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IN RE DISQUALIFICATION OF LEUTHOLD.

THE STATE OF OHIO *v.* BROWN.

[Cite as *In re Disqualification of Leuthold*, 2023-Ohio-4775.]

Judges—Affidavits of disqualification—R.C. 2701.03—Absent some affirmative indication that a judge's personal or social relationship with a potential witness will affect that judge's consideration of the case, a judge's mere acquaintance or friendship with a witness will not ordinarily warrant disqualification—Affiant failed to demonstrate that judge and potential witness in underlying case have the type of close personal or professional relationship that would cause an objective observer to harbor serious doubts about judge's impartiality—Affiant failed to demonstrate that an objective observer would conclude that judge might be reasonably tempted to abandon his obligation of impartiality merely because a potential key trial witness is married to a member of judge's administrative staff—Disqualification denied.

(No. 23-AP-158—Decided December 5, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Crawford County Court of Common Pleas, General and Domestic Relations Division, Case No. 2023 CR 0065.

KENNEDY, C.J.

{¶ 1} Micah R. Ault, the Special Crawford County Prosecutor in the underlying case, has filed an affidavit of disqualification pursuant to R.C. 2701.03 seeking to disqualify Judge Sean E. Leuthold of the Crawford County Court of Common Pleas, General and Domestic Relations Division, from presiding over the case. Judge Leuthold filed a response to the affidavit of disqualification.

{¶ 2} As explained below, Ault has not established that Judge Leuthold should be disqualified. Therefore, the affidavit of disqualification is denied. The case shall proceed before Judge Leuthold.

Trial-Court Proceedings

{¶ 3} In February 2023, the defendant in the underlying case was charged with murder, felony murder, and involuntary manslaughter. The state of Ohio has alleged that during a confrontation with the victim, the defendant placed the victim in a "rear naked chokehold"—a jiu jitsu move—and strangled the victim to death. The state has further alleged that at trial, Ken Dyer will be called as a key witness. Dyer is a friend of the defendant; Dyer purportedly trained the defendant in jiu jitsu, including when to use a chokehold; and Dyer was with the defendant on the night of the altercation, although not at the time of the alleged murder. In addition, after the altercation, the defendant sent Dyer a text message thanking him for, Ault presumes, teaching the defendant the jiu jitsu move that he used in the altercation.

{¶ 4} On September 18, the state requested that Judge Leuthold recuse from the case based on the judge's personal and professional connections to Dyer. The judge declined.

{¶ 5} On October 10, Ault filed this affidavit of disqualification. A jury trial is scheduled to commence on February 26, 2024.

Affidavit-of-Disqualification Proceedings

{¶ 6} Ault alleges that Judge Leuthold should be disqualified from the underlying case because of an appearance of impropriety. Ault asserts that Dyer will be a key witness at trial and that therefore, his credibility will be at issue, requiring the judge to rule on several matters relating to Dyer's testimony. Ault claims that the judge has a close personal and professional relationship with Dyer because Dyer once was the judge's jiu jitsu instructor and with Dyer's wife because she is an employee of the court. The judge denies that disqualification is warranted.

{¶ 7} In support of the prosecutor's assertion that Dyer will be a key witness at trial, Ault claims that Dyer will be asked about the events on the night of the alleged murder, the statements he gave to the police, and why the defendant thanked him after the altercation. Ault further claims that Dyer also will be asked about the defendant's jiu jitsu training and that depending on Dyer's answers, the state's expert in jiu jitsu may dispute Dyer's testimony regarding his training of the defendant on how and when to use the chokehold. Judge Leuthold, Ault states, might be required to decide whether the prosecution may call Dyer as a hostile witness.

{¶ 8} Ault further asserts that the defendant may attempt to call Dyer as an expert witness in jiu jitsu, which would require Judge Leuthold to rule on the qualifications of the judge's own former jiu jitsu instructor. Alternatively, Ault states that the defense could argue that Dyer failed to adequately train the defendant or warn him about the risks of using the chokehold. Ault adds that Dyer's testimony about jiu jitsu could inform the judge's decision on a possible self-defense jury instruction.

