

IN RE DISQUALIFICATION OF D’APOLITO.

THE STATE OF OHIO v. DONLOW.

**[Cite as *In re Disqualification of D’Apolito*, 160 Ohio St.3d 1259,
2020-Ohio-4204.]**

*Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to
demonstrate bias or prejudice—Disqualification denied.*

(No. 20-AP-037—Decided June 22, 2020.)

ON AFFIDAVIT OF DISQUALIFICATION in Mahoning County Court of Common
Pleas, General Division, Case Nos. 2019 CR 00377A and 2019 CR 00019B.

O’CONNOR, C.J.

{¶ 1} Defendant Brian Donlow Jr. has filed an affidavit pursuant to R.C. 2701.03 seeking to disqualify Judge Anthony M. D’Apolito from the above-referenced cases.

{¶ 2} Mr. Donlow alleges that Judge D’Apolito acted in a biased manner toward him at his sentencing hearing in case No. 2019 CR 00377A. For example, Mr. Donlow avers that the judge described Mr. Donlow’s actions as “calculated,” even though the jury had found Mr. Donlow guilty of murder—not aggravated murder, of which “prior calculation and design” is an element. Based on the judge’s sentencing comments, Mr. Donlow believes that Judge D’Apolito has a “prejudicial state of mind” against him and that he will not receive a fair trial in case No. 2019 CR 00019B, in which Mr. Donlow is charged with offenses similar to those charged in the prior matter (No. 2019 CR 00377A).

{¶ 3} Judge D’Apolito filed a response to the affidavit addressing Mr. Donlow’s allegations. For example, the judge acknowledges that during sentencing, he described Mr. Donlow’s actions as “calculating.” The judge further

admits that when he made that comment, he had not considered how his choice of words might be perceived in future proceedings. Regardless, the judge affirms that he can be fair and impartial toward Mr. Donlow in the pending matter and that the prior case will have no impact on the judge going forward.

{¶ 4} “Because a sentencing judge must ordinarily explain the reasons for imposing a sentence, judicial comments during sentencing, even if disapproving, critical, or heavy-handed, do not typically give rise to a cognizable basis for disqualification.” *In re Disqualification of Winkler*, 135 Ohio St.3d 1271, 2013-Ohio-890, 986 N.E.2d 996, ¶ 9. Additionally, “[i]n general, what a judge learns in his official judicial capacity in another proceeding is not the kind of information that leads to disqualification.” *In re Disqualification of Blanchard*, 150 Ohio St.3d 1260, 2017-Ohio-5543, 80 N.E.3d 504, ¶ 4. Therefore, “[i]t is generally agreed that neither a judge’s participation in a prior case, nor the possibility that he may have thereby acquired factual information about a party, either automatically or inferentially establishes the existence of judicial bias.” Flamm, *Judicial Disqualification*, Section 12.5, at 313 (2d Ed.2007).

{¶ 5} Here, Judge D’Apolito’s isolated sentencing comment in the first case does not establish that he will be unable to fairly and impartially preside over Mr. Donlow’s second trial. *See, e.g., In re Disqualification of Zmuda*, 149 Ohio St.3d 1241, 2017-Ohio-317, 75 N.E.3d 1255, ¶ 8. And Mr. Donlow has otherwise failed to establish that Judge D’Apolito’s participation in the first trial requires his removal from the second case. For example, although Mr. Donlow avers that the judge has a “prejudicial state of mind,” Mr. Donlow has failed to demonstrate that Judge D’Apolito was exposed to such highly prejudicial information in the first trial that the likelihood of bias or an appearance of bias in Mr. Donlow’s second trial would be unacceptably high. “Just as ‘[a] judge is presumed to follow the law and not to be biased,’ *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5, a judge is presumed to be capable of separating

what may properly be considered from what may not be considered.” *In re Disqualification of Basinger*, 135 Ohio St.3d 1293, 2013-Ohio-1613, 987 N.E.2d 687, ¶ 5.

{¶ 6} The affidavit of disqualification is denied. The cases may proceed before Judge D’Apolito.
