IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
June 6, 2023 Session

IN RE KATHY DELORES HORTON (PROSPECTIVELY D/B/A A-TEAM BAIL BOND COMPANY, LLC)

Appeal from the Criminal Court for Shelby County
No. NA Chris Craft, Judge

No. W2022-01355-CCA-R3-CD

The appellant, Kathy Delores Horton (prospectively D/B/A A-Team Bail Bond Company, LLC), appeals the Shelby County Criminal Court's denial of her petition to operate a new bail bond company. The appellant asserts that the trial court erred in denying her petition because she had the requisite two years of experience working as a qualified agent. The appellant also raises a challenge regarding the en banc panel, the denial of a claim concerning ex parte communications, and an equal protection claim. Following our review, we affirm the trial court's denial of the appellant's petition, as well as her other claims.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J. ROSS DYER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR. and TOM GREENHOLTZ, JJ., joined.

André C. Wharton, Memphis, Tennessee, for the appellant, Kathy Delores Horton.

Jonathan Skrmetti, Attorney General and Reporter; Jonathan H. Wardle, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Byron Winsett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

On April 19, 2022, the appellant filed a petition seeking approval of a new bail bond company with the Shelby County Criminal Court. An en banc hearing was held on the petition on June 23, 2022. At the onset of the hearing, the presiding judge, Judge Chris

Craft, listed himself and the five other judges who were present for the hearing and stated that the hearing would be transcribed for the other three judges who were not in attendance.[1] Neither the appellant nor her attorney objected or raised any concern with this procedure.

The appellant testified that she had filed a petition to operate a new bail bond company, A-Team Bail Bond Company, LLC, in Shelby County and had filed the articles of organization and obtained a business license and the appropriate insurance license. The appellant had also secured a proposed location for her business, pending approval of her petition, and obtained a power of attorney to write bonds on behalf of Financial Casualty & Surety, the insurance company that would underwrite her bonds. Financial Casualty had also agreed to provide the required $75,000 certificate of deposit that had to be filed with the clerk's office. The appellant testified concerning her financial situation and some of the initial costs to operate her business, stating she did not have any trouble meeting her financial obligations and had no debt other than a mortgage.

The appellant testified that she had worked in the bail bond industry for a little over twenty years and had worked for four bonding companies. The appellant started working for Nationwide Bail Bond Company in 2001 and got her license in 2002.[2] She worked there for three years. The appellant then worked at Memphis Bonding until April 2016 when that company was shut down for failure to pay the bail bond tax to the State of Tennessee. The appellant claimed she always collected the tax when she worked for Memphis Bonding and did not know about the company's tax issues.

After leaving Memphis Bonding, the appellant worked sequentially for A&A Bonding and A-Plus Bonding, and she was still working at A-Plus Bonding. The appellant said that she went through the process of going to court to get qualified as an agent for Nationwide and Memphis Bonding, but she did not go through the process with A&A Bonding or A-Plus Bonding. The appellant explained that she did not get qualified when she worked for A&A Bonding because "the intent was to switch [the business] over." She testified that she did not apply to be qualified as an agent at A-Plus Bonding because the owner "said he just didn't want to get any people qualified right now." The appellant also admitted that she had "done business with other companies" for which she was not actually an employee; specifically, she had acted as an agent and "written bonds at other companies" when the company she was working for would not authorize her to make the bond.

[1] One of the judges had to leave after the appellant's testimony.
[2] The appellant stated that the dates listed in her petition were incorrect.

With regard to her professional background, the appellant testified that she worked at FedEx for twenty-five years, twenty-two of which were in the human resources department, until she accepted a buy-out in 2013 or 2015. The appellant said that she had also worked for the Internal Revenue Service, U.S. Postal Service, Memphis Grizzlies, Baxter's Pharmaceutical, two banks, a kennel club, and a few restaurants. The appellant explained, "I've had a string of jobs, but I've always kept two jobs."

