

**IN RE DISQUALIFICATION OF ALLEN.**

**THE STATE OF OHIO v. JONES.**

[Cite as *In re Disqualification of Allen*, 172 Ohio St.3d 1217, 2023-Ohio-3238.]

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

(No. 23-AP-082—Decided July 26, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Hamilton County Court of Common  
Pleas, General Division, Case No. B2204213.

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**KENNEDY, C.J.**

{¶ 1} Defendant Terrence Jones has filed an affidavit of disqualification pursuant to R.C. 2701.03 seeking to disqualify Judge Lisa C. Allen of the Hamilton County Court of Common Pleas, General Division, from Jones’s criminal case. As explained below, Jones has failed to establish that Judge Allen is biased or prejudiced against him or that the judge cannot be impartial and open-minded in the underlying case. Therefore, the affidavit of disqualification is denied. The case shall proceed before Judge Allen.

**Allegations and Responses**

{¶ 2} Jones argues that Judge Allen should be disqualified because the judge has “exhibited a fixed anticipatory judgment throughout th[e] entire criminal proceeding and has demonstrated bias & prejudice.” In support, he alleges that the judge (1) continued his jury trial on three different dates beginning in November 2022 in violation of his speedy-trial rights, knowing that defense counsel had never filed a jury demand or issued subpoenas for witnesses and knowing that the state had provided only partial discovery, (2) abused her discretion in continuing the jury trial, (3) falsified his new court-appointed counsel’s signature on a continuance

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entry in December 2022, (4) ordered Jones to undergo a competency evaluation without any evidence of incompetency and in May 2023 remanded him to Summit Behavioral Center for an evaluation without his consent and in violation of R.C. 2945.371, (5) ignored his objections to court-appointed counsel who had represented him in a prior case, (6) failed to rule on Jones's pro se motions, and (7) violated the Ohio Code of Judicial Conduct.

{¶ 3} Judge Allen filed a response to the affidavit of disqualification, generally denying any bias or prejudice against Jones and affirming that she can preside over his case impartially and with an open mind.

{¶ 4} After the original response was filed in this court, the judge was asked to file a supplemental response to specifically address Jones's allegations. In her supplemental response, the judge explains that the delays in the underlying case were beyond her control. Specifically, the judge states that (1) the November 2022 trial date was continued twice at the request of the state and that on the November 29 scheduled trial date, court-appointed counsel requested to withdraw because of a disagreement with Jones, (2) the judge scheduled the matter for trial as quickly as possible, (3) she did not forge court-appointed counsel's signature on any continuance entry, (4) court-appointed counsel requested a competency evaluation, which the judge granted, and because Jones was uncooperative, the evaluation could not be completed and he was remanded to the Summit Behavioral Center for evaluation, (5) the judge has permitted court-appointed counsel to withdraw due to disagreements with Jones, but Jones has always been represented by counsel, (6) the judge did not rule on Jones's pro se motions, because he has been represented by counsel throughout the trial-court proceedings, so all pro se motions were given to counsel for further action, and (7) the judge has been "attempting to ensure [Jones] is competent to stand trial."

### **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. Whether the affidavit of disqualification is granted depends 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, 469, 132 N.E.2d 191 (1956).

{¶ 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.

**Analysis**

{¶ 8} As stated above, Jones asserts that Judge Allen has demonstrated bias and prejudice against him and that the judge has exhibited a fixed anticipatory judgment throughout the underlying case. None of the allegations have merit.

*Allegations One through Four*

{¶ 9} Allegations One through Four of the affidavit of disqualification relate to the continuances of the jury trial. Therefore, these allegations are examined together.

