

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ERIC RIVERA,
Petitioner,

v.

Case No. 5D15-3755

JOSHUA BOSQUE,
Respondent.

_____ /

Opinion filed November 24, 2015

Petition for Writ of Prohibition,
Donald A. Myers, Jr., Respondent Judge.

Kansas R. Gooden, and Loreyn P. Raab, of
Boyd & Jenerette, P.A., Jacksonville, for
Petitioner.

Barbara A. Eagan, of Eagan Appellate Law,
PLLC, Orlando, for Respondent.

EDWARDS, J.

Petitioner, Eric Rivera, petitions for a writ of prohibition seeking review of the trial court's denial of his motion to disqualify the presiding judge. Respondent, Joshua Bosque, is represented in his personal injury case against Petitioner by two attorneys from the Payas, Payas & Payas law firm; both are involved in the trial judge's current,

ongoing reelection campaign. One of the attorneys is simply listed as one of many attorneys who support the judge's reelection. However, Respondent's other attorney, Armando Payas, has a more significant role in the campaign: (i) he is a member of the judge's reelection campaign committee; (ii) he was a member of the host committee for a reception in support of the judge's reelection; (iii) he attended a fund raiser; (iv) he is listed as a supporter of the judge's reelection; and (v) he has made a financial contribution to the judge's reelection campaign. Florida law is clear that the aforementioned level of involvement by Armando Payas in the trial judge's on-going campaign is a legally sufficient basis to require granting the motion to disqualify. We grant the petition, quash the order denying the motion to disqualify, and direct the trial court to grant the motion to disqualify so that the case may be reassigned to a different judge.

"A writ of prohibition is the proper procedure for appellate review to test the validity of a motion to disqualify." *Time Warner Entm't Co. v. Baker*, 647 So. 2d 1070, 1071 (Fla. 5th DCA 1994) (citing *Mangina v. Cornelius*, 462 So. 2d 602 (Fla. 5th DCA 1985)). Motions to disqualify are governed substantively by section 38.10, Florida Statutes (2014), and procedurally by Florida Rule of Judicial Administration 2.330. Pursuant to the rule, a judge against whom an initial motion to disqualify has been directed shall determine only the legal sufficiency of the motion without passing on the truth of the facts alleged. Fla. R. Jud. Admin. 2.330(f). The legal sufficiency of the motion turns on whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. See *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1335 (Fla. 1990) (citing *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983)).

"The facts alleged in a motion to disqualify need only show that the party making it has a well-grounded fear that he or she will not receive a fair trial at the hands of the judge. The judicial inquiry should focus on the reasonableness of the affiant's belief that the judge may be biased, and not the judge's own perception of his or her ability to act fairly." *Caleffe v. Vital*, 488 So. 2d 627, 628 (Fla. 4th DCA 1986) (citing *Livingston*, 441 So. 2d at 1087). "A motion to disqualify is legally sufficient if the facts alleged—presumed as true and considered objectively—would reasonably cause a defendant to have a well-founded fear that he or she would not receive a fair trial or hearing before the presiding judge." *Minaya v. State*, 118 So. 3d 926, 929 (Fla. 5th DCA 2013 (citing *Shuler v. Green Mountain Ventures, Inc.*, 791 So. 2d 1213, 1215 (Fla. 5th DCA 2001))). "The facts must be viewed from the perspective of the petitioner." *Michaud-Berger v. Hurley*, 607 So. 2d 441, 446 (Fla. 4th DCA 1992).

Petitioner's motion to disqualify the trial judge was supported by an affidavit from Petitioner and a certificate of good faith from his counsel, asserting Petitioner's fear that he would not be afforded a fair trial before the current judge. The motion to disqualify and its supporting papers identified three different reasons why Petitioner held this fear. Petitioner argues that all three reasons should be considered for their cumulative effect in accordance with *Chillingworth v. State*, 846 So. 2d 674 (Fla. 4th DCA 2003), and *Michaud-Berger*, 607 So. 2d at 441.

The first reason offered by Petitioner concerned the nature and timing of certain rulings made by the trial court. Petitioner moved for a second compulsory medical examination (CME) of Respondent. Petitioner stated that the second CME was needed as an updated assessment following Respondent's second surgery, which took place

following the initial CME. Respondent objected and the trial court denied the motion. Petitioner petitioned this court for a writ of certiorari seeking reversal of that order denying discovery. Respondent filed opposition to the petition in this court, but also filed papers in the trial court withdrawing his objection to the second CME. The trial court took note of the objection being withdrawn and sua sponte granted Petitioner the second CME. Thereafter, this court dismissed Petitioner's certiorari petition, finding that it was moot. Petitioner contends that in promptly granting his request for a second CME shortly after Respondent withdrew its objection, the trial court denied him the opportunity to seek appellate attorney's fees. He additionally argued that the revised order did not provide sufficient time to schedule and conduct the second CME. As Petitioner acknowledges, adverse or unfavorable legal rulings, without more, are not legally sufficient grounds for disqualification. *Winburn v. Earl's Well Drilling & Pump Serv.*, 939 So. 2d 199, 200 (Fla. 5th DCA 2006).