The appellant testified that she has no criminal history and has never been sued with respect to her work as a bonding agent. The appellant said that her intent was to operate under the rules and guidelines of the court and to provide quality service to her clients and their families. If her business grew to the point of needing additional agents, she would bring in agents and would expect them to provide the same level of service and be licensed and operate according to the county rules.

The appellant was also questioned concerning a lawsuit that arose out of her attempt to purchase A&A Bonding from Willie Harper. The appellant explained that she had agreed to work as a bonding agent for A&A Bonding and give Mr. Harper her paychecks in return for him transferring the business to her when she had effectively paid him $75,000. The appellant sued Mr. Harper when he would not transfer the business to her after she had paid him the funds. The lawsuit had not yet been resolved. The appellant also acknowledged that she did not apply to the court for the transfer of ownership of that bonding business.

The appellant stated that she had also sued a tenant for nonpayment of rent, and she had been involved in a dispute over payment of a hospital bill. She believed she had finished paying the hospital bill and that the issue had been resolved. Asked about a possible dispute with Baron Bail Bond Company, a company for which she had not been employed, the appellant said she was not active in "shopping [her] bond" to other companies when Baron was in business because she "was at FedEx full time."

The appellant also presented testimony from Darius Metoyer, an officer of Financial Casualty & Surety. Mr. Metoyer testified that the appellant had contacted his company about serving as surety for her perspective bail bond business and had completed the necessary paperwork. The company "vetted" the appellant and agreed to underwrite her business.

After the first hearing but before a written ruling was issued, the appellant learned her petition was going to be denied. Therefore, she filed a motion to reconsider and reopen the hearing along with several supplemental exhibits. In her motion, the appellant

reiterated her past work experience as a bail bond agent. The trial court agreed to allow the appellant to put on additional proof, and the hearing was set for August 19, 2022.[3]

On the day of the hearing, the appellant also filed a motion to disqualify and for another hearing with a new en banc panel. As grounds for this motion, the appellant asserted that her counsel received information that an interested, non-party attorney, Mike Gatlin, had contacted the State's attorney and at least two of the judges presiding over the matter via email making allegations regarding the appellant's qualifications.

At the onset of the August 19 hearing, the appellant's counsel noted that not all of the judges were present. Judge Craft explained why some of the other judges could not attend and reiterated that all of the judges would review the transcript and participate in the decision even if they could not be present for the hearing. Judge Craft also stated that the rule did not require all judges be present, just that all judges had to make the decision. Judge Craft noted that in his twenty-eight years on the bench, they had never had all ten judges present for a bond company application hearing.

The appellant's counsel then shifted to the matter of the motion to disqualify based on an email sent from Mr. Gatlin to the assistant district attorney and the two judges present at the hearing, Judge Craft and Judge Coffee. Judge Coffee stated that he had not seen the email until it was shown to him that morning. He elaborated that he receives hundreds of emails a day and deletes most without looking at them. Judge Craft stated that if he received the email, he deleted it along with the one hundred other emails he received in a day because he had no memory of it. Judge Craft said that having now seen the content of the email, he could say that it would have had no effect on his ruling because it essentially just quoted the applicable code section. The judges then orally denied the appellant's motion to disqualify.

The appellant's counsel then asked about the matter of disqualification concerning the other judges who were not present. Judge Craft observed that none of the other judges were addressed on the email and reiterated that neither him nor Judge Coffee were aware of the email prior to the hearing. Both judges confirmed they did not send the email to any of the other judges. Nevertheless, Judge Craft said that he would contact the other judges to make sure none of them knew about the email either.[4] The judges ultimately entered an order denying the motion to disqualify finding that if any such email was received by either of them, it was not considered, had no effect on their ability to be impartial, and would have no effect on their ruling.

[3] The judges later commented that they had never allowed a second hearing like this before.

[4] It was later detailed in the order denying the appellant's petition to operate a new bail bond company that the other judges did "not recall receiving the email (it was not addressed to them) and deny the motion to disqualify as well."

