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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALAN GORDON,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G050564 & G050616

(Super. Ct. No. 13WF3653)

O P I N I O N

Original proceedings; petitions for writ of mandate to challenge orders of the Superior Court of Orange County, Stephanie George, Judge.

Petition granted. Motion to consolidate. Granted.

Staycie R. Sena for Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Elizabeth Molfetta, Deputy District Attorney, for Real Party in Interest.

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THE COURT:*

After giving *Palma* notice (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171), we issue a peremptory writ of mandate in the first instance because respondent court erroneously struck two timely filed challenges for cause under Code of Civil procedure section 170.3.¹

The district attorney responded similarly to both challenges, contending that any factual disputes raised in petitioner's challenges should be resolved by a different judge other than the judge who is the subject of the challenge. We agree.

On our own motion and for good cause, we consolidate both petitions for a writ of mandate. As we explain, the issue whether a reasonable person could doubt respondent court's ability to be impartial should be considered by another judge pursuant to section 170.3, subdivision (c)(5).

I

PROCEDURAL HISTORY

Petitioner is represented by retained counsel on charges that carry a maximum sentence of life imprisonment. The case was assigned to Judge Stephanie George.

A. *The First Motion to Disqualify & the First Writ Petition (G050564)*

On August 1, 2014, petitioner filed a motion to disqualify Judge George for cause pursuant to section 170.3 based upon a series of events that allegedly occurred during a court hearing on July 28, 2014. Petitioner attached his counsel's declaration, as well as the declaration of the mother of another criminal defendant, who happened to be in the courtroom that same day.

* Before Rylaarsdam, Acting P.J., Aronson, J., and Ikola, J.

¹ Statutory references are to the Code of Civil Procedure.

In her declaration, petitioner's counsel described her efforts to continue the hearing date for petitioner's upcoming preliminary hearing because of counsel's serious health issues from an automobile accident, resulting in four spinal cord surgeries and seven hospitalizations between March and June 2014. Counsel attempted to further describe her attempts to obtain various juvenile therapy records.

Apparently, counsel's efforts occurred during two unreported sessions; the first off the record discussion at the bench and the second discussion off the record in chambers. Counsel contended that respondent court responded to her attempts to explain her reasons for requesting a delay by "yelling" at counsel, refusing to let her adequately explain matters, and by finally telling counsel, "I don't want to hear it." According to counsel, respondent court belittled her discovery efforts, asserting the court "could not believe that [counsel] made it all the way through law school, passed the bar exam and was qualified to practice as an attorney." Counsel explained she was "stunned and could not respond."

In a second declaration, the mother of one of counsel's other clients described respondent court as having "glared" at counsel, "stormed" out of the courtroom into chambers and later "scold[ed]" counsel in the presence of the attendees in the courtroom. According to the declarant, "I have never seen the sort of tension, condescension and ridicule I saw toward [counsel] that day."

On August 8, 2014, respondent court filed an order striking petitioner's statement of disqualification because it failed to demonstrate on its face any legal grounds for disqualification. (§170.4, subd. (b).) In its verified answer, respondent court could not recall any discussion by counsel regarding counsel's illness, and denied questioning counsel's capabilities or intellectual capacity. Instead, respondent court characterized the court's observations as "expressing my dismay at [counsel's] disregard of the procedural requirements for the relief she was seeking." Respondent court denied any prejudice or bias against counsel.

On August 15, 2014, petitioner filed a petition for a writ of mandate (G050564) in this court to vacate respondent court's August 8, 2014, order, and to stay the August 26, 2014, preliminary hearing. On August 22, 2014, this court issued an order granting a stay of the preliminary hearing, and invited the district attorney to file an informal response, and should address the advisability of issuing a peremptory writ in the first instance. (*Palma, supra*, 36 Cal. 3d 171.)

In its informal response, the district attorney acknowledged "there is a dispute as to the facts as reflected in the answer filed by the court and the declaration provided by [petitioner's counsel]." The district attorney urged that such a factual dispute be decided by another judge.

B. The Second Motion to Disqualify & the Second Writ Petition (G050616)

On August 15, 2014, petitioner filed a second motion to disqualify Judge George for cause pursuant to section 170.3. In her declaration, counsel explained that, as a result of Judge George's conduct concerning her first motion to disqualify, "I am in the process of filing a complaint with the California Judicial Performance Commission."

On August 19, 2014, respondent court issued an order striking petitioner's new statement of disqualification for failure to state facts constituting grounds for disqualification. In its verified answer, respondent court denied it was aware of counsel's intent to file a complaint with the Commission on Judicial Performance.

On August 27, 2014, petitioner filed a second writ petition (G050616) from respondent court's August 19, 2014 order. On August 29, 2014, this court issued a new *Palma* notice and requested a preliminary response from the district attorney. This court further granted petitioner's request to stay all proceedings in respondent court.

In its informal response, the district attorney questioned whether petitioner's second motion to disqualify, by itself, raised legal grounds for disqualification. However, taken in conjunction with the first motion for disqualification,

the district attorney urged the matter be remanded for a hearing before a different judge in accordance with section 170.3, subdivision (c)(5).

C. Subsequent Proceedings

On September 3, 2014, while this court's stay order was in effect, respondent court issued an order setting aside the August 8, 2014, order that was the subject of the first writ petition in G050564. Acting sua sponte, respondent court reconsidered its decision and purported to vacate the August 8, 2014, order striking petitioner's statement of qualification. Respondent court directed the parties to agree on a different judge to determine the statement of disqualification within 5 days; were the parties to be unable to agree, respondent court ordered that the matter be referred to the presiding judge for assignment by the Judicial Council. Respondent court's September 3, 2014, order did not address the August 19, 2014, order that was the subject of the second writ petition in G050616.

Petitioner has questioned whether respondent court has jurisdiction to reconsider its order in light of this court's stay of "all proceedings."

II

DISCUSSION

The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate. (§ 170.3, subd. (d); *People v. Mayfield* (1997) 14 Cal.4th 668, 811.)

A party may seek a judge's disqualification for cause under the procedure set forth at section 170.3, subdivision (c). The party must do so "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (§170.3, subd. (c).)

A challenged judge has the power to strike an untimely or legally insufficient statement of disqualification. (§170.4, subd. (b).) However, if the statement of disqualification raises an appropriate issue of fact as to the judge's bias or prejudice,

the judge is without power to pass upon the question of his or her own disqualification. Instead, the question must be determined by another judge. (See § 170.3, subd. (c)(5).)

Based on the facts presented here, we conclude the court improperly struck the first disqualification challenge without first sending it to another judge for resolution of the factual disputes. Petitioner's challenge complied with section 170.3, subdivision (c)(1) on the basis that it set forth facts and not "mere conclusions" regarding the basis for disqualification (*In re Morelli* (1970) 11 Cal.App.3d 819, 84); and because it presented enough factual discrepancies requiring the assistance of another judge to resolve.

III

DISPOSITION

Let a peremptory writ of mandate issue in the first instance directing respondent court to vacate its orders of August 8, 2014, August 19, 2014, and September 3, 2014, and to enter a new order requiring the matter be heard by another judge pursuant to section 170.3(c)(5). Each side shall bear its own costs.