

Supreme Court of Kentucky

FROM THE 14TH JUDICIAL CIRCUIT
SCOTT CIRCUIT COURT, DIVISION II
CASE NO. 20-CI-00376

IN RE:

RYAN QUARLES, IN HIS OFFICIAL
CAPACITY AS COMMISSIONER OF
AGRICULTURE, ET AL., AND
COMMONWEALTH OF KENTUCKY EX
REL ATTORNEY GENERAL DANIEL
CAMERON

PLAINTIFFS

V.

ANDREW BESHEAR, IN HIS OFFICIAL
CAPACITY AS GOVERNOR, ET AL.

DEFENDANTS

ORDER DENYING DISQUALIFICATION

Kentucky Revised Statute (KRS) 26A.020 is Kentucky's procedural mechanism for trial-judge disqualification. Under this statute, a party who believes a judge will not afford a fair and impartial trial may file with the circuit clerk an affidavit stating the factual basis for that belief. The circuit clerk, in turn, certifies the party's affidavit to the Chief Justice for immediate review and a decision whether grounds exist to appoint a different judge for the case.

Following that statutory process, the Governor of the Commonwealth seeks disqualification of the Honorable Brian Privett, 14th Judicial Circuit, Division 2, from presiding in the above-referenced case. The Governor filed, and the Scott Circuit Clerk certified to the Chief Justice, the affidavit of J. Michael Brown, the Secretary of the Governor's Executive Cabinet, setting forth the

grounds for disqualification. The Governor also filed a letter to the Chief Justice, which included his arguments for disqualification.

The underlying case involves the Governor's executive orders relating to the spread of COVID-19. The Commissioner of Agriculture, Ryan Quarles, and Evans Orchard and Cider Mill, LLC, brought this case in the Scott Circuit Court seeking an injunction to stop enforcement of several of the Governor's executive orders. The case was assigned to Judge Privett, who granted a restraining order in favor of Commissioner Quarles and Evans Orchard, temporarily enjoining the enforcement of the executive orders.

Through Secretary Brown's affidavit and the accompanying letter, the Governor argues that Judge Privett should be disqualified from presiding over this case because of his personal and political relationship with Quarles. As evidence of this relationship, the Governor points to two pictures of Judge Privett and Quarles that were posted to social media platforms.

In the first photo, Quarles and Judge Privett appear together posing for a picture at a 2018 campaign event for Judge Privett's re-election to his circuit court seat. Judge Privett posted the photo to his Twitter account with the caption "My friend [Ryan Quarles]¹ happened to be in Cynthiana tonight and was able to stop by my event. Always good to see you Ryan!" The second photo, posted to the Scott County Republican Party Instagram page in 2018, shows Judge Privett posing for a picture alongside Quarles and several others at a

¹ The caption referred to Ryan Quarles's Twitter account.

Scott County Republican Party event. These photos, the Governor argues, evidence a relationship between Quarles and Judge Privett that raises doubt about the judge's impartiality, requiring Judge Privett's disqualification from the case.

In response to the Governor's motion for disqualification, Judge Privett asserts that he does not have a close relationship with Quarles and that he knows Quarles only as an elected official from his judicial circuit. He further states that he has only had brief encounters with Quarles and has never attended social events with Quarles or spoken on the phone with him. Judge Privett also asserts that, although the Twitter photo was taken at his own campaign event, Quarles was attending a different campaign event at the same venue and only stopped by Judge Privett's event to meet prospective voters.

The filing of an affidavit under KRS 26A.020² prompts the Chief Justice "to review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge."³ KRS 26A.020 is silent on the subject of when a judge should be disqualified and a special judge should be appointed, but KRS 26A.015 offers some guidance. That statute provides that a judge should disqualify himself in any proceeding when, among

² Our Supreme Court has held KRS 26A.020 to be an unconstitutional "encroachment by the legislature on the power of the judiciary to make rules." *Foster v. Overstreet*, 905 S.W.2d 504, 506 (Ky. 1995). But because it is a "statutorily acceptable' substitute for current judicially mandated procedures[.]" the Court "out of deference and respect" extended comity to the legislature. *Id.* at 507.

