IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 3, 2023

SUSAN B. FERKIN v. KATHERINE BELL

Appeal from the Circuit Court for Shelby County
No. CT-2859-22 Damita J. Dandridge, Judge

No. W2023-00481-COA-T10B-CV

A pro se petitioner seeks accelerated interlocutory review of the denial of her motion to disqualify the trial judge. After a de novo review, we affirm the denial of the motion for disqualification.

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

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and KENNY W. ARMSTRONG, J., joined.

Susan B. Ferkin, Memphis, Tennessee, pro se appellant.

OPINION

I.

A.

Susan B. Ferkin requested the audio recordings of the hearings on Michael Cory Halliburton's petition for post-conviction relief.[1] *See Halliburton v. State*, No. W2019-01458-CCA-R3-PC, 2020 WL 4727434 (Tenn. Crim. App. Aug. 13, 2020) (affirming the denial of post-conviction relief). Ms. Ferkin was present for the hearings and asserted that the audio recordings would corroborate her claims of inappropriate conduct during the proceedings.

[1] A jury convicted Halliburton of one count of attempted first degree premeditated murder, two counts of aggravated assault, and one count of domestic assault. *See State v. Halliburton*, No. W2015-02157-CCA-R3-CD, 2016 WL 7102747, *1 (Tenn. Crim. App. Dec. 6, 2016).

After her request for the recordings was denied, Ms. Ferkin filed a pro se petition for, among other things, judicial review under the Tennessee Public Records Act. *See* Tenn. Code Ann. § 10-7-505 (2020). The respondent, Katherine Bell, a court reporter administrator for the Criminal Court of the 30th Judicial District of Tennessee, moved to dismiss. And Ms. Ferkin filed a motion for judgment as a matter of law.

On February 17, 2023, the trial court conducted a hearing on the petition for judicial review. The court concluded that Ms. Ferkin's petition should be dismissed and the motion for judgment as a matter of law should be denied.

On February 24, and before an order was entered on the motion to dismiss, Ms. Ferkin moved to disqualify the trial judge. She claimed the facts provided a reasonable basis for questioning the judge's impartiality. The trial judge had not followed the law and accepted the respondent's argument "hook, line, and sinker, while refusing to allow Petitioner a proper and fair hearing of her case." The judge did not understand the workings of the Tennessee Board of Judicial Conduct and placed improper emphasis on the Board's dismissal of a complaint Ms. Ferkin had filed against the judge who presided over the post-conviction proceedings. And the trial judge had improperly relied on the respondent's counsel to draft a proposed order dismissing Ms. Ferkin's petition.

Despite the filing of the motion to disqualify, counsel for Ms. Bell submitted a proposed order dismissing the petition for judicial review, which the trial court entered. An e-mail to the trial court judge from counsel for Ms. Bell, on which Ms. Ferkin was copied, recounts the sequence of events:

> Judge Dandridge,
>
> > On Monday [February 27], this Office as Counsel for Respondent Katherine Bell in the above-styled case, pursuant to Rule 10 of the Local Rules of Practice for the Circuit Court of the Thirtieth Judicial District at Memphis, presented an order to your courtroom clerk regarding the Court's oral ruling from the hearing conducted on February 17, 2023. . . . Counsel's proposed Order Dismissing Petition for Judicial Review incorporated the Court's oral ruling. The above-mentioned local rule imposes on the prevailing party the duty to prepare a proposed order incorporating the Court's oral ruling and to present the proposed order within seven days of the motion hearing. We had presented a copy of the proposed order to pro se Petitioner Ferkin, who advised us that she would not agree to the proposed order in that form or any other. Thus our presentation of the proposed order to the Court was only for the purpose of satisfying Respondent's obligation under the Local Rule.

> When this Office presented the proposed order on Monday, we brought to your clerk's attention that Petitioner had filed a "Tenn. Sup. Ct. R. 10B Motion for Judicial Disqualification" on Friday, February 24, 2023, and that Respondent's proposed order should not be entered, but should be held pending the full adjudication of the recusal motion. . . . Caselaw under Rule 10B provides that the recusal motion must be resolved before any further orders are entered in the case, even if the Court has previously ruled.
>
> However, it is our understanding that the Court entered the proposed order on Monday, perhaps inadvertently. Our suggestion is that the Court vacate that order and proceed no further to enter an order memorializing the Court's February 17 rulings until the recusal is fully adjudicated.

Counsel's e-mail concluded with a request that Ms. Ferkin be included if the court wanted to hear from the parties:

> We also think it best not to appear before the Court ex parte to address this issue. If you wish for us to appear before the Court either in person or remotely, we will do so if at the same time the Court offers Petitioner Ferkin the opportunity to appear and be heard.