Judge Craft recounted for the record that sometime after the first hearing, the appellant's counsel had contacted him to inquire why the court had not ruled on the appellant's petition, and Judge Craft informed counsel that the petition was going to be denied but that they were awaiting signatures from all the judges. The appellant's counsel then requested a phone conference with Judge Craft, Judge Coffee, and the assistant district attorney to discuss their concerns about the petition. Judge Craft told counsel that they would not have that discussion off the record and offered counsel the opportunity to have a hearing and present additional proof about whether the appellant qualified under the statute. After reviewing the procedural history of the matter, Judge Craft urged counsel to present any additional proof concerning the appellant's qualifications because anything else was a non-issue.

The appellant then presented her additional testimony with regard to her experience as a bail bonding agent. The appellant testified that she began writing bonds in 2002 with Nationwide Bail Bond Company, and she worked with them until 2005.[5] She said she was "sworn in before the [c]ourts from 2002 to 2005." She stated that she "worked seven days a week, weekends and nights" with Nationwide and that Nationwide was in good standing at that time.

The appellant testified that she then went to work for Memphis Bonding as a qualified agent for eleven years, from 2005 (or possibly 2007) until 2016. The appellant said that although she also worked at FedEx until 2013, once she accepted a buy-out she had no job other than bail bonding from June of 2013 until April of 2016. Thus, she worked exclusively for Memphis Bonding for a period of two years and ten months. It was her understanding that Memphis Bonding was "in good standing[]" at that time, and she was never told that she could not write bonds "until that day [in] April 2016."

The appellant immediately then went to work at A&A Bonding and had a deal with the owner, Mr. Harper, that he would transfer the company to her after she paid him $75,000. The appellant claimed she "didn't know [she] was entering into a situation that was not right" because she was relying on Mr. Harper's long-time experience. After the appellant paid Mr. Harper the amount, he told her that she still had to work for him for another two years. The appellant asked Mr. Harper for her money back, and he told her "no" so she had "no other recourse" but to sue.[6] The appellant was never approved as a qualified agent at A&A Bonding.

[5] The appellant stated that she might have provided the wrong dates at the first hearing but that she had since checked her licenses to get the dates right.

[6] The judges interjected that the only issue at hand in the present hearing was whether the appellant had two years of experience as a qualified agent with a bonding company in good standing and that the appellant's

The appellant then went to work for A-Plus Bonding in 2019 until the present, but she was never qualified as an agent with them either. She claimed that at both A&A and A-Plus, she worked only as a "writing agent" and did not post bonds. When questioned, the appellant stated that she did not know she had to be a qualified agent in order to just write bonds. The appellant reiterated that she completed the necessary training to keep her license active and had never been informed that such practice was against the rules.

The appellant claimed that she worked two full-time jobs from 2002 to 2013, one at FedEx and one as a bail bondsman. She elaborated that she was a salaried "flex" employee at FedEx so she was "able to flex [her] time" to handle bond matters as long as she made up the time later. She said that she generally worked from 5:00 p.m. until 1:00 or 2:00 a.m. at the bonding company and also on weekends.

On August 26, 2022, the trial court entered an order "denying, at this time, petition for approval of new bail bond company." In its order, the trial court determined that the proof did not establish that the appellant had worked full time for two years as a qualified agent for a bonding company in good standing. The court pointed out that from the appellant's testimony, she apparently did not work full time as a bonding agent from 2002 to 2016 because she was a full-time employee at FedEx until 2013 and worked several other jobs as well. The court also noted that it had entered an order shutting down Memphis Bonding Company in 2016 due to irregularities in its practice like falsifying records to avoid paying the bail bond tax, which meant that Memphis Bonding Company did not qualify as a "bonding company in good standing."

As to the appellant's testimony that she had worked in some capacity for two other bonding companies since 2016, the court noted that those companies never requested the court to qualify the appellant as an agent. The court also pointed out that there was an on-going dispute between the appellant and the owner of one of those companies because the appellant had attempted to buy the company, without requesting prior court approval, and the owner had refused to transfer the company or return the funds to the appellant. The court further noted concern over the appellant's testimony "that she in the past has been making bonds through other companies when the company she is working for would not make the bond, even though she apparently has not been qualified as an agent by this court for those companies." The court summarized that the last time the appellant worked as a qualified agent was for Memphis Bonding Company "from 2002 [sic] forward until it was shut down by this court in 2016, the majority of that time while working as a Federal Express employee for 25 years until her retirement in 2013."

