Opinion Issued October 7, 2022

DOCKET NO. SCR 21-0005

SPECIAL COURT OF REVIEW

IN RE INQUIRY CONCERNING THE HONORABLE JONATHAN BAILEY CJC NO. 19-1770

PER CURIAM OPINION

Before this Review Tribunal[1] is an appeal from a Public Warning issued by the Texas State Commission on Judicial Conduct (the "Commission") against Respondent, the Honorable Jonathan Bailey, former judge of the 431st Judicial District Court in Denton County.[2] The Commission's Public Warning concluded that Judge Bailey[3] (1) failed to comply with the law and maintain competence in it; (2) failed to be patient, dignified, and courteous to a litigant; and (3) exhibited bias and prejudice against a litigant. Respondent appealed, and this Review Tribunal conducted a trial de novo to review the Commission's sanctions. *See* TEX. GOV'T CODE § 33.034 (providing the procedure to appeal Commission sanctions).

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[1]This Special Court of Review consists of the Honorable John M. Bailey, Chief Justice of the Eleventh Court of Appeals, presiding by appointment; the Honorable Darlene Byrne, Chief Justice of the Third Court of Appeals, participating by appointment; and the Honorable Edward Smith, Justice of the Third Court of Appeals, participating by appointment.

[2]Respondent and the presiding justice of this Special Court of Review, Chief Justice John M. Bailey, are not related.

[3]All references in this opinion to "Judge Bailey" are to Respondent.

As set forth herein, we find that Respondent committed legal error as alleged, but that his legal error did not rise to the level of sanctionable judicial misconduct. We also find that Respondent did not commit non-legal error as alleged. We conclude that Respondent did not violate the Code of Judicial Conduct or the Texas Constitution as alleged. We vacate the Commission's public warning and dismiss the charges against Respondent without sanctions.

We note at the outset that the function of the Commission "is not to punish; instead its purpose is to maintain the honor and dignity of the judiciary and to uphold the administration of justice for the benefit of the citizens of Texas." *In re Slaughter*, 480 S.W.3d 842, 845 (Tex. Spec. Ct. Rev. 2015) (per curium) (quoting *In re Lowery*, 999 S.W.2d 639, 648 (Tex. Rev. Trib. 1998, pet. denied)). Similarly, a special court of review is not charged with punishing but with providing guidance to judges and protection to the public. *In re Davis*, 82 S.W.3d 140, 150 (Tex. Spec. Ct. Rev. 2002).

I. Stipulated Facts[4]

1. At all relevant times, the Honorable Jonathan Bailey was the Judge of the 431st Judicial District Court in Denton, Denton County, Texas.

2. Judge Bailey presided over Cause No. 18-3538-431, *In the Matter of the Marriage of Misty Anne Simone and Michael Anthony Simone and in the interest of M.S.S. and M.A.S.* (the "divorce case").

3. While the divorce case was pending, Michael Simone ("Michael") was indicted in Cause No. 18-3334-431, *State v. Michael Simone* (the "criminal case") on a charge of continuous family violence against his wife, ("Misty") for acts alleged to have occurred shortly before the divorce was filed in April 2018. The criminal case was also assigned to Judge Bailey's court. A condition of Michael's bond was that he not possess a firearm. Michael signed an acknowledgment that he was aware of the

[4]The Commission and Respondent executed agreed stipulations of fact.

bond condition and that he knew his bond could be revoked and he would be re-arrested if he violated a condition of bond.

4. On August 5, 2019, Judge Bailey presided over the final hearing in the divorce case.

5. During the final divorce trial hearing, the parties testified to the following:

    a. Misty and Michael had two children, a boy, age 11 and a girl, age 9.

    b. Misty testified that in November of 2016, Michael used a firearm to fake his own suicide. While on a facetime call with Misty, Michael displayed a handgun, held it to his head, turned the camera around, and fired the gun. Michael also testified and admitted "I discharged seven rounds into a teddy bear in the corner of my room."

    c. Misty testified that she called the police after that incident and they ultimately found Michael several blocks away, unharmed. She also testified that Michael was in possession of two handguns and a couple of knives. Michael was ultimately placed in the state hospital in Wichita Falls for psychiatric evaluation. Misty testified that during this time Michael owned four or five handguns, an AK-47, several shotguns and three or four rifles.

    d. Michael testified that his mother removed all the guns from the house as a condition of his release from the hospital.

    e. Misty testified that Michael currently owns firearms and "that the children had reported seeing an unsecured handgun as recently as last weekend." Michael contradicted Misty's testimony and denied present possession of a firearm.

6. At the conclusion of the final divorce hearing on August 5, 2019, and based on evidence presented at that hearing, Judge Bailey signed and filed an "Order to Search for Firearms" (the "Order") in the criminal case.

7. The Order authorized "any peace officer, member of law enforcement, or Denton County Adult Probation Officer" to search for and seize any firearm in Michael's possession, in his vehicle, and in his residence in Flower Mound, Texas, and further, to "use any reasonable force necessary to discharge the duties" described. There was no "Officer's Return" attached to or incorporated in the Order.

