The Law of Judicial Disqualification or Recusal

Florida Rules of Judicial Administration:

Rule 2.330. Disqualification of Trial Judges

(a) *Application.* --This rule applies only to county and circuit judges in all matters in all divisions of court.

(b) *Parties.* --Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.

(c) *Motion.* --A motion to disqualify shall:

(1) be in writing;

(2) allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification;

(3) be sworn to by the party by signing the motion under oath or by a separate affidavit; and

(4) include the dates of all previously granted motions to disqualify filed under this rule in the case and the dates of the orders granting those motions.

The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith. In addition to filing with the clerk, the movant shall immediately serve a copy of the motion on the subject judge as set forth in Florida Rule of Civil Procedure 1.080.

(d) *Grounds.* --A motion to disqualify shall show:

(1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

(2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to the cause.

(e) *Time.* --A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be

Resp. 2 for id

promptly presented to the court for an immediate ruling. Any motion for disqualification made during a hearing or trial must be based on facts discovered during the hearing or trial and may be stated on the record, provided that it is also promptly reduced to writing in compliance with subdivision (c) and promptly filed. A motion made during hearing or trial shall be ruled on immediately.

(f) *Determination--Initial Motion.* --The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

(g) *Determination--Successive Motions.* --If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion.

(h) *Prior Rulings.* --Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.

(i) *Judge's Initiative.* --Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative.

(j) *Time for Determination.* --The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c). If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case.

Florida Statutes:

§ 38.10. Disqualification of judge for prejudice; application; affidavits; etc

Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of

causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he or she does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

Canon 3 E: Florida Code of Judicial Conduct

E. *Disqualification.*

(1)'A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge.

(f) the judge, while a judge or candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:

(i) parties or classes of parties in the proceeding;

(ii) an issue in the proceeding; or

(iii) the controversy in the proceeding.

Cases:

Judge may have a hearing:

District Court of Appeal of Florida,

Fifth District.

Michael D'AMBROSIO, Petitioner,

v.

STATE of Florida, Respondent.

No. 99-2124.

Dec. 3, 1999.

Petition was filed for writ of mandamus to require ruling on motion to disqualify judge. The District Court of Appeal ordered immediate ruling on the motion and reserved jurisdiction. The Circuit Court, Seminole County, Alan A. Dickey, J., disqualified himself without a hearing. The District Court of Appeal, Cobb, J., held that judge could have held a hearing on the motion for disqualification.

So ordered.

West Headnotes

[1] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of Objections. Most Cited Cases

Trial judge could have held an expedited hearing on motion for disqualification. West's F.S.A. R.Jud.Admin.Rule 2.160.

[2] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of Objections. Most Cited Cases

A trial judge who is confronted by a motion for disqualification is obligated to dispose of that motion by an immediate ruling, and any hearing on that motion must be expedited. West's F.S.A. R.Jud.Admin.Rule 2.160.

*508 Steven G. Mason of Law Offices of Steven G. Mason, Orlando, for Petitioner.
*509 Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Respondent.

ON REVIEW OF ORDER ENTERED PURSUANT TO ORDER GRANTING WRIT OF MANDAMUS

COBB, J.

By order dated September 2, 1999, this court issued a writ of mandamus and ordered Circuit Judge Alan Dickey to "immediately enter a ruling on the motion to disqualify filed by the petitioner." Our order tracked the requirement of Florida Rule of Judicial Administration 2.160 which provides in relevant part:

(e) Time. A motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court *for an immediate ruling.* Any motion for disqualification made during a trial must be based on facts

discovered during the trial and may be stated on the record and shall also be filed in writing in compliance with subdivision (c). Such trial motions shall be ruled on immediately.

(f) Determination-Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, *the judge shall immediately enter an order* granting disqualification and proceed no further in the action. If any motion is legally insufficient, *an order denying the motion shall immediately be entered.* No other reason for denial shall be stated, and an order of denial shall not take issue with the motion. (Emphasis added).

Judge Dickey entered an order dated September 17, 1999 which he labeled "Order Disqualifying Judge Without Hearing as Ordered by Fifth District Court of Appeal." He found that the motion for disqualification, filed on July 9, 1999, was legally sufficient and granted it. The order, apparently issued by the trial judge in a state of high dudgeon, goes on to blame this court for compelling him to commit a violation of the Code of Judicial Conduct by depriving a party (the state) of the opportunity to be heard in regard to the legal sufficiency of the motion. The order laments: "Apparently in the Fifth Appellate District of Florida the opposing party does not have the discretion to be heard, and the trial court does not even have the discretion to hold a hearing." A copy of this order was forwarded by Judge Dickey to the Judicial Qualifications Commission. Moreover, an ensuing order by the Chief Judge of the Eighteenth Circuit reassigning the case to a successor judge reiterates the grim message that we have forbidden a hearing in this cause.

Our initial reaction to this onslaught from Seminole County is: "Good Grief, Charlie Brown!" What we regarded as a form order to prompt a trial court ruling in response to an allegation of delay has created a conflagration of hostility and confusion. We now undertake, pursuant to the reservation of jurisdiction in our September 2, 1999 order, to clarify the apparent misconception.

[1] As set out above, Rule 2.160 expressly places the burden on the trial judge to rule on a motion to disqualify immediately. **The rule itself neither authorizes nor precludes a hearing on said motion.** (emphasis added for JQC hearing only). However, by repeatedly using the term "immediately," the supreme court clearly intended that, if a hearing is held, such hearing should be held in an expedited fashion. Our order of September 2, 1999 merely tracked the requirement of Rule 2.160 and ordered that the trial judge immediately enter a ruling. As with Rule 2.160, our order was silent concerning a hearing. If Judge Dickey's accusation that he was forced to violate the Rules of Judicial Conduct has substance then he *510 should direct it to the supreme court, not this court.

The record reflects that a copy of the motion to disqualify, filed on July 9, 1999, was presented to Judge Dickey and was further called to the judge's attention when the prosecutor, by letter to the judge dated July 12, 1999, requested a hearing. Despite this, no hearing was set and no ruling was made. Rule 2.160, by affirmatively requiring the trial judge to rule immediately on the motion to disqualify, does not

permit the court to accept a passive role when confronted with such motion. The rule requires affirmative action. Judge Dickey failed in this case to order an expedited hearing and/or rule on the motion for over two months despite the clear directive of Rule 2.160.

