

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 2, 2023

FILED

10/17/2023

Clerk of the  
Appellate Courts

**JAMES PAUL BURKHART v. KATHRYN JEAN BURKHART**

**Appeal from the Circuit Court for Sumner County  
No. 2022-CV-960 Joe Thompson, Judge**

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**No. M2023-01390-COA-T10B-CV**

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In this accelerated interlocutory appeal, Appellant seeks to appeal from the denial of three separate motions to recuse the trial judge. As to the first motion, we affirm the trial court's denial of that motion on the basis of Appellant's failure to comply with Rule 10B of the Rules of the Supreme Court of the State of Tennessee. As the second and third recusal motion, we dismiss this appeal, as no effective order denying those motions has yet been entered by the trial court.

**Tenn. Sup. Ct. R. 10B Interlocutory Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Appeal Dismissed in Part and Remanded**

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and JEFFREY USMAN, J., joined.

James Paul Burkhart, Portland, Tennessee, Pro se.

Sharon Linville, Hartsville, Tennessee, for the appellee, Kathryn Jean Burkhart.

**OPINION**

**I. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

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<sup>1</sup> In order to affect an accelerated interlocutory appeal in a recusal matter, the appellant is required to support his or her petition for recusal appeal with "all supporting documents filed in the trial court, a copy of the trial court's order or opinion ruling on the motion, and a copy of any other parts of the trial court record necessary for determination of the appeal." Tenn. Sup. Ct. R. 10B, § 2.03. The appeal is then to be decided on an expedited basis. Tenn. Sup. Ct. R. 10B, § 2.06. As we discuss *infra*, the record as submitted by Mr. Burkhart contains no sworn testimony and thus no evidence. We therefore can only rely on the documents submitted with the petition for an accelerated interlocutory appeal.

This is an appeal from the denial of three motions for recusal. Plaintiff/Appellant James Paul Burkhart filed an amended motion to recuse in the Sumner County Circuit Court (“the trial court”) on August 28, 2023.<sup>2</sup> The motion sought the recusal of trial judge Joe Thompson “due to several Code of Judicial Conduct violations.” Mr. Burkhart alleged that the trial judge had shown prejudice against him on multiple occasions as well as preferential treatment of a therapist based on her previous appearances before the judge. The trial court denied this motion by order of September 19, 2023, finding that Mr. Burkhart’s concerns regarding the therapist had “nothing to do with” the trial court and Mr. Burkhart’s anger and frustration with the proceedings were not “a reason for recusal.”

Mr. Burkhart filed a second motion to recuse the trial judge on the morning of September 26, 2023. While the general allegations of bias against Mr. Burkhart and preferential treatment of the therapist matched those of the first recusal motion, this second motion relied on events occurring more recently. On the same day, the trial court wrote on Mr. Burkhart’s motion by hand that it was denied on the basis that Rule 10B of the Rules of the Supreme Court of the State of Tennessee was not followed and parts of the motion fell under the Rule’s restrictions against repetitive recusal motions.

Mr. Burkhart quickly filed a third motion to recuse the trial judge shortly before noon on September 26, 2023. This motion contained the same allegations as the second recusal motion but more clearly identified the Rules of Judicial Conduct the judge had allegedly violated. The trial court summarily denied the motion pursuant to section 1.01 of Rule 10B on September 27, 2023, once again by hand writing its ruling on Mr. Burkhart’s motion. Mr. Burkhart filed his petition for an accelerated interlocutory appeal in this Court on September 29, 2023.

On October 6, 2023, the trial court entered an amended order on Mr. Burkhart’s August 28, 2023 amended motion to recuse. Therein, the trial court provided more detailed reasoning behind its denial of Mr. Burkhart’s recusal motion. Specifically, the trial judge found that Mr. Burkhart’s failed to comply with Rule 10B in that his motion was not supported by an affidavit or declaration under penalty of perjury. Still, the trial court went on to address Mr. Burkhart’s allegations, concluding that Mr. Burkhart’s arguments failed to demonstrate a bias or other circumstance that would warrant recusal. On October 10, 2023, Mr. Burkhart filed an objection to the trial court’s October 6, 2023 order in which he objected to the trial court’s factual findings and legal reasoning in concluding that recusal was not warranted; Mr. Burkhart did not, however, respond to the trial court’s finding that his motion failed to include the required affidavit or declaration, nor did he specifically ask for any relief in his pleading, such as to alter or amend the order.