³ KRS 26A.020(1).

other things, “he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.”⁴

Similarly, Rule 2.11 of the Code of Judicial Conduct provides that a judge “shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”⁵ Rule 2.11 provides a number of specific situations in which recusal is required, but the list is not exhaustive.⁶ Further, Comment [5] to that Rule provides that “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”

The determination of whether a judge’s impartiality might reasonably be questioned under Rule 2.11 “is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.”⁷ So a judge’s subjective belief that he or she is capable of presiding fairly over a particular proceeding has no bearing.

The question, then, is whether the two social media posts create a circumstance in which Judge Privett’s impartiality might reasonably be

⁴ KRS 26A.015(2)(e).

⁵ Supreme Court Rule (SCR) 4.300.

⁶ Rule 2.11(A) (“A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned; including but not limited to the following circumstances: . . .”).

⁷ *Presbyterian Church (U.S.A) v. Edwards*, 594 S.W.3d 199, 201 (Ky. 2018) (quoting *Dean v. Bondurant*, 192 S.W.3d 744, 746 (Ky. 2006)).

questioned because, as argued by the Governor, they show a personal or political relationship with Quarles.

From the outset, we note that the circumstances are fundamentally different from a recent case in which the Chief Justice disqualified a circuit judge for his social media activity involving one of the parties in a case before him. In *In re: Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney Gen., and Jefferson Cty. Teachers Ass’n v. David A. Dickerson, in his official capacity as Sec’y of the Kentucky Labor Cabinet*,⁸ Andy Beshear—then the Attorney General of Kentucky—and the Jefferson County Teachers Association brought an action against Governor Matt Bevin’s Secretary of the Kentucky Labor Cabinet, David Dickerson.⁹ Attorney General Beshear sought to stop Secretary Dickerson from issuing subpoenas to the superintendents of several school districts for information about employees who called-in sick during public demonstrations and teacher “sick-outs” at the Capitol during the 2018 and 2019 sessions of the General Assembly.¹⁰ The sick-outs and public demonstrations were a point of political contention between Attorney General Beshear and Governor Bevin, who were then opponents in the 2018 gubernatorial contest to be decided just a couple of months later. And Attorney

⁸ Order of Disqualification and Appointment, *In re: Commonwealth of Kentucky ex rel. Andy Beshear Attorney General and Jefferson County Teachers Association v. David A. Dickerson, in his official capacity as Secretary of the Kentucky Labor Cabinet*, No. 19-CI-00425, at *1 (Ky. Sept. 27, 2019).

⁹ *Id.*

¹⁰ *Id.* at *2.

General Beshear had used his support for and from teachers as a central theme in his campaign.¹¹

Following the same procedure under KRS 26A.020, Secretary Dickerson moved to disqualify the Franklin Circuit judge who presided over the case because the judge had “liked” a Facebook post supporting Andy Beshear’s campaign for governor.¹² The Chief Justice disqualified the judge, finding that the “like” created a circumstance in which the judge’s impartiality might reasonably be questioned.¹³

But, importantly, the mere fact that the judge “liked” a Facebook post involving a party appearing in a case before him was not the determining factor requiring disqualification. Rather, the Chief Justice pointed to two separate private reprimands of the Kentucky Judicial Conduct Commission that recognized that “liking” the Facebook page of a candidate for judicial office violated Rule 4.1(A)(3) of the Code of Judicial Conduct, the rule prohibiting a judge from publicly endorsing a candidate for judicial office.¹⁴ Following that precedent, the Chief Justice found the judge’s “like” of the Facebook post

¹¹ *Id.* Although Attorney General Beshear sued Secretary Dickerson, the Chief Justice recognized that Governor Bevin was, for all intents and purposes, a party to the action. *Id.* at *4.

¹² *Id.* at *1–2.

¹³ *Id.* at *8.

