

IN RE DISQUALIFICATION OF KUHN.

THE STATE OF OHIO v. PYLES.

[Cite as *In re Disqualification of Kuhn*, 2023-Ohio-4882.]

Judges—Affidavits of disqualification—R.C. 2701.03—A judge is disqualified from presiding over a case in which judge, while serving as a prosecutor, was significantly involved in a critical decision—Judge’s disqualification from underlying criminal case is necessary to avoid appearance of impropriety because judge gave charging advice to law enforcement while serving as county prosecuting attorney—Disqualification granted.

(No. 23-AP-168—Decided December 15, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Scioto County Court of Common Pleas,
General Division, Case No. 16-CR-810.

KENNEDY, C.J.

{¶ 1} Eric Allen, counsel for the defendant, Jacob B. Pyles, in the underlying criminal case, has filed an affidavit of disqualification pursuant to R.C. 2701.03 seeking to disqualify Judge Mark E. Kuhn of the Scioto County Court of Common Pleas, General Division, from presiding over the case. Judge Kuhn filed a response to the affidavit of disqualification.

{¶ 2} As explained below, because the judge, while serving as the elected county prosecutor, gave law enforcement advice about the criminal charge to file against Pyles in the underlying criminal case, the judge’s disqualification is necessary to avoid any appearance of impropriety. Therefore, the affidavit of disqualification is granted. The case shall be reassigned to another judge of the Scioto County Court of Common Pleas, General Division.

Trial-Court Proceedings

{¶ 3} In October 2016, Pyles assaulted a woman with whom he was residing. The victim reported the incident to the Portsmouth Police Department. A department “Booking Sheet” detailed the victim’s account of Pyles’s assault of her, the threats he had made to her, and her injuries. The booking sheet also stated: “Due to the severity of the victim’s injuries this was determined to be a felonious assault. Sgt. Fugitt spoke to Mark Kuhn and he advised that the suspect’s actions and the victim’s injuries constitute the charge of felonious assault.” At that time, Kuhn was serving as the Scioto County Prosecuting Attorney.

{¶ 4} Pyles was charged with and convicted of felonious assault and intimidation of an attorney, victim, or witness in a criminal case. The trial court sentenced Pyles to prison terms of seven years on the felonious-assault charge and three years on the intimidation charge, with the sentences to run consecutively.

{¶ 5} Judge Kuhn assumed judicial office on July 9, 2018, and Pyles’s case was assigned to his docket.

{¶ 6} Pyles has retained Allen to file a motion for judicial release. Allen filed the affidavit of disqualification on November 1, 2023.

Affidavit-of-Disqualification Proceedings

{¶ 7} Allen alleges that Judge Kuhn is biased against Pyles and that the judge should be disqualified to avoid an appearance of impropriety, *see* R.C. 2701.03(A) (specifying grounds for disqualification but also providing that an affiant may allege that a judge “otherwise is disqualified to preside”). In response, the judge denies being biased or prejudiced against Pyles and denies that there are any grounds for his disqualification.

Bias

{¶ 8} In support of the allegation that Judge Kuhn is biased against his client, Allen primarily points to the booking sheet delineating the conversation between Sergeant Fugitt and the judge when the judge was serving as prosecutor.

This evidence, Allen asserts, shows that the judge “handled the initial charging decision regarding Mr. Pyles” and that he was involved in the initial investigation.

{¶ 9} In response, Judge Kuhn denies being biased or prejudiced against Pyles. The judge asserts that he did not actively prosecute Pyles in the underlying criminal case and that he was not involved in presenting the case to the grand jury or in the trial proceedings. The judge does not remember speaking with Sergeant Fugitt about the underlying case but acknowledges that given the information in the report, the words attributed to him in the booking sheet are consistent with a response he would have made.

Otherwise Disqualified under R.C. 2701.03(A)

{¶ 10} In support of the contention that Judge Kuhn should be disqualified to avoid an appearance of impropriety, Allen avers that “[a]n objective observer would have serious doubts about [the judge’s] impartiality” because, among other things, the judge “handled the initial charging decision.”

{¶ 11} Judge Kuhn’s response to this allegation is the same as his response to the allegation of bias: the judge reiterates that he does not remember having a conversation with Sergeant Fugitt about the underlying criminal case, including what crime to charge Pyles with.

Disqualification of a Common-Pleas-Court Judge

{¶ 12} 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).

{¶ 13} 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.

{¶ 14} As set forth above, Allen alleges that Judge Kuhn is biased against him and that the judge should be disqualified to avoid an appearance of impropriety. For the reasons explained below, because Allen has established that the judge’s disqualification is warranted to avoid an appearance of impropriety, there is no need to address the allegation that the judge is biased against Pyles.

