

Rel: October 30, 2020

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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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**Ex parte Alabama Department of Revenue**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: State of Alabama, Department of Revenue**

**v.**

**Greenetrack, Inc.)**

**(Greene Circuit Court, CV-19-900056)**

BOLIN, Justice.

The Alabama Department of Revenue petitions this Court for a writ of mandamus ordering Judge Eddie Hardaway to recuse

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himself from an appeal challenging a decision of the Alabama Tax Tribunal in favor of Greenetrack, Inc. We grant the petition and issue the writ.

#### Facts and Procedural History

In 2009, the Alabama Department of Revenue determined that Greenetrack owed \$75 million in sales taxes and consumer-use taxes for its electronic-bingo activities for the period from January 1, 2004, through December 31, 2008. On June 11, 2011, Greenetrack filed a notice of appeal from the tax assessments in the Greene Circuit Court. See § 40-2A-7(b)(5), Ala. Code 1975. The case was styled as Alabama Department of Revenue v. Greenetrack, Inc., was docketed as case no. CV-2011-000015, and was assigned to Judge Hardaway. It appears from the materials before us that the case was consolidated with Greenetrack, Inc. v. Tim Russell, in his official capacity as the Commissioner of Revenue for the Alabama Department of Revenue, case no. CV-2009-900048, an action filed by Greenetrack challenging certificates of lien for taxes filed by the Alabama Department of Revenue. On October 16, 2013, the Alabama Department of Revenue moved for Judge Hardaway to recuse himself in both cases, arguing that recusal

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was required because Judge Hardaway had recused himself two months earlier from another case on a related matter involving these same parties, styled as State of Alabama v. Greenetrack, case no. CV-2011-900030. The Alabama Department of Revenue noted that Judge Hardaway, in his notice of recusal and request for assignment of a judge in State of Alabama v. Greenetrack, case no. CV-2011-900030, stated in the section entitled "reason for recusal":

"[The State] ask[s] that I recuse because I presided over State of Alabama v. [825 Electronic Gambling Devices, CV-2010-20,<sup>1</sup>] in which the Supreme Court removed me from said case because of several orders I entered in the case."

On October 17, 2013, Greenetrack responded, arguing that evidence that Judge Hardaway had been removed in one case (case no. CV-2010-20) and had recused himself in another involving the same parties did not satisfy the burden of the

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<sup>1</sup>After this Court had entered over a four-day period three emergency orders vacating three separate orders of the trial court before ultimately dismissing the appeals in State of Alabama v. 825 Electronic Gambling Devices (No. 1091340, July 1, 2010) and State of Alabama v. 825 Electronic Gambling Devices et al. (No. 1091342, July 1, 2010), a case seeking the forfeiture of 825 electronic-gaming machines, this Court removed Judge Hardaway from presiding over the underlying case. Even though a properly supported motion seeking his recusal had not been heard in the trial court, this Court determined that the removal of Judge Hardaway was necessary to preserve the appearance of justice and fairness.

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Alabama Department of Revenue to prove that his recusal was necessary. Judge Hardaway, however, rejected Greenetrack's argument and on July 5, 2014, entered orders recusing himself from case no. CV-2011-000015 and case no. CV-2009-900048. In the orders, Judge Hardaway provided that, after considering the submitted motions and the law, he was recusing himself "to avoid any appearance of bias or impropriety."

Alabama Department of Revenue v. Greenetrack, case no. CV-2011-000015, was then assigned to Judge D. Al Crowson. Before the case was litigated, Greenetrack exercised its right to pursue its challenge to the tax assessments with the Alabama Tax Tribunal, see § 40-2A-7(b)(5), Ala. Code 1975. The Greene Circuit Court dismissed the action. On August 29, 2019, the Alabama Tax Tribunal entered a judgment in favor of Greenetrack.

On September 27, 2019, the Alabama Department of Revenue filed a notice of appeal and complaint in the Greene Circuit Court, seeking reversal of the Alabama Tax Tribunal's final order<sup>2</sup> and affirmation of the Alabama Department of Revenue's assessments against Greenetrack for \$75 million in sales taxes

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<sup>2</sup>Greenetrack, Inc., Taxpayer v. State of Alabama, Dep't of Revenue, case no. S. 11-422-JP, August 29, 2019.

