RENDERED: DECEMBER 27, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000013-MR

RICHARD T. KEMPER — APPELLANT

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 00-CI-00059

EDWARD MARSHALL THOMPSON AND
CITY OF MONTEREY, KENTUCKY — APPELLEES

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM; McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: An attorney requested (by motion) a trial judge to recuse himself. After the Judicial Conduct Commission ruled against the attorney, the judge denied the motion and proceeded with the case. Subsequently, the attorney filed an affidavit of bias and prejudice with the circuit clerk but that affidavit was not forwarded to the Chief Justice. It is necessary to vacate the final judgment and remand the matter in order that the circuit clerk can certify the facts to the Chief Justice and await a decision thereon.

The City of Monterey (the City) passed a nuisance ordinance (effective 2-11-98) which, among other things, prohibits accumulations of rubbish, defined as filth, refuse, trash, garbage, or other waste material which endangers the public health, welfare, safety, or interferes with the adjacent property owners' peaceful enjoyment of their property. The ordinance also prohibits houses from having broken windows or uncovered windows or doorways. The enforcement section, section 4, requires that:

> When the City of Monterey receives written complaints from two separate households with adjacent or nearby property, the city council will take action. With a first warning, occupants or owner will have thirty (30) days to correct the violation. After thirty days (30), if the violation is not corrected, it shall be the duty of any law enforcement officer to serve or cause to be served a notice upon the occupant or owner a second notice of violation with a correction date of ten (10) days from the date the second notice is served. If the violation is not corrected within ten (10) days, then a citation to appear in district court will be issued.

After the City received two letters (dated March 5, 2000) of complaint (from Donald Wilson and Joyce Atha) about appellee, Edward Marshall Thompson's property (Mr. Thompson), the City gave Mr. Thompson a written notice (dated March 13, 2000) of violations of the nuisance ordinance on his property, with ten days to correct the violations. At the April 2000 city council meeting, the council noted that the violations had been corrected and that no further action was to be taken under the ordinance. However, the mayor was to send a letter to Mr. Thompson requesting that the structure be restored. Apparently the

residence located on the property contained a lot of housing code problems, but the City either did not have a housing code or did not cite Mr. Thompson under the housing code. The nuisance code does not deal with habitability or restoration, but the April 18, 2002, letter from the mayor to Mr. Thompson did indicate the City would like to see the house fixed up.

On May 12, 2000, Richard T. Kemper (Mr. Kemper) filed a complaint against Mr. Thompson and the City alleging that Mr. Kemper was an adjacent property owner to the Thompson's property and he was unsatisfied with the City's enforcement of the nuisance ordinance. Mr. Kemper requested a declaration that the Thompson property harbored a public nuisance and an injunction or mandamus to compel the City to enforce the nuisance ordinance. An amended complaint was authorized in part by the trial court on December 5, 2000. It was never filed. On January 16, 2001, Mr. Kemper's attorney, his son, Gerald T. Kemper (Attorney Kemper) filed a motion (pursuant to SCR 4.300) in the action, moving that the trial judge recuse himself, and other motions. On January 23, 2001, the trial court held the case in abeyance. On February 12, 2001, the trial court entered an order which noted the case was being held in abeyance until the confidential matter was resolved, which has been resolved, and set a hearing on all pending motions for February 27, 2001. Attorney Kemper had previously filed a complaint with the Judicial Conduct Commission (JCC) against the trial judge which had been dismissed. Subsequently, Attorney Kemper filed a supplemental complaint with the JCC requesting the trial judge be removed from this case on

the basis of prejudice as a result of the filing of the first complaint. By letter dated April 2, 2001, the Judicial Conduct Commission dismissed the supplemental complaint. An affidavit was filed on March 1, 2001, by Attorney Kemper with the circuit clerk alleging bias and prejudice by the trial judge. On March 8, 2001, the trial court entered an order dated March 7, 2001, denying the motion to disqualify. Immediately thereafter, the trial court proceeded to rule on all pending motions. Attorney Kemper appealed the March 8, 2001, order in this Court in 2001-CA-000746. This Court dismissed that action on October 8, 2001, as having been taken from a non final order. Attorney Kemper filed a petition for a writ of prohibition on April 9, 2001, in this Court (2001-CA-000756). Said writ (CR 76.36 Relief) was denied on June 4, 2001 and final on July 16, 2001. Meanwhile, a motion for summary judgment was granted against the appellant by order entered May 10, 2001. This appeal followed.

On appeal, appellant presents two arguments. The first is that the trial judge erred in not disqualifying himself pursuant to SCR 4.300. In appellant's argument he argues procedure, contending the Supreme Court had not ruled on the matter and that it was error for the trial judge to rule on the matter. The attorney apparently is not familiar with the processes for recusal. As one appellee correctly pointed out, in Kentucky there are two methods for seeking to disqualify a judge. See Nichols v. Commonwealth, Ky., 839 S.W.2d 263, 265 (1992). The first method is to file a motion to disqualify the presiding

judge with the presiding judge pursuant to KRS 26A.015(2), which Attorney Kemper did in this case. The second method, pursuant to KRS 26A.020(1), is to file an "affidavit that the judge will not afford him a fair and impartial trial" with the circuit clerk, which Attorney Kemper did also.

The trial judge was made aware of the motion under KRS 26A.015(2) to disqualify and did enter an order holding the case in abeyance until after the JCC reviewed the case and found no bias or prejudice. Subsequently, the trial court denied the motion to recuse and proceeded with the case. That ruling was interlocutory and is subject to appeal when the case is final. See Nichols, 839 S.W.2d 263. The second or supplemental complaint to the JCC contends the trial judge will be prejudiced because a previous complaint was filed.[1] No new motion was filed with the court so there was no reason to hold the case in abeyance. Thus, the trial court did not err per se in ruling on the pending motion.