{¶ 15} An appearance of impropriety is not among the grounds for disqualification specified in R.C. 2701.03(A). However, a judge “otherwise is disqualified” under R.C. 2701.03(A) when one of the express bases for disqualification—interest, relation to a party, bias, or prejudice—do not apply but other 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 judge is otherwise disqualified). Although the statute speaks in terms of *actual* bias and 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.

{¶ 16} “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

{¶ 17} Generally, a judge will not be disqualified from presiding over a criminal case that, although pending at the time he or she was serving as a prosecutor, was one in which he or she was not directly involved. *In re Disqualification of English*, 166 Ohio St.3d 1243, 2021-Ohio-4670, 186 N.E.3d 844, ¶ 6, citing *In re Disqualification of Rastatter*, 117 Ohio St.3d 1231, 2005-Ohio-7147, 884 N.E.2d 1085, ¶ 3. The test for determining whether a judge should preside over a case that was initiated or pending while the judge was serving as a prosecutor depends on the nature of the judge’s involvement in that case. A judge is disqualified if he or she participated personally and substantially as a lawyer in the same matter. *See In re Disqualification of Selvaggio*, 153 Ohio St.3d 1201, 2017-Ohio-9436, 100 N.E.3d 413, ¶ 4; Jud.Cond.R. 2.11(A)(7)(b). As explained below, a judge is also disqualified if he or she had significant involvement as a prosecutor in a critical decision in the case.

{¶ 18} The United States Supreme Court has explained, “When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome.” *Williams v. Pennsylvania*, 579 U.S. 1, 9, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016). There is a risk that the judge would be so wedded to his or her previous position as a prosecutor “that the judge ‘would consciously or unconsciously avoid the appearance of having erred or changed position.’ ” *Id.*, quoting *Withrow v. Larkin*, 421 U.S. 35, 57, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

{¶ 19} In *Williams*, the Supreme Court held that “under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” *Id.* at 8. The court further held that a prosecutor’s decision authorizing the government to seek the death penalty against the defendant in the underlying case was a “critical decision.” *Id.* at 11, 14. The court determined that a state supreme-court justice who—three decades earlier—authorized the state to pursue the death penalty against the defendant while serving as district attorney was barred from later adjudicating a petition to overturn that defendant’s death sentence. *Id.* at 16. Prosecutors, the court noted, bear responsibility for any number of “critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call.” *Id.* at 11. And “[e]ven if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process.” *Id.*

{¶ 20} Pyles seeks a reduction of his sentence through judicial release pursuant to R.C. 2929.20. That statute gives trial judges considerable discretion in deciding whether to grant or deny an offender’s motion for judicial release. *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923, 812 N.E.2d 963, ¶ 8; *State v. Sykes*, 2018-Ohio-4774, 124 N.E.3d 406, ¶ 19 (8th Dist.); *State v. Williams*, 10th Dist. Franklin No. 07AP-1035, 2008-Ohio-1906, ¶ 10. Depending on the circumstances, a judge deciding a motion for judicial release may be required to consider the seriousness of an eligible offender’s offenses. *See* R.C. 2929.20(J)(1).

{¶ 21} Judge Kuhn denies any direct involvement in the prosecution of Pyles in the underlying criminal case and has no memory of the conversation with Sergeant Fugitt. But Sergeant Fugitt memorialized his discussion with the judge in

the booking sheet. According to that report, the judge, while serving as the county prosecutor, conferred with law enforcement about the case and personally advised that the “suspect’s actions and the victim’s injuries” justified the charge of felonious assault. The judge’s charging advice was given in his professional capacity: counsel for the government as the county prosecutor. Therefore, a reasonable and objective observer with full knowledge of the facts would harbor serious doubts about Judge Kuhn’s ability to impartially preside over Pyles’s motion to reduce his sentence through judicial release.

{¶ 22} “Preservation of public confidence in the integrity of the judicial system is vitally important, and judicial decisions must be rendered in a manner that does not create a perception of partiality. An appearance of bias can be just as damaging to public confidence as actual bias.” *In re Disqualification of Murphy*, 110 Ohio St.3d 1206, 2005-Ohio-7148, 850 N.E.2d 712, ¶ 6. “The law requires not only an impartial judge but also one who appears to the parties and the public to be impartial.” *In re Disqualification of Corrigan*, 110 Ohio St.3d 1217, 2005-Ohio-7153, 850 N.E.2d 720, ¶ 11.

{¶ 23} Therefore, Allen’s allegation has merit. To allay any concerns about the fairness and integrity of the proceedings and to ensure to the parties and the public the unquestioned neutrality of the trial judge, Judge Kuhn is disqualified.

Conclusion

{¶ 24} The affidavit of disqualification is granted. The case shall be reassigned to another judge of the Scioto County Court of Common Pleas, General Division.