[2] Our conclusion is simple: a trial judge, confronted by a motion for disqualification, is obligated to dispose of that motion by "an immediate ruling" pursuant to Florida Rule of Judicial Administration 2.160. If the judge affords a hearing to the parties on that motion, it must be an expedited one.DAUKSCH and GRIFFIN, JJ., concur.

Fla.App. 5 Dist.,1999.
D'Ambrosio v. State
746 So.2d 508, 24 Fla. L. Weekly D2692

Motion must allege valid reason for recusal:

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,

Fourth District.

Tatyana NUDEL, Petitioner,

v.

FLAGSTAR BANK, FSB, Mortgage Electronic Registration Systems, Inc. as Nominee for Flagstar Bank, FSB, Palm Beach County, and Adorno & Yoss, LLP, Respondents.
Richard J. Davis and Nancy Davis, Petitioners,

v.

HSBC Bank USA, National Association, as Trustee, for Sequoia 2007-3, Respondent.

Nos. 4D10-641, 4D10-1842.

Aug. 11, 2010.

Background: Law firm filed petitions for writ of prohibition, seeking to have judge disqualified from two actions in the Circuit Court, the Fifteenth Judicial Circuit, Palm Beach County, Meenu T. Sasser, J., and the cases were consolidated.

Holdings: The District Court of Appeal held that:
(1) law firm was not entitled to disqualification based on judge's ex parte communications regarding scheduling of motions, and

(2) ex parte communication regarding scheduling did not violate canon of judicial conduct.

Petitions denied.

West Headnotes

[1] KeyCite Citing References for this Headnote

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

District Court of Appeal reviews de novo the legal sufficiency of motions to disqualify a judge.

[2] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Ex parte communications regarding purely administrative, non-substantive matters, such as scheduling, do not require disqualification of judge.

[3] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act

227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Judge's ex parte communications with bank's counsel did not require disqualification of judge in foreclosure action, as the communications all involved purely administrative, non-substantive matters regarding the scheduling of motions, not the merits of the case, and judge did not exhibit any objectively reasonable basis for opposing party to fear bias. West's F.S.A. R.Jud.Admin.Rule 2.330.

[4] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Communications between administrative personnel of bank's law firm and judge's judicial assistant (JA) did not require disqualification of judge in foreclosure actions; scheduling of hearings was typically a matter delegated by judges to judicial assistants, and communications did not provide an objectively reasonable basis for opposing parties to fear that the judge would not be fair and impartial.

[5] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k46 k. Relationship to Attorney or Counsel. Most Cited Cases

Alleged animosity that had developed between judge's judicial assistant (JA) and one of attorney's employees did not require disqualification of judge in foreclosure action, as there was no objectively reasonable basis for attorney's clients to fear that the judge would not be fair and impartial.

[6] KeyCite Citing References for this Headnote

227 Judges
227I Appointment, Qualification, and Tenure
227k11 Removal or Discipline
227k11(2) k. Standards, Canons, or Codes of Conduct, in General. Most Cited Cases

Judge's ex parte communication with a party's counsel regarding the party's improperly-scheduled motion did not violate canon of judicial conduct prohibiting ex parte communications; canon expressly exempted communications relating to scheduling and other administrative matters, and the communication was immediately brought to the attention of opposing party. West's F.S.A. Code of Jud.Conduct, Canon 3(B)(7).

[7] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(1) k. In General. Most Cited Cases

It is improper for a party to use the procedure for disqualification of judges to achieve a strategic advantage and/or frustrate the efficient function of the courts. West's F.S.A. R.Jud.Admin.Rule 2.330.

Thomas E. Ice of Ice Legal, P.A., West Palm Beach, for petitioners Tatyana Nudel, Richard J. Davis and Nancy Davis.
No response required for respondents.

PER CURIAM.

*1 In these two cases, which we have consolidated for purposes of this opinion, the law firm of Ice Legal, P.A. (Ice), seeks, under the guise of disqualifying the judge, to exclude itself from proceeding before Judge Sasser, who presides over the foreclosure division of the Palm Beach circuit court. [FN1] These petitions for writ of prohibition represent the seventh and eighth petitions that this law firm has filed in this court seeking the same relief.[FN2] All the prior petitions were carefully reviewed and denied on the merits.

As in the prior petitions and motions to disqualify filed by the firm, Ice attempts to pyramid a host of unrelated matters, which were not raised within the ten-day time limit of Florida Rule of Judicial Administration 2.330(e), to achieve its goal. The repetitive claims have been reviewed *de novo* on numerous occasions and rejected on the merits. None of these issues, alone or together, provide Ice's clients with any objectively reasonable basis to fear that the judge is biased.

In addition to re-raising these issues, the Ice firm raised new arguments alleging that *ex parte* communication between opposing counsel and the judge requires disqualification. The communications involved a recurring scheduling dispute involving Ice. The Ice firm has insisted on specially-set hearings on its motions even though the judge, through her judicial assistant (JA), had expressed that the types of motions at issue should be set for ten-minute hearings on the uniform motion calendar. Ice has complained that it needs at least fifteen minutes to be heard and demanded specially-set hearings.

In one of these cases, aware of Ice's persistent objections to their motion being set on the uniform motion calendar, the plaintiff bank scheduled a hearing on Ice's motion to dismiss during a time reserved for summary judgment motions. The judge phoned the bank's counsel advising that the hearing needed to be scheduled on the uniform motion calendar and that twenty minutes was not necessary to argue the motion. The bank's attorney immediately informed Ice and tried to coordinate a

convenient time for the hearing. The next day, the judge entered a written order requiring the bank to schedule the hearing on the motion calendar within ten days.

In the second case, an administrative employee for the bank's counsel attempted to coordinate scheduling of Ice's motions on the uniform motion calendar. Ice continued to object to the scheduling, maintaining its position that it needed fifteen minutes instead of ten.[FN3] Another administrative employee for the bank's counsel contacted the judge's JA to inform her that the Ice firm was again objecting to having their motions heard at the uniform motion calendar. Another judge, sitting in Judge Sasser's absence, signed orders scheduling the hearing on the uniform motion calendar. The above incident led Ice to request all emails between the law firm's staff and the JA. Ice contends the emails show that the law firm's administrative staff has been engaged in *ex parte* communications with the judicial assistant.

