

IN RE DISQUALIFICATION OF SINGER.

THE STATE OF OHIO v. LEE.

**[Cite as *In re Disqualification of Singer*, 166 Ohio St.3d 1216,
2021-Ohio-3891.]**

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

(No. 21-AP-106—Decided August 18, 2021.)

ON AFFIDAVIT OF DISQUALIFICATION in Montgomery County Court of Common Pleas, General Division, Case No. 2017 CR 785.

O’CONNOR, C.J.

{¶ 1} Defendant Chuckie M. Lee has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Gregory F. Singer from the above-referenced case.

{¶ 2} In August 2018, Judge Singer determined that Mr. Lee had knowingly and voluntarily waived his right to counsel, and Mr. Lee thereafter represented himself at trial. A jury found him guilty of murder and other offenses. In August 2020, the Second District Court of Appeals reversed the trial court’s judgment, finding that Mr. Lee’s waiver of counsel was equivocal and unclear. *State v. Lee*, 2d Dist. Montgomery No. 28125, 2020-Ohio-3987. A new trial is now scheduled before Judge Singer.

{¶ 3} In his affidavit, Mr. Lee avers that Judge Singer is biased against him. Mr. Lee argues that he will not receive a fair retrial, primarily based on Judge Singer’s treatment of him prior to and during the first trial. According to Mr. Lee, Judge Singer forced him to try his case without proper preparation, disregarded his

rights, summarily dismissed his concerns about lacking discovery, and expressed frustration with him for deciding to represent himself. In addition, Mr. Lee alleges that during his first trial, Judge Singer made a racist comment.

{¶ 4} Judge Singer filed a response to the affidavit in which he denies any bias against Mr. Lee and affirms that if he remains on the case, he will afford Mr. Lee a fair retrial.

{¶ 5} For the reasons explained below, Mr. Lee has not established that Judge Singer’s disqualification is necessary.

Waiver

{¶ 6} “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. Mr. Lee claims that Judge Singer demonstrated bias against him at his August 2018 pretrial hearing and trial. After Mr. Lee’s successful appeal, Judge Singer appointed him new trial counsel in December 2020. Yet neither Mr. Lee nor his counsel filed an affidavit of disqualification until August 12, 2021—11 days before the scheduled retrial—even though the allegations were known to Mr. Lee at the time the case was remanded to the trial court. Because nothing in the record justifies the delay, Mr. Lee has waived the right to disqualify Judge Singer 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 when incidents giving rise to the claim of bias occurred “several months prior to the filing of the affidavit” and the affidavit was filed “less than three weeks before the scheduled trial”); *In re Disqualification of Dezso*, 134 Ohio St.3d 1223, 2011-Ohio-7081, 982 N.E.2d 714, ¶ 6 (“[affiant’s]

delay in filing the affidavit of disqualification constitutes an independent ground for denying his disqualification request”).

Merits of the affidavit of disqualification

{¶ 7} Even if Mr. Lee had not waived his objections to Judge Singer, Mr. Lee has failed to set forth an adequate ground for disqualification. 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. 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.

{¶ 8} Mr. Lee has not established that Judge Singer has hostile feelings toward him or that the judge has formed a fixed anticipatory judgment on any issue in the underlying case. Nor has Mr. Lee set forth a compelling argument for disqualifying Judge Singer to avoid an appearance of partiality. It is “well established that ‘a judge may preside over the retrial of a case even if that judge’s rulings of law were reversed on appeal.’ ” *In re Disqualification of Floyd*, 135 Ohio St.3d 1249, 2012-Ohio-6336, 986 N.E.2d 10, ¶ 10, quoting *In re Disqualification of Kimmel*, 36 Ohio St.3d 602, 522 N.E.2d 456 (1987). Therefore, the fact that the court of appeals reversed Mr. Lee’s convictions based on Judge

Singer’s error of permitting Mr. Lee to represent himself does not, by itself, require the appointment of a new judge.

{¶ 9} Nor has Mr. Lee established that Judge Singer’s 2018 comments and conduct show that he is unable to fairly and impartially preside over the retrial. “When necessary, an affiant should submit evidence beyond the affidavit to support the allegations contained therein.” *In re Disqualification of Trimmer*, 164 Ohio St.3d 1212, 2021-Ohio-2320, 172 N.E.3d 192, ¶ 5. Mr. Lee, however, failed to submit any portion of the 2018 transcripts to substantiate his claims. Instead, he appears to rely solely on the court of appeals’ decision. Although the court of appeals’ lead opinion was critical of the manner in which Judge Singer determined that Mr. Lee had waived his right to counsel, the opinion did not suggest that the judge’s actions were the product of bias or that the judge had become personally embroiled with Mr. Lee. Indeed, the lead opinion noted that “ ‘ “waiver of counsel is a stormy sea for a trial court to navigate.” ’ ” *Lee*, 2d Dist. Montgomery No. 28125, 2020-Ohio-3987, at ¶ 40, quoting *State v. West*, 2d Dist. Greene No. 2015-CA-72, 2017-Ohio-7521, ¶ 47, quoting *State v. Gatewood*, 2d Dist. Clark No. 2008 CA 64, 2009-Ohio-5610, ¶ 34. And the concurring judge noted the trial court’s “thorough and patient dialogues and explanations” about the consequences of Mr. Lee’s waiving his right to counsel. *Id.* at ¶ 67 (Froelich, J., concurring in judgment only). Although there may be circumstances in which a new judge should preside over a retrial after a remand from a court of appeals, Mr. Lee has not proved that any such disqualifying circumstances exist here. *See, e.g., In re Disqualification of Winkler*, 135 Ohio St.3d 1271, 2013-Ohio-890, 986 N.E.2d 996 (disqualifying a judge from resentencing a defendant because the judge made a series of disparaging remarks about the defendant at the initial sentencing that could have caused the objective observer to question whether the judge had developed hostile feelings toward the defendant).

{¶ 10} Finally, Mr. Lee has not established that during the first trial, Judge Singer made a racist remark demonstrating prejudice against Mr. Lee. Mr. Lee, who is Black, alleges that after he objected to the prosecutor’s use of a video, Judge Singer replied, “Well, it looks like it showed you getting the tar beat out of you.” The word “tar,” Mr. Lee states, has long been used to refer to a Black person’s skin. In response, Judge Singer claims that he was unaware that his comment had a racist origin.

{¶ 11} Because Mr. Lee failed to submit a transcript, the context in which Judge Singer made the comment is unclear. More importantly, Mr. Lee failed to cite any authority to support his argument. A review of dictionaries does not indicate that the phrase “to beat the tar out of” someone is commonly understood to have a racist meaning or implication. *See, e.g., 17 Oxford English Dictionary* 634 (2d Ed.1989) (defining “to beat (knock, etc.) the tar out of” as “to beat unmercifully, to reduce to a state of helplessness”); Ammer, *The American Heritage Dictionary of Idioms* 47 (1997) (defining to beat the “tar out of” the same as to “beat the living daylights out of” and as meaning to “[a]dminister a merciless beating to; also, defeat soundly”); Spears, *NTC’s American Idioms Dictionary* 38 (3d Ed.2000) (defining to “beat the tar out of” someone as “to beat or spank someone, probably a child”).

{¶ 12} Mr. Lee may be correct that the use of “tar” in other contexts has derogatory racial connotations. But without more, the record is insufficient to conclude that Judge Singer’s specific comment here had a racial subtext or demonstrates that the judge is prejudiced against Mr. Lee based on his race.

{¶ 13} The affidavit of disqualification is denied. The trial may proceed before Judge Singer.