{¶ 9} As proof of the allegation that Judge Leuthold has a disqualifying close personal relationship with Dyer, Ault states that Dyer trained the judge in jiu jitsu. In support of the allegation that the judge has a disqualifying close professional relationship with Dyer, Ault asserts that Dyer is employed as the parole-and-probation supervisor in Crawford County and that Dyer's office is located down the hallway from Judge Leuthold's chambers. According to Ault, Dyer is responsible for supervising individuals that the judge has placed on probation and for ensuring that probationers comply with the sentencing conditions imposed by the judge.

{¶ 10} In response, Judge Leuthold states that his relationship with Dyer does not require his disqualification.

{¶ 11} Judge Leuthold acknowledges that in 2009, he started martial-arts training with Dyer and that their relationship developed into a friendship. However, around 2011, the judge became unable to continue martial-arts training. Although the judge has no ill will toward Dyer, they stopped socializing together about eight years ago and they now seldom see or talk to each other. The judge further states that he has forgotten most of the rudimentary martial-arts skills that Dyer taught him.

{¶ 12} Judge Leuthold also denies having a professional relationship with Dyer. Prior to 2017, Dyer occasionally appeared in the judge's courtroom as a probation officer. However, in 2017, Dyer was promoted to a supervisory position within the Ohio Adult Parole Authority. In 2019, the Adult Parole Authority ceased supervising defendants on community control and began supervising only defendants on postrelease control. Therefore, contrary to Ault's contention, Dyer is not currently associated with the county's probation department, Dyer does not supervise any defendants who appear in the judge's courtroom, and the Adult Parole Authority's office in the courthouse is located on a different floor than the judge's chambers.

{¶ 13} Ault also claims that because Dyer's wife, Nikki, works for Judge Leuthold at the court, that relationship disqualifies the judge from presiding over the case.

{¶ 14} Judge Leuthold acknowledges that Nikki Dyer serves as the court's criminal administrator. The judge clarifies, however, that he hired Nikki based on her qualifications, not based on any relationship that the judge had with Dyer. The judge further states that he has no relationship with Nikki outside the office and that because her spouse may testify as a witness in the underlying case, she has been walled off from the matter.

{¶ 15} Judge Leuthold affirms that if either party calls Dyer as a witness, the judge's decisions regarding Dyer's testimony will be based on the law and the facts.

Disqualification of a Common-Pleas-Court Judge

{¶ 16} 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 set forth in the affidavit exist. R.C. 2701.03(E).

{¶ 17} The burden falls on the affiant to submit "specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations." R.C. 2701.03(B)(1). Therefore, "[a]n affidavit must describe with specificity and particularity those facts alleged to support the claim." *In re Disqualification of Mitrovich*, 101 Ohio St.3d 1214, 2003-Ohio-7358, 803 N.E.2d 816, ¶ 4.

{¶ 18} In this case, Ault does not allege that Judge Leuthold has a personal interest in the matter pending before him, nor does Ault allege that the judge is related to a party or has exhibited bias or prejudice in the case. Rather, Ault alleges that disqualification is necessary to avoid an appearance of impropriety.

{¶ 19} An appearance of impropriety is not among the grounds for disqualification specified in R.C. 2701.03. However, a judge is "otherwise * * * disqualified" under R.C. 2701.03 when one of the express bases for disqualification—interest, relation to a party, bias, or prejudice—do not apply but grounds for disqualification exist. *See generally In re Disqualification of Schooley*,

173 Ohio St.3d 1241, 2023-Ohio-4332, 229 N.E.3d 1224, ¶ 19 (citing examples of when a municipal-court judge is "otherwise * * * disqualified" for purposes of R.C. 2701.031). Although the statute speaks in terms of *actual* bias or prejudice, it has long been recognized that "even in cases in which no evidence of actual bias or prejudice is apparent, a judge's disqualification may be appropriate to avoid an appearance of impropriety." *In re Disqualification of Crawford*, 152 Ohio St.3d 1256, 2017-Ohio-9428, 98 N.E.3d 277, ¶ 6; *see also In re Disqualification of Floyd*, 101 Ohio St.3d 1215, 2003-Ohio-7354, 803 N.E.2d 816, ¶ 9.

