IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DR. ERWIN D. JACKSON, as an elector of the City of Tallahassee,

Petitioner,

v.

LEON COUNTY ELECTIONS CANVASSING BOARD; SCOTT C. MADDOX, as the successful candidate for Tallahassee City Commission, Seat 1; and CITY OF TALLAHASSEE, a Florida municipal corporation,

Respondents.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D16-5205

Opinion filed November 23, 2016.

Petition for Writ of Certiorari -- Original Jurisdiction.

Charles Burns Upton II of the Upton Law Firm, P.L., Tallahassee, for Petitioner.

No appearance for Respondent Leon County Elections Canvassing Board.

Stephen Marc Slepin of The Maddox Horne Law Firm, Tallahassee, for Respondent Scott C. Maddox.

Louis C. Norvell, Assistant City Attorney, for Respondent City of Tallahassee.

PER CURIAM.

Petitioner Dr. Erwin Jackson has filed an emergency petition for writ of certiorari, writ of prohibition, and constitutional stay writ. We deny the petition in part and grant it in part, addressing each section of the petition in turn.

Petition for Writ of Certiorari

First, we deny the petition for writ of certiorari. Petitioner Jackson has not shown that the trial court's ruling on his motion for default against Respondent Scott Maddox, nor its ruling that the City Charter requires Maddox to be an elector of the City of Tallahassee on November 21, 2016, meets the high standard for certiorari relief. See Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004) ("It is well settled that to obtain a writ of certiorari, there must exist '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.'" (quoting Bd. of Regents v. Snyder, 826 So. 2d 382, 387 (Fla. 2d DCA 2002))).

Petition for Writ of Prohibition

We also deny Jackson's petition for writ of prohibition. While we find that Jackson's November 15 motion for disqualification of the trial judge was legally sufficient, and was timely as to the conduct of the November 10 hearing, Jackson thereafter failed to take appropriate and timely steps to seek our review of the order denying disqualification and to prevent the trial judge from taking further action pending such appellate review. The general rule of timeliness for judicial disqualifications requires action "at [the] first opportunity to do so in a proceeding

before that judge." St. Pierre v. State, 966 So. 2d 972, 975 (Fla. 2d DCA 2007). We have stated the rule as requiring action "as soon as practicable." People Against Tax Revenue Mismanagement, Inc. v. Reynolds, 571 So. 2d 493, 496 (Fla. 1st DCA 1990) (denying a petition for writ of prohibition on the merits but noting that "[w]hen the motion was denied and movants elected to challenge that ruling by seeking a writ of prohibition rather than waiting to raise the issue on plenary appeal, a petition should have been filed as soon as practicable" citing Carr v. Miner, 375 So. 2d 64 (Fla. 1st DCA 1979))). A party having knowledge of grounds to disqualify a judge may not delay taking preventive action until after suffering an adverse ruling. "A motion for recusal is considered untimely when delayed until after the moving party has suffered an adverse ruling unless good cause for delay is shown." Fischer v. Knuck, 497 So. 2d 240, 243 (Fla. 1986); Lawson v. Longo, 547 So. 2d 1279, 1281 (Fla. 3d DCA 1989) (holding that party waives right to seek removal of judge "[b]y doing nothing to affirmatively promote or protect the issue of the possible recusal"); Data Lease Fin. Corp. v. Blackhawk Heating & Plumbing Co., Inc., 325 So. 2d 475, 479 (Fla. 4th DCA 1975) (holding a motion is untimely if not filed after the party has knowledge to support disqualification and after the party suffers an adverse ruling).

We recognize that the procedural context of this case is unique in that the delay occurred after Jackson had timely filed his motion to disqualify and obtained a ruling denying it. However, the principles of timeliness and preservation of the disqualification claim apply with equal force where a party having knowledge of

grounds for disqualification participates in further proceedings before the trial judge without first seeking a stay or seeking appellate review of the order denying disqualification. In this case, the trial judge denied the motion for disqualification by order rendered the morning of November 16; and within about an hour after rendering that order, rendered another order setting a case management conference for November 18. Although Jackson has filed in this Court numerous documents in a series of three sets of petitions denominated as emergencies, and has done so on exceedingly short time frames measured in hours, he did not file a petition for writ of prohibition prior to the November 18 case management conference.