{¶ 10} Jones's first allegation is that Judge Allen improperly continued his trial on three different dates in November 2022 and that her actions violated his constitutional and statutory rights, including his right to a speedy trial. As his second allegation, he argues that the judge abused her discretion in granting the continuances. Throughout his affidavit of disqualification, Jones alleges that Judge Allen falsified an entry continuing his case—which is being treated as his third allegation of disqualification. And as his fourth allegation, Jones asserts that there was no evidence of his incompetency and that a competency evaluation is therefore unnecessary. Jones argues that the judge's orders requiring a competency evaluation and remanding him to the Summit Behavioral Center without his consent and in violation of the procedures in R.C. 2945.371 were just attempts to circumvent his speedy-trial rights.

{¶ 11} In response, Judge Allen provided the following history of the case. Jones was initially arrested on August 30, 2022, and court-appointed counsel was assigned to the case on August 31. A bond-revocation order was issued on September 5, and Jones was indicted on one count of robbery on September 8. A second arrest warrant and a second bond-revocation order were issued on September 9. Jones was arraigned by a magistrate on September 20.

{¶ 12} Jones's first appearance before Judge Allen was on October 4. At that time, court-appointed counsel requested to withdraw. The judge granted the

request and appointed new counsel. The case was scheduled for a jury trial on November 21, 2022. At the request of the state, the jury trial was continued until November 28. On November 28, the state again requested a continuance, this time for one day. The judge granted the state's request, and the matter was scheduled to proceed to trial on November 29.

{¶ 13} On November 29, Jones and his court-appointed attorney had a disagreement, which resulted in Jones accusing his attorney of being ineffective and stating that he was going to file a grievance against the attorney. Because of that conflict, the judge appointed new counsel to represent Jones. Jones's newly appointed counsel requested the competency evaluation; the judge granted that request on December 6.

{¶ 14} A Court Clinic doctor attempted to evaluate Jones pursuant to that order, but the doctor was unable to complete the competency evaluation because Jones was uncooperative. After Jones again failed to cooperate with the judge's second order, which was issued on January 24, 2023, the judge remanded Jones to the Summit Behavioral Center for evaluation. The evaluation was to be completed by June 15, and a report hearing was scheduled for June 27. Jones filed his affidavit of disqualification on June 5, and the report hearing was therefore postponed.

{¶ 15} Judge Allen categorically denies the allegation that she forged court-appointed counsel's signature on any continuance entry.

{¶ 16} It is well established that "[a] judge's decision to grant or deny a party's request for a continuance is within the sound discretion of the judge and is not, by itself, evidence of bias or prejudice." *In re Disqualification of Pontious*, 94 Ohio St.3d 1235, 1236, 763 N.E.2d 603 (2001). Judge Allen's decisions to grant the state two continuance requests are not evidence that the judge is biased or prejudiced against Jones, nor are they evidence that the judge lacks impartiality or an open mind.

{¶ 17} Moreover, the continuance of the jury trial on November 29 was unavoidable. Jones had a conflict with court-appointed counsel. He accused counsel of being ineffective and threatened action against counsel. Judge Allen had no choice but to remove the counsel, appoint new counsel, and continue the trial.

{¶ 18} Article IV, Section 5(C) of the Ohio Constitution empowers a chief justice to “pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or a division thereof.” An affidavit of disqualification “addresses the narrow issue of the possible bias of a judge” and “ ‘is not a vehicle to contest matters of substantive or procedural law.’ ” *In re Disqualification of McGrath*, 149 Ohio St.3d 1224, 2016-Ohio-8601, 74 N.E.3d 453, ¶ 2, quoting *In re Disqualification of Solovan*, 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.3d, ¶ 4. Therefore, it is outside the scope of this affidavit-of-disqualification proceeding to rule on Jones’s second allegation that it was an abuse of discretion for the judge to grant the continuances.

{¶ 19} Similarly, it is generally outside the scope of this proceeding “to evaluate [a] judge’s reasons for ordering [a] competency evaluation.” *In re Disqualification of Beridon*, 156 Ohio St.3d 1303, 2019-Ohio-2896, 129 N.E.3d 477, ¶ 3. Judge Allen did not sua sponte order a competency evaluation of Jones. The newly court-appointed counsel requested a competency evaluation of Jones, and the judge granted that request.

