

IN RE DISQUALIFICATION OF CROCE.

THE STATE OF OHIO v. FORD.

**[Cite as *In re Disqualification of Croce*, 160 Ohio St.3d 1240,
2020-Ohio-4051.]**

Judges—Affidavits of disqualification—R.C. 2701.03—Clerk properly accepted affidavit for filing under R.C. 2701.03(B)—Affiants failed to demonstrate that judge had disregarded their and defendant’s welfare to extent requiring that she be disqualified from defendant’s ongoing trial—Disqualification denied.

(No. 20-AP-042—Decided June 11, 2020.)

ON AFFIDAVIT OF DISQUALIFICATION in Summit County Court of Common Pleas,
General Division, Case No. CR-2017-06-1953.

O’CONNOR, C.J.

{¶ 1} Joseph F. Gorman and Scott A. Riley, attorneys for the defendant, Stanley Ford, have filed an affidavit pursuant to R.C. 2701.03 seeking to disqualify Judge Christine Croce from the above-referenced death-penalty case.

Background

{¶ 2} According to the affiants, on February 18, 2020, Judge Croce commenced jury selection in the underlying matter, and on March 11, the prosecution began its presentation of the evidence. On March 17, Judge Croce suspended the trial due to the COVID-19 pandemic. On May 4, she ordered that the trial resume on June 9.

{¶ 3} On May 28, the administrative judge of the Summit County Court of Common Pleas, General Division, issued an updated emergency order that, among other things, suspended all trials through July 31, 2020, required individuals

entering the courthouse to wear masks while present in any courtroom and to comply with physical-distancing protocols, and prohibited more than ten individuals in any courtroom at one time. Many of the mandates and public-health protections identified in the May 28 emergency order were established in prior emergency orders issued on March 13 and April 29, which the administrative judge “incorporated” into her May 28 order.

{¶ 4} On June 5, Judge Croce issued orders denying Ford’s motion for a mistrial and his request for a continuance. In light of the ongoing pandemic, the judge also imposed various health and safety protocols for the resumption of the trial and identified measures—such as the installation of “[b]arriers/germ guards” throughout her courtroom—that she had already taken to protect the health of trial participants.

{¶ 5} On June 8, one day before the scheduled resumption of the trial, affiants filed this affidavit of disqualification. They allege that in Judge Croce’s recent orders, she refused to comply with the administrative judge’s May 28 emergency order—not only by ordering the trial to resume on June 9 but also by failing to implement all of the public-health protections identified in the May 28 order. Affiants further allege that Mr. Riley, the defendant, and some of the defendant’s witnesses have health conditions that may place them at a high risk for becoming very sick if diagnosed with COVID-19 and that even with the safety measures adopted by Judge Croce, the layout of her courtroom will not permit appropriate social distancing. According to affiants, “Judge Croce demonstrated a bias and disregard for the welfare of the individuals involved with the resumption of Mr. Ford’s trial.”

{¶ 6} Judge Croce filed a response to the affidavit and requests that it be dismissed. The judge denies any bias against the affiants or the defendant and believes that the affidavit was not timely filed. The judge also disputes affiants’ contention that she would be violating the May 28 emergency order by resuming

the underlying trial. The May 28 order, the judge asserts, expressly incorporated the administrative judge's April 29 emergency order, which excepted the underlying case from certain mandates, including the mandate suspending all trials.

The timing of the affidavit of disqualification

{¶ 7} R.C. 2701.03(B) requires that an affidavit of disqualification be filed “not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled.” This statutory deadline may be set aside only “when compliance with the provision is impossible,” such as when the alleged bias or prejudice occurs fewer than seven days before the hearing date. *In re Disqualification of Leskovyansky*, 88 Ohio St.3d 1210, 723 N.E.2d 1099 (1999). Here, affiants filed their affidavit one day before the scheduled resumption of the trial on June 9. Affiants aver, however, that their affidavit is premised “exclusively on the June 5, 2020 Orders.” In light of affiants’ averment, the clerk properly accepted the affidavit for filing despite the seven-day requirement in R.C. 2701.03(B). *See In re Disqualification of Squire*, 110 Ohio St.3d 1202, 2005-Ohio-7157, 850 N.E.2d 709, ¶ 3; *In re Disqualification of Adkins*, 155 Ohio St.3d 1308, 2018-Ohio-5438, 122 N.E.3d 193, ¶ 8.

