REL: December 18, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200070

Ex parte Derrick James Williamson, Jr.

PETITION FOR WRIT OF MANDAMUS

(In re: Derrick James Williamson, Jr.

v.

Alabama Department of Mental Health and Tammie Ross McCurry, Annie Delois Jackson, Jeremy Lain Booth, Jacqueline Graham, and Lynn Beshear, individually and in their official capacities)

(Tuscaloosa Circuit Court, CV-20-900463)

PER CURIAM.

Derrick James Williamson, Jr., was employed by the Alabama Department of Mental Health ("ADMH") as a mental-health security officer and assigned to Taylor Hardin Secure Medical Facility ("THSMF") until his employment was terminated on April 24, 2020. Williamson sought review of the termination of his employment by the commissioner of ADMH, Lynn Beshear. However, ADMH apparently declined to consider Williamson's appeal of the termination of his employment because, it concluded, Williamson's position as a mental-health security officer was not subject to the protections afforded by the Merit System Act, Ala. Code 1975, § 36-26-1 et seq., i.e., his position was exempt from that Act.

In May 2020, Williamson, acting pro se, sued Beshear; Dr. Tammie Ross McCurry, the associate commissioner of ADMH; Annie Delois Jackson, the facility director of THSMF; Jeremy Lain Booth, the captain of the security officers at THSMF; and Jacqueline Graham, the director of the Alabama Personnel Department (hereinafter referred to collectively as "the individual defendants"), in both their individual and official

capacities. He made various allegations against McCurry, Jackson, and Booth, including allegations that certain of their actions constituted both retaliation and prior restraint regarding his First Amendment rights; he also asserted against those three particular defendants claims alleging negligent and wanton supervision, hiring, and training and conspiracy under both federal and state law. Thus, Williamson's action was, in part, an action seeking relief pursuant to 42 U.S.C. § 1983. As to those claims, he sought compensatory and punitive damages, declaratory relief, and injunctive relief, including his reinstatement. Williamson's claims against Beshear and Graham included a § 1983 claim based on alleged due-process and equal-protection violations and a state-law claim alleging fraud. Finally, Williamson amended his petition on June 13, 2020, to name ADMH as a defendant and to include a claim seeking judicial review of the decision of ADMH determining, among other things, that his position was exempt from the merit system. Williamson amended his complaint two more times on June 30, 2020, and on July 13, 2020.

In July 2020, ADMH moved to dismiss the portion of the action seeking judicial review, and the trial court granted that motion on August

4, 2020. On August 3, 2020, the individual defendants filed a motion to dismiss some, but not all, of the claims stated against them in Williamson's third amended complaint. The trial court entered an order dismissing those claims, but not all of Williamson's claims against the individual defendants, on September 14, 2020. On that same date, Williamson filed a motion seeking reconsideration of the trial court's September 14, 2020, dismissal order dismissing certain claims asserted against the individual defendants, a motion to recuse the trial-court judge, and a fourth amended complaint.

Williamson's main basis for seeking the recusal of the trial-court judge was his allegation that the law firm by which the individual defendants' attorney, Terri Olive Tompkins, was employed, Phelps, Jenkins, Gibson, and Fowler, L.L.P., had made a campaign contribution of $250 to the trial-court judge's election campaign in 2008, which, he contended, required the trial-court judge to recuse himself under Ala. Code 1975, § 12-24-3. According to Williamson, the trial-court judge also had "a personal bias against actions brought against mental-health officials" based on his "significant connection with the mental-healthcare

system." In addition, Williamson alleged that the trial-court judge's failure to state his reasoning in his orders dismissing certain of Williamson's claims; his failure to dispose of certain motions; his failure to acknowledge statements made by Tompkins in the motion to dismiss filed on behalf of the individual defendants that, according to Williamson, violated the Alabama Rules of Professional Conduct; his failure to have the hearings on the motions to dismiss recorded by a court reporter; and his alleged disparate treatment of Williamson based on his race, when considered collectively, required the trial-court judge to recuse himself.

