

IN RE DISQUALIFICATION OF LEWIS.

THE STATE OF OHIO v. TUCKER.

**[Cite as *In re Disqualification of Lewis*, 159 Ohio St.3d 1224,
2020-Ohio-2867.]**

Judges—Affidavits of disqualification—R.C. 2701.03—Affiant waived claims by waiting until eight days before trial to file affidavit—Disqualification denied.

(No. 20-AP-022—Decided March 6, 2020.)

ON AFFIDAVIT OF DISQUALIFICATION in Meigs County Court of Common Pleas,
General and Domestic Relations Division, Case Nos. 18-CR-109 and 19-CR-001.

O’CONNOR, C.J.

{¶ 1} William L. Burton, counsel for the defendant, has filed an affidavit pursuant to R.C. 2701.03 seeking to disqualify Judge Linton D. Lewis Jr., a retired judge sitting by assignment, from the above-referenced cases, now pending for the bench-trial phase of the litigation.

{¶ 2} Mr. Burton alleges that Judge Lewis expressed a fixed anticipatory judgment by indicating his intent to consider evidence admitted during the jury-phase portion of the cases. Mr. Burton also alleges that Judge Lewis exhibited favoritism toward the prosecution in his application of the Rules of Criminal Procedure and by engaging in an ex parte communication with an assistant prosecutor. According to Mr. Burton, Judge Lewis’s actions demonstrate bias toward the defendant or at least give the appearance of bias.

{¶ 3} Judge Lewis filed a response to the affidavit and denies any bias or prejudice against the defendant. According to the judge, in December 2019, he denied the defendant’s motion in limine regarding the admission of prior testimony

from the jury phase, but the judge disputes that that ruling demonstrates bias. In addition, the judge refutes Mr. Burton’s allegations that he misapplied the Rules of Criminal Procedure and that he engaged in an improper ex parte communication. Judge Lewis also identifies the various continuances that he has already granted to the defense.

{¶ 4} For the reasons explained below, no basis has been established to order the disqualification of Judge Lewis.

{¶ 5} First, 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 record shows that Judge Lewis’s challenged actions—e.g., his alleged ex parte communication and the denial of the defendant’s motion in limine—occurred between October and early December 2019. Yet Mr. Burton waited until eight days before the rescheduled March 11, 2020 bench trial to file his affidavit. Because nothing in the record justifies the delay, Mr. Burton has waived the right to disqualify Judge Lewis based on these allegations. *See In re Disqualification of Corrigan*, 91 Ohio St.3d 1210, 741 N.E.2d 137 (2000) (affiant waived objections to judge’s participation when incidents giving rise to claim of bias occurred “several months prior to the filing of the affidavit” and affidavit was filed “less than three weeks before the scheduled trial”).

{¶ 6} Second, even if Mr. Burton had timely filed his affidavit, he has not set forth sufficient grounds for Judge Lewis’s removal. In disqualification requests, “[t]he term ‘bias or prejudice’ ‘implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law

and the facts.’ ” *In re Disqualification of O’Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 469, 132 N.E.2d 191 (1956). “The proper test for determining whether a judge’s participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge’s impartiality.” *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8.

{¶ 7} Mr. Burton has not established that Judge Lewis exhibited favoritism toward the prosecution or expressed a fixed anticipatory judgment on any remaining issue. Nor has Mr. Burton set forth a compelling argument for disqualifying Judge Lewis to avoid an appearance of partiality. An affidavit of disqualification “is not a vehicle to contest matters of substantive or procedural law.” *In re Disqualification of Solovan*, 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.2d 3, ¶ 4. Therefore, it is outside the scope of this matter to determine whether Judge Lewis erred in denying the defendant’s motion in limine or incorrectly applied the Rules of Criminal Procedure. In addition, Mr. Burton apparently claims that Judge Lewis engaged in ex parte conduct by ruling on one of the state’s motions before Mr. Burton had an opportunity to respond. Such conduct, however, does not constitute an improper ex parte communication.

{¶ 8} The affidavit of disqualification is denied. The bench trial may proceed before Judge Lewis. The state’s motion to expedite is denied as moot.