

IN RE DISQUALIFICATION OF FLEEGLE.

THE STATE OF OHIO v. ALEXANDER.

**[Cite as *In re Disqualification of Fleegle*, 169 Ohio St.3d 1217,
2022-Ohio-4433.]**

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

(No. 22-AP-108—Decided September 30, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Muskingum County Court of Common Pleas, General Division, Case No. CR2015-0270.

O’CONNOR, C.J.

{¶ 1} Defendant Justin Alexander has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Mark C. Fleegle from the above-referenced case.

{¶ 2} Mr. Alexander avers that in October 2021, he filed a motion that identified alleged irregularities in his original sentence and requested a new sentencing hearing. According to Mr. Alexander, during an April 2022 hearing, Judge Fleegle retaliated against him for filing the motion by threatening to increase Mr. Alexander’s sentence. He further alleges that Judge Fleegle later had an ex parte communication with an assistant prosecutor during which the judge said that he intended to significantly increase Mr. Alexander’s sentence based on his prison behavior. Given the judge’s conduct during the April 2022 hearing and the ex parte communication, Mr. Alexander asserts, “it would be a complete travesty of justice for [Judge Fleegle] to be further involved in [the underlying] proceedings.”

{¶ 3} Judge Fleegle submitted a response to the affidavit, which includes a transcript of the April 2022 hearing and an affidavit from Mr. Alexander’s former counsel. Judge Fleegle’s response explains the basis for his comments at the hearing. The judge also submitted a letter from the assistant prosecutor assigned to the underlying case. The letter, the judge says, shows that there was no improper ex parte communication between them.

{¶ 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} Mr. Alexander has not established that Judge Fleegle has hostile feelings toward him. Nor has Mr. Alexander set forth a compelling argument for disqualifying Judge Fleegle to avoid an appearance of partiality. The transcript of the April 2022 hearing does not suggest that Judge Fleegle retaliated against Mr. Alexander for filing his motion. Rather, it appears that Judge Fleegle merely attempted to convey the consequences of Mr. Alexander’s going forward with his request for a new sentencing hearing.

{¶ 6} Further, “[a]n alleged ex parte communication constitutes grounds for disqualification when there is ‘proof that the communication * * * addressed substantive matters in the pending case.’ ” (Ellipsis sic.) *In re Disqualification of Forsthoefel*, 135 Ohio St.3d 1316, 2013-Ohio-2292, 989 N.E.2d 62, ¶ 7, quoting *In re Disqualification of Calabrese*, 100 Ohio St.3d 1224, 2002-Ohio-7475, 798 N.E.2d 10, ¶ 2. “The allegations must be substantiated and consist of something more than hearsay or speculation.” *Id.* Mr. Alexander’s allegation that Judge Fleegle and the assistant prosecutor engaged in an ex parte communication is based on hearsay, and the allegation is contradicted by the documents submitted by Judge Fleegle. On this record, disqualification is not warranted. *See, e.g., In re Disqualification of Cacioppo*, 77 Ohio St.3d 1245, 674 N.E.2d 356 (1996) (“The hearsay allegations of the affiant will not stand in the face of an affirmative denial by the trial judge of substantive *ex parte* contacts”).

{¶ 7} The affidavit of disqualification is denied. The case may proceed before Judge Fleegle.