The trial-court judge granted Williamson's September 14, 2020, motion to reconsider in part by indicating that the dismissal of Williamson's claims was without prejudice, but otherwise denied Williamson's motion to reconsider on September 28, 2020, and his motion seeking recusal on September 29, 2020. On September 30, 2020, Williamson filed a notice of appeal to the Alabama Supreme Court seeking review of the interlocutory denial of his requests for injunctive relief. See Rule 4(a)(1)(A), Ala. R. App. P. (providing that a notice of appeal from "any interlocutory order ... refusing ... an injunction" must be filed within

14 days of the entry of that order). That same day, Williamson filed this petition for the writ of mandamus in the Alabama Supreme Court, challenging, primarily, the trial court's denial of his motion to recuse. Our supreme court, on October 7, 2020, transferred Williamson's appeal to this court, pursuant to Ala. Code 1975, § 12-2-7(6); that appeal was assigned appeal number 2200030. On October 21, 2020, our supreme court transferred Williamson's petition for the writ of mandamus to this court, stating in its order that the petition fell within this court's original appellate jurisdiction as set out in Ala. Code 1975, § 12-3-10.

> " 'The issue of recusal may properly be raised in a petition for a writ of mandamus. Ex parte Crawford, 686 So. 2d 196, 198 (Ala. 1996). "The writ of mandamus is an extraordinary remedy which should be granted only when it is clear that the trial court abused its discretion." Ex parte Rollins, 495 So. 2d 636, 638 (Ala. 1986). Further, " '[t]he burden of proof is on the party seeking recusal.' " Ex parte City of Dothan Personnel Bd., 831 So. 2d 1, 9 (Ala. 2002) (quoting Ex parte Cotton, 638 So. 2d 870, 872 (Ala. 1994)).
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> > " ' "The standard for recusal is an objective one: whether a reasonable person knowing everything that the judge knows would have a 'reasonable basis for questioning the judge's

> impartiality.' [Ex parte Cotton, 638 So. 2d 870, 872 (Ala. 1994)]. The focus of our inquiry, therefore, is not whether a particular judge is or is not biased toward the petitioner; the focus is instead on whether a reasonable person would perceive potential bias or a lack of impartiality on the part of the judge in question." ' "

Ex parte Lycans, 257 So. 3d 866, 868 (Ala. Civ. App. 2017) (quoting Ex parte Bank of America, N.A., 39 So. 3d 113, 117 (Ala. 2009), quoting in turn Ex parte Bryant, 682 So. 2d 39, 41 (Ala. 1996)).

As we noted, in his mandamus petition, Williamson primarily challenges the denial of his motion to recuse and seeks an order compelling the trial-court judge to recuse himself. However, Williamson also requests, "in lieu of recusal," that this court order the trial-court judge to provide an "expressed opinion regarding dismissal of [his] administrative appeal" and an "expressed opinion regarding dismissal of ... the claims presented in the Third Amended & Verified Complaint." Finally, Williamson requests, in one brief statement in his petition, a transfer of the action to the Jefferson Circuit Court pursuant to Ala. Code 1975, § 6-3-21.1(a), which governs a change of venue in the interest of

justice or for the convenience of the parties.

Although not included in his claims for relief, Williamson states in his petition that one of his issues is whether the trial-court judge "improperly dismissed [his] First Amendment claims encompassing a request for preliminary and permanent injunctive relief," and he develops a brief argument asserting that this court should treat that portion of his petition as an appeal of the denial of his claim for injunctive relief. As noted above, Williamson has already filed an appeal of that particular aspect of the order dismissing some of his claims against the individual defendants, and, as he requested, the record preparation and other activity in that appeal has been stayed pending the outcome of this petition. Thus, we decline to treat that portion of his petition for the writ of mandamus as a notice of appeal regarding the denial of his request for an injunction, and we will address that issue in the pending appeal.

We first consider Williamson's argument that the trial-court judge was required to recuse himself based on a 2008 campaign contribution made to the trial-court judge by the law firm by which Tompkins, the

attorney for the individual defendants, was employed.[1] Williamson relies on § 12-24-3(a), which provides:

> "(a) In any civil action, on motion of a party or on its own motion, a justice or judge shall recuse himself or herself from hearing a case if, as a result of a substantial campaign contribution or electioneering communication made to or on behalf of the justice or judge in the immediately preceding election by a party who has a case pending before that justice or judge, either of the following circumstances exist:
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> > "(1) A reasonable person would perceive that the justice or judge's ability to carry out his or her judicial responsibilities with impartiality is impaired.
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> > "(2) There is a serious, objective probability of actual bias by the justice or judge due to his or her acceptance of the campaign contribution."