Jackson's scant reference to the appellate record in his statement for the case management conference, on which the dissent relies, was not a request for stay or an objection to the trial court's continuing to preside over this case, nor did it invoke this Court's prohibition jurisdiction. Even if it had, Jackson was obligated to protect his rights on the record at the hearing itself, and failed to do so. The problem here is not the speed with which Jackson originally moved to disqualify the trial court or the speed with which he eventually petitioned this Court for review; the problem is Jackson's conduct at the November 18 hearing, which was inconsistent with his previous claim for disqualification and constituted a waiver. At the case management hearing, Jackson did not object to the trial court's continuing to preside over the case, he did not seek a stay or continuance, and did not indicate any intention to file a petition for a writ of prohibition. That hearing was more than a case management conference and

included argument and rulings on multiple substantive motions, yet Jackson submitted to the jurisdiction of the trial court and participated fully without objection and without referencing disqualification or prohibition, thus waiving his disqualification argument.

We reject the dissent's assertion that we are not authorized to reach the issue of waiver because neither the City nor Maddox raised a waiver defense in response to the petition. Our standard of review on petition for writ of prohibition is de novo. Philip Morris USA, Inc. v. Brown, 96 So. 3d 468, 471 (Fla. 1st DCA 2012). The facts of what Jackson did and did not raise at the November 18 hearing are undisputed and are of record, and legal significance attached to Jackson's failure to take appropriate protective action to, at a minimum, preserve his objection to the trial judge's presiding over the hearing. As the party seeking this extraordinary remedy, Jackson had the burden of proving and preserving every element of his claim for disqualification, and on this record he failed to do so.

We do not hold that prohibition must be filed within hours or even days under different facts, but in light of the unusual time constraints and history of this case, we find that Jackson waived any right to prohibition relief by participating in the November 18 hearing before challenging the denial of his motion to disqualify in this Court and without asserting any objection to the trial court's presiding over that hearing. Had this issue been preserved, however, we would have found that the motion to disqualify was legally sufficient and should have been granted, due to the due process violations we have previously found in this case. See, e.g., Zuchel v. State,

824 So. 2d 1044 (Fla. 4th DCA 2002) (outright denial of the basic and fundamental right of cross-examination would give a reasonably prudent person a well-founded fear of judicial bias).

Petition for Constitutional Stay Writ

Finally, we grant the petition for constitutional stay writ. The circumstances of this election contest are unique. Jackson timely filed his complaint on September 13, 2016, and, over a month later, the trial court stayed proceedings. This Court then ordered the court to hold an immediate hearing, and then, seven days later, vacated the trial court's order following due process violations. We entered a temporary stay order preventing Maddox from taking the oath of office on November 21. The trial court has yet to enter a final judgment. Under these circumstances, we conclude that it is necessary to maintain the status quo by prohibiting Maddox from taking the oath of office pending entry of a final judgment. We thus exercise our authority under article V, section 4(b)(3), of the Florida Constitution to issue "other writs necessary to the complete exercise of [our] jurisdiction." We find that issuance of the writ is necessary to preserve our jurisdiction to fully resolve the claim of Maddox's eligibility. See Monroe Educ. Ass'n v. Clerk, Dist. Court of Appeal, Third Dist., 299 So. 2d 1, 2 (Fla. 1974) (issuance of this writ is not necessarily "dependent upon or altogether ancillary to independent appellate proceeding" (citing Couse v. Canal Auth., 209 So. 2d 865, 867 (Fla. 1968))). We further note that the City has represented in its filings in this

Court that the City Commission will not meet until December 14, 2016, which will be its final meeting of the year.

Accordingly, Maddox shall not take the oath of office pending a final judgment by the trial court. The parties continue to dispute whether Maddox must have been a resident of the City upon taking the oath of candidacy on June 22, 2016, when Maddox attested to his residency for purposes of becoming a candidate; on August 30, 2016, when he was elected; on September 6, 2016, when the election results were certified; or upon taking the oath of office for a new term on November 21, 2016. The trial court has ruled that November 21 is the controlling date. The merits of that ruling are not presently before us and therefore we do not pass upon the question, but for the sake of judicial economy we suggest that the parties make an evidentiary record of Maddox's residency on all potentially applicable dates so that the issue can be resolved with finality in a single plenary appeal. We direct the trial court to determine the controlling legal definition of "residency," refine the outstanding requests for discovery and set a discovery schedule, and, barring any extraordinary circumstances, to enter a final judgment by December 6, 2016.