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dispute with the owner of A&A Bonding was not relevant. The judges clarified that they were not judging the appellant as "a bad person."

The court concluded that the appellant could seek to be qualified as a full-time agent for a bonding company in good standing and, if so qualified, after two years could re-file her petition to operate a new bonding company. The court reiterated that the appellant could not "continue to write bonds when not qualified by this court, as that is a violation of the bail bond statutes."

On September 19, 2022, the appellant filed a motion for expedited rehearing, reconsideration and/or in the alternative for offer of proof based on new evidence. In her motion, the appellant raised an equal protection claim for disparate treatment based on information that a Caucasian male who also received the requisite work experience at Memphis Bonding Company had his petition for a new bail bond company granted on January 18, 2007.

On September 22, 2022, the trial court entered an order denying the appellant's motion for a rehearing. In its order, the trial court reiterated its reasons for the denial of the appellant's motion to open a new bail bond company; namely, because the appellant did not meet the statutory criteria for owning a bonding company and "she had been wrongfully making bonds through other companies even though she had not been qualified as an agent by this court and had no permission from this court to make such bonds." The court concluded that "[n]o new evidence alleged in the instant motion to rehear would alter these two facts[.]"

The appellant filed a timely notice of appeal.

Analysis

The appellant argues that the trial court erred in denying her petition to operate a new bail bond company, asserting she had the required years of experience working as a qualified agent with a bonding company in good standing. The appellant also raises a challenge regarding the en banc panel, the denial of a claim concerning ex parte communications, and an equal protection claim. The State responds that the trial court properly denied the appellant's petition as well as her other claims. We agree with the State.

I. Appellant's Experience

The appellant's primary claim is that the trial court erred in denying her petition to operate a new bail bond company, asserting she had the required experience for approval.

A trial court has full authority to determine who should be allowed to make bonds in its court. *Gilbreath v. Ferguson*, 260 S.W.2d 276, 278 (Tenn. 1953). A "trial court is given wide discretion in its regulation of bail bondsmen[,] and its actions will not be overturned absent a showing that they were arbitrary, capricious[,] or illegal." *In re Hitt* 910 S.W.2d 900, 904 (Tenn. Crim. App. 1995) (citing *Taylor v. Waddey*, 334 S.W.2d 733, 736 (Tenn. 1960)). This Court reviews a trial court's denial of a bondsman's application under a de novo standard of review. Tenn. Code Ann. § 40-11-125(d).

Tennessee Code Annotated section 40-11-317(b) provides that "[a]ny applicant for approval as a bonding company owner shall have had two (2) years' experience writing bail in this state as a full-time qualified agent for a Tennessee professional bonding company in good standing."

We initially recount that any experience the appellant has had since Memphis Bonding was shut down in April 2016 is irrelevant to this determination because the appellant was not qualified by the court as an agent for either A&A Bonding or A-Plus Bonding, the companies with which she has been employed since April 2016. Turning to the appellant's experience from 2002 until June 2013 when the appellant accepted a buy-out from FedEx, it appears that the trial court determined the appellant was not working as a full-time qualified agent during that period, apparently discrediting the appellant's testimony that she worked two full-time jobs.

The Court and the parties had a vigorous discussion at argument about what the term "full time" agent means in the context of this statute. However, when considered "as a reasonable reader would have understood the text at the time it was enacted," *Lawson v. Hawkins Cnty.*, 661 S.W.3d 54, 59 (Tenn. 2023), the term does not incorporate any detailed scheme of regulations applicable to employment in other contexts. Rather, the term "full time" experience here is simply understood to distinguish it from casual, intermittent, or seasonal experience, for example.

