Third District Court of Appeal

State of Florida

Opinion filed July 22, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-0672
Lower Tribunal No. 20-34-K

Erin Murphy,
Petitioner,

vs.

Jeswyn Collins,
Respondent.

A Case of Original Jurisdiction – Prohibition.

Samuel J. Kaufman, P.A. and Samuel J. Kaufman and Rachel Moss; Ross & Girten and Lauri Waldman Ross, for petitioner.

Robertson & Hunter and Loriellen Robertson, for respondent.

Before SALTER, MILLER and LOBREE, JJ.

PER CURIAM.

Erin Murphy ("Murphy") petitions for a writ of prohibition seeking to disqualify the trial judge from continuing to preside over her child custody

proceedings. We find that her motion to disqualify was legally sufficient, grant the petition, and remand for reassignment of the case to another judge.

In 2019, Murphy and Jeswyn Collins ("Collins"), an unmarried couple, resided together in Key West. A child was born during their relationship, which ended in January 2020, after Collins allegedly threatened to punch Murphy. Taking her three-month old baby, Murphy immediately returned to Pennsylvania, her home state. She initiated custody proceedings there, serving Collins on January 22, 2020. Meanwhile, Collins initiated the paternity proceedings below and moved for the return of the child, serving Murphy on January 30, 2020.

A status conference was scheduled for February 11, 2020, and the court's standing order reflected that the parties were required to attend. On February 5, Murphy retained attorneys Samuel Kaufman ("Kaufman") and Rachel Moss ("Moss"), who moved to dismiss Collins' petition on the basis of forum non conveniens and sought to continue the status conference, arguing in part that they needed time to prepare and arrange for Murphy's personal appearance. On February 10, the trial court issued an amended notice re-ordering the February 11 case management conference and advising that requests for telephonic appearance must be made in writing five days before a hearing is scheduled.[1]

[1] No transcript of this conference exists.

On February 21, the trial court denied Collins' motion for the child's return and set Murphy's motion to dismiss for February 27, ordering her to personally attend. Three days later, Murphy's counsel moved for leave for her telephonic appearance, based on her inability to bear the prohibitive costs of travel or be absent from work with less than a week's notice. That same day, the attorneys emailed a copy of the motion to the family court coordinator who, historically, handled all such scheduling with counsel, as well as followed up on February 26, asking if there was anything else required. Collins' counsel replied by email and objected to the accommodation.

At the February 27 hearing, which Murphy failed to attend, the trial judge acknowledged that she was aware of the motion for telephonic appearance and objection and had not ruled upon them. Collins' counsel argued that Murphy should be held in contempt for failing to attend the hearing, and Murphy's counsel realleged the grounds of the motion for telephonic appearance, adding that she had difficulty arranging for care of the baby with short notice. Collins' counsel moved ore tenus for a show cause order to hold Murphy in contempt, which the trial court granted without a verified pleading or taking any evidence. The court asserted that Murphy had "chosen to not return because she doesn't believe that this Court has jurisdiction." With the agreement of the parties, the court then reset the evidentiary

hearing on Murphy's motion to dismiss for March 11, along with Collins' paternity motion.

Thereafter, Collins filed a notice of hearing for March 11 that added timesharing and a rule to show cause against Murphy. Murphy responded by moving to strike the notice or continue the hearing, arguing in part her concerns about traveling in light of the spread of COVID-19, and again requesting leave to provide remote testimony.[2] The motion and Collins' objection were forwarded to the court coordinator. The trial court again did not rule on this motion prior to the hearing. Murphy attended the March 11 hearing and the court denied her motion to dismiss.

On March 16, during unrelated proceedings where Moss represented another client before the same trial judge, the judge allegedly raised her voice and told Moss that Kaufman had filed a motion as a "ploy," had a "history of submitting motions at the last minute," that she had "instructed" her staff "not to accommodate Kaufman," since he "plays games" and "blames the court and her staff," and she was "tired of it." Murphy moved to disqualify the trial judge, alleging under oath that she learned from her counsel of the judge's expressions in the unrelated case and

[2] Shortly after Murphy's motion and this hearing, the Florida Supreme Court and the Sixteenth Judicial Circuit issued administrative orders requiring, whenever feasible, that proceedings be conducted by remote electronic means due to the public health emergency. See In re: COVID-19 Emergency Procedures in the Florida State Courts, Admin. Order No. AOSC20-13 (Fla. Mar. 13, 2020); In re: Covid-19 Emergency Procedures, Fla. 16th Cir. Ct. Admin. Order No. 2.077 (Mar. 18, 2020).

feared that she would not be afforded impartial proceedings.[3] Moss also attached an affidavit to the motion, swearing to the veracity of the allegations. The trial court summarily denied the motion as legally insufficient. Notably, however, the trial judge granted an almost identical motion to disqualify in the case during which she had expressed her disapproval of Murphy's counsel.