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<sup>2</sup> No initial motion is included among the documents that Mr. Burkhart submitted in support of his petition for recusal appeal. As such, we treat the August 28, 2023 amended motion as the first motion to recuse for purposes of this appeal.

## II. ANALYSIS

Our sole concern in this interlocutory appeal is whether the trial court erred in denying Mr. Burkhart's motions for recusal. See *Duke v. Duke*, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012). Appeals from orders denying a motion to recuse are governed by Rule 10B of the Rules of the Supreme Court of the State of Tennessee. The standard of review of a Rule 10B appeal is de novo, with no presumption of correctness. Tenn. Sup. Ct. R. 10B, § 2.01. If we determine, after reviewing the petition and its supporting documents, that no answer to the petition is required, we may "act summarily on the appeal." Tenn. Sup. Ct. R. 10B, § 2.05. Similarly, we may, in our discretion, decide the appeal without oral argument. Tenn. Sup. Ct. R. 10B, § 2.06. Following our review of Mr. Burkhart's petition for recusal appeal, we have determined that neither an answer, additional briefing, nor oral argument is necessary, and we elect to act summarily on the appeal in accordance with Rule 10B sections 2.05 and 2.06.

Tennessee Code of Judicial Conduct Rule 2.11 provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" Tenn. R. Sup. Ct. 10, § 2.11. It is well settled that "[t]he right to a fair trial before an impartial tribunal is a fundamental constitutional right." *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009) (citation omitted). We have previously emphasized that "the preservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial." *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998) (citations omitted). Accordingly, even in cases where a judge sincerely believes that he or she can preside over a matter fairly and impartially, recusal is nevertheless required in cases where a reasonable person "in the judge's position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Davis v. Liberty Mut. Ins.*, 38 S.W.3d 560, 564–65 (Tenn. 2001) (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994)). It is an objective test designed to avoid actual bias and the appearance of bias, "since the appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Id.* at 565 (citation omitted).

Before we can address the merits of Mr. Burkhart's motions for recusal, however, we must first consider the procedural requirements set out in Rule 10B. A party seeking disqualification of a trial judge must "do so by a written motion filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal." Tenn. R. Sup. Ct. 10B, § 1.01. "The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials." *Id.* In addition to stating with specificity the factual and legal basis for the motion, the motion "shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Id.* These requirements are mandatory, and "[w]hen a petitioner fails to support a motion with this mandatory affidavit or declaration under penalty of perjury, we have

repeatedly held that the request for recusal was waived.” *Moncier v. Wheeler*, No. E2020-00943-COA-T10B-CV, 2020 WL 4343336, at \*3 (Tenn. Ct. App. July 28, 2020) (collecting cases). Although many cases of waiver involve the omission of both the affidavit and the affirmative statement, *id.* at \*5; *Hobbs Purnell Oil Co. v. Butler*, No. M2016-00289-COA-R3-CV, 2017 WL 121537, at \*14–15 (Tenn. Ct. App. Jan. 12, 2017), the omission of the affidavit alone has often led to waiver. *Childress v. United Postal Serv., Inc.*, No. W2016-00688-COA-T10B-CV, 2016 WL 3226316, at \*2–3 (Tenn. Ct. App. June 3, 2016); *Johnston v. Johnston*, No. E2015-00213-COA-T10B-CV, 2015 WL 739606, at \*2 (Tenn. Ct. App. Feb. 20, 2015).

Once a motion to recuse has been filed, the trial court “shall act promptly by written order and either grant or deny the motion.” Tenn. R. Sup. Ct. 10B, § 1.03. When the motion is denied, “the judge shall state in writing the grounds upon which he or she denies the motion.” *Id.* The necessity of stating grounds for denying a motion is somewhat relaxed when a repetitive motion is filed, however:

[I]f a subsequent section 1.01 motion is filed in the same case but fails to state, with specificity, substantially different factual and legal grounds than those relied upon in support of a previous section 1.01 motion, the judge may act summarily by filing a written order denying the motion as repetitive. The judge need not require a response to the motion, conduct a hearing on it, or provide any other written explanation for denying the motion.

