Buckner case presents challenge for Gartley

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A week before the start of her first homicide trial as a judge, Tina Polachek Gartley issued a ruling barring prosecutors from mentioning details of a protection from abuse petition they said documented the domestic warfare that precipitated the killing.

Gartley reached her decision after reading through the petition, listening to arguments from defense attorneys and prosecutors and reviewing applicable case law - steps of the legal process far removed from the purview of a jury.

Gartley released her written opinion on the matter last Monday, just as Luzerne County prosecutors and the defendant's attorneys were finalizing a deal that would thrust her into a dual role as judge and jury.

The defendant in the case, Donnell Buckner, agreed to waive his right to a jury trial after prosecutors said they would no longer seek the death penalty. Instead, Buckner said, he would allow Gartley to decide his guilt, innocence and potential punishment.

The trial is scheduled to start Monday.

Gartley's continued involvement in the case, after reviewing evidence she later ruled inadmissible, could pose an ethical quandary pitting a judge's duty to remain impartial against the human nature - and memory.

Christopher Leibig, a defense attorney in Virginia asked to dissect the issue, dismissed the presumption that judges are able to render decisions based solely on the evidence and testimony presented in the courtroom.

Leibig argued knowledge of inadmissible evidence, such as the protection from abuse petition in the Buckner case or a defendant's criminal record, could cloud the judgment of even the most conscientious judge.

"How can a person really ignore that stuff?" Leibig said. "Judges are supposed to do it. Some of them are better than others, but in reality no one really can."

Leibig, whose work has included representing defendants in capital murder cases, said a judge's knowledge of inadmissible evidence could subliminally alter his or her perception of the crime or the credibility of witnesses.

"A judge will try to do the best they can, but on a close case, whether they know it or not, their opinion will be swayed in the favor of the prosecution," Leibig said.

Prosecutors might not need much help with Buckner, who is accused of gunning down his estranged wife, Kewaii Rogers-Buckner, last year in Wilkes-Barre in front of her three children, ages 12, 11 and 9.

Prosecutors said they plan on calling at least one of the children to testify. They have already been given approval to present crime scene photographs and a recording of a harrowing call the 12-year-old child made to 911 in the moments after the shooting.

The protection from abuse petition included details of Buckner's alleged behavior in the weeks leading to Rogers-Buckner's death, including his invitations to her to play Russian roulette and promises to kill her.

Gartley ruled the document inadmissible based on a Sixth Amendment protection that allows a defendant to confront his or her accusers. In essence, Gartley said, the petition would have acted as a witness who could not be cross-examined by Buckner or his attorneys.

Gartley said prosecutors may be allowed to refer to the protection petition if they raise a suitable argument for its admission, such as a theory that the petition may have enraged Buckner or, if the death penalty were still in consideration, that his violation of the order merited execution.

Joel Jacobsen, an assistant attorney general in New Mexico, said judges are often better educated and emotionally equipped than a juror to mind such a gap between legally acceptable evidence and a jarring, but inadmissible document or bit of testimony, that may sear the memory.

"The rules of evidence exist to allow judges to exert control over jurors," Jacobsen said. "Because jurors are non-lawyers usually, they are presumed to be more emotional, less rational, and their access to information needs to be strictly controlled."

Christopher E. Smith, a criminal justice professor at Michigan State University, said a jury exposed to the same powerful, but inadmissible evidence, might be deemed tainted, forcing a mistrial.

Not so with a judge.

"Improper statements are often made in a courtroom and we presume judges can exclude them from consideration despite having heard them," Smith said.

Buckner's attorneys, William Ruzzo and Mark Singer, and the prosecutors, Jarrett Ferentino and Frank McCabe, are under an order from Gartley not to make statements to the media and were unable to comment for this story.

Neither side objected to Gartley's continued involvement in the case, but her knowledge of the protection from abuse petition could be raised on appeal if Buckner is convicted, Jacobsen said.

"Anything can be grounds for an appeal," Jacbobsen said.

The ethical issue alone might not be enough to sway an appellate court, a former Ohio Court of Common Pleas judge said, especially after Buckner signed a waiver last week acknowledging Gartley would preside over his case.

"In essence when he signs it, he is saying that he accepts the judge as the trier of fact," former Judge Stuart A. Saferin said. "That alone would probably protect the judge."

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