

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 2, 2023

BENJAMIN MCCURRY ET AL. v. AGNESS MCCURRY

**Appeal from the Circuit Court for Washington County
No. 38147 Thomas J. Wright, Senior Judge**

No. E2023-00297-COA-T10B-CV

This is an interlocutory appeal as of right, pursuant to Rule 10B of the Rules of the Supreme Court of Tennessee, filed by Agness McCurry (“Petitioner”), seeking to recuse the judge in this case involving post-divorce parenting issues. Having reviewed the petition for recusal appeal filed by Petitioner, and finding no error, we affirm.

**Tenn. Sup. Ct. R. 10B Interlocutory Appeal as of Right;
Judgment of the Circuit Court Affirmed**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which W. NEAL MCBRAYER and KENNY W. ARMSTRONG, JJ., joined.

Agness McCurry, Johnson City, Tennessee, pro se appellant.

Sandy Phillips, Johnson City, Tennessee, for the appellee, Benjamin McCurry.

Jeffrey M. Ward, Greeneville, Tennessee, for the appellee, Amy Briggs.

OPINION

We begin by noting that in her petition for recusal appeal, Petitioner made several statements showing disrespect or contempt for this Court and for the Circuit Court for Washington County (“the Trial Court”). If this were not a Rule 10B recusal appeal, this Court would strike the entire petition, and it would not be considered. *See* Tenn. R. Ct. App. 9 (“Any brief or written argument containing language showing disrespect or contempt for any court of Tennessee will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper.”). Given, however, that “[t]he right to a fair trial before an impartial tribunal is a fundamental constitutional right,” this

Court has chosen to consider the substance of the petition. *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009). The offensive portions of Petitioner’s petition for recusal appeal are hereby deemed stricken, and the Appellate Court Clerk is directed to seal the petition for recusal appeal so that the public shall not have access to this document in the future. Petitioner is cautioned that language showing disrespect or contempt for any court of Tennessee will not be tolerated in future filings.

Along with her petition for recusal appeal, Petitioner submitted a flash drive, which allegedly contains a recording of the proceedings held in the Trial Court on February 7, 2023. The Trial Court noted in its February 16, 2023 order denying the motion for recusal that Petitioner was using her cellular phone to surreptitiously record the proceedings in court that day. The flash drive submitted by Petitioner was not admitted into evidence and was not approved by the Trial Court. Nor does it qualify as a properly authenticated transcript. As such, it would be improper for this Court to consider the contents of the flash drive. This Court will not consider the improperly submitted flash drive in addressing this appeal.

Turning to the allegations in the petition for recusal appeal, we have determined in this case after a review of the petition and supporting documents submitted with the petition, that an answer, additional briefing, and oral argument are unnecessary to our disposition. As such, we have elected to act summarily on this appeal in accordance with sections 2.05 and 2.06 of Rule 10B. *See* Tenn. Sup. Ct. R. 10B, § 2.05 (“If the appellate court, based upon its review of the petition for recusal appeal and supporting documents, determines that no answer from the other parties is needed, the court may act summarily on the appeal. Otherwise, the appellate court shall order that an answer to the petition be filed by the other parties. The court, in its discretion, also may order further briefing by the parties within the time period set by the court.”); § 2.06 (“An accelerated interlocutory appeal shall be decided by the appellate court on an expedited basis. The appellate court’s decision, in the court’s discretion, may be made without oral argument.”).

We review a trial court’s ruling on a motion for recusal under a *de novo* standard of review with no presumption of correctness. Tenn. Sup. Ct. R. 10B § 2.01. “The party seeking recusal bears the burden of proof, and ‘any alleged bias must arise from extrajudicial sources and not from events or observations during litigation of a case.’” *Neamtu v. Neamtu*, No. M2019-00409-COA-T10B-CV, 2019 WL 2849432, at *2 (Tenn. Ct. App. July 2, 2019) (quoting *Williams by & through Rezba v. HealthSouth Rehab. Hosp. N.*, No. W2015-00639-COA-T10B-CV, 2015 WL 2258172, at *5 (Tenn. Ct. App. May 8, 2015)). As this Court explained in *Neamtu v. Neamtu*:

“[A] party challenging the impartiality of a judge ‘must come forward with some evidence that would prompt a reasonable, disinterested person to believe that the judge’s impartiality might reasonably be questioned.’” *Duke*, 398 S.W.3d at 671 (quoting *Eldridge v. Eldridge*, 137 S.W.3d 1, 7-8 (Tenn.

Ct. App. 2002)). When reviewing requests for recusal alleging bias, “it is important to keep in mind the fundamental protections that the rules of recusal are intended to provide.” *In re A.J.*, No. M2014-02287-COA-R3-JV, 2015 WL 6438671, at *6 (Tenn. Ct. App. Oct. 22, 2015), *perm. app. denied* (Tenn. Feb. 18, 2016). **“The law on judicial bias is intended ‘to guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a prejudged conclusion because of interest, partiality, or favor.’”** *Id.* (quoting *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009)).