In this light, the trial court properly discounted the appellant's experience from 2002 through 2013 as not being "full time" experience. During this time, the appellant said she had "flex time" with FedEx and was essentially "on call" with the bonding company, carrying her phone with her at all times. Without other proof in the record showing the nature or extent of her experience prior to 2013, the trial court reasonably could have found this experience as an agent was not "full time," but was casual, at least in the sense of it being occasional, irregular, or uncertain.

Thus, the only period of the appellant's work history in question is from June 2013, when she accepted a buy-out from FedEx and worked solely as a bail bondsman, until April 2016, when Memphis Bonding was shut down by the court due to its practice of falsifying

records. However, we note that the trial court questioned whether the appellant ever worked full time as a bail bondsman prior to April 2016 by its reference in its order to the appellant's "working several other jobs as well (the IRS, US Postal Service, Memphis Grizzlies, Baxter's Pharmaceuticals, First Tennessee Bank, McDonalds, Wendy's, etc.)."

The appellant, relying on the timeframe of June 2013 to April 2016, asserts that she obtained her experience at a time when Memphis Bonding was in good standing and makes a robust argument as to why her tenure with Memphis Bonding should satisfy the statutory requirements. However, as noted by the trial court, Memphis Bonding was "shut down" by the court in 2016, while the appellant was still working there, for "falsifying records to avoid paying the bail bond tax to the State of Tennessee." Therefore, the trial court found Memphis Bonding was not a company in good standing at the time of the appellant's application nor was it a company in good standing while the appellant was working there. We agree.

These distinctions prevent the potential danger surmised by the appellant of "many existing bonding company owners are operating companies illegally, requiring them to have their licenses revoked if their experience was obtained from a company no longer 'in good standing.'" The appellant's situation is an entirely different situation than someone being approved while a company is in good standing and then the company is subsequently determined to not be in good standing after the bondsman and new bonding company have been approved and are operational.[7]

Regardless, it is clear the trial court was also concerned with the appellant's history of writing bonds for companies when she had not been qualified by the court. The court stated multiple times in its order that such action was "a violation of the bail bond statutes." This was obviously another reason relied on by the trial court in reaching its decision. The record contains no indication that the trial court's denial of the appellant's petition was arbitrary, capricious, or illegal. Moreover, our de novo review of the record reveals that the appellant was not a full-time agent with a company in good standing at the time of her application. As such, we affirm the trial court's denial of the appellant's application.

II. En Banc Panel

The appellant also argues that the trial court did not sit en banc as required by Rule 7 of the Shelby County Criminal Court Local Rules. The provision in question provides:

> The Criminal Court Judges, exercising jurisdiction over bail bond companies, shall sit *en banc*, as needed, in the courtroom of the respective

> Administrative Judge and shall approve each company who petitions the Court for permission to write bonds in Shelby County. . . .

Shelby County Criminal Court Local Rule 7.02A.

> In addition, a later provision provides:
>
> All petitions for approval of a new company and/or its agents shall be served upon the District Attorney General at least two (2) weeks prior to the hearing on the petition and shall be heard by the Criminal Court Judges sitting *en banc*, as needed. . . .

Shelby County Criminal Court Local Rule 7.02B.

The appellant asserts that the rule requires the presence of all the judges at the hearing and that furnishing the absent judges a transcript of the hearing is not enough to satisfy due process. Interestingly though, the appellant was not concerned with the procedure employed by the trial court until after learning that her petition was going to be denied. *See* Tenn. R. App. P. 36(a) (stating, "Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

Moreover, the rule does not define what the "en banc, as needed" procedure entails, and the appellant has provided no authority that says an en banc proceeding requires the physical presence of every judge. We glean guidance in deciding this issue from the definition of an "en banc sitting" in *Black's Law Dictionary*, which provides that an "en banc sitting" is a "court session in which all the judges (or a quorum) participate." *Black's Law Dictionary* (11th ed. 2019). Thus, according to this definition, what is required to be considered an "en banc sitting" is the participation of a quorum of all the judges of the particular court. We do not read this definition to require the physical presence of all the judges, only participation. It is our view that the "en banc, as needed," procedure was satisfied in this case by a transcript of the hearing being provided to the absent judges and a quorum of all the judges participating in the decision. It is also of note that the presiding judge at the hearing commented that they had "never had all ten judges present at any en banc hearing in [his] 28 years" on the bench and that "there's never been an objection." The appellant is not entitled to relief.

