

**IN RE DISQUALIFICATION OF O’GRADY.**

**THE STATE OF OHIO v. KANODE.**

**[Cite as *In re Disqualification of O’Grady*, 170 Ohio St.3d 1201,  
2022-Ohio-2854.]**

*Judges—Affidavits of disqualification—R.C. 2701.03 and 2701.031—Affiant waived objections based on judge’s disclosures during first pretrial conference—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety—Disqualification denied.*

(No. 22-AP-068—Decided July 7, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Franklin County Municipal Court Case  
No. 2021 CRB 007956.

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**O’CONNOR, C.J.**

{¶ 1} Kathleen Garber, special prosecutor for the state of Ohio, has filed an affidavit pursuant to R.C. 2701.03 and 2701.031 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge James P. O’Grady from the above-referenced case.

**Background**

{¶ 2} The defendant, an officer of the Columbus Division of Police (“CDP”), is charged with falsification and dereliction of duty based on her alleged conduct during protests following the death of George Floyd. Ms. Garber claims that during the parties’ first pretrial conference with Judge O’Grady in late 2021, he disclosed that he supported the Fraternal Order of Police (“FOP”), that he would be attending an FOP raffle the weekend after the pretrial, and that one of his relatives had retired from the CDP. Because of those disclosures and some of the judge’s other comments during the pretrial, Ms. Garber asked Judge O’Grady to

consider recusing himself. Ms. Garber alleges that in response, defense counsel said that the case would be tried to a jury and Judge O’Grady affirmed that he could be fair and impartial. Based on Judge O’Grady’s assurances, Ms. Garber chose not to pursue the judge’s recusal.

{¶ 3} A few days before the scheduled May 2022 trial, Ms. Garber learned that the defendant had waived her right to a jury. According to Ms. Garber, she again asked Judge O’Grady to consider recusing himself, although he declined to do so. The trial commenced on May 10. After two days of testimony, Ms. Garber had an unexpected health emergency and Judge O’Grady continued the trial. On May 23, Judge O’Grady ordered that trial would resume on May 31, despite Ms. Garber’s informing the judge that her doctors had not yet cleared her to resume trial, she was mourning the death of her father and planning for his funeral, and one of the state’s witnesses would be unavailable on May 31.

{¶ 4} Ms. Garber filed this affidavit of disqualification one week before the trial was set to resume. She alleged that Judge O’Grady is biased in favor of the CDP and the FOP and that at the very least, an appearance of partiality would exist if the judge continued to preside over the case. To support her allegations, Ms. Garber primarily pointed to Judge O’Grady’s comments during the first pretrial, his evidentiary rulings and conduct during the first two days of trial, and his decision to resume trial on May 31 despite Ms. Garber’s objections to that date.

{¶ 5} Judge O’Grady submitted a response to the affidavit denying any bias. The judge said that he never made any comments regarding support for the FOP and that he merely advised the parties that he had a family member who had retired from the CDP and that he would be attending an FOP charity event. Judge O’Grady also noted that his evidentiary rulings during trial were based on the law—not on any bias in favor of or against a party.

{¶ 6} On June 10, Ms. Garber and Judge O’Grady were instructed to supplement the record. Ms. Garber submitted portions of the trial transcript that

she claims support her bias allegations. Judge O’Grady supplemented his response by explaining his decision to resume trial on May 31.

### **Timing of the affidavit of disqualification**

{¶ 7} “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. Ms. Garber has not adequately explained why she waited six months to seek Judge O’Grady’s disqualification based on his purported connections to the CDP and/or the FOP, which the judge first disclosed in 2021. If Ms. Garber believed that the information Judge O’Grady disclosed during the first pretrial warranted his removal, she should have filed her affidavit of disqualification sooner. Ms. Garber has waived her objections to Judge O’Grady based on his disclosures during the first pretrial. *See, e.g., In re Disqualification of Corrigan*, 91 Ohio St.3d 1210, 741 N.E.2d 137 (2000) (affiant waived objections to judge’s participation when incidents giving rise to the claim of bias had occurred several months prior to the filing of the affidavit and the affidavit had been filed less than three weeks before the scheduled trial).

