IN THE UTAH COURT OF APPEALS

----ooOoo----

John L. Legg Jr.,	)	MEMORANDUM DECISION (Not For Official Publication)
Petitioner and Appellant,	)	Case No. 20060729-CA
v.	)	
Board of Pardons and Department of Corrections,	)	F I L E D (June 1, 2007)
Respondents and Appellees.	)	2007 UT App 190

Third District, Salt Lake Department, 050921207
The Honorable Tyrone E. Medley

Attorneys: John L. Legg Jr., West Valley City, Appellant Pro Se
Mark L. Shurtleff and Brent A. Burnett, Salt Lake City, for Appellees

-----

Before Judges Greenwood, Billings, and Davis.

PER CURIAM:

John L. Legg Jr. appeals the district court's dismissal of his petition for postconviction relief. We affirm.

Legg argues that the district court erred when it failed to recuse itself. A motion to disqualify

> shall be filed after commencement of the action, but not later than 20 days after the last of the following: (i) assignment of the action or hearing to the judge; (ii) appearance of the party or the party's attorney; or (iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

Utah R. Civ. P. 63(b)(1)(B). "While a motion to disqualify a judge should not be undertaken lightly, it must be made promptly." Madsen v. Prudential Fed. Sav. & Loan Ass'n, 767 P.2d 538, 542 (Utah 1988). "Timeliness is essential in filing a motion to disqualify." Id. The district court judge was

assigned to this matter on November 30, 2005. Legg filed his motion to disqualify on January 19, 2006, forty-nine days later. Because Legg's motion was based solely on the assignment of the particular judge in this case, the motion was untimely.[1] See Utah R. Civ. P. 63(b)(1)(B)(i).

Legg also argues that the district court erred by ruling without affording Legg an evidentiary hearing. Rule 65C provides that the trial court may either hold "a hearing or otherwise dispose of the case." Utah R. Civ. P. 65C(j). Thus, the trial court has discretion whether to hold an evidentiary hearing and did not err in considering Legg's petition on the merits without a hearing.

Next, Legg argues that the trial court ruled incorrectly regarding the power of the Board of Pardons (the Board) to issue warrants. This argument is without merit. The Board has express statutory authority to issue warrants to retake parolees into Board custody. See Utah Code Ann. § 77-27-11(3) (2003). In Jones v. Utah Board of Pardons and Parole, 2004 UT 53, 94 P.2d 283, the Utah Supreme Court expressly held that the issuance of warrants to retake parolees is constitutional. See id. at ¶¶36, 42. "[T]he Board's power to issue retaking warrants falls well within the ambit of its legitimate plenary powers to grant parole." Id. at ¶35 (quotations omitted). Moreover, the Board "may revoke the parole of any person who is found to have violated any condition of his parole." Utah Code Ann. § 77-27-11(1). If a parolee violates the conditions of parole, the Board may order the parolee to be "imprisoned again as determined by the Board, not to exceed the maximum term." Id. § 77-27-11(6). Thus, the Board retains jurisdiction over parolees, and may

---

[1]In addition, "[t]he question of whether a party's affidavit alleging judicial bias is legally sufficient is a question of law." In re M.L., 965 P.2d 551, 556 (Utah Ct. App. 1998). Rule 63(b) states that the motion "shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest." Utah R. Civ. P. 63(b)(1)(A). "[S]uch bias may not be based solely on the fact that the judge has issued prior rulings adverse to the party making the allegation." In re M.L., 965 P.2d at 556 (citing In re Affidavit of Bias, 947 P.2d 1152, 1154 (Utah 1997)). Legg's affidavit stated only that the district court judge had presided over a prior hearing involving Legg and that the judge issued an adverse ruling in that proceeding. This is insufficient to mandate recusal. See id.

reimprison them for parole violations, even without a new conviction.[2]

We affirm the decision of the district court.

____
Pamela T. Greenwood,
Associate Presiding Judge

____
Judith M. Billings, Judge

____
James Z. Davis, Judge

---

[2] To the extent we are able to understand Legg's remaining arguments on appeal, they are without merit. Legg appears to argue that his 120-day disposition demand was improperly handled. This issue has previously been disposed of by this court, see State v. Legg, 2006 UT App 367 (mem.), and was correctly determined by the trial court in any event. To the extent Legg argues that his due process rights were violated in some way because a hearing was not provided upon his return to prison, Legg signed a "Time Waiver For Parole Revocation Hearing." Therein, Legg specifically waived any claim that he was denied procedural due process when the Board failed to hold parole revocation proceedings immediately upon his return to custody. Finally, Legg provides no factual basis or legal authority for the proposition that the trial court erred when it failed to order transcripts for prior board hearings.