III. Motion to Disqualify - Ex Parte Communication

The petitioner asserts that the trial court improperly denied her motion to disqualify because at least two of the judges received an ex parte communication from an interested, non-party attorney speculating about the appellant's qualifications.

Motions for recusal or to disqualify a trial court judge from presiding over a case are governed by Rule 10B of the Rules of the Supreme Court of Tennessee. "[T]he test for recusal requires a judge to disqualify himself or herself in any proceeding in which '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.'" *State v. Styles*, 610 S.W.3d 746, 750 (Tenn. 2020) (quoting *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008)). Our review of the denial of a motion for disqualification or recusal is de novo. Tenn. Sup. Ct. R. 10B, § 2.01.

The record reflects that the appellant filed a motion to disqualify on August 19, 2022, the morning of the second hearing on her petition to operate a new bail bond company. The motion was based on an email sent from a non-party attorney on June 8, 2022, to the assistant district attorney handling the case and two of the criminal court judges citing a statute and opining on the appellant's qualifications. When the hearing convened, the judges first addressed the motion to disqualify.

Both judges listed on the email were present at the hearing, and both repeatedly denied having any knowledge of the email, noting that they first learned of the email when it was produced during the hearing. Both judges stated that they received "a hundred emails a day," the majority of which they deleted without reading. Having now seen the content of the email, both judges stated it would have not affected their decision even if they had read it.

The appellant argues that her hearing was cut short due to the judges' frustration with her, and that the judges should have disqualified themselves due to the possible perception of bias. While the record reflects that the judges began to express some frustration after the appellant's counsel refused to move on after their repeated assertions that they had never seen the email and denied his motion, it is clear from the record that the motion was denied because the judges never saw the email, not because they were frustrated with appellant's counsel, and the judges nevertheless devoted ample time to the issue.

While this situation gives us pause and provides us with the opportunity to remind the trial court that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety," *see* TN. R. S. Ct. Rule 10, RJC 1.2, even an objective standard requires the reasonable person to consider "all of the facts known to

the judge," *see Cannon*, 254 S.W.3d at 307. Had the judges been aware that they had received a potential ex parte communication, then they should have promptly "notif[ied] the parties of the substance of the communication and provide[d] the parties with an opportunity to respond." Tenn. R. S. Ct. Rule 10, RJC 2.9(B). In this case, the judges denied ever seeing the email and there was no proof to the contrary. Moreover, the appellant was actually offered an opportunity to respond to the email communication. Based on the proof presented, the appellant has failed to show not only that the trial court was influenced or biased based on the email in question but she has even failed to establish that the trial court was aware of the email prior to the hearing. Accordingly, the appellant is not entitled to relief.

IV. Motion for Rehearing – Equal Protection

The petitioner lastly asserts that the trial court erred in denying her motion for rehearing based on new evidence that a Caucasian male who had also worked at Memphis Bonding was granted permission to operate a new bail bond company, essentially an equal protection claim. "[B]oth the state and federal constitutions guarantee equal protection of the law, meaning 'all persons similarly circumstanced shall be treated alike.'" *Dotson v. State*, No. W2019-01059-SC-R11-PD, 2023 WL 4393296, at *9 (Tenn. July 7, 2023) (quoting *State v. Robinson*, 29 S.W.3d 476, 480 (Tenn. 2000)). We conclude this issue is wholly without merit. The petition of the individual whom the appellant is pointing to in an allegation of racial bias was granted in 2007, nine years before Memphis Bonding was forced to stop doing business and fifteen years before the appellant filed her petition. No rehearing or offer of proof would have changed the fact that the other individual's petition was granted many years earlier than the appellant's and while Memphis Bonding was still in good standing. Thus, the appellant and this other individual are not "similarly circumstanced" persons. The appellant is not entitled to relief.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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J. ROSS DYER, JUDGE