*Id.*

Because the procedural posture of Mr. Burkhart’s August 28, 2023 motion to recuse is different than that of his following two motions, we will consider the August 28, 2023 motion separately from the latter two motions. Here, Mr. Burkhart alleged that the trial court exhibited bias against him by preferring the testimony of a therapist to his own testimony concerning some disputed issues. The trial court’s September 19, 2023 order found that Mr. Burkhart had not shown that recusal was necessary. Although Mr. Burkhart contends that this ruling was in error, we agree with the trial court that Mr. Burkhart’s motion was procedurally deficient and should have been denied.

Here, Mr. Burkhart’s August 28, 2023 recusal motion contained a statement that it was “not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” But the motion was not supported by an affidavit under oath or a declaration under penalty of perjury that the allegations were based on Mr. Burkhart’s personal knowledge. Accordingly, Mr. Burkhart has failed to strictly comply with the requirements set out in Rule 10B.

We acknowledge that Mr. Burkhart is proceeding pro se in this appeal. As explained by this Court, “[t]he courts should take into account that many pro se litigants have no legal

training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary." *Jackson v. Lanphere*, No. M2010-01401-COA-R3-CV, 2011 WL 3566978, at \*3 (Tenn. Ct. App. Aug. 12, 2011) (quoting *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003)). Therefore, "[w]hile entitled to fair and equal treatment before the courts, a pro se litigant is still required to comply with substantive and procedural law as do parties represented by counsel." *Gilliam v. Gilliam*, No. M2007-02507-COA-R3-CV, 2008 WL 4922512, at \*3 (Tenn. Ct. App. Nov. 13, 2008) (citing *Hessmer*, 138 S.W.3d at 903). Mr. Burkhart's pro se status does not relieve him of the obligation to comport with the requirements set out in Rule 10B.

This Court has previously chosen to address the substance of a recusal motion despite a petitioner only substantially complying with Rule 10B requirements when faced with an appeal under Rule 3 of the Tennessee Rules of Appellate Procedure. *See, e.g., Vazeen v. Sir*, No. M2022-00273-COA-R3-CV, 2023 WL 6160350, at \*9 (Tenn. Ct. App. Sept. 21, 2023) (citing *Stark v. Stark*, No. W2019-00901-COA-T10B-CV, 2019 WL 2515925, at \*6 (Tenn. Ct. App. June 18, 2019)).<sup>3</sup> However, we have consistently stressed that "the accelerated nature of these interlocutory appeals as of right requires meticulous compliance with the provisions of Rule 10B regarding the content of the record provided to this Court[.]" *Elliott v. Elliott*, No. E2012-02448-COA-T10B-CV, 2012 WL 5990268, at \*3 (Tenn. Ct. App. Nov. 30, 2012); *Johnston*, 2015 WL 739606, at \*2. Doing so allows this Court to meet its obligations under Rule 10B, which requires this Court to decide these appeals "on an expedited basis." Tenn. Sup. Ct. R. 10B, § 2.06. Thus, when the record on interlocutory appeal is "procedurally flawed" by the petitioner's failure to include a sworn affidavit or declaration under penalty of perjury in support of the motion to dismiss, "the record is insufficient to determine the issues raised" in the appeal. *Childress*, 2016 WL 3226316, at \*3. Moreover, the failure to provide any sworn testimony means that Mr. Burkhart has failed to present this Court with any "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)).<sup>4</sup>

We note that, despite later acknowledging that Mr. Burkhart's motion did not

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<sup>3</sup> In *Vazeen*, the appellant had submitted declarations in support of some of his recusal motions. The failure in that case was primarily the lack of affirmative statement that the motion was not being presented for an improper purpose. *Id.*

<sup>4</sup> As we have previously explained when similarly faced with a petition containing allegations of the trial judge's bias against the petitioner but a lack of sworn testimony, "conclusory statements, devoid of facts or details, do 'not rise to the dignity of evidence.'" *Judzewitsch v. Judzewitsch*, No. E2022-00475-COA-T10B-CV, 2022 WL 1279790, at \*2 (Tenn. Ct. App. Apr. 29, 2022) (quoting *Four Seasons Heating & Air Conditioning, Inc. v. Beers Skanska, Inc.*, No. M2002-02783-COA-R3-CV, 2003 WL 22999430, at \*5 (Tenn. Ct. App. Dec. 23, 2003)).