ROWE and KELSEY, JJ., CONCUR. MAKAR, J., CONCURS in part and DISSENTS in part with opinion.

Makar, J., concurring in part, dissenting in part.

This election contest case, which began in early September 2016, has resulted in three emergency appellate proceedings, all of which were avoidable had the requisite answer, discovery, and evidentiary hearing been held expeditiously as Florida law requires. See §§ 102.168(1), (3)(b) & (7), Fla. Stat. (2016). Needless delays have impeded the right of the electors of the City of Tallahassee to a speedy resolution of this controversy, one that needs final resolution for the sake of local governance. Public controversies are brought to appellate courts for resolution; we don't seek them out. And when they land on our plate, and involve matters of great urgency, we dig in and adjudicate them with studious speed.

In this one case, we've now issued three opinions this week, all of which I fully concur in except the conclusion that Jackson waived his right to seek appellate review of the trial judge's denial of Jackson's disqualification motion. Filing a prohibition petition in an appellate court challenging the denial of a disqualification order—versus raising the issue on appeal after final judgment—need only be done as soon as practicable. People Against Tax Revenue Mismanagement, Inc. v. Reynolds, 571 So. 2d 493, 496 (Fla. 1st DCA 1990). Jackson did so. He filed his prohibition petition in this Court midday on Sunday, November 20th, challenging the trial court's order, which was entered shortly before noon on Wednesday, November 16th. Spaced in-between was extensive legal work by the parties, including compliance with the trial court's simultaneous order requiring the filing of written statements as to discovery,

outstanding motions, and all other issues to be considered in advance of a case management conference held on Friday morning November 18th.

As a part of his detailed filing, Jackson made clear that appellate review of the disqualification order was forthcoming, saying as follows: "*For the benefit of the appellate record*, Jackson requests that this court state the basis on which it denied his motion for disqualification." (Emphasis added). The disqualification issue did not come up at the hearing, and neither Maddox nor the City claimed Jackson waived his right to seek appellate review of the disqualification order by appearing at or participating in the conference. Indeed, Jackson had no legal responsibility to say or do anything further to preserve his right of appellate review, particularly in light of his case management filing highlighting the matter. It would have been futile for Jackson to have told the trial court to halt the Friday case management conference, particularly given this Court had directed the trial court to move forward expeditiously; and Jackson didn't have the option of boycotting the proceeding. Telling the trial court "I'm seeking review of your disqualification order" at the case management conference might have been a nicety (he'd already said as much in his case management report), but it would have no legal effect on Jackson's appellate rights. Other than simply saying so, no legal authority exists that Jackson had to request a stay of proceedings, should have objected to the trial judge continuing to preside over the case, and had to invoke our Court's prohibition jurisdiction prior to the case management conference; these are desirable trial practice pointers, but aren't legal grounds for waiving appellate

rights.

Finally, unlike cases the panel cites where a litigant dithers and fails to *seek* disqualification timely *in the trial court*, Jackson timely sought disqualification below. He then specifically said appellate review was forthcoming in his case management statement and soon thereafter (on a weekend no less) filed a petition promptly. Where a litigant has preserved his right to appellate review and timely sought review, and no opposing party claims waiver, we should not so readily deny him that right, particularly when we've been charitable in allowing review in the past for situations involving exceptionally deleterious inactions. See People Against Tax Revenue Mismanagement, 571 So. 2d at 494-96 (adjudicating the merits of a prohibition petition filed on a Friday afternoon to stop a Monday trial despite petitioner having presented disqualification issue in an untimely way numerous times in the trial and appellate court over a year's time). And because no party has raised the waiver issue in this proceeding, Jackson has had no opportunity to defend whether his attendance and participation at the case management conference amounts to a waiver of his appellate right; he will surely be surprised to discover that this Court has unilaterally adjudicated the matter without notice and an opportunity to defend this right, one that should not be taken away under the circumstances.