¹⁴ *Id.* at *6–7 (citing Order of Private Reprimand, Commonwealth of Kentucky Judicial Conduct Commission (Dec. 5, 2014), *available at* https://kycourts.gov/commissionscommittees/JCC/Documents/Public_Information/PrivateReprimand120514.pdf; and Order of Private Reprimand, Commonwealth of Kentucky Judicial Conduct Commission (Apr. 2, 2015), *available at* https://kycourts.gov/commissionscommittees/JCC/Documents/Public_Information/PrivateReprimand040215.pdf).

supporting Andy Beshear’s campaign for governor to be an endorsement of Andy Beshear as a gubernatorial candidate, amounting to “a per se violation of Rule 4.1(A)(3).”¹⁵ As such, the Chief Justice ultimately determined disqualification was warranted because the “like” amounted to an endorsement of a candidate’s ongoing campaign, the candidate was a party in the case, the candidate’s campaign opponent was the de-facto opposing party in the case, *and* the case involved a central issue in the candidate’s campaign.¹⁶

In this case, the parties are not competing candidates in an ongoing campaign, and the case does not concern a central campaign issue. But more importantly, Judge Privett’s post and the picture appearing on the Scott County Republican Party’s Instagram page fall short of a political endorsement of Quarles. While Kentucky law provides no guidance on the issue of whether a judge’s social media post containing a picture with a political figure amounts to an endorsement of that official, it seems clear that Judge Privett’s Twitter post did not go so far. The post makes no mention of a campaign for Quarles, and, other than identifying Quarles as “my friend,” the post does not imply support for Quarles as a political candidate. Likewise, the Scott County Republican Party’s Instagram picture in which Judge Privett and Quarles pose with seven

¹⁵ *Id.* at *7. Additionally, it is worth noting that, in the context of a First Amendment free speech claim, a judge’s “like” of a political candidate’s Facebook page has been deemed “the Internet equivalent of displaying a political sign in one’s front yard.” *Bland v. Roberts*, 730 F.3d 368, 386 (Ky. 2013).

¹⁶ *Id.* at *8 (“Given that [the judge’s] “like” may reasonably be perceived as a public endorsement of a candidate’s campaign, that the candidate is a party in this case, and that this case involves a central issue in that candidate’s campaign, this is one such circumstance [in which the judge’s impartiality might reasonably be questioned].”).

others at a Scott County Republican Party event could not reasonably be perceived as an endorsement of Quarles.¹⁷ It is not clear from the picture whether Judge Privett is attending the event in support of Quarles or any other political candidate or if Judge Privett himself is one of the candidates being promoted by the event.

Instead, the two social media posts could more reasonably be construed as evidence of Quarles’s political support for Judge Privett during Judge Privett’s campaign for circuit judge. But even still, courts ordinarily hold that such unexceptional campaign support does not reasonably create the appearance of impartiality, especially when the litigant’s support was remote in time from the underlying case. For example, Justice John Roach, in a 2006 order recusing himself from a case in which certain parties and their counsel were designated as hosts of a fundraiser for his campaign, noted that a campaign contribution within the state’s campaign donation limits, without more, is virtually never enough to require recusal in other states.¹⁸ “To the contrary,” he noted, “the cases that require recusal all involve the existence of a

¹⁷ Judge Privett’s appearance at a Republican Party event, especially in the midst of his own campaign for circuit judge, may have judicial-conduct implications. Rule 4.1(A)(7) of the Kentucky Code of Judicial Conduct prohibits judges from seeking, accepting or using endorsements from a political organization. In the same vein, subsection (A)(6) prohibits judges from publicly identifying himself or herself as a nominee of a political organization.

¹⁸ *Dean v. Bondurant*, 193 S.W.3d 744, 751 (Ky. 2006) (“Simply put, I have yet to find a case that required recusal merely based on a campaign contribution within the state’s campaign contribution limits.”). Justice Roach analyzed Canon 3(E)(1) of SCR 4.300 (1988), “which is virtually identical to Rule 2.11(A) of SCR 4.300 (2018).” *Presbyterian Church (U.S.A.)*, 594 U.S. at 201 n. 4 (Ky. 2018). See also *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla. 1990) (“[A]n allegation in a motion that a litigant or counsel for a litigant has made a legal campaign contribution to the political campaign of the trial judge, or the trial judge’s spouse, without more, is not a legally sufficient ground.”).

substantial donation coupled with other activities that reasonably raise questions of impartiality.”¹⁹ Similarly, “commonplace forms of nonmonetary support” for the judge’s campaign are generally not enough to warrant disqualification either.²⁰

The reality of Kentucky’s judicial system is that judicial officers must run for election and consequently seek the support of their constituents. Judicial candidates often hold campaign events and express gratitude to those who show up and give their support. Those candidates often elevate the support of their constituents in campaign literature or otherwise. A rule requiring disqualification whenever a judge has posed for a picture with a constituent and later showcased that picture as a part of his or her campaign, without some other evidence indicating a closer relationship between the judge and constituent, would be difficult to sustain in a state that elects its judges.