"Upon being presented with an initial motion for disqualification, a trial judge is tasked solely with determining whether the motion is legally sufficient." Samra, 45 Fla. L. Weekly at D114. If it is, "the judge shall immediately enter an order granting disqualification and proceed no further in the action." Id. (quoting Fla. R. Jud. Admin. 2.330(f)). The legal sufficiency of a motion to disqualify is reviewed de novo, and it is shown "when the alleged facts 'would place a reasonably prudent person in fear of not receiving a fair and impartial trial.'" Samra, 45 Fla. L. Weekly at D114 (quoting Sands Pointe Ocean Beach Resort Condo. Ass'n v. Aelion, 251 So. 3d 950, 954 (Fla. 3d DCA 2018)). Here, neither the order below nor Collins have

[3] Murphy's counsel also asserted their belief that this explained why the trial judge had not responded to or ruled on either motion for telephonic appearance. These allegations taken from the motion to disqualify are accepted as true for our purposes. See Samra v. Bedoyan, 45 Fla. L. Weekly D114, D115 n.2 (Fla. 3d DCA Jan. 15, 2020).

identified any technical defects in the motion under rule 2.330, Florida Rules of Judicial Administration.[4]

As to the substance of the allegations, we have "previously noted that 'a judge should disqualify himself or herself in . . . instances where . . . the judge has a personal bias or prejudice concerning **a party or a party's lawyer**.'" Samra, 45 Fla. L. Weekly at D114 (quoting Fla. Code Jud. Conduct, Canon 3E(1)). Circumstances and events immediately preceding or following a lower court's alleged expression of bias may inform a party's reasonable fear. See JJN FLB, LLC v. CFLB P'ship, LLC, 283 So. 3d 922, 926 (Fla. 3d DCA 2019) (finding "close temporal proximity" between trial court's actions in different proceedings render party's fear reasonable).

Here, the trial judge's alleged characterization of Murphy's counsel as engaging in "ploy[s]" and having a "history" of filing late motions and "blaming" court staff, by itself, could have rendered Murphy's fear of bias a reasonable one.

[4] We are not persuaded by Collins' arguments that Murphy's motion was insufficient either as based on hearsay, or due to the absence of a transcript of the proceedings during which the trial judge made the alleged remarks. See Hayslip v. Douglas, 400 So. 2d 553, 556 (Fla. 4th DCA 1981) (rejecting similar hearsay challenge under prior iteration of the rule); see also Ellis v. Henning, 678 So. 2d 825, 827 (Fla. 4th DCA 1996) (finding motions to disqualify legally insufficient *only* because there existed neither transcript *nor sworn factual allegations* concerning context where trial judge's remarks arose); Michaud-Berger v. Hurley, 607 So. 2d 441, 447 (Fla. 4th DCA 1992) (Letts, J., concurring) ("A litigant who is . . . informed that the presiding judge believes her lawyer to be greedy, deceitful, unethical . . . would be a fool not to have 'fears' that she will not receive a fair trial.").

Id. (granting writ where "court's 'denouncement of the petitioners' [counsel's] character and believability in the prior proceeding was a strong implication that [it] would not believe them in future proceedings, and that [it] had already formed a hostile opinion'"); Lowman v. Racetrac Petroleum, Inc., 220 So. 3d 1282, 1284 (Fla. 1st DCA 2017) (holding that "as an indication of a bias which may create a party's fear of not receiving an impartial hearing, there is no appreciable difference" between statements directed toward petitioner or his counsel); State v. Alzate, 972 So. 2d 226, 229 (Fla. 3d DCA 2007) (granting writ of prohibition where trial judge accused counsel of "play[ing] games"); DeMetro v. Barad, 576 So. 2d 1353, 1354 (Fla. 3d DCA 1991) ("[A] judge's statement that he [or she] feels a party has lied in a case before him [or her], generally indicates bias against the party.") (citation omitted).

Here, the trial judge allegedly expressed being so "tired" of Murphy's counsel that she "instructed" her staff not to accommodate their scheduling requests as a matter of internal policy. If true, this went beyond the "mere reporting of perceived . . . unprofessionalism." 5-H Corp. v. Padovano, 708 So. 2d 244, 248 (Fla. 1997); see also State v. Dixon, 217 So. 3d 1115, 1122 (Fla. 3d DCA 2017) ("[A] motion to disqualify a trial judge may rely on the judge's announcement of his policy in other cases in order to establish a well-founded fear that the judge will not be impartial in the case in which the motion to disqualify was filed."); Michaud-Berger, 607 So. 2d

at 447 (holding motion legally sufficient where "petitioner was confronted with a memorandum opinion in which respondent found that one of her attorney's actions in an unrelated case involved 'sophistry,' 'greed, overreaching and attempted extortion'").

In light of the trial judge's prior, unexplained failures to rule on Murphy's motions for telephonic appearance, despite their colorable allegations, as well as her unsupported oral finding on Murphy's purported "refusal" to travel to a hearing where no evidence was taken, her subsequent disparagement of counsel reasonably caused Murphy to fear not only a lack of impartial proceedings in the future, but that she had already been penalized without knowledge or recourse. The fact that the same trial judge properly granted an almost identical motion to disqualify in the proceedings where the statements were originally made buttresses our conclusion that disqualification is required here. Therefore we grant the petition and remand for further proceedings following the reassignment of the case to a new judge.