Third District Court of Appeal

State of Florida

Opinion filed June 17, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1798
Lower Tribunal No. 17-10899

Gamal Marwan,
Petitioner,

vs.

Geilan Sahmoud,
Respondent.

A Case of Original Jurisdiction – Prohibition.

Kutner and Associates and Maurice Jay Kutner; Young, Berman, Karpf & Gonzalez, P.A., and Cynthia L. Greene, for petitioner.

Buchbinder & Elegant, P.A., and Harris J. Buchbinder, for respondent.

Before SCALES, LINDSEY and LOBREE, JJ.

LOBREE, J.

Gamal Marwan (the "former husband") petitions this Court for a writ of prohibition because the trial court denied his second motion for disqualification. Finding the former husband's motion to be legally sufficient, we grant the petition.

Factual Background

In July 2019, the trial court conducted a full-day evidentiary hearing on motions of Geilan Sahmoud (the "former wife") to hold the former husband in contempt for his alleged failure to make alimony and other payments pursuant to the marital settlement agreement reached in November 2018. During her case in chief, the former wife's counsel conducted a brief direct examination of the former husband focused on his recent failure to make required alimony payments, which he readily admitted on account of his purported inability to pay.

During the former husband's case to rebut the presumption of ability to pay in compliance with the settlement agreement, he testified that his sole source of income was his salary (and bonus) of approximately $210,000 annually. He related that he had complied with most of the settlement's terms, including paying child support, insurance, and school expenses, but stressed that anything beyond his salary would only, and rarely, come from his mother. The former husband offered evidence of his bank account and credit card statements, financial affidavits, and a notice reflecting that his bank accounts and assets in Egypt (which he valued at about $400,000), had been seized by the tax authority. He testified that he had $800 in a

checking account, around $400 cash, and a Cartier watch valued around $3,000, but no real property, car, or other available assets.[1] On cross-examination, the former wife's counsel impeached his credibility by questioning his prior statements of indigency three years before the settlement, around which time he purchased a million-dollar home and partially owned a $1.3 million, fifty-eight foot yacht (which had been sold to a family trust before the dissolution).[2]

The trial court then proceeded to ask questions about the use of, expenses for, ownership, and sale of the yacht. The court then permitted the parties to follow up its questioning, during which the former wife introduced a loan application where the former husband had included the yacht among his assets. The former husband, on redirect, repeated that his ownership interest in the boat was transferred before the marital settlement was signed. The court asked the former husband's counsel to provide documentary evidence pertaining to the current ownership of the yacht.

The court then remarked, "now that an exhibit has been introduced into evidence . . . I have some questions as to present ability to pay." The court inquired if either side had further questions regarding present ability to pay. The court was

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[1] The former husband also had $500,000 frozen in a U.S. investor program associated with his green card application.

[2] Counsel for the trustee asserted at the hearing that the former wife executed a general release in favor of the trust at the time of the settlement. No motion pertaining to the trust or its assets was addressed at the hearing or included in the record before this court.

reminded that the parties had already rested and told that neither party wished to ask any additional questions.

The court's inquiry continued. Focusing on the former husband's testimony that he had paid for recent travel with mileage points, the court asked him to provide documents reflecting such miles or credit card points and directed that he should log onto his computer to find them, if required. The court asked the former husband for any document that could refresh his recollection about expenses from a trip to India, as well as any documentation generally proving the existence and use of such mileage or card points. The court also asked the former husband about how he intended to pay for his son's college dorms, the bill for which was coming due soon, which had not been a subject of either party's inquiry.

The former husband's counsel expressed that he was "concerned about the extent of the court's role in asking these questions," and that it "appear[ed] to [him] that perhaps the court was doing the job for the wife's lawyers." The trial court reminded counsel of its authority to make inquiries of any witness, while permitting follow-up questions by the parties. At the end of the hearing, the trial court asked counsel to submit written closing arguments and alternative proposed orders.

Following the hearing, the former husband moved to disqualify the trial judge, arguing that he had a reasonable fear of bias against him, in light of the trial court's

active questioning, after the parties had rested, concerning his present ability to pay.[3] The motion outlined the facts described above, construing the court's actions alternatively as suggestions or tips to the other side on what they needed—but had so far failed—to prove, partial advocacy, and improperly requesting and taking evidence after the parties rested. The trial court denied the motion as legally insufficient.

Standard of Review

Whether a motion to disqualify is legally sufficient is a question we review de novo. See Wade v. Wade, 123 So. 3d 697, 697 (Fla. 3d DCA 2013) (citing MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1335 (Fla. 1990) ("The legal sufficiency of the motion is purely a question of law.")). However, having made that determination, whether the trial judge should have granted or denied the motion is reviewed for abuse of discretion. See King v. State, 840 So. 2d 1047, 1049 (Fla. 2003) ("Disqualification of trial judges . . . [and any] order denying [such] a motion . . . is reviewed for abuse of discretion.").

Analysis

"The test for determining the legal sufficiency of a motion for disqualification is whether 'the facts alleged (which must be taken as true) would prompt a

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[3] The former husband previously moved to disqualify the judge on other grounds.

reasonably prudent person to fear that he could not get a fair and impartial trial.'"
Bank of America, N.A. v. Atkin, No. 3D18-1840, 2018 WL 6595138, *4 (Fla. 3d DCA Dec. 14, 2018) (quoting Molina v. Perez, 187 So. 3d 909, 909 (Fla. 3d DCA 2016)).