{¶ 20} "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. "The 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.

Analysis

{¶ 21} For purposes of this affidavit of disqualification, Ault's assertion that Dyer will be a key witness is taken as true. However, as explained below, Ault has not established that Judge Leuthold should be disqualified.

A Judge's Personal and Professional Relationship with a Witness

{¶ 22} Absent some affirmative indication that a judge's personal or social relationship with a potential witness will affect that judge's consideration of the case, a judge's mere acquaintance or friendship with a witness will not ordinarily warrant disqualification. *See In re Disqualification of Bressler*, 81 Ohio St.3d 1215, 1215-1216, 688 N.E.2d 517 (1997); *In re Disqualification of Goldberg*, 155 Ohio St.3d 1246, 2018-Ohio-5434, 120 N.E.3d 850, ¶ 8; *see also* Flamm, *Judicial*

Disqualification, Section 8.2, at 202 (2d Ed.2007) ("the fact that a judge is friends with a witness does not ordinarily warrant an inference that the judge would be predisposed to credit that witness['s] testimony").

{¶ 23} "Judges are presumed to be capable of distinguishing their personal lives from their professional obligations." *In re Disqualification of Lynch*, 135 Ohio St.3d 1208, 2012-Ohio-6305, 985 N.E.2d 491, ¶ 10. And just as "[t]he reasonable person would conclude that the oaths and obligations of a judge are not so meaningless as to be overcome merely by friendship with a party's counsel," *id.*, the objective observer would not question a judge's impartiality merely because the judge knows or has a friendly relationship with a witness.

{¶ 24} Therefore, a judge's friendship with a police detective who was scheduled to testify as a witness before the judge did not create an appearance of impropriety warranting disqualification. *Bressler* at 1215-1216. Nor did a judge's admitted friendship with an expert witness. *In re Disqualification of Cunningham*, 88 Ohio St.3d 1219, 723 N.E.2d 1105 (1999).

{¶ 25} However, there may be situations when a judge's relationship with a witness will justify disqualification, including when "a judge might reasonably be thought to enjoy a close relationship with or hold particularly strong emotional ties to a person involved in an action before the judge." *In re Disqualification of Russo*, 127 Ohio St.3d 1232, 2009-Ohio-7201, 937 N.E.2d 1021, ¶ 5. Evaluating whether a particular personal relationship between a judge and a witness is sufficient to raise an appearance of impropriety requires a review of the totality of the factual circumstances. Flamm, Section 8.1, at 196.

{¶ 26} For example, in *Hadler v. Union Bank & Trust Co. of Greensburg*, 765 F.Supp. 976 (S.D.Ind.1991), a federal judge admitted to having a longtime personal friendship with a potential key witness in a civil case. The judge explained that the friendship alone did not create the appearance of partiality; rather, that fact combined with others tipped the balance in favor of causing the judge to recuse

from the matter. Specifically, the parties had waived a jury trial and the judge therefore would be required to sit as the ultimate fact-finder, the testimony of the judge's friend was likely to be pivotal to the issue of liability, the judge would be compelled to reach a conclusion on liability based on the credibility of the friend's testimony, and—most importantly—the friend had a financial interest in the outcome of the case as a stockholder and officer of one of the parties. *Id.* at 978-980.

{¶ 27} Similarly, a federal judge recused from a case in which another district-court judge and personal friend would be called as a witness. *United States v. O'Brien*, 18 F.Supp.3d 25 (D.Mass.2014). In explaining the decision to recuse, the trial judge stated that he would likely have to rule on the validity of certain lines of questioning and would likely limit that testimony in many respects. The trial judge recognized that having to make such rulings would "open [him] up to the criticism that [he] was excluding evidence not for proper reasons, but to shield [his] colleague from embarrassment." *Id.* at 36.