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and consumer-use taxes for its electronic-bingo activities from January 1, 2004, through December 31, 2008. See § 40-2B-2(m)(2), Ala. Code 1975.<sup>3</sup> The case was styled as State of Alabama, Department of Revenue v. Greenetrack, Inc., was docketed as case no. CV-2019-900056, and was assigned to Judge Hardaway.

On October 11, 2019, the Alabama Department of Revenue filed a motion asking Judge Hardaway to recuse himself. In its motion, the Alabama Department of Revenue argued that Judge Hardaway had recused himself "to avoid any appearance of bias or impropriety" in case no. CV-2011-000015, a challenge to the same tax assessments that are at issue in this case; had recused himself in case no. CV-2009-900048; and had recused himself in 2013 in case no. CV-2011-900030, a third case between the parties involving the seizure of gambling devices. The Alabama Department of Revenue reasoned that, because the reasons for recusal in the earlier cases remained, Judge Hardaway should recuse himself in the underlying case.

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<sup>3</sup>Section 40-2B-2(m)(2) provides: "[T]he Department of Revenue may appeal to circuit court from a final or other appealable order issued by the Alabama Tax Tribunal by filing a notice of appeal with the appropriate circuit court within 30 days from the date the final or other appealable order was entered."

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On March 23, 2020, Greenetrack filed its response, making the same arguments it made in its response to the motion to recuse filed in case no. CV-2011-000015. Specifically, Greenetrack argued:

"[Judge Hardaway's] recusal or disqualification in ... prior cases with very limited issues presented in them does not require recusal in the instant case related solely to the Department of Revenue's appeal from a final tax assessment held void by the Alabama Tax Tribunal."

On April 8, 2020, the Alabama Department of Revenue filed its reply, arguing that Judge Hardaway had properly recused himself from hearing case no. CV-2011-000015, "to avoid any appearance of bias or impropriety," and that he should do so in this case. The Alabama Department of Revenue maintained that, although the underlying action is an appeal filed by the Alabama Department of Revenue, the case constitutes continued litigation of case no. CV-2011-000015. The Alabama Department of Revenue reasoned that, even though the underlying case has a different case number, Judge Hardaway's recusal is required because, it said, the substantive issues remain the same, the parties remain the same, the tax assessments remain the same, and the reasons supporting recusal remain the same as those presented in case no. CV-

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2011-000015. The Alabama Department of Revenue urged: "Nothing has changed save for the passage of time, a trip to the Tax Tribunal, and a new case number." Additionally, the Alabama Department of Revenue insisted:

"[T]he State has never before, nor does it argue now, that the Court should recuse itself from any case involving it or Greenetrack, when presented as a single party. Instead, it was the combination of both parties and their consequent interactions with the Court that provided the impetus for the Court's previous recusal and removal."

On April 15, 2020, the circuit court conducted a hearing on the motion to recuse.<sup>4</sup> On May 31, 2020, the circuit court denied the Alabama Department of Revenue's motion to recuse without providing any specific rationale or reasoning in its order, stating: "The cases and authorities relied upon by the Alabama Department of Revenue do not support recusal under the facts and circumstances of this case." On July 10, 2020, the Alabama Department of Revenue petitioned this Court for a writ of mandamus directing Judge Hardaway to recuse himself.

#### Standard of Review

"A writ of mandamus is an extraordinary remedy, and it 'will be issued only when there is: 1) a clear legal right in the petitioner to the order

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<sup>4</sup>A transcript of the hearing is not included in the materials submitted to this Court.

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sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.'" "

Ex parte Butts, 775 So. 2d 173, 176 (Ala. 2000) (quoting Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993)).