*2 Based on these allegedly improper *ex parte* communications, Ice seeks to disqualify the judge from all of its cases. In all of its prior petitions, Ice has sought what amounts to firm-wide disqualification which would effectively exclude Ice from proceeding in the foreclosure division. Judge Sasser is presently the only judge presiding in the foreclosure division.

[1] We review *de novo* the legal sufficiency of the motions to disqualify that were filed below. *See Edwards v. State,* 976 So.2d 1177, 1178 (Fla. 4th DCA 2008).

[2] *Ex parte* communications regarding purely administrative, non-substantive matters, such as scheduling, do not require disqualification. *See Rose v. State,* 601 So.2d 1181, 1183 (Fla.1992) ("[A] judge should not engage in *any* conversation about a pending case with only one of the parties participating in that conversation. Obviously, ... this would not include *strictly* administrative matters not dealing in any way with the merits of the case."). *See Rodriguez v. State,* 919 So.2d 1252, 1274-75 (Fla.2006) (*ex parte* discussion of an administrative matter, the nature of a scheduled hearing, did not require disqualification); *Randolph v. State,* 853 So.2d 1051, 1064 (Fla.2003) (*ex parte* conversation about ministerial matter-wording of a sentence in an order-was insufficient to disqualify); *Arbelaez v. State,* 775 So.2d 909, 916 (Fla.2000) (holding that an *ex parte* communication between the judge and the state attorney in a death penalty case did not require disqualification where the communication related to purely administrative matters, including the amount of time the state would be provided to respond to defendant's postconviction motion and the scheduling of hearings).

[3] The *ex parte* communications in the present cases all involved purely administrative, non-substantive matters regarding the scheduling of motions, not the merits of the case. The judge, who had read and was familiar with Ice's motions, did not exhibit any objectively reasonable basis for Ice's clients to fear bias when she indicated that the motions did not require additional time.

[4] [5] As to the communications between the administrative personnel of the bank's law firm and the JA, neither the *ex parte* communications, nor the alleged animosity that has developed between the JA and one of Ice's employees, provides an objectively reasonable basis for Ice's clients to fear that the judge will not be fair and impartial. *See Leone v. F.J.M. Constr.,* 911 So.2d 1285, 1285-86 (Fla. 1st

DCA 2005) (holding that a judicial assistant's disparaging comments to a party's attorney, made after a scheduling dispute, did not provide any reasonable basis to fear that the judge would not be fair). As noted in *Leone,* scheduling of hearings is typically a matter delegated by judges to judicial assistants. This is particularly necessary in the foreclosure division which has an extraordinary backlog of cases. Judge Sasser cannot be expected to hold hearings *regarding the length of upcoming hearings* in order to settle insignificant disputes about whether an additional five minutes is necessary for oral argument on a motion.

*3 [6] ☑ Contrary to Ice's accusations, Judge Sasser did not violate Canon 3(B)(7) of the Florida Code of Judicial Conduct, which expressly exempts communications relating to scheduling and other administrative matters from its prohibition on *ex parte* communications. The judge's *ex parte* communication with the bank's counsel regarding the bank's improperly-scheduled motion was immediately brought to Ice's attention. Ice has had abundant opportunity to respond but never specified any reason why fifteen minutes was required to hear its motions.

[7] ☑ Ice's repetitive attempts at disqualification in these cases appear designed, not to ensure that the proceedings against their clients are presided over by a neutral and fair tribunal, but to achieve a strategic advantage and/or frustrate the efficient function of the foreclosure division. As we suggested in *Nassetta v. Kaplan,* 557 So.2d 919, 921 (Fla. 4th DCA 1990), this tactic is an improper use of the disqualification procedure.

The petitions are denied on the merits.

GROSS, C.J., STEVENSON and DAMOORGIAN, JJ., concur.

FN1. The foreclosure division, which attempts to streamline scheduling procedures, was created to handle the extraordinary backlog of foreclosure cases. *See* Administrative Order 3.302, Fifteenth Judicial Circuit. At the time the petition was filed, an estimated 55,000 foreclosure cases were pending in that court. This number has likely increased since that time.

FN2. *Feith v. Indy Mac Fed. Bank,* 4D09-5070; *Sandomingo v. Washington Mut. Bank,* 4D09-5000; *Vidal v. U.S. Nat'l Bank Ass'n,* 4D10-397; *Glarum v. Lasalle Bank,* 4D10-603; *Brown v. Wachovia Bank,* 4D10-130; *Brown v. Wachovia,* 4D10-642.

FN3. A specially-set hearing would not be available until much later in time, whereas the motions could be heard sooner if set on the uniform motion calendar. Ice made no attempt to schedule its motions for hearing nor has it provided any explanation why its motions-which do not involve evidentiary matters-required any additional time for oral argument. As noted by the judge, at a hearing where the policy was explained to Ice, the judge had read the motions-which raised similar issues Ice has repeated in many of its cases-and additional time for oral argument was unnecessary.

We are aware of no rule or law that requires a trial court to hear oral argument on a pretrial, non-evidentiary motion. *See Gaspar, Inc. v. Naples Fed. Sav. & Loan Ass'n,* 546 So.2d 764, 766 (Fla. 5th DCA

1989) ("Judicial consideration and determination of a non-evidentiary motion on the basis of memoranda of law rather than oral argument by counsel at a noticed hearing does not constitute an ex parte hearing or a denial of due process"); *First City Dev. of Fla., Inc. v. Hallmark of Hollywood Condo. Ass'n,* 545 So.2d 502, 503 (Fla. 4th DCA 1989) ("There is no rule of procedure or law that requires the trial court to have oral argument as to [objections to discovery]"). *See also* Fla. R.App. P. 9.320 ("Oral argument *may* be permitted in any proceeding") (emphasis supplied); *In re Proposed Florida Appellate Rules,* 351 So.2d 981, 1011 (Fla.1977) ("[T]here is no right to oral argument" in appellate proceedings).

