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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALLEN TROY BRIM,

Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E061640

(Super.Ct.No. RIF1208481)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate/prohibition. Becky Dugan, Judge. Petition granted.

Allen Troy Brim, in pro. per., for Petitioner.

No appearance for Respondent.

Paul E. Zellerbach, District Attorney, and Matt Reilly, Deputy District Attorney, for Real Party in Interest.

In this matter we have reviewed the petition, the response filed by real party in interest, and the record.¹ We have determined that resolution of the matter involves the application of settled principles of law and, furthermore, that issuance of an alternative writ of mandate would cause undue delay in bringing the action to trial. We therefore issue a peremptory writ in the first instance. (Code Civ. Proc., § 1088;² *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-179; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223, disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn.4.)

BACKGROUND

Petitioner is representing himself in a criminal prosecution. On January 28, 2014, Judge Dugan met with petitioner's investigator in chambers to discuss the latter's invoice for services.

¹ We also note that we have received a letter from the trial judge. Anticipating real party in interest would have minimal interest in this matter, we also invited the respondent court to file an informal response. (See *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1066, fn. 4.) We did not, however, solicit or expect a personal response from the trial judge. This response is improper since the judge is supposed to be neutral with no interest in the outcome of the petition. (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 189-190; also *Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 523, fn 2; *Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4th 1309, 1315, fn. 2.) Therefore, we have received this letter, but have not filed it.

² Statutory references are to the Code of Civil Procedure, unless otherwise stated.

During the course of their conversation, Judge Dugan stated, “Now, should [petitioner] be representing himself? Probably not. That is not your job.”

Later, the investigator indicated that petitioner told him he was not being allowed to use the law library. Judge Dugan indicated she would address those issues in open court. Referring to petitioner, she added, “He is a relatively unsophisticated, uneducated young man, who I can’t imagine would get much use out of the law library. But he [is] entitled to use it. You’re not entitled to get that use for him. I’ll address those issues.”

Petitioner complains that he has been denied adequate access to the law library at the Southwest Detention Center, and complains that the court’s ruling in this regard are suspect because of Judge Dugan’s attitude that he would not benefit from use of the library.

In June, petitioner sent a letter from a prosecution witness, Erik Williams, retracting his identification of petitioner as the person who shot at him and his friends. When petitioner asked Judge Dugan on June 24, 2014, whether she had received a copy of Williams’s letter, she interrupted him and said, “We are through here.”

On July 23, petitioner filed a statement of disqualification for cause against Judge Dugan in which he recounts these matters.

On July 25, Judge Dugan stated in court: “As to the first thing I’ll get to, I had trailed from yesterday [petitioner’s] 170.1 request to disqualify this Court. I’ve read it. I’ve considered it. In my opinion, based on the transcript with the investigator and the Court and [petitioner’s] statement, no reasonable person would believe this Court is

prejudiced against him. I'm not prejudiced against him, I've never been prejudiced against him, and I'm going to strike the 170.1.”

DISCUSSION

A party seeking to disqualify a trial judge for cause must file a statement of disqualification at the “earliest practicable opportunity” after discovering facts constituting the grounds for the disqualification. (§ 170.3, subd. (c)(1).) Thereafter, the challenged judge may consent or file an answer within 10 days of the filing or service, whichever is later. The question of disqualification must be determined by another judge agreed on by the parties or, if they are unable to agree, by a judge selected by the chairperson of the Judicial Council. (§ 170.3, subd. (c)(5).)

However, a challenged judge has the power to order a statement of disqualification stricken if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification. (§ 170.4.)

A statement that contains nothing but conclusions and sets forth no facts constituting a ground of disqualification may be ignored or stricken from the files by the trial judge. (*People v. Sweeney* (1960) 55 Cal.2d 27, 35.)

In the case of *In re Morelli* (1970) 11 Cal.App.3d 819 (overruled in part on other grounds by *Cedars-Sinai Imaging Medical Group v. Superior Court* (2000) 83 Cal.App.4th 1281, 1287, fn. 6), the court undertook an exhaustive examination of the authorities that articulate the circumstances in which the judge accused of actual bias is excused from referring the matter of disqualification to another judge for determination.

It indicated that the statement of disqualification may be stricken when all that the papers contain are: “conclusions; references to copious transcripts without citation to specific excerpts; allegations of facts not pertinent or appropriate to the issues to be determined in the hearing; material not legally indicative of bias or prejudice, such as judicial opinions expressed in the discharge of litigation and legal rulings; judicial reactions based on actual observance in participation in legal proceedings; and references to circumstances so inconsequential as to be no indication whatsoever of hostility and nonprobative of any bias or prejudice.” (*Id.* at p. 843.)

In this case, Judge Dugan stated she was striking the statement of disqualification, but she did not cite any of the grounds listed in section 170.4. To the contrary, she stated that she was not biased against petitioner. Thus, it appears she was ruling on her own disqualification.

Real party in interest suggests that petitioner’s statement was untimely, but this was not the basis for the court’s order and, thus, we need not consider this ground further.³

Next, we believe petitioner did state legally sufficient grounds for disqualification. He did cite specific instances of alleged bias. While we do not rule that a reasonable person aware of these facts would conclude that Judge Dugan is actually biased, we believe that the matter should have been referred to a neutral judge to make this

³ We will note that although the discussion with the investigator took place in January, the record does reveal when petitioner became aware of Judge Dugan’s comments.

determination. This case involves a defendant representing himself who complains that he is not being given adequate access to the jail law library facilities. The trial judge has made comments expressing her view that the defendant cannot benefit from use of the law library facilities. Under these circumstances, it was especially important that a neutral judge make the determination of bias or the appearance of bias rather than the trial judge who made the comments. Judge Dugan erred in ruling on her own disqualification rather than following the procedures set forth in section 170.3. The order striking petitioner's statement of disqualification must be set aside because it is not based on any of the grounds specified in section 170.4, subdivision (b). Because Judge Dugan did not otherwise answer the statement of disqualification within 10 days, she is automatically disqualified. (*Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 420-421.)

DISPOSITION

Let a peremptory writ of mandate issue directing the Superior Court of Riverside County to set aside its order denying petitioner's motion for disqualification of Judge Becky Dugan and to issue a new order granting this motion.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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RICHLI
Acting P. J.

We concur:

McKINSTER
J.

KING
J.