{¶ 28} Based on this record, Judge Leuthold and Dyer do not have the type of close personal friendship that would cause an objective observer to harbor serious doubts about the judge's impartiality. Judge Leuthold and Dyer were friends when Dyer trained the judge in martial arts, but they have neither trained together nor socialized in over eight years, and they seldom see each other now.

{¶ 29} Moreover, the facts here do not involve any of the unique circumstances that generated the need for recusal in *Hadler* or *O'Brien*. The case is scheduled for a jury trial, and the jury will assess Dyer's credibility. Judge Leuthold may be called upon to rule on objections or motions relating to Dyer's testimony, which are subject to review by an appellate court if an appeal is taken. Merely "[a]pplying the rules of evidence will not, from the perspective of an objective, disinterested, lay observer who is fully informed of the facts, implicate the partiality of the presiding judge." *Arrowood Indem. Co. v. Dogali*, M.D.Fla.

No. 8:09-CV-1193-T-27EAJ, 2011 WL 2971031, *2 (July 20, 2011). Further, the judge has affirmed that his decisions will be based on the law and evidence—not his personal experiences with jiu jitsu or with Dyer. Most importantly, although Ault has averred that Dyer is friends with the defendant, there is no indication that Dyer has a financial interest or any other material interest in the outcome of the murder case.

{¶ 30} Disqualification is also appropriate when the professional relationship between a judge and a witness could suggest to a reasonable person the existence of prejudice or impartiality. *In re Disqualification of Bloom*, 173 Ohio St.3d 1216, 2023-Ohio-3384, 229 N.E.3d 127, ¶ 42. However, when the professional relationship between a judge and a witness " 'is not particularly close, there is less reason to question the judge's impartiality.' " *Id.* at ¶ 43, quoting *In re Disqualification of Barrett*, 152 Ohio St.3d 1275, 2017-Ohio-9435, 99 N.E.3d 410, ¶ 6.

{¶ 31} Under this reasoning, a juvenile-court judge was permitted to preside over a case in which employees of the local juvenile-detention center—who were technically employees of the juvenile court—would testify as witnesses. *Id.* at ¶ 58. Because the judge had no direct oversight of those detention-center employees, no objective observer with full knowledge of the facts would have doubted the judge's impartiality. *Id.* at ¶ 44.

{¶ 32} Similarly, a judge was permitted to preside over a criminal case in which two of the victims were deputy sheriffs who provided security for the courthouse and served as bailiffs to the judges. *In re Disqualification of Solovan*, 100 Ohio St.3d 1238, 2003-Ohio-5483, 798 N.E.2d 21, ¶ 7. Because there was no suggestion that the trial judge had any particular relationship with the deputies—other than the professional association between any judge and courthouse security—no appearance of impropriety would exist if the deputies testified as witnesses. *Id.* at ¶ 4.

{¶ 33} Probation officers, who are typically court employees, routinely appear before judges as witnesses without raising any concerns about the judge's impartiality. In any event, based on Judge Leuthold's response, many of Ault's averments about the judge's professional relationship with Dyer appear inaccurate. According to the judge, Dyer has no connection to probationers in the common pleas court, Dyer has not appeared in Judge Leuthold's courtroom since 2017, and Dyer's office in the courthouse is located on a different floor than the judge's chambers.

{¶ 34} Ault has not established that Judge Leuthold has a close personal or professional relationship with Dyer that would support the judge's disqualification.

Employee's Spouse as a Witness

{¶ 35} The few courts that have addressed the issue have held that a judge is not disqualified when a court staff member has an affiliation through a family member to a case participant "provided that the staff member does not take part in or appear to take part in the judge's substantive decision-making in a case." *Smulley v. Safeco Ins. Co. of Illinois*, D.Conn. No. 3:20-cv-01888, 2021 WL 3374741, *4 (Aug. 3, 2021), citing *In re Horne*, 630 Fed.Appx. 908, 910-911 (11th Cir.2015), and *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1312-1313 (10th Cir.2015); *see also United States v. Reggie*, M.D.La. No. 13-111-SDD-SCR, 2014 WL 1664256, *2 (Apr. 25, 2014) ("even where a colorable conflict exists on the part of [a judge's] law clerk, the proper remedy is sequestration of the law clerk from future involvement in the litigation, not recusal of the judge").