{¶ 20} R.C. 2945.371(A) provides that when the issue of the competency of the accused to stand trial is raised, the court may order one or more evaluations of the accused to determine the accused’s present mental condition. “It has long been recognized that ‘a person [who] lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.’ ” (Brackets sic.) *State v. Smith*, 89 Ohio St.3d 323, 329, 731 N.E.2d 645 (2000), quoting *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Fundamental principles

of due process require that a criminal defendant who is legally incompetent may not be tried. *State v. Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433 (1995). Judge Allen’s decision to grant counsel’s motion for a competency evaluation is not evidence of bias or prejudice or evidence that the judge lacks impartiality or an open mind. Counsel raised a preliminary issue during the proceeding, and the judge granted the motion.

{¶ 21} Finally, Judge Allen “categorically” denies Jones’s allegation that she forged court-appointed counsel’s signature on a continuance entry. Jones did not support this allegation with any evidence to substantiate his claim that Judge Allen committed forgery or falsified an entry. Jones claims that he included “supporting documents as exhibit [sic] to support the factual merits surrounding this AOD mainly all entry of continuances,” but the affidavit of disqualification he filed does not include any exhibits.

{¶ 22} The burden in affidavit-of-disqualification cases falls on the affiant to submit specific allegations demonstrating bias or prejudice. *See* R.C. 2701.03(B)(1). The disqualification of a judge is an “extraordinary remedy,” and in deciding an affidavit of disqualification, “[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. To meet the affiant’s burden and to overcome the presumption, affiants are often required “to submit evidence beyond the affidavit of disqualification supporting the allegations contained therein.” *In re Disqualification of Baronzzi*, 135 Ohio St.3d 1212, 2012-Ohio-6341, 985 N.E.2d 494, ¶ 6. Allegations that are based solely on innuendo and speculation “are insufficient to establish bias or prejudice.” *In re Disqualification of Flanagan*, 127 Ohio St.3d 1236, 2009-Ohio-7199, 937 N.E.2d 1023, ¶ 4. The only evidence regarding Allegations One through Four in the record is the conflicting statements of Jones and the judge. This evidence is not sufficient to overcome the presumption

of Judge Allen’s impartiality and open mind and the absence of bias or prejudice toward Jones.

{¶ 23} For the foregoing reasons, Allegations One through Four in the affidavit of disqualification are without merit.

*Allegation Five*

{¶ 24} Jones next claims that prior to a May 3, 2023 hearing, Judge Allen appointed an attorney who had previously represented Jones in an unrelated case. Jones alleges that during the May 3 hearing, Judge Allen ignored his complaints about the attorney and instead asked the attorney to visit Jones and familiarize himself with the case.

{¶ 25} Judge Allen did not specifically address this allegation in her response to the affidavit of disqualification. The judge did assert, however, that she has permitted court-appointed counsel to withdraw when disagreements with Jones arose and that Jones has always been represented by counsel. The absence of a response from the judge to this particular allegation is not dispositive.

{¶ 26} In general, a judge’s “refusal to disqualify [an affiant’s] court-appointed counsel does not warrant disqualification.” *In re Disqualification of Lucci*, 139 Ohio St.3d 1201, 2014-Ohio-2044, 10 N.E.3d 717, ¶ 7. Neither Jones’s disagreement with Judge Allen’s decision to appoint this particular attorney nor Jones’s dissatisfaction with that attorney is a sufficient reason to disqualify Judge Allen.

{¶ 27} Jones has not established that the judge’s conduct demonstrates that she is biased or prejudiced against him or that she cannot be impartial and open-minded in his case. Therefore, Allegation Five is without merit.

*Allegation Six*

{¶ 28} Jones also alleges that Judge Allen has refused to acknowledge his pro se motions.



