

IN RE DISQUALIFICATION OF BICKERTON.

THE STATE OF OHIO v. O'DAY.

**[Cite as *In re Disqualification of Bickerton*, 170 Ohio St.3d 1286,
2023-Ohio-1104.]**

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

(No. 23-AP-009—Decided February 22, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Columbiana County Court of Common
Pleas, General and Domestic Relations Division, Case No. 2021 CR 0069.

KENNEDY, C.J.

{¶ 1} Dennis W. McNamara, counsel for the defendant, Thomas E. O'Day, has filed an affidavit of disqualification and a supplemental affidavit of disqualification pursuant to R.C. 2701.03 seeking to disqualify Judge Megan L. Bickerton of the Columbiana County Court of Common Pleas, General Division, from presiding over O'Day's criminal case. As explained below, McNamara has failed to establish that Judge Bickerton is biased or prejudiced against him or that she cannot be impartial and open-minded in the O'Day case. Therefore, McNamara's affidavits are denied.

Allegations and Response

{¶ 2} McNamara asserts that O'Day retained him and his cocounsel on or about October 10, 2022. He argues that Judge Bickerton should be disqualified because she is biased and prejudiced against him and any reasonable and objective observer would have doubts about her ability to remain impartial in the O'Day case based on her conduct during a January 20, 2023 final status conference.

{¶ 3} McNamara’s affidavits can be interpreted as alleging that Judge Bickerton has “a bias or prejudice” under R.C. 2701.03(A) for three reasons: (1) she yelled at him during the January 20 final status conference and thereby demonstrated hostility and ill will toward him, (2) she denied a defense motion to suppress without giving him an opportunity to present any evidence and later issued an entry incorrectly indicating that she had held a “motion hearing,” and (3) she made comments during the conference demonstrating that she had formed a fixed anticipatory judgment on the facts, O’Day’s evidence, and his guilt.

{¶ 4} Judge Bickerton filed a response to the affidavits and denies any bias or prejudice against McNamara. She claims that during the conference, she addressed McNamara’s delay in filing the motion to suppress and that he has mischaracterized their exchange and taken her comments out of context. The judge further asserts that McNamara merely disagrees with her ruling from the bench on the motion. According to Judge Bickerton, McNamara has failed to substantiate his claims of bias or prejudice.

Disqualification of a Common-Pleas-Court Judge

{¶ 5} R.C. 2701.03(A) provides that if a judge of a court of common pleas “allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party’s counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court,” then that party or counsel may file an affidavit of disqualification with the clerk of this court. Granting or denying the affidavit of disqualification turns on whether the chief justice determines that the allegations of interest, bias, prejudice, or disqualification alleged in the affidavit exist. R.C. 2701.03(E). The allegations must be “specific,” and the affiant must support them with relevant facts. R.C. 2701.03(B)(1).

{¶ 6} “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.

{¶ 7} A judge is accorded a “presumption of impartiality” in an affidavit-of-disqualification proceeding. *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7. “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.

{¶ 8} The Code of Judicial Conduct requires judges to be “patient, dignified, and courteous” when speaking with lawyers and others in an official capacity, Jud.Cond.R. 2.8(B), and to refrain from words or conduct that might manifest bias or prejudice, Jud.Cond.R. 2.3(B). “Judges are entitled to express dissatisfaction with a [lawyer’s] perceived dilatory tactics, although that dissatisfaction ‘can and should be expressed in a way that promotes public confidence in the integrity, dignity, and impartiality of the judiciary.’ ” *In re Disqualification of Russo*, 163 Ohio St.3d 1252, 2021-Ohio-1246, 169 N.E.3d 692, ¶ 7, quoting *In re Disqualification of Corrigan*, 105 Ohio St.3d 1243, 2004-Ohio-7354, 826 N.E.2d 302, ¶ 10.

{¶ 9} “Adverse rulings, without more, are not evidence that a judge is biased or prejudiced.” *In re Disqualification of Russo*, 110 Ohio St.3d 1208, 2005-Ohio-7146, 850 N.E.2d 713, ¶ 5. Therefore, “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.