The second reason for Petitioner's fear of bias dealt with a perceived disparity between the parties' ability to obtain hearing time. Petitioner stated that his counsel was unable to obtain hearing time prior to trial for his motions, despite using the online scheduling system and calling the judge's assistant directly. On the other hand, according to Petitioner, Respondent's counsel was able to schedule a hearing time immediately upon contacting the judge's assistant even before Respondent's motion was filed. Perceived scheduling issues, by themselves, are not legally sufficient grounds to support a motion to disqualify the trial judge. *Zaias v. Kaye*, 643 So. 2d 687, 687 (Fla. 3d DCA 1994).

While neither of the first two reasons is legally sufficient to require disqualification, they do provide context for the Petitioner's legally sufficient third reason for his motion to disqualify the trial judge: Respondent's counsels' significant involvement in the trial judge's ongoing reelection campaign. The trial judge denied Petitioner's motion to disqualify the presiding judge and Petitioner timely filed his petition with this court.

There are a number of cases dealing with motions to disqualify trial judges based upon counsels' participation in judicial elections. Whether the judge's campaign is ongoing or has concluded and the nature of the attorney's involvement in the campaign are important factors.

Florida law is clear that involvement of a relatively limited nature in a judge's prior campaign, i.e., neither ongoing nor recently concluded, is not grounds for disqualification. See, e.g., *Braynen v. State*, 895 So. 2d 1169, 1169 (Fla. 4th DCA 2005) (holding disqualification is not required where Petitioner's counsel was on the thirty-four member steering committee supporting the trial judge's opponent, where election had concluded); *Zaias*, 643 So. 2d at 687-88 (holding counsel making a campaign contribution of unspecified amount and serving as one of sixty members on judge's campaign that had concluded, did not require disqualification, and commenting that it was not dealing with counsel serving as a member of the judge's contemporaneously active campaign committee); *Raybon v. Burnette*, 135 So. 2d 228, 228-31 (Fla. 2d DCA 1961) (finding the denial of motion for disqualification proper where moving party's counsel supported his law partner who was the judge's opponent, while opposing counsel publically endorsed and supported the judge in the same election, which had concluded).

On the other hand, counsel's significant involvement in a current, ongoing, or recently concluded reelection campaign constitutes sufficient legal grounds for granting a motion to disqualify. See *Dell v. Dell*, 829 So. 2d 969, 970 (Fla. 4th DCA 2002) (holding that the trial judge should have granted a motion to disqualify where counsel seeking fees was member of the judge's reelection committee and was actively engaged in an ongoing campaign seeking judge's reelection while case was pending); *Neiman-Marcus Grp., Inc. v. Robinson*, 829 So. 2d 967, 968 (Fla. 4th DCA 2002) (holding that disqualification was required where opposing counsel was campaign treasurer for trial judge, and the campaign had concluded only days earlier); *Caleffe*, 488 So. 2d at 628 (holding that husband's motion for disqualification should have been granted where wife's lawyer co-chaired the judge's ongoing campaign for reelection).

In *Barber v. MacKenzie*, 562 So. 2d 755, 755, 758 (Fla. 3d DCA 1990), the husband moved for disqualification because two of his wife's lawyers were members of the campaign committee for the trial judge's active, ongoing, reelection campaign. The *Barber* court determined that "[t]he Committee . . . plainly contemplate[d] a course of activity on behalf of the judge during the year leading up to the election. [Thus, there was] a substantial and continuing relationship between the Committee and the trial judge, in a matter of great and immediate importance to the judge." 562 So. 2d at 757. The court held that the disqualification was mandated due to the "continuing affiliation" and that a reasonable litigant in husband's position would fear that this relationship could result in bias favoring the wife. *Id.* at 757-58.

Here, the trial judge's reelection campaign is underway, ongoing, active, and likely to remain that way beyond the date currently scheduled for this trial. At least one of

Respondent's counsel is significantly involved in the reelection campaign. We do not question the trial judge's impartiality and are confident that Petitioner would receive a fair trial in front of this judge. However, because the focus is on the Petitioner's fear that he will not receive a fair trial, we find the motion is legally sufficient to the extent it relies upon these specific campaign-related issues. We grant the petition, quash the order denying the motion to disqualify, and instruct the trial court to enter an order of disqualification.

PETITION GRANTED; ORDER QUASHED.

PALMER and COHEN, JJ., concur.