Fla.App. 4 Dist.,2010.

Nudel v. Flagstar Bank, FSB

--- So.3d ----, 2010 WL 3155028 (Fla.App. 4 Dist.), 35 Fla. L. Weekly D1815

District Court of Appeal of Florida,

Third District.

Marta GARCIA and Luis G. Garcia, Appellants,
v.
AMERICAN INCOME LIFE INSURANCE COMPANY, Appellee.

No. 94-1791.

Dec. 6, 1995.

Plaintiffs appealed from final judgment entered upon adverse jury verdict by the Circuit Court, Dade County, Rosemary Usher Jones, J., in action to collect on insurance policy. The District Court of Appeal held that: (1) defendant's abbreviated remarks to jury concerning motivation for action did not mandate mistrial, and (2) denial of plaintiffs' posttrial motion to disqualify trial judge was not error.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error

30XVI(J)12 Arguments and Conduct of Counsel
30k1060.1 In General
30k1060.1(2) Particular Argument or Conduct
30k1060.1(2.1) k. In General. Most Cited Cases

388 Trial KeyCite Citing References for this Headnote
388V Arguments and Conduct of Counsel
388k133 Action of Court
388k133.6 Instruction or Admonition to Jury
388k133.6(1) k. In General. Most Cited Cases

Defendant's abbreviated remarks to jury concerning motivation for plaintiffs' action did not mandate mistrial; proper cautionary instruction cured any impropriety in counsel's remarks during opening statement, and counsel's remarks during closing argument were, at worst, harmless in nature.

[2] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k46 k. Relationship to Attorney or Counsel. Most Cited Cases

Fact that defense counsel's wife was judge's campaign manager in judge's last reelection campaign was not sufficient ground for posttrial disqualification of judge; subject campaign was four years prior to motion to disqualify and was too remote in time to engender well-grounded fear by plaintiffs that they would not receive fair trial or hearing before judge.

*301 Carlos Lidsky and Charles L. Vaccaro, Hialeah, for appellants.

Shutts & Bowen and Richard M. Leslie, Miami, for appellee.

Before HUBBART, LEVY and GREEN, JJ.

PER CURIAM.

This is an appeal by the plaintiffs Marta and Luis G. Garcia from a final judgment entered upon an adverse jury verdict in an action brought to collect on an insurance policy. We affirm.

[1] First, we are not persuaded that defense counsel's abbreviated remarks to the jury concerning the motivation for this action mandated a mistrial because (a) a proper cautionary instruction cured any impropriety in counsel's remarks during opening statement, and (b) counsel's remarks during closing argument were, at worst, harmless in nature. *See Brumage v. Plummer,* 502 So.2d 966, 969 (Fla. 3d DCA), *rev. denied,* 513 So.2d 1062 (Fla.1987); *Honda Motor Co. v. Marcus,* 440 So.2d 373, 377 (Fla. 3d

DCA 1983), *rev. denied,* 447 So.2d 886 (Fla.1984); *Decks, Inc. v. Nunez,* 299 So.2d 165, 166-67 (Fla. 2d DCA 1974), *cert. denied,* 308 So.2d 112 (Fla.1975).

Second, no reversible error is shown concerning the refused jury instructions or the complained-of affidavit. *See West Town Plaza Assocs. v. Pines Properties, Inc.,* 600 So.2d 477, 478-79 (Fla. 4th DCA 1992); *Giordano v. Ramirez,* 503 So.2d 947, 949 (Fla. 3d DCA 1987); *Rodriguez v. Haller,* 177 So.2d 519, 520-21 (Fla. 3d DCA 1965); *Llompart v. Lavecchia,* 374 So.2d 77, 80 (Fla. 3d DCA 1979), *cert. denied,* 385 So.2d 758 (Fla.1980).

*302 [2] Finally, no error is shown in the denial of plaintiffs' post-trial motion to disqualify the trial judge. Plainly, the trial judge did not, as urged, dispute the truth of any of the facts stated in the sworn motion to disqualify. Although defense counsel's wife was the trial judge's campaign manager in the judge's last re-election campaign to the bench, this in itself was not, as urged, a sufficient ground for disqualification under the circumstances of this case. This is so because the subject campaign was four years prior to the motion to disqualify in this case, and, thus, was too remote in time to engender a well-grounded fear by the plaintiffs that they would not receive a fair trial or hearing at the hands of the judge. *See Barber v. MacKenzie,* 562 So.2d 755, 756 (Fla. 3d DCA 1990), *rev. denied,* 576 So.2d 288 (Fla.1991) (two-year limit for disqualification after attorney participates in trial judge's election to bench).

Affirmed.

Motion must be timely and the burden is on person making motion to state dates, times and be clear and concise:

District Court of Appeal of Florida,

Fourth District.

David S. HEIER, Petitioner,

v.

J. Leonard FLEET, as Circuit Judge of the 17th Judicial Circuit, Respondent.

No. 94-1615.

Sept. 21, 1994.

Petition for writ of prohibition was filed to prohibit judge from hearing petitioner's case. The District Court of Appeal held that motion was legally insufficient since it failed to set forth allegations with specificity and allegations went almost entirely to judicial rulings of judge.

Writ denied.

West Headnotes

[1] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(3) k. Sufficiency of Objection or Affidavit. Most Cited Cases

Motion to disqualify judge was legally insufficient, where allegations lacked specificity and went almost entirely to judicial rulings of judge and movant failed to say what allegedly defamatory remarks judge had made about him and was not sufficiently explicit about circumstances in which they were made.

[2] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(3) k. Sufficiency of Objection or Affidavit. Most Cited Cases

Verified motion for disqualification of judge must contain actual factual foundation for petitioner's alleged fear of prejudice.

[3] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(3) k. Sufficiency of Objection or Affidavit. Most Cited Cases

Facts asserted by petitioner to disqualify judge must be reasonably sufficient to create well-founded fear in mind of party that he or she will not receive fair trial.

[4] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of Objections. Most Cited Cases

Standard to be applied by judge on motion for disqualification of judge is whether reasonably prudent person would, on basis of stated facts, fear that he or she cannot get fair trial with judge presiding.