8. Judge Bailey ordered Michael to remain in the courtroom until a probation officer and police officer escorted Michael to his vehicle and his home and searched both for firearms.

9. Law enforcement officers conducted the searches, and no firearms were found.

10. Respondent timely appealed the Public Warning in CJC No. 19-1770 to the currently sitting Special Court of Review.

(Internal record citations omitted.)

II. Charges

In five charges, the Commission alleges that Respondent:

1. Prepared, signed, and issued an "Order to Search" (a search warrant) in a criminal case without complying with Tex. Code. Crim. Proc. art. 18.01(b), in violation of Canon 2A of the Texas Code of Judicial Conduct;

2. failed to maintain professional competence in the law, as demonstrated when he improperly issued a search warrant based on testimony presented at a divorce hearing and without complying with Texas Code Crim. Proc. art. 18.01(b), in violation of Canon 3B(2) of the Texas Code of Judicial Conduct;

3. failed to be patient, dignified, and courteous to Michael, a litigant before Respondent in both a civil and criminal matter, when he issued, *sua sponte*, the Order based on testimony in a divorce hearing; failed to comply with Tex. Code. Crim. Proc. art. 18.01(b); and held Simone[5] in his courtroom until the Order was executed, in violation of Canon 3B(4) of the Texas Code of Judicial Conduct;

4. failed to perform judicial duties without bias or prejudice as to Simone, a litigant before Respondent in both a civil and criminal matter, when he issued, *sua sponte*, the Order based on testimony in a divorce hearing; failed to comply with the Tex. Code Crim. Proc. art. 18.01(b); and held Simone in his courtroom until the Order was executed, in violation of Canon 3B(5) of the Texas Code of Judicial Conduct;

5. demonstrated, through the above conduct, (1) incompetence in performing the duties of his office; (2) willful violations of the Code of Judicial Conduct; and/or (3) willful or persistent conduct clearly inconsistent with the proper performance of his duties, or that cast public discredit on the judiciary or administration of justice in violation of Article V, § 1-a(6)A of the Texas Constitution.

III. Relevant standards and burden of proof

The type of alleged error, legal or non-legal, determines the applicable standard of review. *See In re Richter*, SCR No. 20-0006, slip. op. at 10–11 (Tex. Spec. Ct. Rev. Nov. 4, 2021) (per curiam), http://www.scjc.texas.gov/media/46852/scr-20-0006-opinion-issued-11-04-21.pdf (last visited Aug. 16, 2022) (citing *In re Ginsberg*, 630 S.W.3d 1, 8–9 (Tex. Spec. Ct. Rev. 2018)). Here, the Commission alleged both legal and non-legal errors. Charges One and Two allege that it was procedural and substantive legal error for Respondent to execute the Order to Search in violation of Article 18.01(b) of the Code of Criminal Procedure.

[5]All references in this opinion to "Simone" are to Michael Simone.

The remaining charges allege non-legal error. Charges Three and Four likewise invoke Article 18.01(b), but ultimately challenge Respondent's conduct and use of his judicial authority. Charge Five alleges a non-legal error challenging Respondent's conduct as a willful and persistent violation of the Code of Judicial Conduct that casts discredit upon the judiciary.

Non-legal errors are reviewed by a willfulness standard. *See Ginsberg*, 630 S.W.3d at 7–9. The Texas Constitution provides that a judge may be disciplined for demonstrating incompetence in performing the duties of his or her office, a willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with performance of his duties or casts public discredit upon the judiciary or the administration of justice. TEX. CONST. art. V, § 1–a(6)A. For the purposes of Article V, Section 1–a, willful or persistent conduct that is clearly inconsistent with the performance of a judge's duties includes a willful violation of a provision of the Code of Judicial Conduct. TEX. GOV'T CODE ANN. § 33.001(b)(2).

Generally, in judicial misconduct cases, "willful" conduct occurs when a judge intentionally or with gross indifference misuses the power of the judicial office. *See Richter*, SCR No. 20-0006, slip. op. at 10–11 (collecting cases); *see also In re Sharp*, 480 S.W.3d 829, 833 (Tex. Spec. Ct. Rev. 2013) (citing *In re Davis*, 82 S.W.3d 140, 148 (Tex. Spec. Ct. Rev. 2002)). "Gross indifference is indifference that is flagrant, shameful and beyond all measure and allowance." *Ginsberg*, 630 S.W.3d at 7. These judicial misconduct cases hold that the inquiry is not whether the judge intended to violate the Code of Judicial Conduct, but whether the judge intended to engage in the conduct for which he or she is disciplined. *Id.* A judge acts intentionally "when the act is done with the conscious objective of causing the result or of acting in the manner defined in the pertinent rule of conduct." *Id.*

The standard for a legal error is more rigorous; because a judge's every ruling is intentional, and thus willful, any legal error would constitute judicial misconduct

under the non-legal error standard. *Id.* at 8. For a legal error to rise to the level of judicial misconduct, the challenged ruling must be "made contrary to clear and determined law about which there is no confusion or question as to its interpretation, and the complained-of legal error additionally must be (1) egregious, (2) made as part of a pattern or practice of behavior, or (3) made in bad faith." *Id.* Because this standard applies only to legal errors, "disciplinary proceedings are inappropriate when the judge's complained-of ruling is made under a law that is arguably unclear or ambiguous." *Richter*, SCR No. 20-0006, slip op. at 11 (internal quotations omitted).

The rules of law, evidence, and civil procedure govern our review. *Sharp*, 480 S.W.3d at 833. The Commission has the burden to prove the charges against Respondent by a preponderance of the evidence. TEX. GOV'T CODE ANN. § 33.034(f); *In re Slaughter*, 480 S.W.3d 842, 845 (Tex. Spec. Ct. Rev. 2015) (per curiam).

IV. Charge One—Legal Error

In Charge One, the Commission alleged that Appellant's Order to Search violated Judicial Canon 2A's mandate that "[a] judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Tex. Code Jud. Conduct, Canon 2(A), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. C [hereinafter TEX. CODE JUD. CONDUCT]. This Charge is based on an alleged legal error—that the Order to Search was procedurally and substantively deficient. Before we can determine whether Respondent's alleged error is sanctionable, we must first decide whether Respondent committed a legal error by issuing the Order to Search.

The Commission asserts that Respondent failed to comply with the law because he knew or should have known that his Order to Search violated Simone's due process rights. Article 18.01(a) of the Code of Criminal Procedure defines a

search warrant as "a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same." TEX. CODE CRIM. PROC. ANN. art. 18.01(a). The Commission contends that Respondent's actions constitute a legal error because the procedure for issuing warrants is clear and established law and Respondent's Order did not satisfy the statutory requirements—it was not accompanied by an affidavit, did not state sufficient facts to establish probable cause, was not requested by the State or a peace officer, and was not issued by a neutral or detached magistrate.

To support its assertion, the Commission points to the text of the Code of Criminal Procedure which authorizes a district judge or magistrate to act under similar facts and circumstances. The Commission emphasizes that Respondent, as the original judge setting Simone's bond, had complete control over the bond conditions—yet he did not include a consent-to-search condition that would have allowed for a warrantless search of Simone's property at any time. The Commission contends that the proper, and statutorily authorized, course of action would have been to set a hearing to revoke Simone's bond entirely and set new conditions as authorized by Article 17.40(b). CRIM. PROC. art. 17.40(b). The Commission further contends that Respondent failed to use alternative protection statutes to monitor Simone or to protect Misty, and that Respondent's actions indicate bias and advocacy by seeking protections that the parties to the underlying case did not request.

In response, Respondent presents two theories. First, he contends that there was no legal error because the law governing the rights of pretrial release is unsettled, meaning that discipline by the Commission is inappropriate. The crux of Respondent's argument is that Simone, as a pretrial releasee, had a diminished privacy expectation and that the law is unsettled because courts have not adopted a bright-line rule delineating an individual's rights under similar circumstances.

Accordingly, under Respondent's theory, the Order was not a legal error made "contrary to clear and determined law about which there is no confusion or question as to its interpretation." *See Ginsburg*, 630 S.W.3d at 8. In the alternative, Respondent contends that he had the legal authority to issue the Order to Search because it was supported by probable cause, which, Respondent contends, makes the Order to Search a valid warrant.

A. The law is settled

Respondent cites to United States Supreme Court and federal precedent to assert that courts are divided on the issue of whether, or to what extent, an indicted person on pretrial release has a diminished expectation of privacy. We disagree that the law is unsettled. The relevant caselaw considers an individual's status when deciding the corresponding liberty interests, delineating between probationers, parolees, presentence releasees, pretrial releasees, and arrestees. Along with the individual's status, courts consider whether the conditions of release contain consent-to-search conditions or waivers.

Persons on probation or parole have the most limited privacy interests. For example, in *United States v. Knight*, one case cited by Respondent, the Supreme Court held that probationers have a lesser expectation of privacy when subject to release conditions. 534 U.S. 112, 114 (2001). Parolees subject to release conditions have fewer expectations than probationers because "parole is more akin to imprisonment than probation." *Samson v. California*, 547 U.S. 843, 850 (2006). The Texas Court of Criminal Appeals has interpreted the principles of *Knight* and *Sampson* as being "clearly rooted in the limited privacy interests of individuals who are *actively* subject to criminal penalties, thereby permitting privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *State v. Villarreal*, 475 S.W.3d 784, 813 (Tex. Crim. App. 2014) (internal quotations omitted) (emphasis added).

In the pretrial context, Respondent cites to *United States v. Scott*, a suppression case involving a pretrial releasee searched pursuant to a standardized release condition. 450 F.3d 863 (9th Cir. 2006). Scott was arrested on drug charges and released on his own recognizance on the condition that he would consent to random drug testing or searches of his home at any time "without a warrant." *Id.* at 865. Respondent asserts that *Scott* supports that pretrial releasees have diminished privacy rights. However, the question before the *Scott* court was whether police may conduct a search of an individual released awaiting trial based *only* on a search condition and not probable cause. *Id.* at 865. The court answered the question in the negative, finding that the bond's consent-to-search condition alone was insufficient to satisfy the Fourth Amendment. *Id.* at 874.

To reach its conclusion, the *Scott* court looked to the traditional reasonableness and totality-of-the-circumstances standards in Fourth Amendment jurisprudence. *Id.* at 867. The court concluded that no "special needs" exception existed in Scott's case and noted that "[p]eople released pending trial . . . have suffered no judicial abridgment of their constitutional rights." *Id.* at 872. They are "ordinary people who have been accused of a crime but are presumed innocent." *Id.* at 871. Thus, the court held that the appropriate standard for the search in *Scott* was probable cause. *Id.* at 872, 874.

Respondent attempts to contrast *Scott* with other case law that he asserts holds that reasonable suspicion is the correct standard for a warrantless search of a pretrial releasee. For example, Respondent cites to *Castillo v. United States* for the proposition that some courts have held that the reasonable suspicion standard applies to searches of persons placed on pretrial diversion. 816 F.3d 1300 (11th Cir. 2016). However, the defendant in *Castillo* was enrolled in a diversion program after he confessed to multiple counts of burglary and dealing in stolen property. *Id.* at 1302. The State "reserved the right to prosecute [the defendant] for the charges to which

he had confessed" if he was found violating the program terms. *Id.* Thus, the *Castillo* court reasoned that the defendant was similar to a parolee or probationer and had a reduced expectation of privacy by virtue of his participation in the diversion program. *Id.* at 1305–06.

Although Respondent is correct that neither the U.S. Supreme Court nor Texas courts have created a bright-line rule that a pretrial releasee's privacy rights are diminished for the purpose of a warrantless search, we decline to find that the law is unsettled. There are key distinctions between the cases cited by Respondent and the one before us. First, the majority of the cases cited by Respondent involve persons who consented to search conditions as part of their probation, parole, or bond release agreements. Simone's release conditions contained no such provision. Second, many of Respondent's cases challenge or otherwise implicate the constitutionality of the release conditions, which are not at issue in our case. *See Maryland v. King*, 569 U.S. 435 (2013) (upholding a state statute authorizing a buccal swab of an arrestee); *Scott*, 450 F.3d at 874 (suppressing evidence, even in the presence of a consent-to-search provision, after finding the search failed to pass constitutional muster). Finally, none of the cases cited by Respondent involve a judicial officer as the primary actor—instead, they involve law enforcement acting in the field according to routine procedure, pursuant to a search condition, or with reasonable suspicion or probable cause.

We find that the cases cited by Respondent and the Commission show that the rights of pretrial releasees are governed by well-settled Fourth Amendment principles. Each case applies a reasonableness standard, and the facts of each case determine the individual's expectation of privacy. Accordingly, we do not agree with Respondent that the law is ambiguous as to the standard applicable to warrantless searches of pretrial releasees.

B. Scope of authority and probable cause warrants

In the alternative, Respondent contends that there is no legal error because he had the authority to issue the Order and because the Order was supported by probable cause. We address both contentions in turn.

At Respondent's hearing before the Commission, he asserted that he "firmly believe[s] that the inherent authority of a district judge allows them to do what [he] did . . . under the circumstances presented in Simone's case." However, in 1928 the Court of Criminal Appeals addressed similar facts to those presented here and found that a magistrate cannot issue a warrant without strict adherence to statutory procedure. In *McLennan v. State*, a magistrate issued a search warrant for "intoxicating liquor" based on the sworn testimony of witnesses in his court. 3 S.W.2d 447, 447 (Tex. Crim. App. 1928). Based on the testimony of the witnesses, the magistrate "was of [the] opinion that sufficient grounds existed for the warrant to issue." *Id.* However, the Court of Criminal Appeals held that the evidence was insufficient to meet the statutory mandates of the Code of Criminal Procedure, which required a "written, sworn complaint" in the form of an affidavit. *Id.* At the time, the Code required two sworn affidavits, and the court held that because "affidavit" had a clear meaning, the sworn oral testimony of a witness was not an affidavit as required by statute. *Id.* at 448; s*ee also Hall v. State*, 394 S.W.2d 659, 659 (Tex. Crim. App. 1965) (accord); *see generally* GEORGE E. DIX & JOHN M. SCHMOLESKY, CRIMINAL PRACTICE AND PROCEDURE § 9:19 (3d ed. 2021) (discussing *McLennan* and *Hall* as the root of the "four corners" rule that limits the basis for a warrant to the text of an affidavit and prohibits extraneous support). Thus, *McLennan* is directly on point regarding Respondent's lack of authority to issue the Order to Search in the absence of a supporting search warrant affidavit.

Respondent also urges us to find that the Order is not a legal error that was made "contrary to clear and determined law" because it was supported by probable cause. *See Ginsberg*, 630 S.W.3d at 8. We find this contention to be unavailing. Of particular concern is the Fourth Amendment's requirement that a neutral and detached magistrate make the probable cause determination for a warrant.

"Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." *Sharp v. State*, 677 S.W.2d 513, 515 (Tex. Crim. App. 1984) (quoting *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972)). As stated by the United States Supreme Court:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S.10, 13–14 (1948). Stated another way, the purpose behind the warrant process is to interpose a neutral party between the investigator and the citizen to be searched to determine whether probable cause exists for the search.

Typically, the investigator is a member of law enforcement. The Fourth Amendment requires that "the issuing person must be institutionally dissociated from the prosecution." DIX, *supra* § 9:38. And the United States Supreme Court has held that a magistrate's participation in the issuance and execution of a warrant can establish that the magistrate lacked the required neutrality and detachment. *See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 328 (1979); *Lyons v. State*, 149 S.W.3d 811, 812 (Tex. App.—Ft. Worth 2004, pet. ref'd) (recognizing that "[t]he failure of the magistrate who issued the search warrant to act as a neutral and detached officer may justify the suppression of the evidence seized pursuant to the warrant"). The

deciding factor is whether "the magistrate's conduct is more akin to that of a mere observer, as opposed to that of an adjunct member or leader of the law enforcement authorities who requested the warrant." *Lyons*, 149 S.W.3d at 812.

Here, the Order to Search was not requested by law enforcement. Respondent acted based on his own courtroom observations with no intermediary between himself and Simone to make the probable cause determination. Essentially, Respondent's role was more akin to an investigator than to a neutral magistrate, and issuing the Order to Search denied Simone the right to a neutral probable cause determination. *See Lyons*, 149 S.W.3d at 812.

Even assuming for the sake of argument that Respondent's Order to Search can substitute for an affidavit, we find that the contents of the Order are insufficient to establish probable cause. An affidavit must set out "sufficient facts for the magistrate to conclude that the item to be seized will be on the described premises at the time the warrant issues and the search [is] executed." *Crider v. State*, 352 S.W.3d 704, 707 (Tex. Crim. App. 2011); *see* CRIM. PROC. art. 18.01(c). An affidavit made on information and belief alone is not sufficient to satisfy the constitutional requirements. *Stevens v. State*, 262 S.W.2d 716, 718 (Tex. Crim. App. 1953). The affidavit must also state the facts or circumstances on which the belief is founded. *Johnson v. State*, 56 S.W.2d 878, 878 (Tex. Crim. App. 1933).

Respondent's Order to Search reads as follows:

> The Court FINDS that credible evidence was presented regarding the Defendant's ownership and possession of several firearms, including a rifle, several handguns, and shotguns. The Court FINDS that there is a clear and present danger of family violence and that this order is necessary to confirm [Michael's] compliance with his bond conditions.

On its face, the Order to Search is factually deficient to establish probable cause. The Order to Search does not provide specific facts that would allow a neutral reviewing reader to draw reasonable inferences that Simone was in possession of a

firearm at the time the Order to Search was issued. Likewise, the Order to Search does not state specific sources of information on which the belief is based, only that "credible evidence was presented." *See Barraza v. State*, 900 S.W.2d 840, 843 (Tex. App.—Corpus Christi–Edinburg 1995, no pet.) (declining to allow oral testimony given during a motion to suppress to remedy defects in an affidavit). The Order to Search does indicate that Respondent "heard the final trial in [the divorce case]." However, a review of the divorce hearing record cannot remedy the above procedural defects. *See* DIX, *supra* § 9:19 (discussing the "four corners" rule that limits the basis for a warrant to the text of an affidavit and prohibits extraneous support).

Thus, we find that existing criminal law defines Respondent's scope of authority and that, even assuming an order issued by a judge can substitute for the clearly defined warrant procedure, Respondent's Order to Search does not contain sufficient facts to support upholding it on probable cause grounds. Accordingly, having also found that the law is settled, we find that Respondent's Order to Search was "contrary to clear and determined law about which there is no confusion or question." *Ginsberg*, 630 S.W.3d at 8.

C. Misconduct

Having determined that Respondent's Order was a legal error, we turn to the question of whether the error rises to the level of judicial misconduct that is sanctionable. Mere legal error is best left to the appellate courts because they provide a safeguard against judicial error. *See In re Barr*, 13 S.W.3d 525, 544 (Tex. Rev. Trib. 1998). However, legal error may constitute sanctionable conduct when it was (1) egregious, (2) made as part of a pattern or practice of legal error, or (3) made in bad faith. *Id.* (citing *In re Quirk*, 705 So.2d 172, 177–78 (La. 1997); *see Ginsberg*, 630 S.W.3d at 8. We address each disjunct in turn.

1. The legal error was not egregious

Sanctions are appropriate for conduct that is "inconsistent with the law and committed with the specific intent to accomplish a purpose which the judge knew or should have known was beyond the exercise of legitimate judicial authority." *In re Mullin*, SCR No. 15-0002, slip op. at 18 (Tex. Spec. Ct. Rev. Oct. 21, 2015), http://www.scjc.texas.gov/media/34156/In-re-Mullin.pdf (last visited Aug. 22, 2022). "It is conduct that is not to be excused, particularly when committed by members of the judiciary." *Id.* "'Egregious' means '[e]xtremely or remarkably bad; flagrant,' or 'shocking.'" *Ginsberg*, 630 S.W.3d at 8 (footnotes omitted) (quoting BLACK'S LAW DICTIONARY (9th ed. 2009); NEW OXFORD AMERICAN DICTIONARY 555 (Angus Stevenson & Christine Lindberg eds., 3d ed. 2010)). In determining whether Respondent committed an egregious legal error in issuing the Order to Search, we note that few Special Courts of Review have issued findings of egregious error.

The Commission takes the position that Respondent's legal error was egregious because Respondent had statutorily authorized alternatives to address any concern about safety or inadequate bond conditions. Regarding safety, the Commission produced evidence that, prior to the final hearing in the divorce case, Misty Simone did not have a protective order against Simone. The Commission asserts that the lack of a protective order is evidence that Respondent overstepped by taking an action not requested by the parties. The Commission also asserts that the Code of Criminal Procedure provides a means to revoke bond conditions for sufficient cause and to order releasees to be rearrested before resetting bond conditions. CRIM. PROC. art. 17.09, § 3 ("Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds that bond is defective . . . or for any other good and sufficient cause, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested,

and require the accused to give another bond in such amount as the judge or magistrate may deem proper.").

Respondent's submissions do not address egregious error—he asserts only that there was no error. However, Respondent's contention that he had probable cause to issue the Order to Search informs our analysis of whether the error was egregious.

Respondent testified that he heard disturbing testimony from Misty Simone that she believed Simone was in possession of multiple firearms. She testified that Simone threatened to harm himself with a firearm in the fall of 2016, that he discharged a firearm in the marital residence in December 2016 and January 2017, and that he had two handguns in July 2017. She further testified that the children reported seeing Simone with a handgun the weekend before the final divorce hearing.

At the de novo trial before the Special Court of Review, Respondent testified that he was concerned about the firearms and safety of the children because he found Simone's testimony "demonstrably false." Simone testified that he surrendered his firearms in 2016, but Misty Simone provided testimony that he discharged a firearm in their home in 2017. Respondent further testified that, as the trial judge, he was the sole judge of witness credibility, and he found Misty Simone's testimony to be credible. Accordingly, Respondent ordered what he believed to be a limited scope search, which he testified was "to protect someone that [he] thought was potentially in danger."

While we have determined that issuing the Order to Search was a legal error, we cannot find under these facts that it was shocking, flagrant, or "beyond all measure and allowance." *See Ginsberg*, 630 S.W.3d at 8; *In re Mullin*, SCR No. 15-0002, slip op. at 18. As set out above, while there is no bright-line rule that governs a person's expectation of privacy while on bond, courts consistently apply a

traditional reasonableness standard when analyzing the validity of a search. *See supra* IV. A. Respondent heard disturbing testimony that Simone was in possession of firearms in violation of his bond conditions. He also heard testimony regarding Simone's drug use, use of firearms in the home, and a purported suicide attempt at a time when he had allegedly surrendered all his firearms. Respondent testified that he believed he was balancing Simone's interests in freedom from confinement against the State's interest in protecting those experiencing family violence. He specifically testified that he was only concerned that Simone might have a firearm, and that rearresting Simone by declaring his bond insufficient would be a greater harm than a limited-scope search of his home and vehicle. Accordingly, we find that Respondent did not commit an egregious legal error.

2. The legal error was not part of a pattern or practice of behavior

A legal error will also rise to the level of misconduct when it was "made as part of a pattern or practice of legal error." *Ginsberg*, 630 S.W.3d at 8. The Commission urges us to find that Respondent's error is part of a pattern because the Commission has disciplined Respondent on two prior occasions.[6] However, the Commission does not allege that Respondent committed the same legal error—issuing an improper search warrant—in either of his prior disciplinary actions or on another occasion. *See id.* at 11 (suggesting that a legal error is not a part of a pattern or practice of behavior when the Commission does not show that the judge committed the same legal error on more than one occasion). Therefore, we do not find that the legal error was part of a pattern or practice of behavior.

[6]In CJC No. 18-0092, the Commission issued findings that Respondent (1) showed antagonism toward the father, which violated his right to a fair trial, and (2) failed to treat the father with patience, dignity, and courteousness. In CJC No. 19-1299, the Commission issued findings that Respondent (1) failed to treat the father with patience, dignity, and courteousness; (2) acted with prejudice toward the father; and (3) denied the father the right to be heard.

3. The legal error was not made in bad faith

The final way a legal error can rise to the level of sanctionable judicial misconduct is when the error is made in bad faith. *Id.* at 8. "'Bad faith' means '[d]ishonesty of belief or purpose.'" *Id.* (alteration in original) (quoting NEW OXFORD AMERICAN DICTIONARY 555 (Angus Stevenson & Christine Lindberg eds., 3d ed. 2010)). The record contains no evidence that Respondent committed legal error in bad faith. We find Respondent's testimony to be credible that he was concerned that Simone possessed a firearm in violation of his bond. We disagree with the Commission's suggestion that Respondent was motivated by an improper purpose for issuing the Order to Search. The record contains no evidence that Respondent acted with dishonesty in his belief or purpose in issuing the Order. Thus, the error was not made in bad faith.

4. Conclusion

We find that Respondent's issuance of the Order to Search was a legal error, but we find that the legal error was not sanctionable judicial misconduct because it was not egregious, part of a pattern or practice of behavior, or made in bad faith. *Id.* Accordingly, we find that Respondent did not violate Canon 2A as alleged. Charge One is dismissed.

V. Charge Two—Legal Error

Charge Two alleges that Respondent violated Canon 3B(2), which states that "[a] judge should be faithful to the law and shall maintain professional competence in it." TEX. CODE JUD. CONDUCT, Canon 3B(2). The Commission contends that Respondent violated Canon 3B(2) because the Order to Search failed to comply with Article 18.01(b) of the Code of Criminal Procedure, evidencing that Respondent failed to maintain competence in the law. This Charge is based on the same alleged legal error as Charge One—that the Order to Search was procedurally and substantively deficient.

Because we have already concluded with respect to Charge One that Respondent's Order to Search was a legal error, but that the error did not rise to the level of sanctionable judicial misconduct, we conclude the same here. *See supra* IV. Accordingly, Charge Two is dismissed.

VI. Charge Three—Non-Legal Error

In Charge Three, the Commission contends that Respondent violated Canon 3B(4), which states that "[a] judge shall be patient, dignified and courteous to litigants." TEX. CODE JUD. CONDUCT, Canon 3B(4). The Commission contends that Respondent's Order violates this Canon because the Order to Search itself shows a failure to be patient, dignified, and courteous. The Commission further contends that Respondent's actions holding Simone in the courtroom while the Order was executed also evidences a violation of this Canon.

We find that Charge Three alleges a non-legal error. Although the Commission invokes Article 18.01(b) of the Code of Criminal Procedure, which we have analyzed above for legal error, Canon 3B(4) applies to a judge's ethical and professional conduct. *See Barr*, 13 S.W.3d at 552 (holding that the proper inquiry when applying Canon 3B(4) is to consider the conduct of the judge including "his manner and choice of language"). Non-legal errors are reviewed under the willfulness standard. *See Ginsberg*, 630 S.W.3d at 7–9.

It is generally accepted that discipline is appropriate under this Canon when a judge is discourteous to those with whom he deals in an official capacity. *Barr*, 12 S.W.3d at 552–53. In *Barr*, the Texas Review Tribunal found that the judge violated Canon 3B(4) by making lewd and sexually offensive comments to female attorneys. *Id.* at 536–37. Similarly, in *Bartie*, another review tribunal found a violation of Canon 3B(4) when a judge repeatedly used "extremely obscene language in his courtroom." *In re Bartie*, 138 S.W.3d 81, 85 (Tex. Rev. Trib. 2004, no appeal).

It is clear from the record before us that Respondent did not exhibit these or similar behaviors. At the trial de novo, Respondent produced evidence that he treated Simone with courtesy and respect during the proceedings in question. Lori Dally, Misty Simone's attorney in the divorce case, testified that she found Respondent's demeanor to be patient, dignified, and courteous. Respondent also testified that the Commission previously issued public admonishments for his demeanor in another case and that the resulting admonishment, as well as an appellate opinion in the case, caused him to make a conscious effort to correct his behavior. Respondent admitted that his prior behavior fell below the standard required by the Code of Judicial Conduct, but he testified that he believed his demeanor in the case before us was appropriate.

Nonetheless, the Commission contends that Respondent also violated Canon 3B(4) by resorting to "self-help" in the form of issuing an illegal order. The Commission cites to the following language in *Barr*, a case where a judge was found to have violated Canon 3B(4), in support of this proposition: "conduct on the part of a judge that departs from otherwise recognized, established, and accepted procedures for the enforcement of orders and judgments, constitutes lawless conduct which advances a personal brand of justice in which the judge becomes a law unto herself or himself." *Barr*, 13 S.W.3d at 553. However, the facts in *Barr* are sufficiently distinct from those here, and the language cited by the Commission is unpersuasive because its application here would impermissibly merge legal and non-legal errors.

In *Barr*, the alleged misconduct involved the judge's oral order to release an individual who was just acquitted by a jury. *Id.* at 549. When Judge Barr issued the order, a sheriff's deputy refused to comply, stating that it was against policy to release individuals from the courtroom. *Id.* at 550. Judge Barr instructed the deputy that the acquitted individual should be allowed to leave through the courtroom and public elevator instead of being taken to the basement to be processed before release.

Id. When the deputy refused, Judge Barr became enraged, shouted angrily, left the bench and physically attempted to escort the acquitted individual from the courtroom, and threatened the deputy and bailiff with contempt. *Id.* at 550–51.

The review tribunal held that when applying Canon 3B(4), the proper inquiry is to focus on the conduct of the judge and, in Judge Barr's case, his personal attempt to "enforce his order outside the courtroom." *Id.* at 552. Accordingly, the tribunal did not analyze the merits of the oral order, instead it focused only on Judge Barr's conduct and concluded that Judge Barr was "less than patient and courteous" to the deputy and bailiff by trying to physically enforce his order outside the courtroom by leaving the bench. *Id.* at 553. So, while *Barr* "clearly, absolutely, unequivocally, and unanimously condemn[s] the use of self-help or other personal intervention on the part of a judge in an effort to enforce a judicial order when established judicial remedies are available," we decline to extend Canon 3B(4)'s application to a legal error in the way the Commission urges us. *Id.* *Barr* holds that it is a violation of Canon 3B(4) to use self-help by conduct to enforce an order when there are other enforcement mechanisms available. It does not hold that issuing an improper or procedurally defective order is self-help that runs afoul of Canon3B(4). The record contains no evidence that Respondent acted in an impermissible manner by resorting to self-help or undermining his judicial office to enforce his Order to Search.

Finally, the Commission contends that Respondent failed to treat Simone with patience, dignity, and courteousness in violation of Canon 3B(4) by detaining Simone in the courtroom while the Order was executed. The Commission questioned Respondent about this alleged detention during the trial de novo. There is nothing in the divorce case reporter's record detailing what happened during the time the Order to Search was executed. Accordingly, we are limited to the testimony at the trial de novo. Respondent testified that Simone was "allowed to come and go so long as he was with his attorney. He wasn't taken into custody, and he wasn't

detained. He was allowed to use his phone." Dally testified that she was under the impression that Simone was not free to leave. She did not remember if Simone was allowed to use his phone while waiting in the courtroom. In the absence of other evidence or testimony, we cannot conclude that Respondent's actions exhibit a failure to treat Simone with patience, dignity, and courtesy.

Properly focusing on Respondent's conduct, we find Respondent's evidence credible and conclude that the Commission failed to meet its burden to prove by a preponderance of the evidence that Respondent willfully failed to treat Simone with patience, dignity, and courtesy as alleged in Charge Three. *See Barr*, 13 S.W.3d at 553 (finding conduct is the proper focus when reviewing an alleged violation of Canon 3B(4)). Charge Three is dismissed.

VII. Charge Four—Non-Legal Error

In Charge Four, the Commission contends that Respondent violated Canon 3B(5), which provides that a judge shall perform his duties "without bias or prejudice." TEX. CODE JUD. CONDUCT, Canon 3B(5). The Commission asserts that Respondent "used his judicial authority to advance a personal agenda," as an advocate against family violence. Charge Four alleges a non-legal error that we review using the willful standard as set out above. *See Ginsberg*, 630 S.W.3d at 7–9.

The Commission bases its contention on four things: (1) Respondent is well decorated for his work in family law, (2) Respondent's wife is involved in child-abuse cases with the Denton County District Attorney's Office, (3) Respondent has been admonished twice by the Commission for displaying bias against fathers who are parties in family violence cases, and (4) Respondent has had personal experiences with Child Protective Services and family violence. The Commission contends that Respondent's background indicates a bias against Simone that caused Respondent to issue the Order to Search.

A judge's role is to serve as a neutral party. Bias or prejudice is indicated through improper statements, favoritism, and antagonism. *See In re Williams*, SCR No. 19-0001, slip. op. at 19–21 (Tex. Spec. Ct. Rev. May 17, 2019), http://www.scjc.texas.gov/media/46745/scr-19-0001-opinion-judgment-and-concurring-dissenting-opinion.pdf (last visited Aug. 23, 2022) (finding a violation of Canon 3B(5) when a judge made disparaging comments about the district attorney's office). We have reviewed the Commission's exhibits and the hearing transcripts and find no evidence of bias or prejudice. Our conclusion is aided by a comparison of Respondent's prior admonishments—which he admits are examples of behavior falling below the standard required by the Code of Judicial Conduct. In those cases, Respondent actively questioned witnesses, disparaged their testimony, and made openly biased statements against litigants on the record. Here, the Commission points to no biased language, actions,[7] or statements by Respondent in the record. Accordingly, we conclude that Respondent did not act with bias or prejudice in violation of Canon 3B(5). Charge Four is dismissed.

VIII. Charge Five—Non-Legal Error

In its final Charge, the Commission alleges that Respondent's conduct towards Simone demonstrated incompetence in performing the duties of his office, constituted a violation of the Code of Judicial Conduct, and was willful and persistent conduct clearly inconsistent with the proper performance of his duties, or that Respondent's conduct cast public discredit on the judiciary or administration of justice in violation of Article V, § 1-a(6)A of the Texas Constitution.

[7]As noted previously, we decline to perform a legal-error analysis to a conduct-based Canon simply because the Commission has elected to invoke the language of the Code of Criminal Procedure in its charge. *See supra* VI.

Because we did not find that Respondent violated the Code of Judicial Conduct, we likewise find that he did not willfully violate Article V, § 1-a(6)A of the Texas Constitution. Accordingly, Charge Five is dismissed.

IX. Conclusion

Having failed to find that Respondent violated the Code of Judicial Conduct or the Texas Constitution as alleged, we vacate the Commission's public warning and dismiss the charges against Respondent without sanctions.