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[1]In his petition, Williamson also complains that Tompkins left the firm of Phelps, Jenkins, Gibson, and Fowler, L.L.P., and began working for the law firm of Rosen Harwood, P.A., in September 2020. He states in his petition that Rosen Harwood, P.A., also made a contribution to the trial-court judge's election campaign in 2008. Williamson did not make this allegation in his motion to recuse, so we will not consider that argument here. See Ex parte Alabama Med. Ctr., 109 So. 3d 1114, 1117-18 (Ala. 2012) (explaining that, in a mandamus proceeding, an appellate court will not consider statements of counsel or evidence that was not before the trial court). However, we note that, in light of our resolution of this issue, infra, we would reject this argument on the same basis that we reject Williamson's argument regarding the contribution made by Phelps, Jenkins, Gibson, and Fowler, L.L.P.

The individual defendants argue that § 12-24-3(a) does not apply to require recusal in the underlying case because, they point out, the campaign contribution about which Williamson complains was made in the 2008 election year and not in the "immediately preceding election year," which would have been 2016. Williamson counters that the trial-court judge was unopposed in the 2016 election and, therefore, did not participate in an election in 2016. Thus, he argues, the "immediately preceding election" would have been in 2008. We cannot agree with Williamson.

We explained the meaning of the term "the immediately preceding election" in Dupre v. Dupre, 233 So. 3d 357, 360 (Ala. Civ. App. 2016):

> " 'The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. If possible, the intent of the legislature should be gathered from the language of the statute itself.' Volkswagen of Am., Inc. v. Dillard, 579 So. 2d 1301, 1305 (Ala. 1991). 'When the language of a statute is plain and unambiguous, ... courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning -- they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature.' Ex parte T.B., 698 So. 2d 127, 130 (Ala. 1997). '[W]hen a term is not defined in a statute, the commonly accepted definition of the term should be applied.' Bean

> Dredging, L.L.C. v. Alabama Dep't of Revenue, 855 So. 2d 513, 517 (Ala. 2003). In common parlance, the 'immediately preceding' judicial election would be the last judicial election before the filing of the motion to recuse."

Thus, the 2016 election was the immediately preceding election for purposes of the application of § 12-24-3(a). Nothing in the language of § 12-24-3 indicates that an election cannot qualify as the "immediately preceding election" if a judicial candidate is unopposed. Although Williamson relies on Ala. Code 1975, § 17-13-5(c), to support his argument that an unopposed candidate does not participate in an election, that statute instructs the probate judge to omit the name of an unopposed candidate for a primary election from the primary ballot; it does not address whether the names of unopposed candidates are to appear on the ballot for a general election. Thus, Williamson has failed to establish a clear legal right to the trial-court judge's recusal under § 12-24-3(a).

Insofar as Williamson contends that the trial-court judge's conduct is sufficient upon which to base recusal even in the absence of a requirement that he recuse under § 12-24-3(a), we reject his argument.

> "Canon 3(C)(1) of the Alabama Canons of Judicial Ethics clearly states that '[a] judge should disqualify himself in a

> proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned.' (Emphasis added.) Therefore, it appears that actual bias is not necessary for a judge to recuse -- only a reasonable appearance of bias or impropriety. The strictest application of this rule may 'sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice" ' In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 2d 942 (1955)(citations omitted). Furthermore, our Supreme Court has written:
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> > " 'Recusal is required when "facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge." ... The question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of impropriety.'
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> "Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994), cert. denied, Duncan v. Alabama, 513 U.S. 1007, 115 S. Ct. 528, 130 L. Ed. 2d 432 (1994) (citations omitted). All reasonable doubts should also be resolved in favor of recusal. Matter of Sheffield, 465 So. 2d 350 (Ala. 1984)."

Crowell v. May, 676 So. 2d 941, 944 (Ala. Civ. App. 1996) (third emphasis added). Further,

> "[t]he party seeking the recusal of a judge has the burden of presenting evidence indicating that the judge is biased.

> Henderson v. G & G Corp., 582 So. 2d 529 (Ala. 1991). The presumption is that a judge is not biased. Id.; Rikard v. Rikard, 590 So. 2d 300 (Ala. Civ. App. 1991). '[R]ecusal is not required by a mere accusation of bias unsupported by substantial fact.' Acromag-Viking, Inc. v. Blalock, 420 So. 2d 60, 61 (Ala. 1982)."

Ex parte Dixon, 841 So. 2d 1273, 1280 (Ala. Civ. App. 2002).