{¶ 36} For example, in a bankruptcy case, an attorney for the creditors requested the judge's recusal after discovering that the sister of the judge's courtroom deputy was employed as a paralegal for the debtors' attorney. *In re Horne*, S.D.Ala. No. 13-00258-CB-B, 2014 WL 1370151 (Apr. 8, 2014). The paralegal had submitted an affidavit in the bankruptcy case attesting that she had served copies of an amended petition on the creditors' attorney, which contradicted

testimony by the creditors' attorney. The creditors' attorney argued that the judge's impartiality could be questioned because the judge would be required to choose between the conflicting testimonies of the courtroom deputy's sister and the creditors' attorney. After the bankruptcy judge declined to recuse from the case, the creditors' attorney appealed to the district court.

{¶ 37} The district court held that the sibling relationship between the witness and the court's administrative employee did not create an appearance of impropriety. *Id.* at *4. The court explained:

> The Court has neither found, nor been directed to, any cases in which recusal was sought based on the relationship between a court's administrative employee, such as a courtroom deputy, and a witness or party. There are, however, a number of recusal cases involving law clerks, who are members of chambers staff and who engage in substantive work on cases assigned to the judge. The rule that emerges from those cases is this: If a law clerk's relationship with an attorney or party in a case creates an appearance of impropriety, then the law clerk is disqualified from working on that case but the judge is not. * * *
>
> A courtroom deputy functions as an administrative employee who plays no substantive role in the decision-making process. A law clerk's relationship to a party does not create an appearance of impropriety, as long as the law clerk performs no substantive work on the case. A fortiori, no appearance of impropriety arises from [a] courtroom deputy's relationship to a party because that courtroom deputy's function is administrative, not substantive. To paraphrase the First Circuit: "Both bench and

> bar recognize, moreover, that judges, not [courtroom deputies] make decisions."

(Brackets sic.) *Id.* at *4-5, quoting *In re Allied-Signal, Inc.*, 891 F.2d 967, 971 (1st Cir.1989).

{¶ 38} On appeal, the federal appellate court affirmed the district court's decision, concluding that recusal would be warranted "on the basis of a judicial employee's relationships only when the employee has (or appears to have) a role in the substantive decision-making process." *Horne*, 630 Fed.Appx. at 911. Because the courtroom deputy had no substantive role in the judge's decisions and because the deputy's sister was merely an affiant rather than a party, "recusal was not warranted and indeed would have been inappropriate." *Id.*

{¶ 39} The record here is devoid of evidence indicating that Nikki Dyer has any role in Judge Leuthold's substantive decision-making processes. Regardless, the judge has screened her from the underlying case, and she will not participate in it. Given those facts—and considering that a jury will decide Dyer's credibility and that there is no indication that Ken or Nikki Dyer have a financial or other material interest in the outcome of the underlying case—an objective observer would not conclude that Judge Leuthold might be reasonably tempted to abandon his obligation of impartiality merely because a potential key trial witness is married to a member of the judge's administrative staff.

Conclusion

{¶ 40} As another court has explained, "it is recognized that the public understands that judges are usually longstanding members of the community in which they serve and although they will inevitably encounter witnesses with whom they, or people close to them, have had positive or negative experiences, judges can and will ordinarily ignore those experiences and decide the matters before them impartially." *United States v. Salemme*, 164 F.Supp.2d 86, 105 (D.Mass.1998).

{¶ 41} For the reasons explained above, the record does not support a finding that Judge Leuthold and Dyer share such a close personal and professional relationship—when considered individually or cumulatively—that would cause an objective observer fully informed of all relevant facts to harbor serious doubts about the judge's impartiality. Similarly, a court staff member's relationship with a key witness would not cause an objective observer fully informed of all relevant facts to harbor serious doubts about the judge's impartiality. Therefore, the affidavit of disqualification is denied. The case may proceed before Judge Leuthold.
