

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2006

MARITIZA DOMINGUEZ,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

No. 4D06-2031

[August 16, 2006]

PER CURIAM.

We grant this petition for writ of prohibition and quash the trial court's order denying petitioner Dominguez's motion to disqualify.

The circuit court denied the motion to disqualify as uncertified, untimely and insufficient. The motion was untimely as the petitioner admits it was filed twelve days after discovering the facts that constitute the grounds for the motion. Fla. R. Jud. Admin. 2.160(e). Furthermore, the motion did not contain the requisite certification by the attorney that the motion and statements contained therein were made in good faith. Fla. R. Jud. Admin. 2.160(c).

The motion's untimeliness and lack of certification would have justified the denial of the motion to disqualify, and had the matter ended there, no doubt we would have denied the petition. However, the trial court then commented on the truthfulness of the facts asserted in the motion to disqualify, thereby creating a new basis for disqualification. *City of Hollywood v. Witt*, 868 So.2d 1214 (Fla. 4th DCA 2004) (stating that when ruling on a motion for disqualification a judge may not pass on the truth of the allegations set forth in the sworn motion, "but must take them to be true, deciding only the legal sufficiency of the motion"). While one of the grounds of the motion argued that an e-mail regarding petitioner's attorney sent by the judge to all the other judges and hearing officers in the circuit warranted disqualification, and although we find that the e-mail was troubling, we do not find that it constitutes a *per se* basis for disqualification.

Yet disqualification is warranted in this case because the circuit court order takes issue with the facts alleged in the motion to disqualify. The order of the trial court denying the motion to disqualify contains the following:

Lastly, the law provides that adverse legal rulings do not provide a basis for disqualification. The fact that the court found that there was a substantial likelihood that the defendant's attorney committed a violation of the Rules Regulating The Florida Bar and took appropriate action as required by Canon 3.D.(2) of the Code of Judicial Conduct is also not a legally sufficient basis for disqualification.

We hold this to be a comment on the validity of petitioner's grounds for disqualification, and therefore violative of *Hollywood v. Witt*.

As we trust the trial court will act in conformity with this opinion, we withhold issuance of the writ.

STEVENSON, C.J., and POLEN, J., concur.
MAY, J., dissents with opinion.

MAY, J., dissenting.

I respectfully dissent. I would deny the petition. First, as noted by the majority, the motion for disqualification was untimely and lacked the requisite certification. Second, I respectfully disagree that the wording of the order raised a new basis for disqualifying the trial judge.

In his order, the trial judge stated: "Lastly, the law provides that adverse rulings do not provide a basis for disqualification." This is a statement of the law that happens to be correct, not a dispute over the factual allegations in the motion. *See 5-H Corp. v. Padovano*, 708 So. 2d 244, 248 (Fla. 1997). The judge then stated: "The fact that the court found that there was a substantial likelihood that the defendant's attorney committed a violation of the Rules Regulating The Florida Bar and took appropriate action as required by Canon 3.D.(2) of the Code of Judicial Conduct is also not a legally sufficient basis for disqualification." This too is a statement of the law that happens to be correct, not a dispute over the factual allegations in the motion. *Id.*

I agree with the majority that the trial judge's action in circulating an e-mail to all the other judges is "troubling." However, the petitioner has

not established, and we cannot discern, that the motion to disqualify was filed within ten days of the discovery of this information. I would suggest that using the words: “I find the motion legally insufficient” is certainly a cleaner way of ruling on a motion to disqualify. I simply do not agree that the words chosen by this trial judge rose to the level of disputing the factual allegations, which of course, would give rise to disqualification of the judge. *See, e.g., Hayslip v. Douglas*, 400 So. 2d 553, 555-56 (Fla. 4th DCA 1981).

* * *

Petition for writ of prohibition to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Richard I. Wennet, Judge; L.T. Case No. 06-3216 CFA02.

William S. Abramson, West Palm Beach, for petitioner.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Diane F. Medley, Assistant Attorney General, West Palm Beach, for respondent.

Not final until disposition of timely filed motion for rehearing.