As suggested by counsel for Ms. Bell, the trial court vacated its order dismissing the petition for judicial review. It also set a hearing on Ms. Ferkin's motion for disqualification. These actions, as well as the court's communications with counsel for Ms. Bell, constituted, in Ms. Ferkin's view, additional facts mandating the judge's disqualification. Ms. Ferkin filed the e-mails as supplemental evidence in support of her motion for disqualification. She described the e-mails as "ex parte conversations with opposing counsel." Ms. Ferkin also faulted the trial judge "for following the ex parte legal advice of an interested party, for fail[ing] to properly supervise her staff, and for making materially false statements regarding her actions with respect to Petitioner's disqualification motion."

B.

At the hearing on the motion to disqualify, the trial judge gave Ms. Ferkin the opportunity to explain why disqualification was appropriate. Ms. Ferkin explained:

> Well, the opposing counsel was allowed to present information, inaccurate information, testimony that, well, contained lies in their motion [to dismiss], in their response.
>
> I feel like I was not given an opportunity to fully present my case to you, to the Court. I did not get — I was allowed to say like two or three

> things in response to the remarks and with regards to the [*State ex rel. Wilson v.*] *Gentry*, [No. M2019-02201-COA-R3-CV, 2020 WL 5240388 (Tenn. Ct. App. Sept. 2, 2020)], case and only looking at that and also only looking at the Board of Judicial Conduct, which had nothing to do with this case of getting this public record, and here now the Board of Judicial Conduct is not a court, and whatever things they decide, they're not a court, and it has no bearing in this case.
>
> And further with the recent emails, a paper trail of emails in which opposing counsel has given the court/judge advice, which is not legal.

Later, Ms. Ferkin told the Court, "The bottom line is . . . I feel like I did not have an opportunity to fully present my issue . . . ."

The court denied the motion to disqualify. It determined that Ms. Ferkin "failed to meet her burden of proof to show that the Court's alleged bias ha[d] arisen from extrajudicial sources and not from events or observations made by the Court during the litigation of this case."

II.

A.

Ms. Ferkin petitioned for an accelerated interlocutory review of the denial of her motion to disqualify.[2] *See* TENN. SUP. CT. R. 10B § 2.01. She focuses most of her arguments on the trial judge's alleged "failure to abide by the law in responding to Petitioner's request for judicial [review] of her public records request." In Ms. Ferkin's view, the judge "show[ed] no interest into inquiring into the legal obligations and legal consequences of the conduct of Ms. Bell and her advisors in their failure to answer [the public records] request in a timely manner." And Ms. Ferkin faults the judge for "rel[ying] almost completely on the State for her decision" and "not even address[ing] Petitioner's arguments."

Ms. Ferkin also complains about ex parte communications. In her words, "[t]he judge t[ook] no responsibility for the actions of her staff as she is required to do in order to control potential ex parte communications." According to Ms. Ferkin, "the judge is following unsolicited ex parte advice from opposing counsel, and neither the judge nor her clerks feels any responsibility to give Petitioner notice except as a 'courtesy.'" And she

[2] After her interlocutory appeal was docketed and assigned to a panel of this Court, Ms. Ferkin filed a separate appeal of the dismissal of petition for judicial review.

accuses the judge of being untruthful when the judge denied seeing e-mails from opposing counsel.[3]

B.

In Tennessee, litigants "have a fundamental right to a 'fair trial before an impartial tribunal.'" *Holsclaw v. Ivy Hall Nursing Home, Inc.*, 530 S.W.3d 65, 69 (Tenn. 2017) (quoting *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002)); *see Kinard v. Kinard*, 986 S.W.2d 220, 227 (Tenn. Ct. App. 1998) (reasoning that litigants "are entitled to the 'cold neutrality of an impartial court'" (quoting *Leighton v. Henderson*, 414 S.W.2d 419, 421 (Tenn. 1967))); *see also* TENN. CONST. art. VI, § 11. It "goes without saying that a trial before a biased or prejudiced fact finder is a denial of due process." *Wilson v. Wilson*, 987 S.W.2d 555, 562 (Tenn. Ct. App. 1998).

Our courts also recognize that "the appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 565 (Tenn. 2001); *see In re Cameron*, 151 S.W. 64, 76 (Tenn. 1912) ("[I]t is of immense importance, not only that justice shall be administered . . . , but that [the public] shall have no sound reason for supposing that it is not administered."). So judges should recuse when they have "any doubt as to [their] ability to preside impartially in [a] case." *Davis*, 38 S.W.3d at 564. But a judge must also "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." TENN. SUP. CT. R. 10, Rule 2.11(A). This test is "an objective one." *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008). It requires recusal "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Davis*, 38 S.W.3d at 564-65 (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994)). On appeal, the denial of a motion to disqualify is reviewed de novo.[4] TENN. SUP. CT. R. 10B § 2.01.

To seek disqualification or recusal, a party must come forward with some evidence that would give a person of ordinary prudence in the judge's position a reasonable basis

[3] Accusing the trial judge of being untruthful is not the only troubling accusation included in Ms. Ferkin's petition for an accelerated interlocutory review. She accuses the trial judge of violating her oath of office by not reporting other judges to the Tennessee Board of the Judicial Conduct. And she makes general statements showing disrespect for the courts of this State, mimicking claims made by Michael Cory Halliburton. *See Halliburton v. Ballin*, No. W2022-01208-COA-T10B-CV, 2022 WL 4397190, at *6 (Tenn. Ct. App. Sept. 23, 2022). Ordinarily such statements would be grounds for striking her petition and dismissing the appeal. *See* TENN. CT. APP. R. 9. Exercising our discretion, we strike only the offensive language.