Analysis

Allegation One

{¶ 10} McNamara’s first allegation is that Judge Bickerton unexpectedly started yelling at him at the beginning of the final status conference. He claims that in his 47 years of trying cases, he had never experienced “such a tirade from the bench.” To support this claim, McNamara submitted a transcript of the conference, which he claims reflects the judge’s criticism and sarcastic remarks but not “her anger and her volume.” Judge Bickerton’s conduct, McNamara avers, demonstrated hostility and ill will toward him and is evidence of bias.

{¶ 11} In response, Judge Bickerton claims that McNamara has mischaracterized and exaggerated their exchange during the conference. The judge says that she addressed McNamara’s delay in filing the motion to suppress and that although her tone was firm, it did not undermine the decorum of the court. Judge Bickerton denies harboring any hostility toward McNamara and does not believe that she expressed any hostility during the conference. To support her position, the judge submitted an audio recording of a portion of the conference.

{¶ 12} As noted above, judges must be “patient, dignified, and courteous” when speaking with lawyers in an official capacity, Jud.Cond.R. 2.8(B), and must refrain from words or conduct that might manifest bias or prejudice, Jud.Cond.R. 2.3(B). “Judges are entitled to express dissatisfaction with a [lawyer’s] perceived dilatory tactics, although that dissatisfaction ‘can and should be expressed in a way that promotes public confidence in the integrity, dignity, and impartiality of the judiciary.’” *Russo*, 163 Ohio St.3d 1252, 2021-Ohio-1246, 169 N.E.3d 692, at ¶ 7, quoting *Corrigan*, 105 Ohio St.3d 1243, 2004-Ohio-7354, 826 N.E.2d 302, at ¶ 10.

{¶ 13} Upon review, neither the transcript nor the audio recording of the conference support McNamara's allegation that Judge Bickerton yelled at him, engaged in a tirade, or otherwise acted with hostility toward him.

{¶ 14} The record shows that on October 14, 2022, Judge Bickerton held a status conference during which the judge and counsel selected January 20, 2023, as the date for the final status conference and January 31, 2023, as the trial date. Judge Bickerton asked defense counsel whether there were any issues with discovery, and McNamara replied that he had received discovery, that he was reviewing it, and that he did not think there would be any problems. Judge Bickerton advised McNamara and his cocounsel that she wanted to address any discovery issues before January and that defense counsel should file any motions "as soon as [they] bec[a]me aware of it" so that the issues could be resolved before the final status conference.

{¶ 15} Over two months later, on December 30, 2022, McNamara filed a motion to suppress evidence that the state had provided in discovery. During the January 20, 2023 final status conference, Judge Bickerton addressed the defense's extended delay in filing the motion to suppress. In response, McNamara essentially stated that he and his cocounsel had discovered the issue raised in the motion while preparing for trial.

{¶ 16} The audio recording and transcript indicate that Judge Bickerton was frustrated because McNamara had not complied with her prior instruction to file any discovery motions as soon as possible. She was critical of his conduct, and her tone was firm. But she was not hostile or angry, nor did she yell at him. "In general, a judge will not be disqualified merely for voicing disapproval of an attorney's actions or for interrogating the attorney in what the attorney considers a confrontational tone." *In re Disqualification of Stormer*, 166 Ohio St.3d 1203, 2021-Ohio-4671, 182 N.E.3d 1208, ¶ 5.

{¶ 17} The comments challenged by McNamara in his affidavits do not reflect bias or prejudice. Nor has McNamara established that Judge Bickerton's frustrations with him have so infected the pending criminal case that a disinterested observer might reasonably question the judge's ability to evaluate fairly and objectively O'Day's legal interests or McNamara's work as an attorney. Therefore, this allegation does not support a finding of bias or prejudice.

Allegation Two

{¶ 18} The second allegation relates to Judge Bickerton's handling of the defense motion to suppress. McNamara asserts that at some point before the final status conference, he inquired with the judge's staff about conducting a motion hearing, presumably on the motion to suppress. According to McNamara, the judge's staff member advised him that a motion hearing could not be held on January 20 and that he should address the scheduling of a motion hearing with Judge Bickerton during the conference.

