IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

DOUGLAS MICHAEL GUETZLOE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

WRIT NO.: 08-51

Case No.: 2008-CA-21379-O

Petition for Writ of Prohibition

Frederic B. O'Neal, Esq.,
for Petitioner.

Ryan J. Vescio, Esq.,
Assistant State Attorney
for Respondent.

Before Strickland, Shea, Thorpe, JJ.

PER CURIAM.

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

Petitioner, Douglas Michael Guetzloe, ("Petitioner" or "Guetzloe") seeks a writ of prohibition following the trial court's denial of his Motion for Disqualification. This Court has jurisdiction. Florida Rule of Appellate Procedure 9030(c)(3). We dispense with oral argument, Fla. R. App. P. 9.320, and deny the Petition.

Guetzloe was convicted in the county court of fourteen counts of violating Florida's Electioneering Communication Statute on account of his distribution of material during a

mayoral election in Winter Park. Guetzloe was not a candidate. These materials consisted of four pages and were sent to over five thousand households without the consent of any of the candidates. Guetzloe appealed to the Fifth District Court of Appeal which affirmed the conviction for violating the electioneering statute but also held that "double jeopardy bars multiple prosecutions for a single distribution of electioneering communications." *Guetzloe v. State of Florida,* 980 So. 2d 1145, 1148 (Fla. 5th DCA 2008). The case was remanded for re-sentencing on a single count of violating the Florida Electioneering Statute.

On remand there were numerous recusals and disqualifications of judges which, ultimately, led to the matter now before this Court.

The lineup of judges who have been assigned to this case is:

> 1) C. Jeffrey Arnold - County Court Judge - presided over trial and sentenced Guetzloe.
>
> 2) Steve Jewett - County Court Judge - assigned because Judge Arnold was appointed to Circuit Court after sentencing Guetzloe and before the Fifth District Court of Appeal decision.
>
> 3) Martha C. Adams - County Court Judge - assigned to case after Judge Jewett recused himself.
>
> 4) Wayne J. Shoemaker County Court Judge - assigned to case after Judge Adams entered an order of disqualification following Guetzloe's motion seeking that relief.
>
> 5) C. Jeffrey Arnold - Circuit Court Judge, in his capacity as Acting County Court Judge, pursuant to Ninth Circuit Administrative Order 2007-17-03, "Order on the Assignment of Circuit Judges and County Judges to Temporary Duty in the Circuit and County Courts of the Ninth Judicial Circuit."[1] Judge Arnold was re-assigned to this case after Judge Shoemaker requested that Administrative Judge Carolyn B. Freeman

[1] The same administrative order was re-adopted in 2008, 2009 and 2010.

> reconsider her assignment of him and cited the case of *Clemons v. State*, 816 So, 2d 1180 (Fla. 2d DCA 2002). Specifically, Judge Shoemaker pointed to the passage in *Clemons* stating that "it is reversible error for a successor judge to sentence a defendant where the record does not show that the substitution of judges is 'necessary' or dictated by an 'emergency.'" [2]

Following Judge Arnold's re-assignment to his case, Guetzloe moved to disqualify him, on the basis of an alleged encounter at a non-judicial function.

STANDARD OF REVIEW

"The standard of review regarding the trial court's construction of the rules is de novo." *Smith v. Smith*, 902 So. 2d *859*, 862 (Fla. 1st DCA 2005).

APPLICABLE RULE PROVISION

The issue in this petition concerns the two different standards governing the disqualification of trial judges, as expressed in the Rules of Judicial Administration.

Rule 2.330. Disqualification of Trial Judges

. . . .

> **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 he 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,)(I), 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

[2] *Clemons v. State*, 816 So. 2d 1180, 1182 (Fla. 2d DCA 2002).

> impartial in the case. Such a successor Judge may rule on the truth of the facts alleged in support of the motion.

Fla. R. Jud. Admin. 2.330 (f),(g).

The question here, as framed by the petition, is whether or not Judge Arnold is a "successor judge" as that term is used in Rule 2.330. If he is, then the disqualification motion is governed by paragraph (g) of Rule 2.330 and he must consider and decide the merits of that motion. If he is not a "successor judge," then he must decide the motion to disqualify him under the far more lenient standard of section (f), i.e., whether the motion is legally sufficient on its face.

Neither party cites any case law addressing this issue and both claim that there is none. Our independent research confirms that this petition presents a unique factual situation which has not been addressed by a court. Guetzloe appeals to "common sense" and argues that "a 'successor judge' is every other judge in a case after the 'original judge," (Am. Pet. Writ Prohibition ¶33.) From this proposition, Petitioner concludes that "because Judge Arnold was the 'original judge' in the case, as a matter of common sense he cannot also be considered a 'successor judge' for purposes of Rule 2.330(g)."

