

IN RE DISQUALIFICATION OF O’FARRELL.

THE STATE OF OHIO v. SMITH.

**[Cite as *In re Disqualification of O’Farrell*, 165 Ohio St.3d 1240,
2021-Ohio-3890.]**

*Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to present
sufficient evidence to overcome the presumption of impartiality or that
judge had formed a fixed anticipatory judgment—Disqualification denied.*

(No. 21-AP-105—Decided September 7, 2021.)

ON AFFIDAVIT OF DISQUALIFICATION in Noble County Court of Common Pleas
Case No. CR221-2003.

O’CONNOR, C.J.

{¶ 1} Defendant Edward T. Smith has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Edward E. O’Farrell, a retired judge sitting by assignment, from the above-referenced case, now pending for a jury trial.

{¶ 2} Mr. Smith alleges that Judge O’Farrell is biased against him for two reasons. First, Mr. Smith claims that at a May 2021 pretrial, his former counsel made damaging comments about him to the judge. Second, Mr. Smith alleges that Judge O’Farrell has predetermined his sentence, as evidenced by a letter the judge sent to counsel.

{¶ 3} Judge O’Farrell filed a response to the affidavit in which he detailed his handling of Mr. Smith’s case.

{¶ 4} 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, 132 N.E.2d 191 (1956), paragraph four of the syllabus. “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. In addition, a “presumption of impartiality” is accorded all judges in affidavit-of-disqualification proceedings. *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7.

{¶ 5} For the reasons explained below, there is no evidence that Judge O’Farrell has hostile feelings toward Mr. Smith or has formed a fixed anticipatory judgment on any issue in the underlying case. Nor has Mr. Smith set forth a compelling argument for disqualifying Judge O’Farrell to avoid an appearance of partiality.

Comments by Mr. Smith’s former counsel

{¶ 6} Mr. Smith has not demonstrated that Judge O’Farrell is biased against him based on allegedly “damaging” comments made by Mr. Smith’s former counsel at a May 2021 pretrial. Judge O’Farrell states that he has no personal knowledge of many of Mr. Smith’s allegations regarding the pretrial. Given the conflicting accounts in the record, Mr. Smith has failed to set forth sufficiently compelling evidence to overcome the presumption that Judge O’Farrell is fair and impartial. *See, e.g., In re Disqualification of Harwood*, 137 Ohio St.3d 1221, 2013-Ohio-5256, 999 N.E.2d 681, ¶ 6-7 (affiant failed to set forth compelling evidence to overcome presumption of impartiality when judge had denied affiant’s allegations and affiant had failed to sufficiently substantiate her allegations).

{¶ 7} Even assuming the truth of Mr. Smith’s allegations, “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. Absent a showing of substantial prejudice, judicial disqualification is not necessary merely because a judge hears inadmissible or potentially unflattering information about a defendant during the course of a proceeding. The alleged comments here were not so prejudicial that Judge O’Farrell would be unable to set them aside and impartially preside over Mr. Smith’s jury trial.

Judge O’Farrell’s letter

{¶ 8} Mr. Smith has also not established that Judge O’Farrell predetermined his sentence. Judge O’Farrell acknowledges that after a June 2021 pretrial, he sent the prosecutor and Mr. Smith’s current counsel a letter confirming the events of the pretrial. The letter indicated that after counsel discussed the allegations against Mr. Smith and his criminal record, the judge advised counsel of the sentence he was promising, which was presumably based on the information known to him at that time. Judge O’Farrell states that throughout his nearly 40 years of judicial service, his practice has been to evaluate the evidence orally presented by the prosecution and countered by the defense at a pretrial and to communicate with them what he believes would be a fair and appropriate sentence *if* the defendant is adjudicated guilty. The judge further states that Mr. Smith’s current counsel fully participated in the June 2021 pretrial and had no objections to the process.

{¶ 9} Mr. Smith now argues that Judge O’Farrell’s letter proves that he has already decided Mr. Smith’s sentence. But contrary to Mr. Smith’s contention, his sentence is not written in stone. The judge’s letter should be interpreted as identifying the sentence he would impose based on the information provided to him at the June 2021 pretrial. If sentencing is ultimately necessary in the underlying case, Judge O’Farrell must consider the evidence and arguments presented at trial

and during the sentencing hearing. Such information may affect the preliminary position expressed in the judge's letter. As previously explained,

A judge rarely hears preliminary aspects of a case without forming conditional opinions of the facts or law. These conditional opinions often assist the parties and their counsel in identifying and narrowing the issues in controversy and facilitate the settlement of cases prior to trial. However, the formation of these conditional opinions is not sufficient to counter the presumption of the judge's ability to render a fair decision based upon the evidence later presented at trial.

In re Disqualification of Brown, 74 Ohio St.3d 1250, 1251, 657 N.E.2d 1353 (1993). Judge O'Farrell's letter is not sufficient to counter the presumption that he will fairly and impartially sentence Mr. Smith based on the information presented at trial and sentencing. Moreover, according to Judge O'Farrell, Mr. Smith's current counsel fully participated in the pretrial process without objection. “ ‘A party who fails to object at trial, but then raises an issue in an affidavit of disqualification * * * bears a particularly heavy burden * * *.’ ” (Ellipses sic.) *In re Disqualification of Ruehlman*, 136 Ohio St.3d 1217, 2013-Ohio-2717, 991 N.E.2d 246, ¶ 5, quoting *In re Disqualification of Solovan*, 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.2d 3, ¶ 8. Mr. Smith has not met that burden here.

{¶ 10} The affidavit of disqualification is denied. Trial may proceed before Judge O'Farrell.