{¶ 19} But during the conference, McNamara asserts, Judge Bickerton orally denied the motion to suppress without allowing him the opportunity to call witnesses or present evidence. And later that day, he claims, Judge Bickerton issued an entry stating that she had conducted a "motion hearing." McNamara argues that the judge's entry was "not correct," and he describes the situation as one "where [the defense] lost without being given a hearing and without having an opportunity to call a witness or present evidence." McNamara argues that O'Day was entitled to a hearing on the motion.

{¶ 20} In response, Judge Bickerton states that McNamara has mischaracterized the communication he had with her staff member and that regardless, the communication is irrelevant to the disqualification request. Judge Bickerton believes that McNamara merely disagrees with her decision on the motion to suppress—which is not a reason to disqualify her.

{¶ 21} The record shows that the January 20 proceeding was originally scheduled as a final status conference. However, during the conference, the discussion between Judge Bickerton and counsel turned to the merits of the pending motion to suppress. After McNamara and the assistant prosecutor presented arguments supporting and opposing the motion, Judge Bickerton orally denied it. She explained that the issue raised in the motion was not a “suppression issue” under the Fourth Amendment to the United States Constitution but instead was related to the credibility of one of the state’s witnesses—which would be an issue for trial. Later that day, Judge Bickerton issued an entry indicating that the matter had come before her “for a motion hearing” and that the motion to suppress was denied.

{¶ 22} “In an affidavit-of-disqualification proceeding, the burden falls on the affiant to submit sufficient argument and evidence demonstrating that disqualification is warranted.” *In re Disqualification of Nastoff*, 134 Ohio St.3d 1232, 2012-Ohio-6339, 983 N.E.2d 354, ¶ 10. Here, McNamara has failed to sufficiently explain how the judge’s decision to rule on a pending motion during the conference and the judge’s later describing the conference as a “motion hearing” demonstrate bias or prejudice against him or show that she will not be impartial and open-minded at trial. As set forth above, both sides presented arguments during the January 20 proceeding, and Judge Bickerton explained why she believed that the issue raised in the motion to suppress was being raised prematurely. Therefore, she concluded that the issue was a legal one, not an evidentiary one, and decided the motion from the bench.

{¶ 23} McNamara may have other remedies, including an appeal, if he disagrees with the judge’s decision on the motion or her decision not to schedule an evidentiary hearing. But “reviewing alleged legal errors is not the role of the chief justice in deciding affidavits of disqualification.” *D’Apolito*, 139 Ohio St.3d 1230, 2014-Ohio-2153, 11 N.E.3d 279, at ¶ 5. And “[a]dverse rulings, without

more, are not evidence that a judge is biased or prejudiced.” *Russo*, 110 Ohio St.3d 1208, 2005-Ohio-7146, 850 N.E.2d 713, at ¶ 5.

{¶ 24} Judge Bickerton’s handling of the motion to suppress does not support a finding of bias or prejudice.

Allegation Three

{¶ 25} As his third allegation, McNamara claims that Judge Bickerton made three comments during the final status conference that demonstrate she cannot be impartial and open-minded in the O’Day case. As set forth above, “if a judge’s words or actions convey the impression that the judge has developed a ‘hostile feeling or spirit of ill will,’ or if the judge has reached a ‘fixed anticipatory judgment’ that will prevent the judge from hearing the case with an ‘open state of mind * * * governed by the law and facts,’ then the judge should not remain on the case.” (Ellipsis sic.) *In re Disqualification of Hoover*, 113 Ohio St.3d 1233, 2006-Ohio-7234, 863 N.E.2d 634, ¶ 7, quoting *Pratt*, 164 Ohio St. at 469, 132 N.E.2d 191. Therefore, if in fact Judge Bickerton’s comments reflect that she has predetermined the evidence and O’Day’s guilt, she should be disqualified.

