

**IN RE DISQUALIFICATION OF GAUL.**

**THE STATE OF OHIO v. TOWNSEND.**

[Cite as *In re Disqualification of Gaul*, 169 Ohio St.3d 1231, 2022-Ohio-4127.]

*Judges—Affidavits of disqualification—R.C. 2701.03— Affiant waived objections based on events that allegedly occurred during 2018 trial—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety— Disqualification denied.*

(No. 22-AP-099—Decided September 21, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Cuyahoga County Court of Common  
Pleas, General Division, Case No. CR-17-614508-A.

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**O’CONNOR, C.J.**

{¶ 1} Defendant Albert Townsend Sr. has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Daniel Gaul from the above-referenced case, now pending on Mr. Townsend’s postconviction motions and petitions and on remand instructions from the Eighth District Court of Appeals in *State v. Townsend*, 8th Dist. Cuyahoga No. 110525, 2022-Ohio-692.

{¶ 2} Mr. Townsend avers that Judge Gaul is interested in the underlying case and that his impartiality might be reasonably questioned. Judge Gaul filed a response to the affidavit and requests that it be denied. The judge says that he has no bias against Mr. Townsend and that the court of appeals has already ruled on most of the issues Mr. Townsend raises in his affidavit of disqualification.

{¶ 3} For the reasons explained below, no basis has been established to order the disqualification of Judge Gaul.

{¶ 4} First, Mr. Townsend has waived his objections to Judge Gaul based on the judge’s rulings or comments during Mr. Townsend’s 2018 trial. 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. Many of the allegations in Mr. Townsend’s affidavit relate to errors or statements allegedly made by Judge Gaul during Mr. Townsend’s 2018 trial. Yet Mr. Townsend has not adequately explained why he waited until August 2022 to file an affidavit of disqualification against Judge Gaul. It appears that Mr. Townsend has filed other postconviction motions or petitions since his 2018 trial and therefore could have sought the judge’s disqualification when those filings were pending. Because nothing in the record justifies the delay, Mr. Townsend has waived the right to disqualify Judge Gaul based on allegations relating to Mr. Townsend’s 2018 trial. *See In re Disqualification of Dezso*, 134 Ohio St.3d 1223, 2011-Ohio-7081, 982 N.E.2d 714, ¶ 6 (affiant’s delay in filing affidavit of disqualification “constitutes an independent ground for denying his disqualification request”).

{¶ 5} Second, even if Mr. Townsend had not waived some of his objections to Judge Gaul, most of Mr. Townsend’s allegations relating to his 2018 trial would not be grounds for disqualification. “The 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.

{¶ 6} Mr. Townsend alleges, among other things, that his 2018 convictions lacked sufficient evidence and that Judge Gaul ignored prosecutorial misconduct during the trial, improperly allowed defense counsel to withdraw, and unfairly enhanced Mr. Townsend’s sentence. But it is well-settled that “affidavits 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. Mr. Townsend may have had other remedies, including appeal, for those alleged legal errors. But “reviewing legal errors is not the role of the chief justice in deciding affidavits of disqualification.” *Id.* Mr. Townsend has not shown that Judge Gaul 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. Townsend set forth a compelling argument for disqualifying Judge Gaul to avoid an appearance of partiality.

{¶ 7} Third, Mr. Townsend asserts that he filed a disciplinary grievance against Judge Gaul and that a judicial-misconduct complaint currently pending against Judge Gaul includes or should include Mr. Townsend’s allegations against the judge. In general, “a judge is not automatically disqualified solely because a party in a case pending before him or her has filed a complaint against the judge with Disciplinary Counsel or a similar body.” *In re Disqualification of Kilpatrick*, 47 Ohio St.3d 605, 606, 546 N.E.2d 929 (1989). However, “a unique combination of factors arising from a pending disciplinary matter can be sufficient to create an

appearance of impropriety that mandates a judge’s disqualification.” *In re Disqualification of O’Neill*, 100 Ohio St.3d 1226, 2002-Ohio-7476, 798 N.E.2d 12, ¶ 5 (judge disqualified to avoid the appearance of impropriety when the attorney-affiant had been named as a witness in a disciplinary complaint against the judge and would likely be subject to vigorous cross-examination by the judge’s counsel); *see also In re Disqualification of Maschari*, 88 Ohio St.3d 1212, 723 N.E.2d 1101 (1999) (judge disqualified to avoid an appearance of impropriety when the attorney-affiant was the judge’s former election opponent and had alleged that he was to be called as a witness in disciplinary proceedings against the judge); *In re Disqualification of Squire*, 105 Ohio St.3d 1221, 2004-Ohio-7358, 826 N.E.2d 285 (judge disqualified from an attorney’s case because the attorney had filed two grievances against the judge and the judge’s relationship with the attorney had become an impediment that might prevent the judge from approaching the case with the requisite objectivity).

{¶ 8} Based on the material that Mr. Townsend submitted with his affidavit, it does not appear that his grievance against Judge Gaul is related to any disciplinary complaint pending against the judge. As noted in Mr. Townsend’s affidavit, it appears that disciplinary counsel has filed a complaint against Judge Gaul in the Board of Professional Conduct.<sup>1</sup> But Mr. Townsend has not shown that he is a witness in any such proceeding or that the proceeding is related to his grievance against Judge Gaul. Indeed, Mr. Townsend submitted a copy of a 2017 letter from disciplinary counsel dismissing his grievance against the judge. Accordingly, there is no evidence indicating that the pending disciplinary complaint has affected or would affect Judge Gaul’s conduct in the underlying case.

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1. The complaint is a matter of public record. *See* Board of Professional Conduct case No. 2021-039. In deciding this affidavit of disqualification, the chief justice has no knowledge of the complaint beyond what is provided in the record of this disqualification matter.

{¶ 9} Finally, Mr. Townsend avers that if he is granted an evidentiary hearing, Judge Gaul may be subpoenaed as a witness. The chief justice, however, has long “declined to establish a rule ‘requiring disqualification of a judge based solely on suppositions that the judge may be called as a witness or allegations that the judge possesses evidence material to the case.’ ” *In re Disqualification of Stuard*, 113 Ohio St.3d 1236, 2006-Ohio-7233, 863 N.E.2d 636, ¶ 6, quoting *In re Disqualification of Gorman*, 74 Ohio St.3d 1251, 657 N.E.2d 1354 (1993). Here, there is no indication that Mr. Townsend is entitled to an evidentiary hearing, and regardless, he has failed to allege—let alone demonstrate—that Judge Gaul possesses evidence that is necessary for resolution of any of Mr. Townsend’s pending motions or is unobtainable from other witnesses. *See In re Disqualification of Matia*, 135 Ohio St.3d 1246, 2012-Ohio-6343, 986 N.E.2d 8, ¶ 11.

{¶ 10} The affidavit of disqualification is denied. The case may proceed before Judge Gaul.

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