Further, despite Judge Privett’s assertions to the contrary, the two social media posts could similarly be construed as evidencing some degree of friendship between Judge Privett and Quarles. But “[w]hether or not disqualification is required when a friend appears as a party to a suit before a judge depends on how personal the relationship is between the judge and the party.”²¹ And a judge’s acquaintance with a party—e.g., as members of the

¹⁹ *Id.*

²⁰ *See Post v. State*, 779 S.E.2d 624, 631 (Ga. 2015) (“Allegations that a party or a party’s attorney made unexceptional campaign contributions or provided commonplace forms of non-monetary support during a judge’s election campaign ordinarily are insufficient to require referring a recusal motion for reassignment to another judge.”).

²¹ 48A C.J.S. *Judges* § 289 (2020).

same church or religious congregation, neighbors, former classmates, etc.—without proof of a closer connection, is not enough to require disqualification of the judge.²²

Here, Judge Privett’s Twitter photo with Quarles with a caption referring to Quarles as his “friend,” and the Instagram post showing the two at the same political event, without additional evidence of their personal relationship, is not a sufficient basis for disqualification. Judge Privett asserts that he has spoken to Quarles only during brief encounters and no more than five times and that the two have never spoken on the phone or been a guest in each other’s homes. It is commonplace to refer to acquaintances—even those with whom little connection is shared—as “friends,” and evidence that one has done so in a social media post does not show a personal relationship that would raise a reasonable question of impartiality.

At bottom, Judge Privett’s Twitter post showing a picture of himself and Quarles and the Scott County Republican Party’s Instagram post showing the two together with others at a political event could not reasonably be interpreted as evidencing more than a mere acquaintanceship or, at most, Quarles’s unexceptional show of support for Judge Privett’s campaign. Especially considering the two social media posts occurred almost two years before the

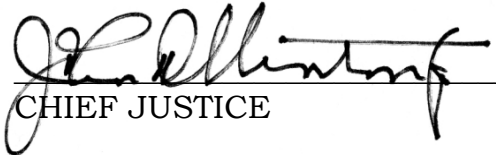
²² See *MacKenzie*, 565 So.2d at 1335 (“There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers. However, such allegations have been found legally insufficient when asserted in a motion for disqualification.”). See also 48A C.J.S. *Judges* § 289 (2020) (“A judge's acquaintance with a party, without some factual allegation of bias or prejudice, is not sufficient to warrant recusal.”).

inception of the underlying case, without additional evidence of a closer relationship, they do not require Judge Privett's disqualification or, by extension, Judge Privett's disclosure of those social media posts to the parties or lawyers in the case under Rule 2.11. Accordingly, Judge Privett is not disqualified from presiding over this case.

For these reasons, the Chief Justice orders as follows:

1. The request to disqualify the Honorable Brian Privett from presiding over the above-referenced case is DENIED;
2. The Scott Circuit Clerk shall place a copy of this order in the record of the above-styled matter and serve copies of this order on all counsel of record and parties not represented by counsel; and
3. The request is denied without prejudice of any party to seek appellate review after entry of a final judgment.

Entered this 23rd day of July 2020.


CHIEF JUSTICE

Copies to: Tina Foster, Scott County Circuit Court Clerk
Brian Privett, Circuit Judge, 14th Judicial Circuit, Division 2
Joe Bilby, Kentucky Department of Agriculture
Jason Obermeyer, counsel for Evans Orchard & Cider Mill
Barry Dunn, Chad Meredith, Brett Nolan, Aaron J. Silletto,
Heather L. Becker, and Marc Manly, Office of the Attorney General
La Tasha Buckner, S. Travis Mayo, Taylor Payne, and Laura
Tipton, Office of the Governor
Joe Newberg, Energy and Environment Cabinet
Sam Flynn, Finance and Administration Cabinet
Wesley W. Duke and David T. Lovely, Cabinet for Health and
Family Services
Crystal Miller, WEDCO District Health Department