[5] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases

Adverse judicial rulings are not proper basis for disqualification of judge.

*669 David S. Heier, pro se.

No response required for respondent.

PER CURIAM.

[1] The petition for writ of prohibition to prohibit respondent from hearing petitioner's case is denied as the motion was legally insufficient.

[2] [3] [4] [5] A verified motion for disqualification of a judge must contain an actual factual foundation for petitioner's alleged fear of prejudice. The facts asserted by a petitioner *670 in a motion to disqualify a judge must be reasonably sufficient to create a well-founded fear in the mind of the party that he or she will not receive a fair trial. *Fischer v. Knuck,* 497 So.2d 240, 242 (Fla.1986). The standard to be applied by the judge is whether a reasonably prudent person would, on the basis of the stated facts, fear that he or she cannot get a fair trial with this judge presiding. *E.g., Jernigan v. State,* 608 So.2d 569 (Fla. 1st DCA 1992). Adverse judicial rulings are not a proper basis for disqualification of the judge. *E.g., Jackson v. State,* 599 So.2d 103 (Fla.), *cert. denied,* 506 U.S. 1004, 113 S.Ct. 612, 121 L.Ed.2d 546 (1992).

Here petitioner's allegations lack specificity and go almost entirely to judicial rulings of the judge. Regarding the one issue raised regarding alleged defamatory remarks made by the judge, which appears not to concern directly a judicial ruling, petitioner fails to say what remarks the judge has made about him, and is not sufficiently explicit about the circumstances in which they were made.

The judge correctly denied the motion for disqualification. Petitioner has failed to make an adequate preliminary case for a writ of prohibition.

HERSEY, STONE and WARNER, JJ., concur.

Fla.App. 4 Dist.,1994.
Heier v. Fleet
642 So.2d 669, 19 Fla. L. Weekly D2010

District Court of Appeal of Florida,

Fifth District.

Carl Joe HOWARD, Appellant,
v.
STATE of Florida, Appellee.

No. 5D06-1302.

March 16, 2007.

Background: Defendant was convicted in the Circuit Court, Citrus County, Richard A. Howard, J., of simple battery. Defendant appealed.
Holdings: The District Court of Appeal, Lawson, J., held that:
(1) defendant failed to show sufficient grounds for disqualifying trial court judge, and

(2) mistrial was warranted when victim testified regarding alleged rape, in violation of motion in limine.

Reversed and remanded.

West Headnotes

[1] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act

227k47 Acting as Counsel or Other Participation in Cause
227k47(1) k. In general. Most Cited Cases

Trial judge's presiding over dependency proceeding involving defendant's child, together with damaging evidence regarding defendant in dependency proceedings, and rulings contrary to defendant's position, was insufficient grounds for disqualifying judge from presiding over defendant's criminal trial for aggravated assault with deadly weapon and battery.

[2] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(2) k. Statements and expressions of opinion by judge. Most Cited Cases

Allegation that trial judge made statement during dependency case involving defendant's child likening defendant to Charles Manson, by itself, was insufficient grounds to disqualify judge from presiding over defendant's criminal trial for aggravated assault with deadly weapon and battery; there was no showing as to when comment was made, for purposes of requirement that motion be made within ten days after discovery of facts in support of disqualification, or to nature of comment or context under which it was made, and comment, by itself, did not demonstrate that judge was biased against defendant. West's F.S.A. R.Jud.Admin.Rule 2.160(c, e) (2005).

[3] KeyCite Citing References for this Headnote

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k867 Discharge of Jury Without Verdict; Mistrial
110k867.12 Evidentiary Matters
110k867.12(6) Other Misconduct; Character of Accused
110k867.12(7) k. In general. Most Cited Cases
(Formerly 110k867)

110 Criminal Law KeyCite Citing References for this Headnote
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k868 k. Objections and disposition thereof. Most Cited Cases

Mistrial was warranted, in prosecution for aggravated battery with deadly weapon and simple battery, when victim testified that defendant had broken into her trailer and raped her while she was

unconscious, in violation of motion in limine precluding evidence of other crimes or bad acts; victim had been allowed to testify, over defendant's objection, as to defendant's "mental problems," alleged sale of victim's camper trailer in exchange for crack cocaine to give to his current girlfriend, and injunction prohibiting defendant from having contact with her, and trial court's curative instruction to disregard testimony about rape was inadequate.

*1261 James S. Purdy, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant.
Bill McCollum, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

LAWSON, J.

Carl Joe Howard appeals from his conviction for battery (and probationary sentence imposed by the trial court), raising two issues. First, he alleges error in the denial of his motion to disqualify the trial judge. Second, he argues that the trial court erred in denying his motion for mistrial. Although we find that the motion to disqualify was properly denied, we agree with Howard as to his second point on appeal, and reverse the conviction.

Howard was charged by information with one count of aggravated assault with a deadly weapon,[FN1] and one count of simple battery.[FN2] He was acquitted as to the felony assault charge, but the State's case was problematic with respect to both charges. *1262 The victim, Martha Jay, presented inconsistent testimony at trial, and was thoroughly impeached with prior inconsistent statements during cross examination. Her testimony was also inconsistent with that of the other alleged eye-witness, Ms. Jay's son. Finally, the injuries that Ms. Jay claimed to have sustained as a result of the battery could not be confirmed by the law enforcement officers who responded to the scene. Both officers testified that the physical evidence at the scene was not consistent with Ms. Jay's statement of events.

FN1. § 784.021(1)(a), Fla. Stat. (2005).

FN2. § 784.03, Fla. Stat. (2005).