{¶ 26} O’Day was apparently arrested in a sting operation. The state alleges that he exchanged text messages with and attempted to meet an undercover agent who was posing as a minor and/or a prostitute. For ease of analysis, the challenged comments will be addressed individually. McNamara claims that the most contested issue at trial will be whether O’Day intended to meet a 15-year-old girl or an adult who works at a sports bar.

The first comment

{¶ 27} In the affidavits of disqualification, McNamara claims that during the conference, he informed Judge Bickerton that he did not believe that O’Day had sent any of the purported text messages to the undercover agent. In response to that statement, McNamara claims, Judge Bickerton said: “And Mr. O’Day just randomly showed up in East Palestine, Ohio, at the same exact location that an

underage person was supposed to meet him?” Based on Judge Bickerton’s comment, McNamara alleges that the judge “clearly has concluded” that O’Day was communicating with a 15-year-old child.

{¶ 28} In her response to the affidavits of disqualification, Judge Bickerton did not specifically address this allegation or otherwise explain the challenged comment. And the portion of the audio conference recording she provided does not include this comment. The transcript of the conference indicates that Judge Bickerton made the comment while the judge and counsel were discussing the motion to suppress. The full exchange occurred as follows:

MR. MCNAMARA: * * * I also believe—I mean, I wasn’t there, didn’t send or receive any texts, but it’s my understanding or belief that there are no texts on Mr. O’Day’s phone.

THE COURT: And Mr. O’Day just randomly showed up in East Palestine, Ohio, at the same exact location that an underage person was supposed to meet him? No?

{¶ 29} McNamara alleges that Judge Bickerton had a sarcastic tone in her voice during this exchange. But the transcript does not reveal tone of voice. Further, the particular language that McNamara challenges was phrased in the form of a question. Judges often ask probing questions during preliminary proceedings to better understand a party’s arguments. Judge Bickerton’s questions are not sufficient to counter the presumption that she will fairly preside over the jury trial and decide any legal issues based on only the evidence later presented at trial. *See, e.g., In re Disqualification of Weithman*, 157 Ohio St.3d 1261, 2019-Ohio-4814, 137 N.E.3d 1232, ¶ 6-8.

{¶ 30} Based on Judge Bickerton’s questions, no reasonable and objective observer would harbor serious doubts about whether the judge has formed a fixed anticipatory judgment on the evidence or O’Day’s guilt.

The second comment

{¶ 31} While Judge Bickerton and counsel were discussing the motion to suppress, the judge also made the following comment: “I can only tell you that this is a task force that has been put together that I see these cases all the time. Very direct. Same circumstances.” McNamara argues that facts in other cases are irrelevant to O’Day’s case but that based on Judge Bickerton’s comment, other cases are “clearly a relevant factor” to her.

{¶ 32} In response, Judge Bickerton contends that McNamara has taken her comment, which was part of a longer discussion, out of context.

{¶ 33} Judge Bickerton is correct that the challenged comment was part of a longer discussion. The record shows that the judge made the comment while attempting to convey to McNamara that the cases he cited in the motion to suppress were distinguishable from the allegations against O’Day and that the issue McNamara had raised in his motion was a credibility issue and not appropriate for a motion to suppress. She said:

You are telling me that there is no documentation that you have received in discovery that indicates—and, again, these are all trial arguments. This isn’t a suppression argument. A trial argument as to the credibility and what their evidence that they are presenting—I don’t know what all it is. I can only tell you that this is a task force that has been put together that I see these cases all the time. Very direct. Same circumstances. What you’re alluding to in your motion to suppress is that there is some—and the cases you cite—that there is some search of the phone which requires access

through a code to get in and that it's connected and dumped. The content data specifically stated in there is obtained.

{¶ 34} Considering the context of the judge's comment, the judge's knowledge of and reference to prior undercover operations do not mean that she has already decided O'Day's guilt or that she will consider those other cases to be relevant to O'Day's case. "Just as 'a judge is presumed to follow the law and not to be biased,' a judge is presumed to be capable of separating what may properly be considered from what may not be considered." *In re Disqualification of Basinger*, 135 Ohio St.3d 1293, 2013-Ohio-1613, 987 N.E.2d 687, ¶ 5, quoting *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5.