### **The merits of the affidavit of disqualification**

{¶ 8} Even if Ms. Garber had not waived some of her objections to Judge O’Grady, she has not demonstrated that his removal—especially at this stage of the litigation—is warranted. “When 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, Ms. Garber has not met her “heavy burden” to succeed on her disqualification request, *In re Disqualification of Croce*, 160 Ohio St.3d 1240, 2020-Ohio-4051, 155 N.E.3d 960, ¶ 8.

{¶ 9} The fact that Judge O’Grady has a relative who is a retired police officer or that the judge attended an FOP charity event six months before trial does not mean that he cannot fairly or impartially preside over a case alleging police misconduct. “A judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions.” *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5. Without more, Judge O’Grady’s attenuated connections to the CDP and/or the FOP are insufficient to overcome the presumption that he will be fair and impartial. *See also In re Disqualification of Fuerst*, 77 Ohio St.3d 1253, 674 N.E.2d 361 (1996) (absent a specific demonstration of bias, a judge’s membership in a church in the local Catholic diocese did not warrant his disqualification from a case involving sex-abuse claims against a Catholic priest and the diocese).

{¶ 10} Further, Ms. Garber’s disagreement with Judge O’Grady’s trial decisions is not evidence of bias. It is well settled that “[d]issatisfaction or disagreement with a judge’s rulings of law are legal issues subject to appeal,” and “[a] trial judge’s opinions of law, even if erroneous, are not by themselves evidence of bias or prejudice and thus are not grounds for disqualification.” *In re Disqualification of Murphy*, 36 Ohio St.3d 605, 606, 522 N.E.2d 459 (1988). This is not the proper forum in which to determine what evidence is relevant in the trial court or to review a judge’s evidentiary rulings. “[A]ffidavits of disqualification

cannot be used to remove a judge from a case simply because a party is particularly unhappy about a court ruling or a series of rulings.” *In re Disqualification of D’Apolito*, 139 Ohio St.3d 1230, 2014-Ohio-2153, 11 N.E.3d 279, ¶ 5.

{¶ 11} Although a judge’s adverse rulings could be evidence of bias if they were “accompanied by words or conduct that call into question the manner in which the proceedings are being conducted,” *In re Disqualification of Knece*, 138 Ohio St.3d 1274, 2014-Ohio-1414, 7 N.E.3d 1213, ¶ 10, Ms. Garber has not sufficiently demonstrated that Judge O’Grady’s adverse rulings were accompanied by questionable trial conduct. Ms. Garber has primarily alleged that the judge (1) permitted defense counsel to scream at and belittle her without admonishment and (2) ordered the trial to resume on May 31 despite her reasonable objections to that date.

{¶ 12} Judges must require order and decorum in their courtrooms and cannot lose control of a case by permitting lawyers to engage in unprofessional conduct without warning or sanctioning them. *See* Jud.Cond.R. 2.8(A). A review of the underlying trial transcript, however, does not support Ms. Garber’s claim that defense counsel’s conduct was so egregiously unprofessional that Judge O’Grady should be removed for not reining him in. Additionally, in Judge O’Grady’s supplemental response, he sufficiently explained why he believed that resuming trial on May 31 was fair to all parties and counsel. For example, the judge noted that by May 23, Ms. Garber had been appointed cocounsel and that the judge had advised Ms. Garber that her unavailable witness could testify on a later date. In general, “it is not the chief justice’s role in deciding an affidavit of disqualification to second-guess how a trial judge manages her docket.” *In re Disqualification of Dezso*, 134 Ohio St.3d 1223, 2011-Ohio-7081, 982 N.E.2d 714, ¶ 12. Neither Judge O’Grady’s failure to admonish defense counsel nor his decision to resume trial on May 31 support a conclusion that he must be disqualified during trial.

SUPREME COURT OF OHIO

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

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