The terms “bias” and “prejudice” usually refer to a state of mind or attitude that works to predispose a judge for or against a party, but not every bias, partiality, or prejudice merits recusal. *Watson v. City of Jackson*, 448 S.W.3d 919, 929 (Tenn. Ct. App. 2014) (citing *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994)). **“Even though the judge is expected to have no bias at the beginning of the trial, he must, perforce, develop a bias at some point in the trial; for the decision at the conclusion of the trial is based upon the impressions, favorable or unfavorable, developed during the trial.”** *Id.* at 933 (quoting *Spain v. Connolly*, 606 S.W.2d 540, 544 (Tenn. Ct. App. 1980)). To merit disqualification, the prejudice must be of a personal character, directed at the litigant, and stem from an extrajudicial source resulting in an opinion on the merits on some basis other than what the judge learned from participation in the case. *Id.* at 929. “A trial judge’s opinions of the parties or witnesses that are based on what he or she has seen at trial are not improper and ‘generally do[] not warrant recusal.’” *Id.* at 933 (quoting *Neuenschwander v. Neuenschwander*, No. E2001-00306-COA-R3-CV, 2001 WL 1613880, at *11 (Tenn. Ct. App. Dec. 18, 2001)).

Neamtu, 2019 WL 2849432, at *3 (quoting *In re Samuel P.*, No. W2016-01592-COA-T10B-CV, 2016 WL 4547543, at *2 (Tenn. Ct. App. Aug. 31, 2016) (emphasis in original).

The only order this Court may review in a Tennessee Supreme Court Rule 10B recusal appeal is the trial court’s order denying a motion to recuse. *Duke v. Duke*, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012) (“Pursuant to [Tennessee Supreme Court Rule 10B], we may not review the correctness or merits of the trial court’s other rulings . . .”).

In her petition for recusal appeal, Petitioner asserts that Judge Wright should be recused because he incarcerated her due to her immigration status and made xenophobic statements about said status. Petitioner is mistaken. In the February 16, 2023 order denying Petitioner’s motion to recuse, the Trial Court explained that Petitioner was incarcerated for contempt of court. The Trial Court then carefully and thoroughly analyzed Petitioner’s allegations of bias. We quote liberally from the Trial Court’s February 16, 2023 order, which states:

Mother appears to raise three separate grounds for recusal, though all appear to be premised upon her lawful permanent residence status under VAWA.

1. Allegation of deprivation of rights under color of law.

The underlying factual basis for Mother's Motion to Recuse appears to be the fact that she was ordered into custody for contempt of court on two separate occasions during a recent hearing February 7, 2023. Separate contempt Orders were filed contemporaneously with the orders that she be placed in custody on February 7, 2023 and clearly state the Court's grounds for her incarceration.

Ms. McCurry was found to be in contempt of court for ignoring repeated requests and orders from the Bench that she stop talking. It is impossible for the Court to conduct an orderly proceeding when participants refuse to follow the explicit orders from the Judge regarding who is to be talking, and when. Ms. McCurry alleges that she was sentenced "to incarceration due to evidence provided to the Court that she was a lawful permanent resident under the Violence Against Women Act. . . ." Mother's Motion at p. 1. She goes on to state that the undersigned "ordered for Agness to be incarcerated due to being a lawful permanent resident under VAWA, but he also subjected Agness to 'punishments' and 'pains' by the Sheriff's Office based off her immigration status."

Ms. McCurry's incarceration had only to do with maintaining the dignity and authority of the Court and insisting upon an orderly presentation of arguments and testimony as well as appropriate decorum during the trial proceedings. She was ultimately sanctioned with a term of 24 hours incarceration for her repeated refusal to obey the orders of the Court, which resulted in the obstruction of the administration of justice.

2. Allegation that Mother was deprived of Due Process.

Mother alleges that she was deprived of Due Process because she was "discriminated against by Judge Wright due to her lawful permanent resident status under VAWA." Mother's Motion at p. 3. Mother has not been discriminated against by the undersigned in this proceeding. Any participant in Court that disobeyed repeated orders and obstructed the administration of justice would have been treated exactly as Ms. McCurry was. Again, none of her treatment had any relation to her lawful permanent resident status.

Ms. McCurry has actually been provided with a heightened level of

Due Process in this case, some at her insistence, and some because she is *Pro Se*, and some because she already believed she had been mistreated by the judiciary at the trial and appellate levels in this case. For instance, at her request an out of State witness was allowed to testify via Webex. Special arrangements were made by the Clerk's office to provide her witness access to the proceedings. (Typically, the attorney is required to provide the web access for a remote participant.) This was done without any showing as to the nature or necessity of the testimony.

As it turned out, the witness had very little firsthand knowledge of any facts. Most of her testimony consisted of sharing her opinions and conclusions about Ms. McCurry and the way she has been treated, and repeating what Ms. McCurry had told her. Nevertheless, the witness was allowed to testify extensively. Ms. McCurry and her remote witness were given wide latitude, not ordinarily provided to a litigant represented by an attorney, with regard to the nature and extent of the remote witness' testimony.