Williamson labors under certain misconceptions regarding the process due one appearing in a legal action pro se. Although he is generally correct that appellate courts liberally construe the pleadings, that rule is not confined to pro se plaintiffs; we have explained that "[t]he Rules of Civil Procedure are to be construed liberally to effect the purpose of the rules, and, under the rule of liberal construction, every reasonable intendment and presumption must be made in favor of the pleader." Brandon v. Humana Hosp.-Huntsville, 598 So. 2d 950, 951 (Ala. Civ. App. 1992). Even so, that rule does not have application to Williamson's recusal arguments; the construction of his pleadings is not at issue. To support his argument that he has presented sufficient evidence to support recusal, Williamson initially contends that the trial-court judge's failure

to state the reasons for granting the motions to dismiss demonstrated bias against Williamson.

Williamson states that he, as a pro se plaintiff, "has a clear legal right to notice and understanding regarding the dismissal of his claims" and that "the denial of a reason for dismissal ... is improper." However, Williamson is simply incorrect in asserting that the trial-court judge was required to state the reasons underlying his rulings on the motions to dismiss. Williamson is correct that our supreme court required a circuit-court judge to specify the reasons that he denied in forma pauperis status in Ex parte Little, 837 So. 2d 822 (Ala. 2002); however, the holding of Ex parte Little has no application here, where the matter involves not the denial of in forma pauperis status but, instead, rulings on motions to dismiss several of Williamson's claims.[2] As the individual defendants

[2]Although the basis stated in Ex parte Little for requiring that a trial-court judge state his or her reason for denying a request to proceed in forma pauperis on appeal was that an appellate court must be "advised of the reason for denial of indigency status [so that it] can ... adequately perform [its] responsibility of reviewing the denial," 837 So. 2d at 825, there exists no legal basis requiring a trial court to give a statement of reasons for an initial denial of indigency status at the outset of an action. See, e.g., James v. State, 61 So. 3d 357, 383 (Ala. Crim. App. 2010) (noting that Rule 24(a), Ala. R. App. P., requires a statement of reasons

point out, Rule 52(a) specifically states that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56[, Ala. R. Civ. P.] ...." Thus, the trial-court judge was not required to state his reasoning for granting either motion to dismiss, and his failure to do so cannot be considered a factual showing that would make a reasonable person question the impartiality of the trial-court judge.

Williamson's other complaints include the trial-court judge's apparent failure to rule on certain discovery matters or other, unspecified motions; the trial-court judge's failure to have a court reporter record the hearings on the motions to dismiss; what Williamson contends was the trial-court judge's lack of interest in the proceedings; the trial-court judge's failure to acknowledge statements made by Tompkins in the motion to dismiss she filed on behalf of the individual defendants that, according to Williamson, violated the Alabama Rules of Professional Conduct; and a generalized claim of racial bias. We note that the

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for the denial of a request to proceed in forma pauperis on appeal, but stating that "Rule 24(a) ... only applies when a person is seeking to proceed on appeal in forma pauperis" and that "[i]t does not apply to the initial filing of a request for indigency status in the circuit court").

underlying action, although presently stayed at Williamson's request, proceeds below and that, if certain motions have not been acted upon by the trial-court judge, Williamson may reassert those motions at any time; thus, we fail to see how the trial-court judge's failure to rule on certain motions amounts to proof that would lead to questions regarding the trial-court judge's impartiality.[3] Similarly, Williamson's complaint that the trial-court judge seemed disinterested in the proceedings appears to be rooted in the fact that the trial-court judge "took matters under advisement"; the fact that the trial-court judge did not indicate his rulings at the hearings is not a fact from which a reasonable person could perceive bias or partiality on the part of the trial-court judge. In addition, Williamson has presented no materials in support of his mandamus petition indicating that he requested the presence of a court reporter at the hearings on the motions to dismiss, and he provides no authority for

[3]One particular motion to which Williamson refers in his motion to recuse filed in the trial court was a motion to "deem a defendant served." Apparently, the trial-court judge indicated that he would take no action on that motion, which, of course, is not a recognized motion under the Rules of Civil Procedure and requires no action on the part of the trial-court judge.

the premise that the trial-court judge was required to have the arguments on those motions to dismiss recorded. Thus, the failure of the trial-court judge to have a court reporter present to record the proceedings is not proof that would lead a reasonable person to question whether the trial-court judge was biased or partial in favor or against any party.

