

FEB 11 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NIKKI D. AMOROSINO,

Defendant - Appellant.

No. 08-50070

D.C. No. CR-07-00344-GHK-1

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
George H. King, District Judge, Presiding

Argued and Submitted February 2, 2009  
Pasadena, California

Before: HALL, SILVERMAN and CALLAHAN, Circuit Judges

Nikki Amorosino appeals the district court's order affirming the judgment of the magistrate judge following a bench trial on Amorosino's misdemeanor charge.

We have jurisdiction pursuant to 28 U.S.C. § 1291. *United States v. Waites*, 198 F.3d 1123, 1126 (9th Cir. 2000). We review the district court's order de novo. *See*

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

*id.* Within the context of that de novo review, the magistrate judge's failure to grant the government's motion to dismiss the citation is reviewed for abuse of discretion, *Hirabayashi v. United States*, 828 F.2d 591, 607 (9th Cir. 1987), as is his ruling on the motion for recusal, *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002). We affirm.

The district court correctly held that the magistrate judge did not abuse his discretion when he failed to grant the government's motion to dismiss the citation before the government withdrew the motion. First, none of the magistrate judge's comments suggested that he was unwilling to grant the motion. Quite the opposite – the comments expressly recognize the government's discretion on this matter. Similarly, there is nothing in the record to suggest that the magistrate judge's remarks overcame the independent judgment of the prosecutor and coerced her into withdrawing her motion. The magistrate judge's limited inquiry was permissible given the "leave of court" requirement in Federal Rule of Criminal Procedure 48(a).

Further, the district court correctly held that the judge's statements did not require his recusal under 28 U.S.C. § 455. In their context and notwithstanding a stray remark directed to defense counsel (not the prosecutor), the statements merely show that the magistrate judge was confused about the impact of the

defense's new evidence and was trying to understand the reason for the government's dismissal motion. The comments do not create a "significant risk that the judge will resolve the case on a basis other than the merits." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (quoting *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990)). Viewed in context, only someone "hypersensitive" or "unduly suspicious" would question the judge's impartiality based on the pre-trial comments and questions. *See id.*

Finally, 36 C.F.R. § 261.3(b), which Amorosino was found to have violated, does not include a materiality requirement for a false report. The text of § 261.3(b) does not contain an express requirement of materiality and "false . . . report or other information" did not contain such a requirement at common law. *See United States v. Wells*, 519 U.S. 482, 489-91 (1997); *United States v. Youssef*, 547 F.3d 1090, 1094 (9th Cir. 2008). Even if there were a materiality requirement, there was sufficient evidence of materiality to support the conviction given that Amorosino's statement to the Forest officer claimed an association with law enforcement. *See Neder v. United States*, 527 U.S. 1, 16 (1999).

AFFIRMED.

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SILVERMAN, Circuit Judge, dissenting:

Because I believe the magistrate judge's statements gave the appearance of bias, I respectfully dissent.

Recusal is mandatory if "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991) (internal quotation marks and citation omitted). Even if the majority is correct that the magistrate judge was merely confused about the new evidence, certainly his impartiality might reasonably be questioned given his repeated statements questioning the prosecutor's decision to move for dismissal. There is no denying that the judge had the right to inquire about the basis for the motion, but he did more than that. Speaking not as a judge but as a self-described former prosecutor, he succeeded in persuading the AUSA to change her mind and to not exercise her prosecutorial discretion to drop the case. Then, having convinced the prosecutor that the defendant merited prosecution, he proceeded to preside over the trial himself. Calling the judge's comments "stray remarks" does not lessen how they would have been perceived by a reasonable person in the defendant's shoes. Although I do not question the judge's good faith, I do think that a reasonable person with

knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. For that reason, recusal was required on the defendant's motion.

I agree with the majority's treatment of the materiality issue, but would reverse the district court and remand for a new trial before a different judge.