"A mandamus petition is a proper method by which to seek review of a trial court's denial of a motion to recuse. Ex parte City of Dothan Pers. Bd., 831 So. 2d 1, 5 (Ala. 2002); Ex parte Cotton, 638 So. 2d 870, 872 (Ala. 1994), abrogated on other grounds, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996). A trial judge's ruling on a motion to recuse is reviewed to determine whether the judge exceeded his or her discretion. See Borders v. City of Huntsville, 875 So. 2d 1168, 1176 (Ala. 2003). The necessity for recusal is evaluated by the 'totality of the facts' and circumstances in each case. Dothan Pers. Bd., 831 So. 2d at 2. The test is whether '"facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.'" In re Sheffield, 465 So. 2d 350, 355-56 (Ala. 1984) (quoting Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982))."

Ex parte George, 962 So. 2d 789, 791 (Ala. 2006).

#### Discussion

The Alabama Department of Revenue contends that it has a clear legal right to the recusal of Judge Hardaway from the underlying case. Specifically, the Alabama Department of Revenue urges that Judge Hardaway exceeded his discretion in



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denying its motion to recuse because, it insists, a reasonable person would question Judge Hardaway's impartiality in light of his recusal in earlier challenges to the tax assessments at issue in the underlying case, as well as his recusals in other cases involving the same parties and this Court's removal of Judge Hardaway in a case involving the same parties without the issue of recusal having been heard in the circuit court.

"Canon 2(A) [, Canons of Judicial Ethics,] states:

"'A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.'

"Given the concept of promoting public confidence in the system, Canon 3(C)(1) [, Canons of Judicial Ethics,] states that '[a] judge should disqualify himself in a proceeding in which ... his impartiality might reasonably be questioned' by members of the public, a party, or counsel. See Wallace [v. Wallace], 352 So. 2d 1376 (Ala. Civ. App. 1977)]; Acromag-Viking v. Blalock, 420 So. 2d 60 (Ala. 1982); affirmed on other grounds, 474 So. 2d 91 (Ala. 1985). Nonetheless, recusal is not required based on a 'mere accusation of bias unsupported by substantial fact. Each case must stand on its own.' Wallace, supra at 1379; see Acromag-Viking, supra; Ford v. Ford, 412 So. 2d 789 (Ala. Civ. App. 1982); Miller v. Miller, 385 So. 2d 54 (Ala. Civ. App.), cert. denied, 385 So. 2d 56 (Ala. 1980). ... 'For the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that

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presumption and idea.' Fulton [v. Longshore], 156 Ala. [611,] 613, 46 So. [989,] 990 [(1908)]."

Ex parte Balogun, 516 So. 2d 606, 609 (Ala. 1987), abrogated on other grounds, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996). Prejudice on the part of a judge is not presumed, see Hartman v. Board of Trs. of Univ. of Alabama, 436 So. 2d 837, 841 (Ala. 1983), and substantial evidence must support a finding that disqualification of a judge is required, see Ex parte Melof, 553 So. 2d 554, 557 (Ala. 1989), abrogated on other grounds, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996). The test to be applied is: ""'Would a person of ordinary prudence in the judge's position knowing all the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?'" Ex parte Monsanto Co., 862 So. 2d 595, 605 (Ala. 2003) (quoting Ex parte City of Dothan Pers. Bd., 831 So. 2d 1, 6 (Ala. 2002), quoting in turn Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994)).

""[A] judge's recusal in a prior case involving a party is not alone sufficient for disqualification in a later case involving that party.' Communities for Equity v. Michigan High Sch. Athletic Ass'n, 459 F.3d 676, 699 (6th Cir. 2006) (summarizing the holding in Person v. General Motors Corp., 730 F. Supp. 516, 518-19 (W.D.N.Y. 1990)). The party moving for recusal of the trial judge must still present substantial evidence showing that it is

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"reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge." Ex parte Duncan, 638 So. 2d [1332,] 1334 [(Ala. 1994)] (quoting Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982))."

Ex parte Rogers, 218 So. 3d 859, 865-66 (Ala. Civ. App. 2016).

When recusal is required, a judge may reassume jurisdiction over a case only when the disqualification that led to his or her recusal has been removed. Ex parte George, 962 So. 2d at 792.

