

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY O. SIMMS,	§ No. 206, 2003
	§
Defendant Below,	§ Court Below – Superior Court
Appellant,	§ of the State of Delaware,
	§ in and for Sussex County
v.	§ I.D. 0207014771
	§
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: September 9, 2003  
Decided: October 8, 2003

Before **HOLLAND, STEELE** and **JACOBS**, Justices.

This 8th day of October 2003, upon consideration of the briefs on appeal and the record, it appears to the Court that:

(1) The defendant-appellant, Jeffrey O. Simms, filed an appeal from the Superior Court's April 4, 2003 sentence of eight years of incarceration for the crime of Burglary in the Second Degree, and lesser sentences for the crimes of Endangering the Welfare of a Child, Criminal Mischief, and Offensive Touching.

(2) Simms has raised one issue on appeal. He asserts that, although the trial judge declined to sentence Simms as an habitual offender, the trial judge did sentence Simms to eight years imprisonment under the burglary charge, which is the minimum required by section 4214(a) of the habitual

offender statute. According to Simms, this creates the impression that the habitual offender statute was followed by the sentencing judge. Simms asserts that this creates an appearance of unfairness and the matter should be remedied by remanding the matter to the Superior Court for sentencing by another judge.

(3) Because Simms' defense counsel did not request that the sentencing judge recuse himself, this Court must review Simms' claim under the plain error standard.<sup>1</sup> "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process ... [and] is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."<sup>2</sup>

(4) Simms' claim that the sentencing judge should have recused himself is not supported by the record. Assuming *arguendo* that the issue has not been waived, the record reflects no evidence of bias and, therefore, no evidence of plain error. Accordingly, we affirm the judgment of the Superior Court.

---

<sup>1</sup> See Supr. Ct. R. 8; *Stevenson v. State*, 709 A.2d 619, 635 (Del. 1998).

<sup>2</sup> *Wainright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

(5) Simms was indicted on charges of Burglary in the Second Degree, Assault in the Third Degree, Endangering the Welfare of a Child, and Criminal Mischief. The charges originated from an incident in which Simms forced his way into the residence of his former girlfriend, Martha Reid. Simms choked Reid in front of her sixteen-year old son, and subsequently threw a cinder block through Reid's rear window.

(6) Simms' trial began on February 10, 2003. Simms was found guilty of Burglary in the Second Degree, Endangering the Welfare of a Child, Criminal Mischief, and the lesser included offense of Offensive Touching instead of the more serious Assault in the Third Degree.

(7) Simms' sentencing was originally scheduled for March 24, 2003. Prior to that date, the State filed a motion to have Simms classified as an habitual offender. The trial judge postponed sentencing until April 4, 2003 to give defense counsel time to address the State's habitual offender motion.

(8) On April 4, 2003, defense counsel objected to the sentencing judge treating a 1982 conviction for theft in Maryland as a felony for purposes of finding Simms to be an habitual offender. Simms' attorney also requested the judge not to impose an eight-year sentence. The sentencing judge then ruled that Simms was not an habitual offender and further stated:

I was, at sentencing last week, fully prepared to proceed to sentence Mr. Simms, and had my notes and comments written last week. The sentence I am going to give today is the sentence that I prepared last week, and I just want the record to reflect that. Because without me stating that, there might be some inference that there is a coincidence of the sentence with the habitual offender statute. That is no more than that. But I did not have the habitual motion in front of me at the time of sentencing, it had been filed and was not handed up to me until the moment of sentencing, in which to give an opportunity, therefore to counsel to [present] the 1982 theft matter. But what you are getting today is what I was fully prepared to give last week.

(9) On April 4, 2003, Simms was then sentenced to the statutory maximum of eight years for the offense of Burglary in the Second Degree, pursuant to Del. Code Ann. tit. 11, § 4204(k). *See* Del. Code Ann. tit. 11, §§ 825, 4205(b)(4). Lesser sentences were given on the other charges. At the time, defense counsel made no further objection and, in particular, did not request the judge to disqualify himself.

(10) On appeal, Simms argues that the sentencing judge should have recused himself because the judge appeared motivated by the eight-year minimum sentence that was provided for in the habitual offender statute, even though the State's motion to classify Simms as an habitual offender was denied.

(11) In *Los v. Los*, this Court adopted a two-step analysis in reviewing a sentencing judge's recusal decision: (i) whether, as a matter of

subjective belief, the judge was satisfied that he or she could proceed to hear the case free of bias or prejudice concerning a party; and (ii) whether objectively there is an appearance of personal bias.<sup>3</sup> On appeal, the reviewing court must be satisfied that the sentencing judge engaged in the subjective test and will review the merits of the objective test.<sup>4</sup> In this case, the record reflects that both aspects of the test are satisfied.

(12) First, the sentencing judge recognized the possibility of the appearance of bias and explicitly clarified for the record that the sentence he was about to impose was not influenced in any way by the State's habitual offender motion. The judge stated that his sentencing decision had been reached a week prior to his reviewing the State's motion. That the sentence actually imposed would have been the statutory minimum had Simms been declared an habitual offender, the judge noted, was merely coincidental. Accordingly, this Court is satisfied that the sentencing judge engaged in the subjective test set forth in *Los v. Los*.<sup>5</sup>

(13) The second part of the *Los* test is also satisfied. Simms had a violent criminal history, including a 1990 conviction for Sodomy, a 1985 conviction for Assault and Battery, and a 1984 conviction for Nighttime

---

<sup>3</sup> See *Los v. Los*, 595 A.2d 381, 384-385 (Del. 1991).

<sup>4</sup> See *id.* at 385.

<sup>5</sup> *Id.*

Burglary. Moreover, the crime for which Simms was to be sentenced involved his forcing his way into his girlfriend's home, choking her in front of her sixteen-year old child, and then throwing a cinder block through her rear window. This history made the sentencing judge's conclusion that Simms had a propensity toward violence, was a danger to society, and thus deserved the statutory maximum sentence for burglary, objectively reasonable.

(14) Accordingly, the record reflects no evidence of bias on the part of the sentencing judge and *a fortiori* no plain error.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland  
Justice