

**IN RE DISQUALIFICATION OF POKORNY.**

**THE STATE OF OHIO v. NIXON.**

**[Cite as *In re Disqualification of Pokorny*, 166 Ohio St.3d 1227,  
2021-Ohio-4488.]**

*Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to meet  
statutory filing deadline—Affidavit dismissed.*

(No. 21-AP-138—Decided October 8, 2021.)

ON AFFIDAVIT OF DISQUALIFICATION in Portage County Court of Common Pleas,  
General Division, Case No. 2021 CR 00626.

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**O’CONNOR, C.J.**

{¶ 1} Defendant David A. Nixon has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Thomas J. Pokorny, a retired judge sitting by assignment, from the above-referenced case.

{¶ 2} Mr. Nixon alleges that Judge Pokorny has committed fraud upon the court and has violated the Code of Judicial Conduct.

{¶ 3} Mr. Nixon, however, filed his affidavit on October 7, 2021—five days before his scheduled sentencing hearing. Under R.C. 2701.03(B), an affidavit of disqualification must 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 or the case is scheduled or assigned to a judge within seven days of the next hearing. *In re Disqualification of Leskovyansky*, 88 Ohio St.3d 1210, 723 N.E.2d 1099 (1999). The affiant bears the burden of showing that he or she has complied

SUPREME COURT OF OHIO

with the statutory filing deadline. *In re Disqualification of Eyster*, 105 Ohio St.3d 1246, 2004-Ohio-7350, 826 N.E.2d 304, ¶ 3.

{¶ 4} Mr. Nixon claims that he made every effort to timely file his affidavit but that the post office failed to deliver the affidavit when it promised to do so. On this record, Mr. Nixon has not set forth a sufficient basis for excusing his failure to comply with the seven-day requirement in R.C. 2701.03(B). *See, e.g., In re Disqualification of Synenberg*, 138 Ohio St.3d 1214, 2013-Ohio-5916, 3 N.E.3d 1199, ¶ 3-5 (car problems en route to filing an affidavit of disqualification did not excuse failure to meet the seven-day requirement). According to the allegations in the affidavit, the alleged bias occurred between August 26 and September 14, which gave Mr. Nixon a sufficient amount of time to file his affidavit within the statutory period.

{¶ 5} The affidavit of disqualification is dismissed. The case may proceed before Judge Pokorny.

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