According to the Alabama Department of Revenue, Judge Hardaway's recusal in the underlying case is required because, it says, the disqualification that led to his earlier recusals and removal remain present. The Alabama Department of Revenue insists that nothing has changed that would obviate Judge Hardaway's earlier disqualification; consequently, it reasons that Judge Hardaway's impartiality over the underlying case might reasonably be questioned. In support of its contention, the Alabama Department of Revenue directs this Court to Ex parte Balogun, supra.

In Ex parte Balogun, after the parties' divorce case had settled and certain documents that had been identified for trial (allegedly involving the husband, the Macon County Dog

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Track, and unethical conduct) had been turned over to law-enforcement agencies and other parties, the former husband moved to have the trial court return all the exhibits in the divorce case. When the former husband learned that the trial judge was the one who had turned over the documents to law-enforcement agencies, the former husband moved for the trial judge to recuse himself from further proceedings in the divorce case. The former husband reasoned that the trial judge's giving the documents to law-enforcement agencies was an indication of bias. The trial court denied the motion, finding that the relinquishing of the documents to law-enforcement agencies did not show bias. This Court agreed that giving the documents to law-enforcement agencies did not show bias on the trial judge's part but held that the trial judge's recusals in two earlier cases and the reasons supporting those recusals constituted substantial evidence requiring the trial judge's recusal. The two earlier cases involved the Macon County Dog Track, and, when recusing himself from those cases, the trial judge had reasoned that his recusals were required because his impartiality might be questioned. The trial judge stated that he had expressed

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opinions regarding the legalization of dog racing in both a legal and political context and that his views were known by the public. This Court held that the evidence of the trial judge's two earlier recusals in cases involving the Macon County Dog Track and the trial judge's reasons set forth for those recusals demonstrated that "a person of ordinary prudence could reasonably question [the trial judge's] impartiality" and, thus, that the former husband had met his burden of proof. Ex parte Balogun, case no. 516 So. 2d at 610.

Greenetrack, on the other hand, contends that evidence of Judge Hardaway's earlier recusals and removal and the reasons set forth explaining his disqualifications leading to them do not satisfy the Alabama Department of Revenue's burden of proving that recusal is necessary. According to Greenetrack, Judge Hardaway's removal by this Court in State of Alabama v. 825 Electronic Gambling Devices, case no. CV-2010-20 (see note 1 supra), and his earlier recusals in the initial challenge to the tax assessments, case no. CV-2011-000015, and a challenge to the certificates of lien for taxes, case no. CV-2009-900048, in and of themselves do not provide substantial

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evidence to question Judge Hardaway's impartiality in the underlying case. Greenetrack maintains that the underlying case, in which the Alabama Department of Revenue appeals the final order of the Alabama Tax Tribunal that voided the tax assessments against it, constitutes a brand new case, and it states that the Alabama Department of Revenue presented no evidence indicating that Judge Hardaway "expressly or impliedly [has] shown any bias for or prejudice against either party, or has acted or failed to act in any manner that would give the appearance of impropriety." Ex parte Rogers, 218 So. 3d at 865. Greenetrack reasons that a reasonable, prudent person could understand that the passage of time could mitigate or completely alleviate the circumstances or conditions that required Judge Hardaway to recuse himself or be removed in the previous proceedings. In support of its contention, Greenetrack relies on Ex parte Rogers.

In Ex parte Rogers, the former wife sought the recusal of the trial judge in a postdivorce action based on the trial judge's recusal in the divorce case. In the postdivorce action, as she did in the divorce action in which the trial judge had recused himself, the former wife argued that the

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trial judge's impartiality could be questioned because the former husband's father, an attorney and a potential witness, practiced before the trial judge and the trial judge's interactions with the former husband's father would place the trial judge in an awkward position when reaching a decision. The trial judge denied the former wife's motion to recuse. The former wife then petitioned the Court of Civil Appeals for a writ of mandamus directing the trial judge to recuse himself. In support of her request, the former wife urged that application of the law set forth in Ex parte Balogun required issuance of the writ. The Court of Civil Appeals disagreed, noting that, unlike the evidence in Ex parte Balogun, the evidence did not establish that the trial judge had made public comments regarding the former wife or the former husband, nor did the evidence indicate that the trial judge had "shown any bias for or against either party, or [had] acted or failed to act in any manner that would give the appearance of impropriety." 218 So. 3d at 865. The Court of Civil Appeals further observed that the trial judge in his answer to the former wife's petition for a writ of mandamus stated that, at that time, unlike when the divorce case was

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pending, the former husband's father rarely practiced before the court and, consequently, the passage of time had removed the earlier reason for recusal. Accordingly, the Court of Civil Appeals held that the former wife had not met her burden of producing substantial evidence that a reasonable person could question the trial judge's impartiality or that there was an appearance of impropriety stemming from the trial judge's recusal in the divorce case.