The Respondent, State of Florida ("Respondent" or "State"), counters that the choice of applicable standards under Rule 2.330 focuses not so much on initial and successor *judges* but rather on first and successive *motions.* The State argues that a party has only one opportunity to take advantage of the forgiving standard of section (f) which governs initial motions to disqualify a judge. To permit Guetzloe to avail himself of this standard more than once, the State contends, would run afoul of the intent of the Rule (and its related statute) "to limit a

party's ability to pick and choose which judge should hear a dispute by creating additional determinations in ruling on multiple motions to disqualify trial judges." (Resp. to Pet. Writ Prohibition & 14.) The difficulty here is that normally no distinction need be made between a successor judge and a successive motion because the second judge hears the subsequent disqualification motion. Such is not the case here where Judge Arnold, the initial judge, decided a successive motion.

We see the merit in both arguments but conclude that the State's position more faithfully comports with and advances the purposes of the Rule governing disqualification of judges. The State is correct that context is important. Guetzloe loses sight of the context of various provisions of the disqualification rule. On a motion to disqualify, the term "initial judge" must apply to the judge who heard the initial disqualification motion. That much is plain. Normally, that would be the judge first assigned to a case. Here, the assignment of judges was unusual. The first judge assigned, Judge Arnold, was later re-assigned after one judge recused himself, another granted a motion to disqualify pursuant to Rule 2.330(f) and a third requested that the case be again be assigned to Judge Arnold, who had originally sentenced Guetzloe. The first or initial motion to disqualify was not heard by Judge Arnold so, in the context of the disqualification rule, he is not the "initial judge." However, because he ruled upon a successive disqualification motion, he is a "successor judge" for purposes of Rule 2.330. Thus, the heightened standard of section (g) of Rule 2.330 applies.

There is also a statute relating to disqualification of judges. *See* §38,10, Fla. Stat. (2010). Section 38.10 provides:

> 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.

§38.10, Fla. Stat. (2010).

> "A motion to disqualify is governed substantively by section 38.10, Florida Statutes

(2005), and procedurally by Florida Rule of Judicial Administration 2.330." *Parker v. State*, 3 So. 3d 974, 981 (Fla. 2009). This means that "the circumstances under which a party is entitled to seek a second disqualification are substantive rather than procedural and, therefore, the statute controls." *Brown v. St. George Island, Ltd.*, 561 So. 2d *253*, 561 (Fla. 1990). Whether Guetzloe's motion is governed by the statute or the rule need not concern us in any detail because the same result obtains. Section 38.10 and Rule 2.330 must be read in pan materia.

Cardinal v. Wendy's of So. Fla, Inc, 529 So. 2d 335, 337 (Fla. 4th DCA 1988); *Sikes v Seaboard Coast Line Ry. Co.,* 429 So. 2d 1216, 1224 (Fla. 1st DCA 1983). In the end, whether viewed as a matter of substance or procedure, governed by rule or statute, the disqualification of a trial judge in Florida, is in the simplest terms, easy - almost automatic - the first time around but more difficult thereafter. Under this construct, the dual purposes of the disqualification scheme are advanced - "to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." *Livingston v. State,* 441 So. 2d 1083, 1086 (Fla. 1983). The ease with which an initial disqualification may be obtained infuses the proceedings with the necessary public confidence in their integrity. The heightened standard applicable to subsequent disqualification motions serves to prevent judge-shopping and delay. The Florida Supreme Court has stated that:

> We believe that the legislature intended that a party should have only one unfettered right to obtain a judge's disqualification under section 38.10. When a party has obtained the disqualification of a judge under section 38.10, that party's subsequent effort to disqualify another judge under the same statute is subject to the conditions of the latter portion of that statute regardless of whether an intervening judge has presided.

Brown v. St. George Island, Ltd., 561 So. 2d at 256.

We conclude that Rule 2.330 is to be read similarly. Guetzloe exercised his one "unfettered right" to the disqualification of a judge when he sought, and obtained, Judge Martha Adams's removal from this case. He now, again, claims that same unfettered right, this time to seek the disqualification of Judge Arnold. To do so, he asks that his motion to disqualify Judge

Arnold be treated as if it is his first motion of this kind when, simply, it is not. By definition, a party cannot make two initial motions to disqualify a trial judge. Therefore, Guetzloe may not again benefit from the low threshold of Rule 2.330(f). Instead, his motion to disqualify Judge Arnold is governed by section (g) of Rule 2.330.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that the Petition for a Writ of

Prohibition of Petitioner, Douglas Michael Guetzloe, be and hereby is **DENIED.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this

2nd day of August, 2010.

/S/
STAN STRICKLAND
Circuit Judge

/S/
TIM SHEA
Circuit Judge

/S/
JANET C. THORPE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished via U.S. mail or hand delivery to:

1) Frederic B. O'Neal, Esq., P.O. Box 842, Windermere, Florida 34786;

2) William J. Sheaffer, Esq., 609 East Central Boulevard, Orlando, FL 3801;

3) Ryan Vescio, Esq., Assistant State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; and

4) The Honorable C. Jeffrey Arnold, Circuit Judge, Orange County Courthouse, Orlando, Florida 32801

on this ___2nd___ day of ____August_____, 2010.

_/S/_____
Judicial Assistant