

IN RE DISQUALIFICATION OF FLEEGLE.

THE STATE OF OHIO v. KING.

**[Cite as *In re Disqualification of Fleegle*, 151 Ohio St.3d 1228,
2017-Ohio-8041.]**

Judges—Affidavits of disqualification—R.C. 2701.03—Motion for reconsideration—Unsworn statements in a motion for reconsideration cannot be considered as part of an affidavit for disqualification—Disqualification denied.

(No. 17-AP-067—Decided July 31, 2017.)

ON AFFIDAVIT OF DISQUALIFICATION in Muskingum County Court of Common
Pleas, General Division, Case No. CR2004-0327.

O’CONNOR, C.J.

{¶ 1} Defendant, Richard King, filed an affidavit of disqualification against Judge Mark Fleegle on July 10, 2017. Mr. King’s affidavit was denied in an entry dated July 12, 2017, because he failed to identify any matter currently pending before Judge Fleegle.

{¶ 2} Mr. King filed a motion for reconsideration on July 24, 2017. Mr. King states that since filing his affidavit of disqualification, he filed a motion to correct his sentence and that this motion was pending before Judge Fleegle at the time his affidavit was dismissed.

{¶ 3} The July 12 entry, however, was based on the sworn statements in Mr. King’s affidavit. Mr. King cannot raise new facts in an unsworn motion for reconsideration. *See, e.g., In re Disqualification of Fuerst*, 134 Ohio St.3d 1267, 2012-Ohio-6344, 984 N.E.2d 1079, ¶ 19 (allegations raised in an unsworn rebuttal letter cannot be considered as part of the affidavit of disqualification and are

therefore considered a “nullity”). Therefore, Mr. King has failed to establish that the prior decision was in error.

{¶ 4} Alternatively, even if a motion is pending before Judge Fleegle, Mr. King has waived the allegations of bias raised in his affidavit of disqualification. It is well established that an affidavit of disqualification must be filed “as soon as possible after the incident giving rise to the claim of bias and prejudice occurred,” and failure to do so may result in waiver of the objection, especially when “the facts underlying the objection have been known to the party for some time.” *In re Disqualification of O’Grady*, 77 Ohio St.3d 1240, 1241, 674 N.E.2d 353 (1996). The affiant has the burden to demonstrate that the affidavit is timely filed. *In re Disqualification of Capper*, 134 Ohio St.3d 1271, 2012-Ohio-6287, 984 N.E.2d 1082, ¶ 11. Here, most of the alleged conduct giving rise to Mr. King’s affidavit occurred during his 2005 trial and 2006 postconviction proceedings. Yet Mr. King has not explained why he is raising these claims now. Because nothing in the record justifies the delay in filing the affidavit of disqualification, Mr. King has waived the right to disqualify Judge Fleegle on these grounds.

{¶ 5} For these reasons, the motion for reconsideration is denied.