Although Ex parte Balogun and Ex parte Rogers are instructive, this case is unique. The State and Greenetrack have a lengthy history of litigation before Judge Hardaway; Judge Hardaway has recused himself in several cases involving these parties; in one case this Court ordered Judge Hardaway's removal without the issue having been entertained in the circuit court; and Judge Hardaway recused himself in Greenetrack's initial challenge to the tax assessments filed in the circuit court. We are mindful that issues in some of the earlier cases, such as the legality of electronic bingo and the propriety of the seizure of gaming machines or illegal gambling devices are not issues in the underlying case. We further recognize that the main issue presented in the



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underlying case is whether the Alabama Tax Tribunal properly ruled that the tax assessments were void, and we admit that the passage of time and factual distinctions may have tempered the reasons supporting the past recusals and removal. However, in light of the totality of the facts and circumstances surrounding the past decisions of recusal and removal and the litigiousness of the parties regarding past recusal requests, a reasonable, prudent person might question the impartiality of Judge Hardaway. And, because nothing in the materials before us indicates that the reasons for recusal set forth in case no. CV-2011-000015 and case no. CV-2009-900048 do not remain, we agree with the Alabama Department of Revenue that the reasons for recusal in the earlier cases remain<sup>5</sup> and that Judge Hardaway exceeded his discretion when

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<sup>5</sup>We observe that neither Greenetrack nor Judge Hardaway provides any evidence or offers any reason, other than the passage of time, regarding why the reasons for recusal or removal that existed in the other cases do not remain. This statement does not obviate the burden on the party requesting recusal to present substantial evidence that it is "reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge." Ex parte Rogers, 218 So. 3d at 865-66. This observation should not be viewed as creating a burden-shifting process; rather, it is simply an observation that, in this case, in light of the contentiousness between these parties and the interactions with the circuit court, the totality of the facts and circumstances in earlier cases, and Judge Hardaway's earlier

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he refused to recuse himself in the underlying case. As we stated in Ex parte Smith, 282 So. 3d 831, 841 (Ala. 2019):  
""A fair and impartial judge is the cornerstone of the integrity of the judicial system. Even the appearance of partiality [or bias] can erode the public's confidence in the integrity of the judiciary."" (Quoting State v. Moore, 988 So. 2d 597, 601 (Ala. Crim. App. 2007), quoting in turn In re Judicial Disciplinary Proceedings Against Laatsch, 299 Wis. 2d 144, 150, 727 N.W.2d 488, 491 (Wis. 2007).)

Lastly, we decline the request of the Alabama Department of Revenue in its petition to reassign this case. This Court has set forth well established procedures for a trial judge to request reassignment of a case once a trial judge recuses himself or herself or is disqualified, and the materials before us indicate that Judge Hardaway, when having recused himself in other cases, has followed those procedures; therefore, the Alabama Department of Revenue has not demonstrated a clear, legal right to relief in this regard.

#### Conclusion

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recusal in Greenetrack's initial challenge to the tax assessments in the circuit court, nothing in the materials before us indicates that the reasons for the earlier recusals or removal no longer remain.

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The Alabama Department of Revenue has demonstrated a clear, legal right to the recusal of Judge Hardaway in the underlying case. Accordingly, we grant its petition and direct Judge Hardaway to recuse himself in the underlying case.

PETITION GRANTED; WRIT ISSUED.

Shaw, Wise, Bryan, Stewart, and Mitchell, JJ., concur.

Parker, C.J., and Sellers, J., concur in the result.