenue Services, in violation of 26 U.S.C. § 7206, and six counts of willful failure to file a tax return, in violation of 26 U.S.C. § 7203. On February 27, 1996, Judge Dlott advised the parties that her sister-in-

*The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

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law, Dale Goldberg, was the First Assistant U.S. Attorney for the Southern District of Ohio. At that time, Edmund Sargus was the U.S. Attorney. Bowman had no objection to Judge Dlott presiding over the case because the Judge's sister-in-law would have no direct involvement in his prosecution. Bowman was arraigned on March 4, 1996, and the prosecution was represented by David Bosley, Assistant U.S. Attorney. At the arraignment, Judge Dlott raised the issue of her relationship with the First Assistant U.S. Attorney. Bowman stated that he had no objection to Judge Dlott presiding over the case.

On August 2, 1996, a jury found Bowman guilty of all the tax fraud offenses charged. After a short recess, the Judge considered Bowman's bond status pending sentencing. Initially, the government did not think that Bowman would be a danger to the community. The Judge, however, disagreed and ordered that Bowman be taken into custody immediately in this tax case, pursuant to 18 U.S.C. § 3143(a)(1). For more than a year now, the defendant has been held in a local jail pending sentencing. A three-judge panel of this Court affirmed Bowman's pre-sentence detention. *United States v. Bowman*, No. 96-3845 (Oct. 3, 1996).

The long period of pre-sentence detention is the result of the following events. On August 23, 1996, after the trial but before sentencing, Dale Goldberg was appointed Interim U.S. Attorney for the Southern District of Ohio. Ms. Goldberg held this position until July 15, 1997, when Sharon Zealey was sworn in to the position. During her tenure as Interim U.S. Attorney, Ms. Goldberg recused herself and appointed James Rattan to serve as Acting U.S. Attorney for

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the cases pending before Judge Dlott. Bowman's sentencing hearing was originally scheduled for December 5, 1996, but was then rescheduled for December 17, 1996.

On December 10, 1996, Bowman filed a motion requesting that Judge Dlott recuse herself because of her relationship with the Interim U.S. Attorney, citing 28 U.S.C. § 455. The pertinent parts of § 455 require "[a]ny . . . judge . . . of the United States [to] disqualify [her]self in any proceeding in which [her] impartiality might be questioned," *id.* § 455(a), or when "a person within the third degree of relationship" to the judge is either an "officer . . . of a party," *id.* § 455 (b)(5)(i), or "[i]s acting as a lawyer in the proceeding," *id.* § 455(b)(5)(ii). On July 29, 1997, Bowman moved to have his sentencing rescheduled again, and Judge Dlott set the hearing for August 15, 1997. After eight months without a ruling by the District Court on his motion for recusal, Bowman filed the instant petition for writ of mandamus on August 8, 1997, seeking an order from this Court directing Judge Dlott to recuse herself before his sentencing. Judge Dlott finally denied the motion for recusal on August 11, 1997.

Mandamus is a proper method for review of the District Court's refusal to recuse herself under 28 U.S.C. § 455. *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990). Under the present circumstances, the law is not entirely clear as to whether § 455(b) required Judge Dlott to recuse herself because of her relationship with Ms. Goldberg, considering that Ms. Goldberg properly recused herself from all cases pending before Judge Dlott, pursuant to 28 C.F.R. § 0.131, during her term as Interim U.S. Attorney. However, Judge Dlott's relationship with Ms. Goldberg combined with her considerable delay in ruling on Bowman's motion for

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recusal would cause any "reasonable person [to] harbor doubts about the judge's impartiality."

In re Aetna, 919 F.2d at 1143. This is especially true given that Judge Dlott's relationship with the Interim U.S. Attorney coincided with this delay.

Bowman has been in prison for over sixteen months since his conviction, without being officially sentenced by a District Court. According to the pre-sentence report, the guideline range for his sentence is between thirty-three and forty-one months, given an offense level of 20 and a category-I criminal history. Conceivably, Bowman could serve the majority of his sentence before he ever has an opportunity to appeal his conviction to this Court. Accordingly, we grant Bowman's petition and issue a writ of mandamus directing that Judge Dlott recuse herself from this case. We direct that another District Judge be assigned to Bowman's case. The newly assigned court should then promptly hold a sentencing hearing in this tax case and consider whether Bowman should be released pending sentencing and appeal.