

IN RE DISQUALIFICATION OF ALLEN.

THE STATE OF OHIO v. McCARY

THE STATE OF OHIO v. ORR

AND

THE STATE OF OHIO v. KEYS.

[Cite as *In re Disqualification of Allen*, 170 Ohio St.3d 1232, 2022-Ohio-4715.]

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

(No. 22-AP-148—Decided December 14, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Hamilton County Court of Common Pleas, General Division, Case Nos. B22-3684, B22-0675, B20-1897, and B22-0711.

O’CONNOR, C.J.

{¶ 1} Ravert J. Clark, counsel for the defendants in the above-referenced criminal cases, has filed an affidavit and a supplemental affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Lisa C. Allen from the cases and any other matter in which Mr. Clark appears as counsel.

{¶ 2} Mr. Clark avers that Judge Allen is biased in favor of the prosecution, or that an appearance of bias exists, based on the judge’s “liking” of a “tweet” by the Hamilton County Prosecuting Attorney’s Office. According to Mr. Clark, the prosecutor’s office posted a video to its Twitter account about an unrelated criminal case pending before a different judge in which Mr. Clark serves as counsel. Mr. Clark describes the prosecutor’s video as “one-sided propaganda” and submits that

the video disparages him and his defense theory in the unrelated case. Judge Allen’s “liking” and endorsing of the video, Mr. Clark argues, suggests that she has a pro-prosecution bias, created an appearance of bias in any case in which he appears as counsel, and violated several rules of the Code of Judicial Conduct.

{¶ 3} Judge Allen submitted a response to the affidavit and requests that it be denied. According to Judge Allen, she does not recall “liking” the prosecutor’s tweet, she must have inadvertently “liked” it, and she has never watched the video. The judge notes that regardless, the case referenced in the tweet and the video have no relation to the underlying matters, and she affirms that she can fairly and impartially preside over the cases.

{¶ 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. Mr. Clark has not established that Judge Allen has hostile feelings toward him, that the judge favors the prosecution in the underlying cases, or that the judge has formed a fixed anticipatory judgment on any

issue in the matters. Nor has Mr. Clark set forth a compelling argument for disqualifying Judge Allen to avoid an appearance of partiality.

{¶ 5} “[J]udges must apply extra caution when using social media because their online activity may be easily misconstrued or create an appearance of partiality requiring disqualification.” *In re Disqualification of Kerenyi*, 160 Ohio St.3d 1201, 2020-Ohio-1082, 153 N.E.3d 121, fn. 1. But in determining whether an appearance of bias exists, “[t]he reasonable observer is presumed to be fully informed of all the relevant facts in the record—not isolated facts divorced from their larger context.” *In re Disqualification of Gall*, 135 Ohio St.3d 1283, 2013-Ohio-1319, 986 N.E.2d 1005, ¶ 6. Here, Judge Allen says that she does not recall “liking” the tweet, that she must have inadvertently done so, and that she did not watch the video. Although the prosecutor’s video was critical of the defense’s theory in the unrelated case, it does not appear that the video mentioned Mr. Clark by name. Therefore, even if Judge Allen had watched the video, it is unclear how Judge Allen’s “liking” of the post shows any personal bias against Mr. Clark warranting her removal from all of his cases. Based on this record—and considering the presumption of impartiality accorded to judges—a well-informed, objective observer would not reasonably question Judge Allen’s impartiality merely because she inadvertently “liked” a video about a case pending before a different judge that has no connection to the facts in the underlying cases.

{¶ 6} Further, whether Judge Allen’s “liking” the social-media post violated any ethical rule in the Code of Judicial Conduct is outside the scope of this matter. The issue here is narrow and limited to determining whether a judge in a pending case has a bias, prejudice, or other disqualifying interest that requires the judge’s disqualification from that case. *See In re Disqualification of Capper*, 134 Ohio St.3d 1271, 2012-Ohio-6287, 984 N.E.2d 1082, ¶ 19 (“affidavit-of-disqualification proceedings are not the appropriate mechanism for determining whether a judge has followed the Code of Judicial Conduct”).

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{¶ 7} The affidavits of disqualification are denied. The cases may proceed before Judge Allen.