{¶ 29} In response, Judge Allen states that because Jones has been represented by counsel at all times, she did not believe that it was appropriate to rule on his pro se motions and she therefore provided the motions to Jones’s attorneys so that they could discuss them with him.

{¶ 30} It is well established that “although [a defendant] has the right either to appear *pro se* or to have counsel, he has no corresponding right to act as co-counsel on his own behalf.” *State v. Thompson*, 33 Ohio St.3d 1, 6-7, 514 N.E.2d 407 (1987). A defendant does not have any right to “hybrid representation.” *Id.* at 6. The right to counsel and the right to act pro se “are independent of each other and may not be asserted simultaneously.” *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, paragraph one of the syllabus.

{¶ 31} Because a defendant represented by counsel has no right to simultaneously assert the right to proceed pro se, a trial court may not entertain a represented defendant’s pro se motions. *State v. Washington*, 8th Dist. Cuyahoga Nos. 96565 and 96568, 2012-Ohio-1531, ¶ 11 (“Because [the defendant] chose to proceed with legal representation, the court could not consider [the defendant]’s motion to withdraw his plea, which his appointed counsel did not agree with”); *State v. Pizzaro*, 8th Dist. Cuyahoga No. 94849, 2011-Ohio-611, ¶ 9 (“Had the trial court entertained [the] defendant’s pro se motion while [the] defendant was simultaneously being represented by appointed counsel, this would have effectively constituted hybrid representation in violation of the established law”); *State v. Davis*, 10th Dist. Franklin No. 05AP-193, 2006-Ohio-5039, ¶ 12 (“where a defendant who is represented by counsel files pro se motions and there is no indication that defense counsel joins in those motions or indicates a need for the relief sought by the defendant pro se, such motions are not proper and the trial court may strike them from the record”).

{¶ 32} Judge Allen’s decision to refrain from ruling on Jones’s pro se motions while he was represented by counsel does not demonstrate bias or

prejudice or that the judge cannot be impartial and open-minded in his case. Jones's sixth allegation is without merit.

*Allegation Seven*

{¶ 33} Lastly, Jones alleges that the judge's conduct throughout the trial proceedings violates the Code of Judicial Conduct.

{¶ 34} Judge Allen did not specifically respond to this allegation. The judge did assert, however, that she has been "attempting to ensure [Jones] is competent to stand trial."

{¶ 35} The absence of a response from the judge to this particular allegation is not dispositive. Determining whether a judge has violated the Code of Judicial Conduct is beyond the reach of an affidavit-of-disqualification proceeding. As stated above, "the issue before the chief justice in disqualification proceedings is a narrow one" and " 'is limited to determining whether a judge in a pending case has a bias, prejudice, or other disqualifying interest that mandates the judge's disqualification from that case.' " *In re Disqualification of Burge*, 142 Ohio St.3d 57, 2014-Ohio-5871, 28 N.E.3d 48, ¶ 4, quoting *In re Disqualification of Kate*, 88 Ohio St.3d 1208, 1209-1210, 723 N.E.2d 1098 (1999). An affidavit-of-disqualification proceeding is "not the appropriate mechanism for determining whether a judge has followed the Code of Judicial Conduct." *In re Disqualification of Capper*, 134 Ohio St.3d 1271, 2012-Ohio-6287, 984 N.E.2d 1082, ¶ 19. Judicial-misconduct complaints are heard by the Board of Professional Conduct and are ultimately decided by all justices of this court. *Burge* at ¶ 4.

{¶ 36} To the extent that Jones argues that his allegations of violations of the Code of Judicial Conduct establish that Judge Allen is biased and prejudiced against him or that the judge lacks impartiality and an open mind, for the reasons set forth above in addressing Allegations One through Six, the seventh allegation is without merit.

**Conclusion**

{¶ 37} For the reasons explained above, the affidavit of disqualification is denied. The case may proceed before Judge Allen.

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