comply with Rule 10B's mandatory requirements,<sup>5</sup> the trial court appears to have allowed Mr. Burkhart to present testimony in support of his recusal motion at the September hearing. Indeed, according to the trial court's original order, during this hearing, Mr. Burkhart swore and affirmed that the statements in his motion were "true and accurate to the best of his knowledge[.]"<sup>6</sup> We conclude that this procedure does not correct the procedural deficiencies in this case. First, even to the extent that such a statement meets Rule 10B's requirements,<sup>7</sup> Rule 10B clearly requires a written motion to recuse that strictly complies with Rule 10B. *See, e.g., Smith v. Smith*, No. E2017-01295-COA-R3-CV, 2019 WL 410702, at \*3 (Tenn. Ct. App. Jan. 31, 2019) (holding that a recusal argument was waived where no written motion accompanied by an affidavit or declaration was filed in the trial court in compliance with the mandatory requirements of Rule 10B). Respectfully, Mr. Burkhart's written motion does not contain all the elements necessary to comply with Rule 10B.

Moreover, even to the extent that this deficiency could be corrected via an evidentiary hearing, Mr. Burkhart has not furnished this Court with a transcript or statement of the evidence that was presented at the September 11, 2023 hearing. "It is well settled that in cases where no transcript or statement of the evidence is filed, the appellate court is required to presume that the record, had it been properly preserved, would have supported the action of the trial court." *Short v. Alston*, No. W2022-00666-COA-R3-CV, 2023 WL 5294531, at \*3 (Tenn. Ct. App. Aug. 17, 2023). Here, after hearing the proof, the trial court found that Mr. Burkhart had not shown that recusal was warranted. Without a transcript or a statement of the evidence presented, we have no evidence from which we could determine that the trial court's ruling was erroneous. *See Runyon v. Runyon*, No. W2013-02651-COA-T10B-CV, 2014 WL 1285729, at \*9 (Tenn. Ct. App. Mar. 31, 2014) ("A claim of bias or prejudice must be based on facts . . ."). Thus, whether viewed through the lens of Mr. Burkhart's failure to comply with the requirements of Rule 10B or with his failure to provide this Court with a transcript or statement of the evidence presented, the fact remains that Mr. Burkhart has failed to provide this Court with the evidence necessary to review the trial court's denial of his recusal motions. The trial court's denial of the August 28, 2023 motion to recuse is therefore affirmed.

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<sup>5</sup> This finding was contained in the trial court's amended order filed on October 6, 2023. At the time the trial court filed this order, Mr. Burkhart had already initiated his appeal to this Court of the denial of his recusal motions. As such, it is somewhat questionable whether the trial court had authority to alter its ruling at this juncture. Regardless, we are permitted to affirm the dismissal of an action on different grounds than that relied upon by the trial court. *See Kinard v. Nationstar Mortg. LLC*, 572 S.W.3d 197, 207 (Tenn. Ct. App. 2018). As a result, we may affirm the trial court's ruling that Mr. Burkhart failed to demonstrate that recusal was required based on the procedural deficiencies of his motion, even if this was not the ground expressly relied upon in the trial court's initial order.

<sup>6</sup> This statement was not included in the trial court's amended order.

<sup>7</sup> This Court has come to somewhat differing conclusions as to whether a declaration to this effect meets the requirements of Rule 10B. *See Vazeen*, 2023 WL 6160350, at \*8 (discussing the cases on this issue).

We reach a different conclusion, however, as to the denial of Mr. Burkhart's latter two motions. As previously discussed, Mr. Burkhart filed another motion to recuse on the morning of September 26, 2023. This motion was ostensibly denied on the same day by way of the following handwritten notation appended to the end of Mr. Burkhart's motion:

MOTION DENIED. Rule 10b not followed. Parts  
of this motion fell under the restrictions against  
multiple motions to recuse addressed by Rule 10b  
1.01.  
4  
Joe Ohy  
Circuit Court Judge  
9/26/23

Later that same day, Mr. Burkhart once again moved for recusal of the trial judge; his final motion was denied in an even more succinct manner:<sup>8</sup>

<sup>3</sup> SUMMARY  
DENIED. Sup. Ct. Rule  
10b 1.01. Joe Ohy  
September 27, 2023

In this case, the trial court correctly cites section 1.01 of Rule 10B as applicable to repetitive motions. That provision provides, in relevant part, as follows:

Any subsequent motion under this section filed in the same case must state, with specificity, substantially different factual and legal grounds than those relied upon in support of a prior motion filed under this section. If a party fails to satisfy this requirement, the subsequent motion may be deemed repetitive and summarily denied as provided in section 1.03.