The merits of the affidavit of disqualification

{¶ 8} It has long been established that “[w]hen an affidavit is filed after commencement of a trial and presentation of evidence, a judge should be disqualified only when the record ‘clearly and unquestionably demonstrates a “fixed anticipatory judgment” that undermines the absolute confidence of the public in the fairness and integrity of the proceedings.’ ” (Citation omitted.) *In re Disqualification of Fuhry*, 145 Ohio St.3d 1253, 2015-Ohio-5684, 49 N.E.3d 1305, ¶ 4, quoting *In re Disqualification of Kate*, 88 Ohio St.3d 1208, 1209, 723 N.E.2d 1098 (1999), quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 469, 132 N.E.2d 191 (1956). Considering that the trial in the underlying case has already

commenced, affiants have not met their heavy burden to establish that disqualification is warranted.

{¶ 9} Affiants essentially allege that Judge Croce is biased and has disregarded their and their client’s welfare by ordering the resumption of the trial under unsafe conditions and in violation of the administrative judge’s May 28 emergency order. The allegations are similar to those in *In re Disqualification of Carr*, 159 Ohio St.3d 1233, 2020-Ohio-2868, 150 N.E.3d 126, in which a public defender alleged that despite a municipal court’s administrative order rescheduling all nonjail criminal and traffic hearings due to the COVID-19 pandemic, one judge of that court continued presiding over hearings in those cases and even issued warrants authorizing the arrests of defendants who had failed to appear for their originally scheduled hearings. The affiant in *Carr* believed that the judge’s conduct not only violated the administrative order but also demonstrated bias and a disregard for the welfare of defendants and their attorneys. In granting the affidavit in part, the chief justice noted that the trial judge had “caused confusion and sent mixed messages to the public at a time when clarity and uniform application of the administrative order were necessary” and that if the judge had issued warrants for the arrests of defendants who had failed to appear, she “eroded the public confidence in the integrity of the judiciary and created at least the appearance of bias.” *Id.* at ¶ 5.¹

{¶ 10} The *Carr* decision was issued in March 2020 at the beginning of the pandemic. Although many details about the spread of the virus that causes COVID-19 remain unknown, since the *Carr* decision, courts, government officials, and other stakeholders have established principles to guide courts and protect the health

1. The judge in *Carr* was disqualified from continuing to preside over any hearings that were subject to the municipal court’s administrative order. However, the affiant’s request for a blanket order disqualifying the judge from all criminal and traffic cases was denied. *Id.* at ¶ 6-7.

of court employees, litigants, and the public.² Many of those precautions have been implemented by Judge Croce and in the administrative judge’s May 28 emergency order.

{¶ 11} In addition, the facts here differ from those in *Carr*. The judge in *Carr* had clearly contravened the purpose of the municipal court’s administrative order by continuing to preside over cases specifically rescheduled by that order and, even worse, appeared to have penalized some defendants who had failed to appear for their originally scheduled hearings. Here, the administrative judge initially excepted the underlying death-penalty case from some of the mandates imposed in the March 13 and April 29 emergency orders, including the mandate suspending all trials. For unknown reasons, the administrative judge did not include that exception in the May 28 emergency order—although, as Judge Croce notes, the May 28 order “incorporated” the prior orders. Thus, unlike *Carr*, the record here is not as clear regarding whether Judge Croce would violate the May 28 order merely by resuming trial on June 9. Further, the judge’s actions in *Carr* “created at least the appearance of bias.” 159 Ohio St.3d 1233, 2020-Ohio-2868, 150 N.E.3d 126, at ¶ 5. But Judge Croce has not engaged in any similar conduct. Reasonable people may disagree about when the underlying trial may safely resume and about the sufficiency of the health and safety protocols implemented by Judge Croce. However, it cannot be said that she has “disregarded” affiants’ and the defendant’s welfare to the extent that it is necessary to disqualify her from an ongoing trial.

{¶ 12} In the end, affiants may have other remedies if they believe that Judge Croce lacks authority to resume the underlying trial in any manner that contravenes the May 28 emergency order. However, that issue cannot be litigated in an affidavit-of-disqualification proceeding. *See In re Disqualification of*

2. *See, e.g.*, Supreme Court of Ohio, *Coronavirus Resources*, <https://supremecourt.ohio.gov/coronavirus/default.aspx> (accessed June 10, 2020) [<https://perma.cc/V69T-4VDY>].

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Solovan, 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.2d 3, ¶ 4 (an affidavit of disqualification “addresses the narrow issue of the possible bias or prejudice of a judge” and “is not a vehicle to contest matters of substantive or procedural law”). Affiants have failed to establish that Judge Croce’s disqualification for bias is warranted—especially at this stage of the litigation.

{¶ 13} The affidavit is denied. The case may proceed before Judge Croce.