[1] Prior to trial, Howard's counsel filed both a verified motion to disqualify the trial judge and a written motion in limine to preclude statements at trial regarding any of Howard's "other crimes or bad acts." The factual basis for the disqualification motion involved a dependency proceeding over which the trial judge presided prior to or during the course of Howard's criminal case. The dependency case dealt with a minor child that Howard had fathered with the victim. According to the verified motion, the judge heard damaging evidence regarding Howard, made rulings contrary to Howard's interests or position, and found the victim's testimony during the dependency trial to have been credible. We find none of these allegations to be legally sufficient to support a motion to disqualify. *See, e.g., Winburn v. Earl's Well Drilling & Pump Service,* 939 So.2d 199, 200 (Fla. 5th DCA 2006) (recognizing prior adverse rulings by a trial judge are not a legally sufficient ground upon which to base a motion to disqualify); *Scott v. State,* 909 So.2d 364 (Fla. 5th DCA 2005) (recognizing the misconduct of a litigant during a prior case

over which a judge presides is no basis to disqualify the judge from presiding over other cases involving the same litigant); *Rivera v. State,* 717 So.2d 477, 481 (Fla.1998) ("The fact that the judge has made adverse rulings in the past against the defendant, or that the judge has previously heard the evidence, or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others,' are generally considered legally insufficient reasons to warrant the judge's disqualification.") (quoting *Jackson v. State,* 599 So.2d 103, 107 (Fla.1992)).

[2] The motion also alleges that the judge made a statement during the dependency case likening Howard to Charles Manson. Although a comment of this nature might serve as a sufficient basis for disqualification, depending upon what was said and the circumstances under which it was said, neither the motion itself nor anything in the record on appeal demonstrates that the motion was timely filed, the exact nature of the comment, or its context. Therefore, we agree that the motion was legally insufficient and properly denied.

A motion to disqualify must generally be filed "within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion," and must "allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification." Fla. R. Jud. Admin. 2.160(c), (e). With respect to timing, the motion does not allege when the purported comment was made, and nothing in the record demonstrates that the motion was timely. *See Carter v. Howey,* 707 So.2d 906, 906 (Fla. 5th DCA 1998) (holding "this court is unable to determine that the motion was timely because the father did not include the dates of the relevant hearings in the motion and the record does not contain transcripts of these hearings").

With respect to the trial court's purported comment, even if the statement was *1263 made during the course of the dependency trial, based upon evidence presented, it would not serve as a basis for disqualifying the judge from presiding over other matters involving Howard unless the words spoken evidenced actual bias. *See Waterhouse v. State,* 792 So.2d 1176, 1192-94 (Fla.2001) (holding sentencing judge's comment that defendant was "a dangerous and sick man and that many other women have probably suffered because of him," made during official proceedings and based upon evidence presented to the court was not sufficient to support a motion to disqualify the judge from other proceedings involving the defendant because the comment "did not constitute a prejudgment of any pending or future motions that the defendant might file" nor indicate "a predisposed bias against the defendant"); *Wargo v. Wargo,* 669 So.2d 1123, 1124 (Fla. 4th DCA 1996) ("Generally, mere characterizations and gratuitous comments, while offensive to the litigants, do not in themselves satisfy the threshold requirement of a well-founded fear of bias or prejudice."); *Oates v. State,* 619 So.2d 23 (Fla. 4th DCA 1993) (holding trial judge's comment that the defendant was "being an obstinate jerk" was insufficient to support a motion to disqualify the judge when the defendant had continuously interrupted the proceedings to the extent that he had to be removed from the courtroom), *rev. denied,* 629 So.2d 134; *Brown v. Pate,* 577 So.2d 645, 647 (Fla. 1st DCA 1991) ("A judge may form mental impressions and opinions during the course of presentation of evidence, as long as she does not prejudge the case."). Although a comment likening a party to a notoriously bad person could be made in a manner or context demonstrating that the judge making the comment was prejudiced against the

party, the scant allegations of Howard's motion fall short of making the necessary showing. Therefore, we conclude that the trial court correctly denied the motion as legally insufficient.

[3] With respect to the second issue on appeal, Howard's counsel argued the motion in limine prior to the start of trial. There was no objection from the State, and the court granted the motion. During trial, however, and over defense objection, the victim was allowed to testify that: (1) she was familiar with Howard's prior "mental problems," (2) she had been told that Howard sold a camper-trailer that she owned (but left on his property at some point in the past) in exchange for crack cocaine to give to his current girlfriend; and (3) she had obtained an injunction prohibiting Howard from having any contact with her after the alleged assault and battery, but that he continued to write her, telling her that he was watching her from a lot near her new residence, in a series of "long rambling" letters that were "just crazy-God was telling him I was doing this or that."

With this testimony as part of the backdrop for analyzing Howard's motion for mistrial, the State asked the victim about the child Howard had fathered with her prior to the alleged assault and battery. The victim began to explain that when she lived in her trailer behind Howard's house, he had a key to the trailer. She then explained that she would "pass out" from back pain she was experiencing, and Howard would come into the trailer. Concerned about where Ms. Jay's narrative was headed, defense counsel interrupted with an objection, which the trial court properly sustained. The judge then reminded the State of his ruling on Howard's motion in limine. Despite the warning, this exchange followed:

Prosecutor: [D]id you have any type of relationship with him after you broke up?

*1264 Ms. Jay (victim): Only when he broke in and raped me while I was unconscious.
Defense counsel immediately moved for a mistrial. The trial court denied the motion and simply instructed the jury to ignore Ms. Jay's response. Under the circumstances, we find that the curative instruction was inadequate, and that the motion for mistrial should have been granted. Given the quantity and quality of evidence before the jury, and in light of the other evidence improperly presented over defense objection, we cannot say beyond a reasonable doubt that the victim's statement that Howard had raped her in the past did not affect the verdict. *Cf. Cooper v. State,* 659 So.2d 442 (Fla. 2d DCA 1995) (finding victim's statement that defendant had raped her daughter in incident not charged in pending case was so prejudicial as to warrant mistrial given circumstances of that case).

Therefore, we reverse and remand this matter back to the trial court.
REVERSED and REMANDED.

TORPY and EVANDER, JJ., concur.

Fla.App. 5 Dist.,2007.
Howard v. State
950 So.2d 1260, 32 Fla. L. Weekly D733

District Court of Appeal of Florida,

Fourth District.

SANTA CATALINA TOWNHOMES, INC., Petitioner,

v.

Shahbaz MIRZA, Respondent.

No. 4D06-1022.

Nov. 29, 2006.

Background: Purchaser of real property brought action against developer, seeking specific performance of contract for construction and sale of property. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Patti Englander Henning, J., denied developer's motion to recuse. Developer petitioned for writ of prohibition.

