

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MAY 21, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 96-0070-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALLAN P. NELSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Allan Nelson appeals his judgment of conviction for four counts of first-degree sexual assault of a child. Nelson argues his due process right to be sentenced by an impartial judge was violated when the judge refused to recuse himself after indicating in another defendant's case that his experience and belief was that pedophiles cannot be rehabilitated. Because we conclude that the trial court's impartiality cannot reasonably be questioned, we deny Nelson's request to be resentenced by a different judge. We affirm the judgment.

The facts are undisputed. Nelson was initially charged with twenty counts of first-degree sexual assault of a child who had not attained the age of thirteen years and with one count of intentionally causing bodily harm to that child. Nelson asked the judge to recuse himself on grounds the judge had prejudged sentencing issues in the case. Specifically, Nelson pointed to a prior case involving a different defendant, Eugene Jensen, and the same trial judge. The judge at Jensen's sentencing stated:

A sick, sick, sick person who preys on innocent little girls, and I'm going to see to it that you are never given an opportunity to do that again. It's my strongest hope that you take your la[s]t breath in prison and you will never get out of prison until you have done that and you exit in a pine box. You prove again what has been this Court's experience that pedophiles cannot be rehabilitated. ... There is no sense in trying to think even in terms of rehabilitation. But you have, as I said, re-enforced the Court's belief that there is no rehabilitating a pedophile. ... no chance for rehabilitation.

At a hearing on Nelson's motion, the trial court refused to recuse himself, noting:

I think the Court's comments in the Jensen case were appropriate for Mr. Jensen's case, but that is not a blanket condemnation against everybody who comes into court charged with sexually molesting juveniles. The Court does not believe that because those statements were made in a case, the Court has to recuse itself in every other case in which defendants are charged with molesting juveniles. So the motion for refusal is denied.

Ultimately, pursuant to a plea agreement, Nelson pled no contest to four of the sexual assault charges. Four of the remaining sexual assault charges were read in for sentencing purposes, and the remaining counts were dismissed. The trial court adopted the recommendation of the presentence

report and sentenced Nelson to twenty-five years on each of the four counts, to be served consecutively. On appeal, Nelson argues the sentences should be vacated and that he should be resentenced by a different judge.

There are two tests for determining whether Nelson's due process right to an impartial and unbiased judge has been violated. See *State v. Rochelt*, 165 Wis.2d 373, 378-79, 477 N.W.2d 659, 661 (Ct. App. 1991). First, there is a subjective test based on the trial judge's own determination of his or her own impartiality in Nelson's case. See *State v. Walberg*, 109 Wis.2d 96, 106, 325 N.W.2d 687, 692 (1982). A trial judge's declaration that he or she was not biased satisfies the subjective test. See *Rochelt*, 165 Wis.2d at 379, 477 N.W.2d at 661. Here, the trial judge's declaration at the motion hearing that he was not biased satisfied the subjective test. See *id.*

The second test is an objective test based on whether impartiality can reasonably be questioned. *Walberg*, 109 Wis.2d at 106, 325 N.W.2d at 692. Whether a trial court's impartiality can reasonably be questioned is a question of law for our de novo review. *Rochelt*, 165 Wis.2d at 379, 477 N.W.2d at 661. We conclude that the trial judge's statements in the Jensen case do not raise a reasonable question about his impartiality in Nelson's case.¹ First, Nelson has not identified any Wisconsin case where a trial court's remarks in a separate, unrelated case involving another defendant could be evidence of the trial court's bias against other defendants that appear before the same judge in the future.

Second, even if a trial judge's statements in a prior case can be proof that a judge is biased against like defendants, the trial judge's statement in Jensen's case does not suggest he has a preconceived belief that he will apply in all cases. The judge was speaking about Jensen, not Nelson. His comments did not indicate that he would automatically reject the possibility of rehabilitation for defendants he sentenced for the same crimes in the future. As the judge noted at the hearing on the recusal motion, he thought the comments in the Jensen case were appropriate for Jensen and did not constitute "a blanket

¹ Additionally, we do not reach the issue whether the trial court's statements in Jensen's case raise a reasonable question about his impartiality in Jensen's case. This opinion should not be construed as deciding any issues relating to Jensen's case.

condemnation against everybody who comes into court charged with molesting juveniles."

Third, Nelson has not produced evidence that he has been diagnosed as a pedophile, so even if the trial judge's statement could be termed an improper statement about pedophiles, there is no reason the statement would apply to Nelson. Not only has Nelson failed to produce any medical testimony or reports suggesting he is a pedophile, he told the presentence investigator that he has had no prior sexual contacts with other children and that he never had any connection with child pornography.

Fourth, Nelson has produced no expert testimony suggesting he is a candidate for rehabilitation. Although Nelson's attorney indicated at sentencing that he thought Nelson would be a strong candidate for long-term intensive therapy, he offered no medical testimony or reports suggesting rehabilitation would be feasible or effective for Nelson.

Nelson argues that his sentence should be vacated in accordance with our decision in *State v. Martin*, 100 Wis.2d 326, 327, 302 N.W.2d 58, 59 (Ct. App. 1981). In *Martin*, the trial court stated at the defendant's sentencing that he would never grant straight probation to a person convicted of delivery of a controlled substance. *Id.* at 327, 302 N.W.2d at 59. We held the trial court's statement evidenced a preconceived policy impermissibly tailored to fit only the crime and not the offender that was impermissibly, at least in part, closed to individual mitigating factors. *Id.* We vacated the sentence and remanded for resentencing. *Id.*

Unlike the trial judge's comments in *Martin*, the judge's comments in Jensen's case did not indicate that he has a preconceived policy impermissibly tailored to fit only the crime and not the offender. The judge did not indicate how his doubts about rehabilitation would affect sentencing. In contrast, the judge in *Martin* stated that he would never grant straight probation to a person convicted of the delivery of a controlled substance. *Id.* In the Jensen case, the judge simply acknowledged the court's experience with prior pedophile offenders. He did not state that he would never consider individual mitigating factors in other cases.

For the foregoing reasons, we conclude that the trial court's impartiality in Nelson's case cannot reasonably be questioned and, therefore, Nelson's due process right to an impartial and unbiased judge has not been violated. Thus, we affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.