KRS 26A.020(1) "provides a separate and distinct opportunity to a party who does not believe he or she will receive a fair and impartial trial. It allows a complaining party to file an affidavit with the circuit clerk who certifies the facts to the Chief Justice who then reviews the facts and determines whether to designate a special judge." Nichols, 839 S.W.2d at 265. In discussing the two methods of seeking a

[1]The JCC subsequently dismissed this complaint but theoretically the process could go on and on. Next the appellant could contend the judge was prejudiced because "two" complaints had been filed, then "three", etc.

recusal, the Court in Nichols went on to say, "It would also appear that an aggrieved party can do either or both." (emphasis added.) Id. In this case, Attorney Kemper did both. The subsequent affidavit was filed with the Owen County Clerk's office on March 2, 2001. There is no evidence in the record that the Owen Circuit Court certified and forwarded the matter to the Chief Justice as required by KRS 26A.020(1). This was error on the circuit clerk's part. Once the affidavit is filed, the circuit clerk must promptly certify and forward the matter to the Chief Justice, and notify the trial judge that the matter is pending so that the matter is held in abeyance pending a ruling by the Chief Justice. See Jackson v. Commonwealth, Ky., 806 S.W.2d 643, 645 (1991). Because the statutory procedure was not followed, it is necessary to vacate the orders entered after March 1, 2001, and to remand the matter to the circuit court for the matter to be held in abeyance until the circuit clerk certifies the facts to the Chief Justice and he rules on the matter.

The appellant's second argument is that summary judgment was prematurely granted. Inasmuch as the judgment is being vacated and held in abeyance until the Chief Justice rules on the matter, the second argument is moot.

For the foregoing reasons, the judgment of the Owen Circuit Court is vacated and the matter remanded for proceedings consistent with this opinion.

McANULTY, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, DISSENTING. I respectfully dissent. As the majority opinion notes, the Nichols case holds that a party may seek the recusal of a judge pursuant to KRS 26A.015, KRS 26A.020, or both. 839 S.W.2d at 265. The majority concludes that Attorney Kemper did both. In my opinion, Attorney Kemper sought recusal pursuant to KRS 26A.015 only.

The recusal motion was filed on January 16, 2001, and the affidavit was filed on March 2, 2001. Attorney Kemper made no mention that the affidavit was filed pursuant to KRS 26A.020, he filed no contemporaneous motion with it, and he took no action to direct the clerk to certify the facts to the Chief Justice as required by the statute. See KRS 26A.020(1).

It appears to me that the affidavit was filed in support of the motion to disqualify. In fact, the appellant acknowledges this on page six of his brief.[2] Furthermore, a motion for a judge to recuse himself must be supported by an affidavit, and "[s]uch an unsupported motion is deficient." Crane v. Commonwealth, Ky., 833 S.W.2d 813, 818 (1992).

Finally, even if the affidavit was not intended by the appellant to be in support of his motion to disqualify but was intended to be pursuant to KRS 26A.020(1), I conclude that the appellant did not preserve any error in this regard in that he did not seek to bring the matter to the attention of either the clerk or the judge. I realize that, according to the statute,

[2] Appellant states in his brief that "in support of his motion and with his consent, the Appellant's attorney, Gerald Kemper, filed an affidavit stating that he believed Judge Bates to be prejudiced against him and the Appellant, Richard Kemper."

the filing of the affidavit requires the clerk to certify the facts to the Chief Justice. However, since Crane requires an affidavit in support of a KRS 26A.015 motion, it was entirely reasonable for the appellee, the judge, and the clerk to assume that the affidavit was in support of the motion for the judge to disqualify himself.

Moreover, if the appellant desired to proceed under KRS 26A.020 in addition to KRS 26A.015, he would have not only advised the appellee, the judge, and the clerk, but he would also have stated in his motion to alter, amend, or vacate the additional ground that the judgment should be vacated due to noncompliance with KRS 26A.020. As the court had not had the opportunity to consider the fact that the appellant might have filed the affidavit in support of a KRS 26A.020 motion (which was never made), his CR 59.05 motion to alter, amend, or vacate should have stated this additional ground in order to preserve the issue for review. See 7 Bertelsman-Philipps, Kentucky Practice, Rules of Civil Procedure Annotated, at 382 (4th ed. 1984).

This court will not review contentions which the trial court had no opportunity to consider. Payne v. Hall, Ky., 423 S.W.2d 530, 532 (1968). Furthermore, "[w]hen trial counsel is aware of an issue and fails to request appropriate relief on a timely basis, the matter will not be considered plain error for reversal on appeal." Crane, 833 S.W.2d at 819. See also Tucker v. Commonwealth, Ky., 916 S.W.2d 181, 183 (1996). Also, any argument that the judge "was without authority to preside over

Appellant's case could not be raised for the first time on appeal." Brutley v. Commonwealth, Ky., 967 S.W.2d 20, 24 (1998) (Graves, J., concurring in part and dissenting in part).

In short, I respectfully dissent for two reasons. First, I don't believe that Kemper's affidavit was filed to initiate a KRS 26A.020 proceeding; rather, it was filed to support his KRS 26A.015 motion. Second, if the affidavit was filed for that purpose rather than in support of his KRS 26A.015 motion, then I don't believe Kemper preserved any error because he failed to cite this as a ground for his CR 59.05 motion to vacate so that the trial court could address the matter by vacating the judgment.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, CITY OF MONTEREY:

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