Holdings: The District Court of Appeal, Warner, J., held that:
(1) because motion to recuse was not denied as untimely, untimeliness did not require Court to deny petition for prohibition, receding from *Thomas v. Chase Manhattan Bank,* 857 So.2d 989, and

(2) motion was deemed granted because it was not ruled on within 30 days.

Petition granted.

West Headnotes

[1] KeyCite Citing References for this Headnote

314 Prohibition
314II Procedure
314k16 k. Jurisdiction or Authority to Issue. Most Cited Cases

Where the trial court denied defendant's motion to recuse as legally insufficient, defendant's failure to file motion to recuse within 10 days after discovery of the facts did not require the appellate court to sua sponte deny defendant's subsequent petition for prohibition; the issue of timeliness was not

properly before the appellate court, and the 10-day period for filing a motion to disqualify was not jurisdictional; receding from *Thomas v. Chase Manhattan Bank,* 857 So.2d 989. West's F.S.A. R.Jud.Admin.Rule 2.160(e) (2005).

[2] KeyCite Citing References for this Headnote

227 Judges
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of Objections. Most Cited Cases

Motion to recuse was deemed granted, where trial court failed to rule on the motion within 30 days of service of the motion. West's F.S.A. R.Jud.Admin.Rule 2.160(j) (2005).

*462 Peter M. Hodkin of the Law Offices of Peter M. Hodkin, P.A., Fort Lauderdale, for petitioner.
Assad S. Mirza of Mirza & Mirza, LLP, Pembroke Pines, for respondent.

EN BANC

WARNER, J.

Santa Catalina Townhomes, Inc. petitions for writ of prohibition to review an order denying its motion to recuse the trial court judge. Because the judge failed to *463 rule within thirty days of service of the motion, the motion was deemed granted, even though the judge later denied it. We therefore grant the petition. We write to address the issue of our jurisdiction.

The facts giving rise to the recusal motion occurred immediately after a hearing on November 30, 2005. Thus, the ten-day period for filing the motion expired on Monday, December 12 (the tenth day being a Saturday). The motion was served on December 8. Also served was a letter to the judge's judicial assistant attaching a copy of the motion. The clerk's docket shows that on December 8, 2005 the petitioner filed the certificate of the attorney pursuant to Florida Rule of Judicial Administration 2.160(c). However, inexplicably the docket also shows the motion and supporting affidavit as being filed with the clerk on Tuesday, December 13, 2005, even though they are all noted as being served on the same day.[FN1] The respondent filed a response to the motion to recuse but did not allege that the motion was untimely. The court denied the motion as legally insufficient.

FN1. Were we not determining that the timeliness issue is not properly before us, we would have remanded for a hearing to determine timeliness in light of this discrepancy in docketing dates.

[1] Florida Rule of Judicial Administration 2.160(e), (2005),[FN2] provides that "[a] motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion...." In *Thomas v. Chase Manhattan Bank,* 857 So.2d 989 (Fla. 4th

DCA 2003), we held that merely serving a motion to recuse within ten days of discovery of facts justifying the motion does not comply with the requirement of filing the motion. We therefore denied a petition for writ of prohibition where the motion was untimely in the trial court. We stated in *Thomas* that the failure to file the motion within the ten-day period *requires* a subsequent petition for writ of prohibition to be denied.
FN2. In 2006, the Rules of Judicial Administration were renumbered, and now the rule governing the disqualification of trial judges is set forth in rule 2.330. *See In re Amendments to the Florida Rules of Judicial Administration,* 939 So.2d 966 (Fla.2006).

However, when faced with this issue, the supreme court has held that where the trial court rules on the motion on the merits and not on timeliness, the issue of timeliness is not before the court. In *Roberts v. State,* 840 So.2d 962 (Fla.2002), the court addressed this issue as follows:

The State contends that Roberts' motion to disqualify, which was filed on October 16, 1996, and amended on November 12, 1996, was not timely. Florida Rule of Judicial Administration 2.160(e) provides that a motion to disqualify must be made "within a reasonable time not to exceed 10 days after discovery of the facts constituting grounds for the motion and shall be promptly presented to the court for an immediate ruling." The State raised the issue of timeliness of the motion below, but Judge Solomon did not deny the motion on this basis. Instead, the judge ruled that "the Defendant's motion to disqualify judge is insufficient, and the motion is denied." Thus, the timeliness of the motion is not properly before us.
Id. at 969. Although this may be considered dicta because the court then determined that the motion was timely, the court's opinion nevertheless states that where the judge ruled on grounds of legal insufficiency rather than untimeliness, the question of timeliness is not "properly" before the reviewing court. Thus, the court did not treat this as a "jurisdictional" time period but one that could be waived or not preserved.

*464 Because of *Roberts,* we conclude that we should recede from *Thomas* to the extent that it holds that the failure to file a motion to recuse within ten days after discovery of the facts requires the appellate court to sua sponte deny a subsequent petition for prohibition. Unlike the time period for filing an appeal, the ten-day period for filing a motion to disqualify is not jurisdictional. Thus, if the trial court does not rule that the motion is untimely based upon the date of its filing, the issue of timeliness is not properly before the court. That makes sense, because so often the question of timeliness depends upon facts which may be in dispute, such as the date on which the party discovered the facts giving rise to the grounds for disqualification. Factual determinations are made by the trial court, not the appellate court.

[2] Concluding that the timeliness of the motion is not properly before us, we grant the petition because the trial court did not rule on the motion within thirty days as required by rule 2.160(j), Florida Rules of Judicial Administration (2005):

The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c). If not ruled on within 30 days of service, then motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case.

Petition granted. This case is remanded for reassignment.

STEVENSON, C.J., GUNTHER, STONE, POLEN, FARMER, KLEIN, SHAHOOD, GROSS, TAYLOR, HAZOURI and MAY, concur.

Motion must state in certificate of service that judge was served:

District Court of Appeal of Florida,

First District.

Jasper Jay HARRISON, Petitioner,

v.

Patricia JOHNSON, Respondent.

No. 1D06-2358.

June 27, 2006.

Rehearing Denied Aug. 3, 2006.