{¶ 35} Based on Judge Bickerton's comment, no reasonable and objective observer would harbor serious doubts about whether the judge has formed a fixed anticipatory judgment on any issues in the case or on O'Day's guilt.

The third comment

{¶ 36} McNamara's final allegation focuses on an exchange that occurred between him and the judge at the end of the conference. At that point, McNamara inquired about whether a potential defense fact witness, a private investigator who resides in Florida, would be permitted to testify via remote technology. According to McNamara, the witness will testify that O'Day had good reason to believe that the person with whom he was communicating was at least 21 years old. McNamara asserts that the private investigator's testimony will be relevant to the question whether O'Day acted recklessly with regard to the age of the person he was to meet. Judge Bickerton said the following in response to McNamara's inquiry:

I don't know that that is going to be a witness that this Court is going to permit to testify, as their testimony is not relevant. * * *

* * *

* * * This is why I'm asking you, if you intend to call this witness, which I assume the State would object to, I need to know your basis for it, and I want that filed by the 27th, period.

{¶ 37} McNamara argues that these comments show that Judge Bickerton essentially ordered that defense witnesses be approved by the court prior to trial and that she will likely exclude testimony as irrelevant if it contradicts the state's evidence.

{¶ 38} In response, Judge Bickerton states that she has not yet decided whether this potential defense witness may testify and that she merely set a briefing deadline related to the potential witness's testimony.

{¶ 39} Judge Bickerton is correct that she has not yet decided whether the private investigator may testify. The record shows that after McNamara asked whether the investigator would be permitted to testify remotely, Judge Bickerton asked McNamara a few questions about the nature of the investigator's testimony. After McNamara explained the purpose of the testimony, the judge responded,

I'm not going to get into this. I—if you intend to call somebody, I will consider that. But what you are telling me right now, I don't know that that is going to be a witness that this Court is going to permit to testify, as their testimony is not relevant. I will hear any argument of it. I hear what you are saying. I'm still scratching my head about it. But if you want to—I would prefer if there is some argument or case law you have in supporting the calling of that witness, I would ask that by the end of next week there is a motion filed addressing that and citing that if you are going to make that argument to call a witness of that nature.

* * *

* * * Like I said, I will absolutely listen, and I will absolutely take into consideration any case law you have to support your position in calling that person, absolutely. I just need to have it so that I'm not here—and you'll learn from me quickly. I don't like things thrown on me at the last minute. I like to research. I like to have the ability to address issues. So when they get dropped on my lap at the last minute it can be very frustrating. That is why I'm asking you, if you intend to call this witness, which I would assume the State would object to, I need to know your basis for it, and I want that filed by the 27th, period.

{¶ 40} Contrary to McNamara's contention, Judge Bickerton did not say or suggest that she would likely exclude evidence that contradicted the state's evidence or that she had to preapprove any potential defense witness's testimony. She merely expressed concerns about the relevance of one particular witness's testimony and requested that McNamara file a motion before trial.

{¶ 41} Moreover, the transcript does not indicate that McNamara raised any objection to the judge's ruling on McNamara's request to allow the investigator to testify remotely or her instruction that McNamara file a motion. "A party who fails to object at trial, but then raises an issue in an affidavit of disqualification before a decision has been rendered by the court, bears a particularly heavy burden * * *." *In re Disqualification of Solovan*, 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.2d 3, ¶ 8. McNamara has not met that burden here.

{¶ 42} Based on Judge Bickerton's comments, no reasonable and objective observer would harbor serious doubts about whether the judge has formed a fixed anticipatory judgment on any issues in the case or on O'Day's guilt.

Conclusion

{¶ 43} As explained above, nothing in this record establishes that Judge Bickerton is biased or prejudiced against McNamara or that she cannot be impartial and open-minded in the O'Day case. Therefore, the affidavits of disqualification are denied. The case may proceed before Judge Bickerton.