Typically, the undersigned does not allow witnesses to testify via the Internet. It is difficult to assess their demeanor and veracity via a head shot on a screen. When a witness is absent from the courtroom it is impossible to tell if they are referring to other materials, or if there are other persons present, and if they are receiving information from others that might affect their testimony. For example, in this particular case, when Ms. McCurry was ordered into custody on the initial contempt she was able to call the remote witness on her cell phone while the deputies were attempting to take her into custody, all while also surreptitiously recording all of the court proceedings, including her encounter with law enforcement. Because Ms. McCurry was allowed to have her telephone in the courtroom she could have also provided the remote witness with access to court proceedings prior to the remote witness' testimony in violation of the Rule of Sequestration which had been invoked at the beginning of the case. She could have texted information to the remote witness during cross examination. For all these reasons remote testimony is rarely allowed. However, this extraordinary treatment was provided to Ms. McCurry because of the facts mentioned above to ensure that Ms. McCurry could have no Due Process concerns.

In addition, Ms. McCurry was allowed to present evidence and cross examine Father's witnesses as well as engage in arguments regarding evidentiary rulings and legal issues. Unfortunately, she is unwilling to accept court rulings that she disagrees with and appears to be incapable of not interrupting opposing counsel or the Court when statements are made that she disputes.

Further, within the last year, Ms. McCurry has filed at least five appeals in this case, including three appeals since the undersigned was designated to hear the case, but before any hearing had ever been held. All of her appeals have been resolved unfavorably for her but mostly because she was trying to appeal a ruling that was not a final order or judgment. Nevertheless, the Court of Appeals has reviewed her appellate issues at least five times within the last year, and from there the Supreme Court has also reviewed her appellate issues more than once.

As explained in previous Orders from this Court, the undersigned has been attempting to provide Ms. McCurry with a hearing on the merits on the Ex Parte Order for Custody suspending her parenting time since the undersigned was designated to hear the case. The actions of the undersigned and the judiciary of the State of Tennessee are not depriving Ms. McCurry of Due Process. It is hard to conceive of a litigant receiving more “process” than Ms. McCurry.

3. Allegation of Manifestation of Bias and Prejudice.

Mother contends that the undersigned has manifested bias and prejudice, and that this “was due to Agness (sic) ‘national origin’ as a lawful permanent resident under VAWA (Violence Against Women and Abused Spouses).” Mother’s Motion at p. 4. As explained above, the undersigned’s actions have had nothing to do with Ms. McCurry’s [sic] national origin or her status as a lawful permanent resident under VAWA. She was treated exactly as any other trial participant in similar circumstances would have been.

She further states that she was incarcerated for 24 hours “due to knowledge of Agness (sic) Federal lawsuit at the United States District Court against the Tennessee Court of Appeals Eastern Division. . . .” *id* at p. 4. Again, her incarceration was for contempt of court. It was not based upon her filing suit against the Court of Appeals. The undersigned learned for the first time that a suit against the Court of Appeals existed during the hearing on February 7¹. This knowledge played no role in the decision to incarcerate Ms. McCurry for contempt.

¹ Following the February 7 hearing, in a separate Order, the parties were directed to bring related documents from the Federal Court lawsuit to the continued hearing on the Ex Parte Order for Custody because statements and allegations made in those documents might be relevant to Father’s claim that Mother is experiencing delusional thinking.

The undersigned is not biased or prejudiced against Ms. McCurry at all. Ms. McCurry was sanctioned for contempt of court due to her willful disobedience to the direct orders of the Court, and the obstruction of the orderly administration of justice, and her challenge to the dignity and authority of the Court. There is no basis for recusal in this case.

(footnote in original).

It is clear from the Trial Court's February 16, 2023 order that Petitioner was incarcerated due to her behavior in court, not due to her immigration status. The Trial Court's orders finding Petitioner in contempt are not before us. As noted above, the only order this Court may review in a Tennessee Supreme Court Rule 10B recusal appeal is the trial court's order denying a motion to recuse. *Duke*, 398 S.W.3d at 668. Petitioner has failed to show that Judge Wright's impartiality might reasonably be questioned.

As discussed above, Petitioner, as the party seeking recusal, bore the burden of proof. Petitioner failed to produce "evidence that would prompt a reasonable, disinterested person to believe that the judge's impartiality might reasonably be questioned." *Neamtu*, 2019 WL 2849432, at *3 (quoting *In re Samuel P.*, 2016 WL 4547543, at *2). As such, we find no error in the Trial Court's February 16, 2023 order denying recusal.

Discerning no error in Judge Wright's denial of Petitioner's motion for recusal, we hereby affirm the decision. The offensive portions of Petitioner's petition for recusal appeal are hereby deemed STRICKEN, and the Appellate Court Clerk is directed to SEAL the petition for recusal appeal so that the public shall not have access to this document in the future. The costs of this appeal are taxed to Petitioner, Agness McCurry, for which execution may issue. This case is remanded for further proceedings.

JOHN W. MCCLARTY, JUDGE