> Trial judges must studiously avoid the appearance of favoring one party in a lawsuit, and suggesting to counsel or a party how to proceed strategically constitutes a breach of this principle.. A trial judge crosses the line when he becomes an active participant in the adversarial process, i.e., gives "tips" to either side.

Id. (citation omitted).

Here, the former husband alleged in pertinent part that: (1) the trial judge "expressed its concern about the lack of evidence of [his] 'present ability to pay,' and commenced a lengthy, detailed, aggressive, and prosecutorial questioning of [him];" (2) its subject of inquiry had not been inquired about by either party's lawyer; (3) the court "invited and encouraged" former wife's counsel "to present new evidence" that he had not sought to introduce; (4) the court's inquiry went far beyond the scope of the questioning of either party before they rested; (5) the court's questions did not serve or intend to clarify his testimony, but to develop information not requested by either side; and (6) the trial court asked the former husband and his counsel to provide it with documents to substantiate his testimony. Having reviewed the record of the proceedings, we find that these allegations are sufficient to place a reasonably prudent person in fear that he could not receive a fair and impartial

hearing or trial because the court crossed the line into active participation in adversarial process.

The hearing at issue was on a civil contempt motion. In Bowen v. Bowen, 471 So. 2d 1274, 1277 (Fla. 1985), our supreme court stated:

> [T]he purpose of a *civil* contempt proceeding is to obtain *compliance* on the part of a person subject to an order of the court. Because incarceration is utilized solely to obtain compliance, it must be used only when the contemnor has the ability to comply. This ability to comply is the contemnor's "key to his cell."

(Emphasis in original). The court observed:

> In a civil contempt proceeding for failure to pay child support or alimony, the movant must show that a prior court order directed the party to pay the support or alimony, and that the party in default has failed to make the ordered payments. The burden of producing evidence then shifts to the defaulting party, who must dispel the presumption of ability to pay by demonstrating that, due to circumstances beyond his control which intervened since the time the order directing him to pay was entered, he no longer has the ability to meet his support obligations. The court must then evaluate the evidence to determine whether it is sufficient to justify a finding that the defaulting party has willfully violated the court order.
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> . . . .
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> In determining whether the contemnor possesses the ability to pay the purge amount, the trial court is not limited to the amount of cash immediately available to the contemnor; rather, the court may look to *all assets* from which the amount might be obtained.

Id. at 1278-79 (emphasis in original). Here, the record reveals that, before the parties rested, no one elicited any evidence that would support a contempt order. The sole

evidence relevant to the finding of present ability to pay, without which he could not be held in contempt, was generated directly by the court's inquiry and requests for production, not only after the parties had both rested, but even after they had ceased following up on the court's initial inquiry.

Section 90.615, Florida Statutes (2019), provides: "When required by the interests of justice, the court may interrogate witnesses, whether called by the court or by a party." This statute gives the court discretion to "seek clarification of an issue and in an effort to ascertain the truth." Y.V. v. Dep't of Children & Families, 271 So. 3d 1160, 1161 (Fla. 3d DCA 2019) (quoting R.W. v. Dep't of Children & Families, 189 So. 3d 978, 980 (Fla. 3d DCA 2016)). However, a court's use of this latitude to independently inquire as a means to supply or develop evidence for an essential element in a party's claim or defense signals bias and is reversible error:

> Such questioning may be appropriate, in the court's discretion, to seek *clarification* of an *issue* and in an effort to ascertain the truth. However, a trial judge must ensure that he or she does not become an active participant or an advocate in the proceedings and should not by words or actions make it "appear that his neutrality is departing from the center."

R.W., 189 So. 3d at 980 (citing R.O. v. State, 46 So. 3d 124, 126 (Fla. 3d DCA 2010) ("A court may not ask questions or make comments in an attempt *to supply essential elements* to the State's case.") (citation omitted; emphasis added); Riddle v. State, 755 So. 2d 771, 773 (Fla. 4th DCA 2000) (reversing where trial court repeatedly

interrupted counsel and aggressively questioned appellant and witnesses on matters not raised by the state, which actions indicated predisposition towards conviction and deprived party of his right to unbiased magistrate)).

The fact that a judge asks a disproportionally higher amount of questions of a witness on an issue than the parties do can also suggest biased and active participation.

> The requisite for a neutral finder of fact does not foreclose a judge from asking questions designed to make previously received ambiguous testimony clear. Certainly a trial judge should not be compelled to act out of confusion or a misapprehension of the facts. The capacity to clear up ambiguous or confusing testimony, however, is not an invitation to trial judges to supply essential elements in the state's case. A review of the transcript indicates that the court's questioning of witnesses in the present case went well beyond an attempt to clear up ambiguities. While numbers are not necessarily determinative, we cannot help but notice that the trial judge here asked the victim forty questions, while the prosecutor asked her three.

Sears v. State, 889 So. 2d 956, 959 (Fla. 5th DCA 2004) (citations omitted); see also Lyles v. State, 742 So. 2d 842, 843 (Fla. 2d DCA 1999) (reversing probation revocation where court "gave the appearance of partiality by taking sua sponte actions which benefitted the State").

Here, the record supports the former husband's assertion of reasonable fear that he would not receive a fair hearing based on the nature and extent of the court's questioning. Accordingly, his motion was legally sufficient and should have been

granted. Having failed to grant it, the trial court necessarily abused its discretion. We issue a writ of prohibition precluding the trial judge from continuing to preside over the case.

Petition granted.