

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH MICHAEL WORSTEIN,

Defendant-Appellant.

UNPUBLISHED

March 3, 2009

No. 283376

Wayne Circuit Court

LC No. 06-000022-01-FH

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Defendant claims an appeal from the sentences imposed on his jury convictions of possession with intent to deliver the controlled substance Psilocybin, MCL 333.7401(2)(b)(ii), manufacture of the controlled substance Psilocybin, MCL 333.7401(2)(b)(ii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

The trial court sentenced defendant to concurrent prison terms of two to seven years for the Psilocybin convictions and two to four years for the marijuana conviction, and to a consecutive two-year term for the felony-firearm conviction. Defendant sought delayed appeal in this Court. This Court remanded this case to the trial court for consideration of defendant's challenge to the scoring of various prior record variables, and for any resentencing necessitated by the trial court's resolution of that challenge. This Court denied leave in all other respects.

At the resentencing hearing, the parties agreed that the recalculated guidelines recommended a minimum term range of seven to 23 months. The trial court sentenced defendant to concurrent terms of 23 months to seven years for the Psilocybin convictions and 18 months to four years for the marijuana conviction, and to a consecutive two-year term for the felony-firearm conviction. Defendant received credit for 661 days served.

Defendant argues that he is entitled to be resentenced by a different judge because the trial judge appeared to be prejudiced against him and defense counsel. We disagree.

A judge is disqualified when he or she cannot impartially hear a case. MCR 2.003(B). A party who challenges a judge for personal bias or prejudice¹ must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). In general, the challenger must prove that the judge harbors actual bias in favor of or prejudice against either a party or a party's attorney that is both personal and extrajudicial. *Van Buren Tp v Garter Belt Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). The opinions formed by a judge based on facts introduced or events that occurred during the proceedings do not constitute bias or prejudice unless the judge exhibits deep-seated favoritism or antagonism that makes the exercise of fair judgment impossible. *Cain, supra* at 496. Critical comments directed to a party or to a party's attorney ordinarily do not support a finding of bias or prejudice, *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999), nor do expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display. *Cain, supra* at 497, n. 30.

Defendant failed to preserve this issue; therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In the remarks about which defendant complains, the trial judge seemed to think that counsel believed that she should have the guidelines scoring grids committed to memory, expressed frustration when defense counsel asserted that the terms imposed constituted defendant's "first" prison sentences, asserted that defendant's actions had a harmful effect on society, and noted that defendant did not seem to be taking the situation seriously. In *People v Antoine*, 194 Mich App 189; 486 NW2d 92 (1992), this Court stated:

Sentencing is the time for comments against felonious, antisocial behavior recounted and unraveled before the eyes of the sentencer. At that critical stage of the proceeding when penalty is levied, the law vindicated, and the grievance of society and the victim redressed, the language of punishment need not be tepid. [*Id.* at 191.]

The trial judge's comments regarding defendant's illegal behavior were based on evidence introduced at trial. The trial judge's comments regarding what she seemed to perceive as counsel's expectations regarding her memory might be characterized as peevish, but do not reflect actual prejudice against defendant or defense counsel. The trial judge's remarks, read in context, do not exhibit the type of deep-seated antagonism that would make it impossible for the judge to act fairly. Defendant has not overcome the presumption that the judge acted in an impartial manner. Defendant is not entitled to relief on the ground that the trial judge was prejudiced against him or his counsel. *Cain, supra*; *Wells, supra*.

¹ MCR 2.003(B)(1).

Moreover, defendant's sentences were within the recalculated guidelines. Defendant does not assert that the trial court erred in scoring the guidelines, or that the trial court imposed sentence based on inaccurate information. Therefore, we must affirm the sentences. MCL 769.34(10).

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering