IN THE COURT OF APPEALS OF THE

STATE OF GEORGIA

DONALD JOHN TRUMP,	)	
RUDOPLPH WILLIAM LOUIS GIULIANI,	)	
MARK RANDALL MEADOWS,	)	Case A24I0160
JEFFREY BOSSERT CLARK,	)	
ROBERT DAVID CHEELEY,	)	
MICHAEL A. ROMAN,	)	
DAVID JAMES SHAFER,	)	
HARRISON WILLIAM PRESCOTT FLOYD,	)	
CATHLEEN ALSTON LATHAM	)	
Applicants,	)	
	)	
versus	)	On application
	)	from
	)	Fulton County
THE STATE OF GEORGIA,	)	Superior Court,
Respondent.	)	23SC188947

BRIEF OF RESPONDENT

Hon. FANI T. WILLIS 223955
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INTRODUCTION

The applicants seek interlocutory review of the superior court's order on their motions to dismiss the indictment in this case and to disqualify the District Attorney. The trial court held an evidentiary hearing on the motion, which spanned several days of testimony and evidence. Ultimately, the trial court found the evidence insufficient to establish any actual conflict of interest and declined to dismiss the indictment. The trial court also permitted the prosecution to proceed under the direction of the Fulton County District Attorney's Office upon the withdrawal of Special Assistant District Attorney Nathan Wade. There being no error by the trial court, the present application merely reflects the applicants' dissatisfaction with the trial court's proper application of well-established law to the facts. Because the applicants have wholly failed to carry their burden of persuasion, this Court should decline interlocutory review.

ANALYSIS

The Court will grant leave to appeal an interlocutory order where: (1) the issue to be decided appears to be dispositive of the case; (2) the order appears erroneous and will probably cause a substantial error at trial or will adversely affect the rights of the appeal parties until entry of final judgment, in which case the appeal will be expedited; or (3) the establishment of

precedent is desirable. Ga. Ct. App. R. 30(b).

A trial court's ruling on a motion to disqualify a prosecutor is reviewed for abuse of discretion. *Neuman v. State*, 311 Ga. 83, 88, 856 S.E.2d 289 (2021). "Such an exercise of discretion is based on the trial court's findings of fact which [this Court] must sustain if there is any evidence to support them." *Id.* A proper application of the abuse-of-discretion standard recognizes the range of possible conclusions the trial judge may reach with regards to the evidence. *Williams v. State*, 328 Ga. App. 876, 880, 763 S.E.2d 261 (2014). So viewed, the trial court properly exercised its discretion in refusing to disqualify the District Attorney.

1) The trial court found that the applicants had failed to show a violation of their due process rights or any other form of actual prejudice to their case.

The trial court found that "the Defendants have failed to demonstrate that the District Attorney's conduct has impacted or influenced the case to the Defendants' detriment" and that "[t]here has not been a showing that the Defendants' due process rights have been violated or that the issues involved prejudiced the Defendants in any way." Order at 8, 17. Despite this, the applicants first insist that the trial court must have erred and that the error is a structural one affecting their rights to due process. As will be shown below, there was a factual basis for the trial court's well-explained rulings, and the

applicants' insistence that error occurred amounts to no more than disagreement with the trial court's assessment of those facts. Dissatisfaction with factual findings is not a basis for the grant of an appeal or the reversal of a trial court's order, and the application should be denied.

2) The District Attorney's public comments were not forensic misconduct requiring disqualification.

Citing public comments made by the District Attorney, the applicants contend that the District Attorney engaged in forensic misconduct. Given the trial court's factual findings, which are supported by the record, the trial court correctly ruled the District Attorney did not engage in disqualifying forensic misconduct.

"There are two generally recognized grounds for disqualification of a prosecuting attorney. The first such ground is based on a conflict of interest, and the second ground has been described as forensic misconduct." *Williams v. State*, 258 Ga. 305, 314, 369 S.E.2d 232 (1988). The *Williams* Court identified a primary example of forensic misconduct: "the improper expression by the prosecuting attorney of his personal belief in the defendant's guilt." *Id.* at 315. While not expounding on other forms of forensic misconduct, the Georgia Supreme Court cautioned that the prosecuting attorney's commentary must be "of such egregious nature as to require his disqualification." *Id.* Another consideration is whether "such remarks were

part of a calculated plan evincing a design to prejudice the defendant in the minds of the jurors, or whether such remarks were inadvertent, albeit improper, utterances." *Id.*[1] In essence, a comment may be improper without being disqualifying. This Court has recognized that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Williams v. State*, 328 Ga. App. 876, 881 n.26, 763 SE2d 261 (2014) (citation omitted); *Whitworth v. State*, 275 Ga. App. 790, 796, 622 SE2d 21 (2005) (physical precedent only) (applying this same principle to a trial court's failure to disqualify the prosecutor).

Mindful of these guideposts, the trial court made extensive factual findings about the District Attorney's public comments and then determined that (1) the comments were not sufficiently egregious to require disqualification under *Williams*; and (2) the comments did not deny the defendants an opportunity for a fundamentally fair trial. Order at 18-20.

[1] In drawing this distinction, the Court in *Williams* provided further guidance by comparing two cases. *Id.* The first, *Pierce v. United States*, 86 F2d 949 (6th. Cir. 1936), involved a prosecutor's pattern of repeated attempts to introduce irrelevant evidence at trial, which was found to be highly prejudicial and constituted misconduct. The second, *Dunlop v. United States*, 165 U.S. 486 (1897), involved improper statements made during closing arguments rather than any kind of pattern of behavior, and they were found not to merit disqualification.

First, as a factual matter, the trial court found that the District Attorney's public comments concerned either the office's conviction rates; the charges in the indictment; the procedural posture of the case; the need for or importance of the investigation; or personal anecdotes. Order at 19. Insofar as the District Attorney delivered a speech at a local church, the trial court concluded the speech did not "cross the line" because it failed to name any defendant; it did not disclose sensitive or confidential evidence; it did not address the merits of the indicted offenses to move the trial to the court of public opinion; and further, the case is too far removed from jury selection for any actual prejudice or improper effect on the jury pool to actualize. Order at 20.[2] These findings are all amply supported by the record and not clearly erroneous. Further, the applicants do not challenge the trial court's factual findings (Application at 13-14), and they are sustained for purposes of appeal.

Second, the trial court properly applied the law to its findings, reasoning

[2] The trial court noted the District Attorney's comment that individuals were "playing the race card" and her references to the different races of three special prosecutors. Order at 20. Although the trial court found that "the effect" was to "cast racial aspersions" at the decision to file the motion to disqualify, it is no surprise the court still found no basis to disqualify the District Attorney. Factual passing references to the various races of members of a prosecuting team are hardly the type of egregious commentary contemplated by *Williams* to warrant disqualification. And a comment suggesting individuals were "playing the race card" is too vague, brief, and limited in scope to imply any defendant harbored racial prejudice, particularly to the point of requiring disqualification.

that the comments were not sufficiently egregious and did not infect the impending trial with the sort of inevitable unfairness to be considered forensic misconduct under *Williams*. Order at 18, 20. *See, e.g.*, *Allen v. State*, 302 Ga. App. 852, 854, 691 S.E.2d 908 (2010) (prosecutor's comment did not "rise to the level of the prosecutor's misconduct in . . . *Williams*[.]"). There is simply no trial court error to be found in the decision to deny disqualification.

Days of evidence and testimony failed to disclose anything like a calculated pre-trial plan designed to prejudice the defendants or secure their convictions. The applicants have not identified any public statement injecting the District Attorney's personal belief as to the defendants' guilt or appealing to the public weighing of evidence. There has been no showing of an effort by the District Attorney to wield any improper influence over a trier of fact which, of course, has not yet been selected. *Compare Williams*, 258 Ga. at 314-315 (pretrial comment that a conviction would be the "right result" constituted an impermissible, but not disqualifying, expression of the prosecutor's opinion concerning the merits of the case); *Strong v. State*, 246 Ga. 612, 613, 272 S.E.2d 281 (1980) (defendant may be prejudiced by pre-trial publicity where prosecuting officers orchestrate, choreograph, and stage a media event for purposes of "corralling the minds" of jurors and "leading [them] into the indictment or conviction being sought by the government").

The applicants have not proved the serious charge of prosecutorial misconduct by the record or by legal authority, and they endeavor to impermissibly relitigate the issue here by substituting speculations of future prejudice for the trial court's findings of fact and rulings of law.

Additionally, the applicants urge this Court to expand the definition of forensic misconduct beyond the holding in *Williams*, 258 Ga. 305. The applicants ignore that the circumstances here are so similar to *Williams* that they do not require the establishment of new precedent to demonstrate that the trial court's ruling was correct. In *Williams*, the defendant sought to disqualify a district attorney based on the district attorney's public statements, made to the media far in advance of any trial or even the beginning of jury selection, that the defendant claimed were improper and disqualifying. The type of misconduct urged here is the same: public statements made by the District Attorney, months in advance of trial or jury selection, that the applicants contend are improper and disqualifying because they have supposedly tainted "*any* possible jury pool." Application at 22.

Thus, while the trial court noted that precedent is sparse, it was undoubtedly correct to look to *Williams* for guidance. Here, just as in *Williams*, "it is a quantum leap from any conclusion that extrajudicial statements made by the prosecutor were improper, to the holding that

disqualification of the prosecutor is required as a result thereof." 258 Ga. at 314. Looking to *Williams*, the trial court evaluated the District Attorney's statements for various hallmarks, such as whether they were "egregious," indications of a calculated intent or plan to prejudice the defendants, or mention of specific defendants, the merits of the case, or sensitive evidence. Order at 18, 20. The court also specifically dismissed the harm claimed by the applicants, observing that "the case is too far removed from jury selection to establish a permanent taint of the jury pool" and that the statement could not deny the applicants "the opportunity for a fundamentally fair trial." Order at 20. In another case with different facts, forensic misconduct may take a form where *Williams* is of no precedential value, but this is not that case, and *Williams* is controlling without requiring the establishment of new precedent.

3) The District Attorney did not otherwise engage in forensic misconduct.

The applicants next claim that the District Attorney exhibited forensic misconduct by submitting a false affidavit in opposition to the motion to disqualify and by testifying falsely at the hearing. As the applicants acknowledge, however, the trial court made no findings that could support such a claim. Application at 25 n.13. This Court should therefore summarily reject this argument, which asks that this Court augment or outright replace the trial court's findings with its own.

As the fact finder on the motion to disqualify, the trial court is "the final arbiter of the weight of the evidence and the credibility of witnesses." *State v. Bell*, 274 Ga. 719, 720, 559 S.E.2d 477 (2002). This Court sits in review of "the trial court's findings of fact[.]" *Neuman*, 311 Ga. at 88. Naturally, then, this Court cannot make factual findings anew or substitute its own determinations for those of the trial court. Nevertheless, that is precisely what the applicants request. The trial court's order evinces that the judge carefully considered the District Attorney's and Wade's testimony, but the court made no factual finding of false testimony or a false affidavit. Order at 16-17. In requesting a contrary finding on this issue, the applicants would have this Court invade the province of the trial court and make additional factual findings. This it cannot do. Because interlocutory review is clearly not permissible on this ground, this argument should be rejected.

4) The trial court properly found no actual conflict of interest necessitating disqualification.

Properly applying the "any evidence" standard to the record, the trial court clearly did not abuse its discretion in denying the defendants' motion to disqualify the District Attorney based on an actual conflict of interest. *Neumann*, 311 Ga. at 88. The operative question is whether the District Attorney has "a disqualifying personal interest in the criminal prosecution" of the defendants. *State v. Sutherland*, 190 Ga. App. 606, 607, 379 S.E.2d 580

(1989).

After hearing testimony on this issue, the trial court engaged in a fact-intensive analysis, examining "all the surrounding circumstances." Order at 7. In so doing, the trial court detailed the District Attorney's and Wade's expenditures; examined the process by which the District Attorney eventually hired Wade; noted the terms of Wade's contract; considered the District Attorney's yearly salary; and assessed any supposed financial gain flowing to the District Attorney. Order at 5-8.

Ultimately, the trial court determined that (1) the District Attorney was not greatly and pecuniarily interested in the prosecution; (2) the District Attorney was not financially motivated to indict or prosecute the case; and (3) the record affirmatively disproved the allegation that the District Attorney sought to prolong the case, given the demonstrable attempts to prevent delays in the prosecution. Order at 8-9. These sound findings that the District Attorney lacked any personal stake in the prosecution are substantiated by the record, and they negate the existence of an actual conflict of interest. *See Blumenfeld v. Borenstein*, 247 Ga. 406, 410, 276 S.E.2d 607 (1981) (sustaining the trial court's factual finding that there was no "actual impropriety" requiring disqualification). Accordingly, the trial court properly exercised its discretion in not disqualifying the District Attorney based on an

actual conflict of interest.

5) No appearance of impropriety warrants disqualification of the District Attorney.

Lastly, the trial court correctly determined that no appearance of impropriety warranted the District Attorney's disqualification, while also remedying any remote likelihood that the actual trial would be affected by any appearance of impropriety.

As the trial court properly recognized, the issue of attorney disqualification lies on a continuum. *Blumenfeld*, 247 Ga. at 409. "Somewhere in the middle of the continuum is the appearance of impropriety based on conduct on the part of the attorney." *Id.* But courts "have rarely been willing to disqualify an attorney based on the appearance of impropriety alone where there is no danger that the actual trial of the case will be tainted."[3] *Id.* Applying this same principle, this Court has held that in the absence of an "actual" conflict or impropriety (as opposed to the appearance of one), the trial court

[3] In noting this high burden to disqualify, Georgia courts require that defendants must raise the disqualifying conflict when he or she first learns of the disqualifying matter. *See Reed v. State*, 314 Ga. 534, 546, 878 S.E.2d 217 (2022). Applicant Roman's counsel learned of the purported potential conflict in September 2023 but did not move to disqualify until January 2024, on the last possible day he could file any pre-trial motions. *See* Oliver Land, "Georgia Defense Attorney Reveals How She Helped Uncover Fani Willis And Nathan Wade Affair That Threatens Trump Case", NEW YORK POST (March 6, 2024), *available at* https://nypost.com/2024/03/06/us-news/how-ashleigh-merchant-uncovered-fani-willis-secret-relationship/

did not abuse its discretion in denying a motion to disqualify a defense attorney. *Kamara v. Henson*, 340 Ga. App. 111, 116, 796 S.E.2d 496 (2017).

Turning to the trial court's ruling on this issue, it determined that the defendants had failed to show a violation of their due process rights or other prejudice to their case "in any way." Order at 16-17. It follows that the actual trial would not be tainted by any appearance of impropriety, and therefore the trial court correctly declined to disqualify the District Attorney. *Compare State v. Shearson Lehman Bro.*, 188 Ga. App. 120, 123, 372 S.E.2d 276 (1988) (explaining that counsel cannot be disqualified because of an appearance of impropriety alone and finding no actual conflict of interest that outweighed the State's interest in having an attorney of choice).

But the trial court went even a step further, finding that it could not determine, based on the evidence, when the relationship between the District Attorney and Wade evolved into a romantic one. Order at 16-17. Even assuming, *arguendo*, that Wade's continued involvement in the prosecution would have produced an appearance of impropriety, the trial court allowed for his withdrawal. Order at 17. This Court has sanctioned this same remedy as a cure for the potential appearance of impropriety. See *Head v. State*, 253 Ga. App. 757, 758, 560 S.E.2d 536 (2002) (ruling that the investigator's discontinued involvement with the prosecution of the case ensured no

appearance of impropriety and upholding the trial court's denial of the disqualification motion). This case is no different. Setting aside whether Wade's removal from the case was in fact necessary, he withdrew from representation hours after the trial court issued its order, and the District Attorney accepted the resignation. See Exhibit 1. Accordingly, the trial court properly exercised its discretion and inherent authority in denying the motion to disqualify based on the appearance of impropriety, and there is no basis to grant interlocutory review on this ground.

CONCLUSION

The applicants having failed to carry their burden as to their request for interlocutory review, the State of Georgia submits this Honorable Court should **DENY** this application.

Respectfully submitted this 8th day of April 2024.

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CERTIFICATE OF SERVICE

I hereby certify that there is a prior agreement with counsel for the defense, as listed below, to allow documents in a PDF format sent via email to suffice for service. To that end, on the 8th day of April, 2024, I served a copy of the foregoing Brief of Respondent upon the following counsel of record via e-mail:

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