[4] In an accelerated appeal, we may request an answer from the other party and briefing. TENN. SUP. CT. R. 10B § 2.05. We may also set oral argument. *Id.* § 2.06. After a review of Ms. Ferkin's petition for accelerated interlocutory appeal and exhibits, we conclude an answer, additional briefing, and oral argument are unnecessary.

for questioning the judge's impartiality. *See* TENN. SUP. CT. R. 10B § 1.01 ("The motion [for disqualification or recusal] shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials."); *Davis v. Tenn. Dep't of Emp. Sec.*, 23 S.W.3d 304, 313-14 (Tenn. Ct. App. 1999) (on petition for rehearing). Here, the evidence relied on by Ms. Ferkin is the dismissal of her petition for judicial review, the preparation of a proposed order of dismissal by opposing counsel, and e-mails between the court and opposing counsel. None of the evidence supports disqualification of the trial judge.

As our supreme court explained, "[a] trial judge's adverse rulings are not usually sufficient to establish bias." *Cannon*, 254 S.W.3d at 308. That is true "even if [the adverse rulings are] erroneous, numerous and continuous"; there must be something more to justify disqualification. *Alley*, 882 S.W.2d at 821; *see also Cannon*, 254 S.W.3d at 308. So the dismissal of Ms. Ferkin's petition for judicial review, standing alone, is not sufficient grounds for disqualification. It is more appropriately an issue for appeal. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

Ms. Ferkin complains that opposing counsel prepared a proposed order dismissing her petition for judicial review, and the court adopted the proposed order as its own. Yet, in drafting and submitting a proposed order, opposing counsel was following a mandate of the local rules of court. *See* 30TH JUD. DIST. CIR. CT. R. 10 (specifying that "[o]rders or decrees shall be prepared by counsel for the prevailing party"). And "most courts have approved . . . the practice of trial courts receiving and using party-prepared . . . orders" provided they "accurately reflect the decision of the trial court" and "represent[] the trial court's own deliberations and decision." *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 315-16 (Tenn. 2014). Although it might be preferable for trial judges to draft their own orders, we do not find it a valid basis to question the impartiality of the trial judge here. *See id*. at 314. Ms. Ferkin claims that the order does not reflect the trial judge's own deliberations and decision. But just because a trial judge accepts the arguments and legal positions of one party over another does not mean the judge has not employed his own judgment. Judicial decisions are almost always adverse to some party.

The trial court also vacated the order of dismissal after opposing counsel suggested that course of action in an e-mail to the court. But we conclude that vacatur was not inappropriate given the timing of Ms. Ferkin's motion to disqualify. The court made a ruling dismissing the petition for judicial review in open court, but the motion to disqualify was filed before entry of the order dismissing the case. A judge whose disqualification is sought must "make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken." TENN. SUP. CT. R. 10B § 1.02. *But see Xingkui Guo v. Rogers*, No. M2020-01321-COA-T10B-CV, 2020 WL 6781244, at *4 (Tenn. Ct. App. Nov. 18, 2020) (concluding that signing and filing an order after a motion to recuse is not impermissible if it memorializes an oral ruling made prior to the motion to recuse).

As for ex parte communications, excepted in limited circumstances, a judge must "not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers." TENN. SUP. CT. R. 10, Rule 2.9(A). But Ms. Ferkin presents no evidence of impermissible communications with the trial judge. "Ex parte" refers to something "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest." *Ex Parte*, BLACK'S LAW DICTIONARY (11th ed. 2019). Almost all of the e-mail communications appended to Ms. Ferkin's "Supplemental Evidence in Support of Tenn. Sup. Ct. R. 10B Motion for Judicial Disqualification" are not ex parte. The e-mails were from Ms. Ferkin, sent to Ms. Ferkin, or Ms. Ferkin was copied on the email.

There are two exceptions in the e-mails that Ms. Ferkin provided. First, there is an e-mail from a "Michael Halliburton" to the court attempting to set a court date, purportedly on behalf of Ms. Ferkin, and a reply e-mail from the court. Second, there is an e-mail from a clerk to counsel for Ms. Bell attempting to schedule a meeting with the judge. But ex parte communications for purposes of "scheduling, administrative, or emergency purposes" are permitted, provided substantive matters are not addressed and other conditions are satisfied. TENN. SUP. CT. R. 10, Rule 2.9(A)(1). We also note that, in the case of the scheduling e-mail from the court to opposing counsel, opposing counsel copied Ms. Ferkin on their reply to the e-mail.

III.

We affirm the denial of the motion for disqualification. We remand the case for such further proceedings as may be necessary.

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE