COURT OF APPEALS DECISION DATED AND FILED

May 21, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2007AP1599-CR
2007AP1600-CR

Cir. Ct. Nos. 2006CF70
2006CF213

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BYRON K. LEE,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Byron Lee appeals from judgments of conviction of third-degree sexual assault and intimidation of a victim, and from an order denying his postconviction motion. He argues that the judge who took his no

contest plea and was assigned to preside at sentencing erroneously recused himself. He also claims that the sentences imposed are unduly harsh and therefore an erroneous exercise of discretion. We conclude that no basis exists for resentencing and affirm the judgments and order.

¶2 Lee appeared before Judge Anthony Milisauskas for sentencing on August 7, 2006. Just as Lee was concluding his sentencing argument, the prosecution pointed out that the judge had previously represented Lee as defense counsel in 2004. The judge did not recall serving as counsel for Lee. After discussion with counsel, Lee indicated that he did not believe the past representation prejudiced the judge against him and asked that the sentencing proceed. However, the judge indicated his policy to recuse himself if he had previously represented any party to an action. Lee was sentenced August 22, 2006, by Judge Bruce E. Schroeder to five years' initial confinement and five years' extended supervision on the sexual assault conviction. On the intimidation conviction, sentence was withheld and Lee was placed on five years' probation consecutive to the other sentence.

¶3 Lee first argues that Judge Milisauskas erroneously exercised his discretion in recusing himself midway through the sentencing hearing. His claim is based on the judge's comment that "the judicial code indicates that if I was an attorney that represented any party in an action, I shall recuse myself. It doesn't say may." Lee argues that this is an erroneous reading of WIS. STAT. § 757.19(2)(c) (2005-06),[1] which requires a judge to disqualify himself or herself

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

when the judge "previously acted as counsel to any party in the same action or proceeding."[2] Lee contends that because Judge Milisauskas represented him on a prior case it was not representation in the "same action or proceeding" and recusal was not statutorily mandated. Lee also points to § 757.19(3), which permits the parties to waive grounds for disqualification.

¶4 Lee's contention that he was entitled to be sentenced by Judge Milisauskas is a nonstarter. Regardless of whether the judge thought his recusal was absolutely required, his recusal demonstrates his determination that he should not continue to preside in the matter because of an appearance of partiality. Under WIS. STAT. § 767.19(2)(g), a judge shall recuse himself or herself when the judge determines that "for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Each member of the Wisconsin judiciary is charged by the Code of Judicial Conduct to personally observe standards of conduct that uphold the integrity and independence of the judiciary and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, including the avoidance of the appearance of impropriety. SCR 60.02, 60.03 (2008). The judge's reference to the Code of Judicial Conduct and his quick review of what proceeding he had already heard reflects his concern for the appearance of impropriety. "The trial judge should recuse himself … whenever he believes his impartiality can reasonably be questioned." ***State v. Walberg***, 109 Wis. 2d 96, 105, 325 N.W.2d 687 (1982) (quoted source omitted). The judge was

[2] Lee also contends that the under the Supreme Court Code of Judicial Conduct, "'a judge shall not participate in any matter in which he or she has a significant financial interest or in which he or she previously acted as counsel.' SCR 60.03." The language is misquoted and is not found in SCR 60.03. SCR 60.04(1)(a) (2008) provides: "A judge shall hear and decide matters assigned to the judge, except those in which recusal is required under sub. (4) or disqualification is required under section 757.19 of the statutes …."

not required to accept Lee's willingness to waive the potential ground for recusal. *See* § 757.19(3) (disqualification may be waived by parties "and the judge"). The judge's self-recusal was a proper exercise of discretion.

¶5 In reviewing the sentence imposed against Lee, we determine whether the sentencing court properly exercised its discretion and, if so, "we follow a consistent and strong policy against interference with the discretion of the trial court, and we afford a strong presumption of reasonability to the court's sentencing determination because the court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76, *review denied*, 2006 WI 39, 290 Wis. 2d 22, 712 N.W.2d 897. When a defendant argues that the sentence is excessive or unduly harsh, a court may find an erroneous exercise of sentencing discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The imposition of the maximum, as was done here on the sexual assault conviction, does not mean that the sentence was excessive. *See* ***State v. Peters***, 192 Wis. 2d 674, 697-98, 534 N.W.2d 867 (Ct. App. 1995).

¶6 Lee contends that the fifteen-year combined sentence, including the five years' initial confinement, is excessive because it is well above the sentence anticipated by the plea agreement and the presentence recommendation.[3] He

[3] Under the plea agreement, the prosecution agreed not to make any specific sentencing recommendation other than for concurrent sentences. The presentence investigation report recommended one to two years in prison and three to four years of extended supervision on each charge.

asserts that the disparity, combined with the insufficient weight the court placed on his character as demonstrated by his acceptance of responsibility for the crimes and his lack of prior felony convictions, render the sentences unduly harsh.

¶7 A large deviation from the recommended sentences does not compel a conclusion that the sentence is harsh. The sentencing court is not bound by any recommendation. ***State v. Bizzle***, 222 Wis. 2d 100, 105-06 n.2, 585 N.W.2d 899 (Ct. App. 1998).

¶8 Lee cannot claim that he accepted responsibility for his crimes. The mere entry of a no contest plea does not mean that Lee had accepted responsibility for his crimes. The sentencing court commented that it was hearing "equivocation" about Lee's admitted guilt and that Lee was claiming innocence despite his plea. The court found that Lee minimized his prior offenses against women as petty stuff and adamantly denied any problem with his sexual behavior. On the record here the sentencing court was free to conclude that Lee did not really appreciate the criminal nature of his conduct.

¶9 It is disingenuous for Lee to claim that his lack of a prior felony conviction militated in his favor and was ignored by the court when the court found that he had an "ugly, ugly criminal history." The court specifically characterized Lee's history as one of criminal violence against women. Those findings are based on the facts of record.

¶10 Examining the nature of the offenses, including the dismissed and read in charge of second-degree sexual assault against his intimidation victim, the sentencing court characterized Lee as a rapist and a dangerous criminal. It rejected the recommended sentences and sought to keep Lee off the street and end his cycle of preying on women by the sentences it imposed. Sentence was

withheld on the intimidation charge in deference to the sentencing recommendations and to give Lee the opportunity to mend his ways. Because the sentencing court identified the objective of the sentences and based the sentences on the facts of record and appropriate considerations, it was a proper exercise of discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. Moreover, we are not persuaded that the sentences shock public sentiment or violate what reasonable people would find right and proper under the circumstances relied on by the sentencing court. The sentences are not excessive.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.