Petition for Writ of Certiorari-Original Jurisdiction.

Jasper Jay Harrison, pro se, Petitioner.

No appearance for Respondent.

PER CURIAM.

By petition for writ of certiorari, Jasper Jay Harrison complains that the circuit court has failed to take timely action on his motion to disqualify the trial judge and his motion to reassign his case to another judge. To the extent he seeks an order of this court disqualifying the trial judge, his proper remedy is through writ of prohibition, and to the extent he seeks to compel a ruling by the circuit court on his motion to reassign, mandamus is the more apt procedural vehicle. We therefore treat the petition as seeking such relief. *See* Fla. R.App. P. 9.040(c).

We conclude, however, that neither prohibition nor mandamus relief is warranted at this point. In addressing motions for disqualification, Florida Rule of Judicial Administration 2.160(c) provides that in addition to filing the motion with the clerk, the movant is required to serve a copy thereof on the subject judge. Harrison's motion for disqualification fails to show proper service on the trial judge, as required by the rule. As a consequence, rule 2.160(j), which mandates that the trial judge rule on the motion for disqualification*564 within 30 days after service of the motion in compliance with subdivision (c), failing which the motion is deemed granted, is not implicated in this case. Accordingly, because petitioner has not yet properly served his motion for disqualification of the trial judge, prohibition will not lie.

Similarly, because petitioner has not brought his motion to reassign before the trial court in order to obtain a ruling thereon, we decline to grant mandamus relief in the form of an order compelling the trial court to make such a ruling. *See Moore v. Correctional Medical Services,* 817 So.2d 963 (Fla. 1st DCA 2002) (in an ordinary civil case, mandamus will generally not lie absent a showing that the trial court has failed to take action on some pending matter that has been noticed for hearing).

Accordingly, we deny the petition for writ of prohibition or mandamus. This disposition is without prejudice to Harrison's right to cure his error in failing to properly serve his motion for disqualification on the trial judge and to thereafter obtain a ruling on that motion or, if no ruling is timely made, to invoke the remedy set forth in rule 2.160(j).

BENTON, POLSTON, and THOMAS, JJ., concur.

District Court of Appeal of Florida,

Third District.

Rene MARQUEZ, Petitioner,
v.
The STATE of Florida, Respondent.

No. 3D09-516.

May 6, 2009.

Background: After defendant's convictions for lewd and lascivious molestation and lewd and lascivious conduct were affirmed on appeal, defendant filed motion to disqualify judge. The trial court did not rule on motion within 30 days. Defendant then filed petition for writ of prohibition.

Holding: The District Court of Appeal held that writ of prohibition would not issue to preclude trial court from presiding over criminal proceedings.

Petition denied.

West Headnotes

[1] KeyCite Citing References for this Headnote

⇦314 Prohibition
⇦314I Nature and Grounds
⇦314k5 Acts and Proceedings of Courts, Judges, and Judicial Officers
⇦314k5(4) k. Proceedings in Criminal Prosecutions. Most Cited Cases

Writ of prohibition would not issue to preclude trial court from presiding over criminal proceedings, even though trial court did not rule on defendant's motion to disqualify within 30 days, where defendant's motion did not contain certificate of service showing that motion was served on judge. West's F.S.A. R.Jud.Admin.Rule 2.330(c)(4), (j); West's F.S.A. RCP Rule 1.080.

[2] KeyCite Citing References for this Headnote

⇦227 Judges
⇦227IV Disqualification to Act
⇦227k51 Objections to Judge, and Proceedings Thereon
⇦227k51(1) k. In General. Most Cited Cases

The intent of the rule requiring that a motion to disqualify a judge be served on the judge is to be sure that the motion comes to the personal attention of the trial judge as soon as possible. West's F.S.A. R.Jud.Admin.Rule 2.330(c)(4).

*975 Rene Marquez, in proper person.
Bill McCollum, Attorney General, and Heidi Milan Caballero, Assistant Attorney General, for respondent.

Before COPE, SHEPHERD, and SUAREZ, JJ.

COPE, J.

This is a petition for writ of prohibition seeking disqualification of the trial judge. We deny the petition because there is no certificate of service reflecting service on the trial judge.

Rene Marquez was convicted of lewd and lascivious molestation and lewd and lascivious conduct and his convictions were *976 affirmed without opinion in 2008. *Marquez v. State,* 990 So.2d 1077 (Fla. 3d DCA 2008) (table). In November 2008, defendant-petitioner Marquez filed a motion to disqualify the trial judge. The judge did not rule on the motion within thirty days.

[1] ☑ The defendant filed a motion seeking reassignment of the case to a new judge. The trial court denied the motion and the defendant has filed a petition for writ of prohibition.[FN*]

FN* Apparently the motion for disqualification has never been ruled on. We assume the trial court's logic was that by denying reassignment, the court was necessarily denying disqualification.

Under the Florida Rules of Judicial Administration, if a motion to disqualify a trial judge is not ruled on within thirty days, "the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case." Fla. R. Jud. Admin. 2.330(j); *see Berube v. State,* 978 So.2d 893 (Fla. 2d DCA 2008); *Johnson v. State,* 968 So.2d 61 (Fla. 4th DCA 2007); *Schisler v. State,* 958 So.2d 503 (Fla. 3d DCA 2007); *see also Tableau Fine Art Group, Inc. v. Jacoboni,* 853 So.2d 299 (Fla.2003).

[2] ☑ We deny the petition because the defendant's motion does not contain a certificate of service showing that the motion for disqualification was served on the trial judge. Rule 2.330(c)(4) provides in part, "In addition to filing with the clerk, the movant shall immediately serve a copy of the motion on the subject judge as set forth in Florida Rule of Civil Procedure 1.080." The intent of the rule is to be sure that the motion comes to the personal attention of the trial judge as soon as possible. The Fourth District has said, and we agree, that prohibition will be denied where the petitioner did not serve a copy of the motion for disqualification on the trial judge as required by the rule. *Johnson,* 968 So.2d at 63 n. 2. The certificate of service on the motion for disqualification reflects only that the defendant placed the motion in the hands of the prison officials for mailing, but does not reflect that a copy was served on the trial judge. We therefore deny the petition. Petition denied.