Insofar as Williamson claims that the trial-court judge failed to acknowledge or to take action on statements made by Tompkins in the motion to dismiss she filed on behalf of the individual defendants that, according to Williamson, violated the Alabama Rules of Professional Conduct, we again find no basis for a reasonable person to perceive bias or partiality from the trial-court judge's inaction. Indeed, as Williamson points out, a judge is required by the Canons of Judicial Ethics to "take or initiate appropriate disciplinary measures against a ... lawyer for unprofessional conduct of which the judge has personal knowledge." Ala. Canons of Jud. Ethics, Canon 3.B.(3). Williamson's complaint that Tompkins engaged in unprofessional conduct arises from her pointing out in the motion to dismiss that Williamson could not present claims that could be presented by only the government because he was not an

attorney and could not represent the government. In doing so, Tompkins cited to Ala. Code 1975, § 34-3-6(a), which governs who may practice law, and Ex parte Ghafary, 738 So. 2d 778, 781 (Ala.1998), which explains that a complaint filed on behalf of a party by a person who is unauthorized to practice law is a nullity. Tompkins did not, as Williamson alleges, violate Rule 3.10, Ala. R. Pro. Cond., which prohibits an attorney from "present[ing], participat[ing] in presenting, or threaten[ing] to present criminal charges solely to obtain an advantage in a civil matter," by asserting in a motion to dismiss that Williamson could not legally advance the rights of a governmental entity as a pro se plaintiff. Thus, the trial-court judge was not required to "take or initiate appropriate disciplinary measures" against Tompkins based on the legal argument she asserted in the motion to dismiss. Canon 3.B.(3). We also reject Williamson's claim of racial bias, which is based solely upon his statement that he was the only African-American at the hearings on the motions to dismiss. The fact that the trial-court judge and the attorneys for the various defendants were Caucasian is not a sufficient basis to conclude that the trial-court judge had a bias against Williamson based on his race.

Williamson also contends that the trial-court judge's impartiality could be questioned based on his "significant reservations and/or connections with the mental-health movement in Tuscaloosa." According to attachments to Williamson's motion to recuse, the trial-court judge helped to establish, and presides over, Tuscaloosa's "mental-health court," which appears to be a diversion program that diverts those charged with lesser crimes from jail to mental-health treatment, if appropriate. Williamson provided two articles relating to the creation of the mental-health court and in which the trial-court judge is quoted to support his claim that the trial-court judge's impartiality might be questioned. Williamson does not explain how the trial-court judge's comments about the need for the mental-health court or his involvement in the creation of a mental-health court would serve to demonstrate bias in favor of ADMH or the individual defendants or against him or cause a reasonable person to question the trial-judge's impartiality.[4]

[4]In his petition, Williamson also asserts as a basis for recusal the trial-court judge's "friendship" on social media with the director of nursing at THSMF. Williamson did not raise this fact as a ground for recusal in his motion filed in the trial court, and we therefore do not consider it. See Ex parte Alabama Med. Ctr., 109 So. 3d at 1117-18.

In conclusion, we cannot agree that the conduct of the trial-court judge in the present case amounts to a basis for recusal. The political contribution made in 2008 by the law firm that employed Tompkins was not made in "the immediately preceding election" so as to trigger the application of § 12-24-3(a). None of the "procedural deficiencies" described by Williamson amount to a basis to question the trial-court judge's impartiality. That is, the trial-court judge was not required to have the hearings on the motions to dismiss recorded, was not required to state his rulings at the conclusion of the hearings, and was not required to make findings of facts or conclusions of law in his orders granting the motions to dismiss, preventing his failure to perform any of those actions from being construed as partiality or bias for or against any party. In addition, neither the fact that the trial-court judge failed to discipline Tompkins for a legal argument she asserted in the motion to dismiss filed on behalf of the individual defendants nor the fact that the trial-court judge and the attorneys for the various defendants are Caucasian are sufficient to raise questions of bias or partiality. Finally, the involvement of the trial-court judge in a mental-health court and his interest in mental-health issues,

without more, does not establish a reasonable basis for questioning the impartiality of the trial-court judge.

Insofar as Williamson requests that we direct the trial-court judge to provide an "expressed opinion regarding dismissal of [his] administrative appeal" and an "expressed opinion regarding dismissal of ... the claims presented in the Third Amended & Verified Complaint," we decline to do so for the reasons expressed above. We also deny Williamson's request to order a transfer of his action to the Jefferson Circuit Court because he never requested a change of venue in the trial court. See Ex parte Green, 108 So. 3d 1010, 1013 (Ala. 2012) (refusing to consider an argument on petition for the writ of mandamus that an action had been properly transferred pursuant to § 6-3-21.1 because neither party had addressed the applicability of that statute in the trial court). Williamson has not established a clear legal right to any of the relief he requested in his petition, and we therefore deny that petition.

PETITION DENIED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur.

Donaldson, J., recuses himself.