Tenn. Sup. Ct. R. 10B, § 1.01. So then, when a party files a repetitive motion to recuse, the trial court may summarily deny the motion via the procedure contained in section 1.03.

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<sup>8</sup> Even to the extent that the trial court had authority to alter its recusal orders pending this appeal, it does not appear that the October 6, 2023 amended order altered the September 26 or 27, 2023 handwritten rulings in any fashion. Indeed, the second and third recusal motions filed by Mr. Burkhart were not mentioned in the amended order.

Section 1.03 in turn permits the trial judge to summarily deny the motion “by filing a written order denying the motion as repetitive” with no other “written explanation.” Tenn. Sup. Ct. R. 10B, § 1.03. Thus, while the above framework allows a trial judge to deny a repetitive motion to recuse without providing a detailed explanation for doing so, it does not dispense with the requirement that the denial of such motion be accomplished by filing a written order.

Indeed, a stamp-filed written order is required by Rule 58 of the Tennessee Rules of Civil Procedure. That rule states, in pertinent part, as follows:

Unless otherwise expressly provided by another rule, entry of a judgment or an order of final disposition or any other order of the court is effective when a judgment or order containing one of the following is marked on the face by the clerk as filed for entry:

- (1) the signatures of the judge and all parties or counsel, or
- (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or
- (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Thus, “any . . . order of the court is effective” only when it is stamp-filed, signed by the judge, and either signed by the parties or accompanied by a certificate of service that the order was served on any non-signing parties. The trial court’s rulings denying Mr. Burkhart’s September 26, 2023 motions contain only one of these components: the signature of the judge. They do not contain any indication that the orders were signed by the parties or their counsel or a statement concerning efforts to serve the parties with copies of the orders. And even more importantly, nothing on the orders indicates that the orders were filed for entry by the clerk. Instead, the only filing stamp is the one indicating Mr. Burkhart’s filing of his motion. Respectfully, the trial court’s treatment of Mr. Burkhart’s motions has very little resemblance to what we typically consider the written order of a court in a court of record.

While we understand the frustration that can result from the filing of repetitive motions, judges are required to enter proper orders setting forth their rulings in accordance with all applicable rules, not only to ensure the orderly process of appeals, but also to “reinforce[] the legitimacy of the legal process” and “promote[] respect for the judicial system.” *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 313 (Tenn. 2014) (citing John J. Brunetti, *Searching for Methods of Trial Court Fact-Finding and Decision-Making*, 49 Hastings L.J. 1491, 1495 (1998)). Here, without compliance with Rule 58, no written orders were effectively entered disposing of Mr. Burkhart’s September 26, 2023 motions. As such, the time for filing his accelerated interlocutory appeal of those orders has not yet been triggered. *See* Tenn. Sup. Ct. R. 10B, § 2.02 (providing that a petition for recusal



appeal must be filed in the appropriate appellate court “within twenty-one days of the trial court’s *entry of the order*” (emphasis added)). In the absence of an effective written order denying Mr. Burkhart’s final two recusal motions, we have no jurisdiction under Rule 10B to review the denial of those motions. As such, Mr. Burkhart’s appeal is dismissed without prejudice as to the trial court’s denial of both September 26, 2023 motions.<sup>9</sup>

### III. CONCLUSION

The judgment of the Sumner County Circuit Court is affirmed with regard to the denial of the August 28, 2023 motion to recuse. This appeal is dismissed as to the denial of the September 26, 2023 motions to recuse. This matter is remanded to the trial court for further proceedings. Costs of this appeal are taxed to Plaintiff/Appellant James Paul Burkhart, for which execution may issue if necessary.

s/ J. Steven Stafford  
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J. STEVEN STAFFORD, JUDGE

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<sup>9</sup> We note that Mr. Burkhart’s September 26, 2023 motions are also not accompanied by affidavits or declarations under penalty of perjury. However, as a result of the trial court’s failure to enter effective orders denying those motions, we do not reach the question of whether the deficiencies that felled Mr. Burkhart’s August 28, 2023 motion would also prove fatal to Mr. Burkhart’s latter two motions to recuse.