COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2013

Diane M. Fremgen
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 No. 2012AP1867-CR **Cir. Ct. No. 2009CF9**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RORY A. KUENZI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Rory Kuenzi appeals a judgment of conviction and an order denying postconviction relief. Kuenzi contends that he is entitled to resentencing before a different judge because: (1) the circuit court judge was biased; or, alternatively, (2) the circuit court erroneously exercised its sentencing

discretion. We conclude that the circuit court judge was not biased and that the circuit court properly exercised its sentencing discretion. Accordingly, we affirm.

Background

¶2 In January 2009, Kuenzi was charged with multiple criminal offenses stemming from an incident in which he and two other individuals intentionally struck and killed deer with snowmobiles. The circuit court dismissed some of those charges, and the State appealed. While that appeal was pending, Kuenzi was convicted in a separate case of homicide by intoxicated use of a motor vehicle and hit and run causing death (the OWI case).

¶3 We reversed the circuit court's order dismissing charges in this case. On remand, Kuenzi moved for Waupaca County Circuit Court Judge Philip Kirk to recuse himself based on statements Judge Kirk made while presiding over the sentencing hearing in the OWI case. The circuit court denied the motion. Kuenzi then pled no contest to three counts of mistreatment of animals, causing death, and the circuit court imposed consecutive terms of incarceration, but made them concurrent with Kuenzi's previously imposed OWI sentence.

¶4 Kuenzi filed a postconviction motion seeking a new sentencing hearing before a different judge. Kuenzi argued that he was denied his due process right to an impartial judge and that the circuit court erroneously exercised its sentencing discretion. The circuit court denied Kuenzi's postconviction motion. Kuenzi appeals.

Discussion

¶5 Kuenzi first argues that he was denied his due process right to an impartial judge at sentencing. *See* ***State v. Goodson***, 2009 WI App 107, ¶8,

320 Wis. 2d 166, 771 N.W.2d 385 ("The right to an impartial judge is fundamental to our notion of due process."); ***State v. Gudgeon***, 2006 WI App 143, ¶11, 295 Wis. 2d 189, 720 N.W.2d 114 ("'[A] minimal rudiment of due process is a fair and impartial decisionmaker.'" (quoted source omitted)). Whether Kuenzi was denied his due process right to an impartial judge is a question of law, which we review de novo. *See* ***State v. O'Neill***, 2003 WI App 73, ¶11, 261 Wis. 2d 534, 663 N.W.2d 292 (WI App 2002).

¶6 We presume that a judge was impartial, and the defendant has the burden to rebut that presumption. ***Goodson***, 320 Wis. 2d 166, ¶8. Judicial bias may be established by a showing of either objective or subjective bias. ***Gudgeon***, 295 Wis. 2d 189, ¶20. Here, Kuenzi does not contend that the court was subjectively biased; rather, Kuenzi contends that the record reflects objective bias. A judge is objectively biased when "a reasonable person could question the judge's impartiality." ***Id.***, ¶21. Objective bias may be established through actual bias or the appearance of bias. ***Id.***, ¶¶21-24. Actual bias is established by facts showing that the circuit court actually treated the defendant unfairly. ***Goodson***, 320 Wis. 2d 166, ¶9. The appearance of bias offends constitutional due process principles when it reveals a great risk of actual bias. *See* ***Gudgeon***, 295 Wis. 2d 189, ¶23. In other words, the appearance of bias is sufficient to require recusal "whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***Id.***, ¶24. If judicial bias is established, reversal is automatic; a biased judge is a structural error not subject to harmless error analysis. ***Id.***, ¶¶9-10.

¶7 Kuenzi contends that the circuit court's statements at the sentencing hearing in this case and in the OWI case establish actual bias. He points to the

following statement by the court at the sentencing hearing in this case: "I knew at that time [of the OWI sentencing] what I would impose on these particular charges if I had the opportunity to do so, and I'll do the same thing today that I would have done then." Kuenzi argues that this statement makes clear that the court impermissibly prejudged the sentence it would impose in this case. Kuenzi acknowledges that the circuit court stated at the postconviction motion hearing that the statement that it knew what it would impose in this case meant that the court intended to impose a concurrent sentence, not that the court had decided the length of the sentence. Kuenzi argues, however, that the statement is reasonably interpreted to mean that the court had determined all aspects of the sentence, including the length.

¶8 We conclude that the record as a whole establishes that the court did not impermissibly prejudge the sentence in this case. The court explained at the postconviction motion hearing that, when it indicated it knew at the time of the OWI sentencing what it would impose in this case, the court was referring to its intention to impose a concurrent sentence. The court's explanation provides another reasonable interpretation of its statement, and we have no basis to question that explanation. Additionally, at the sentencing hearing, the court explained that it considered the facts relevant to the standard sentencing factors and objectives outlined in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, in reaching a sentencing determination. The court did not, as in ***Goodson***, 320 Wis. 2d 166, ¶16, state that it was imposing a particular sentence *because* it had decided earlier it would do so, rather than as a present exercise of discretion. The court here noted that it would have imposed a concurrent sentence if it had imposed sentence for both cases at the same time, reviewed the facts relevant to sentencing in this case, and then reached a sentencing determination. Thus, the court

determined the sentence to impose in this case at the sentencing hearing, rather than imposing a sentence it had previously decided.

¶9 Next, Kuenzi contends that the circuit court's statement that it knew at the time of the OWI sentencing what it would impose in this case creates the appearance of bias with a great risk of actual bias. He argues that a reasonable person would discern a great risk that the court had prejudged the sentence. We disagree. As we explain above, the entire record reveals that the court explained that its statement was limited to an intent to impose a concurrent sentence, and that the court in fact exercised its discretion in imposing sentence in this case rather than imposing a predetermined sentence. We conclude that a reasonable person, viewing the record as a whole, would not believe there was a great risk that the court actually determined the sentence to impose prior to the sentencing hearing in this case.

¶10 Kuenzi also contends that the extreme language used by the court at the OWI sentencing hearing as to the court's view of Kuenzi's negative character creates the appearance of bias. Those comments include: "One word, four syllables—sociopath. Your life has been less relevant than finding couch change. I think you are a knuckle-dragging, Neanderthal, fissiped"; "[Y]our short existence has been a goat rodeo of abject, wretched and despicable failure"; "I believe you possess those traits that make you beyond redemption"; "[Y]our behavior shows antisocial personality, even an abiotic or a nonliving one." Kuenzi argues that the court's remarks revealed a pervasive animus toward Kuenzi, which would lead a reasonable person to believe that the court would not be able to "hold the balance nice, clear and true." *See* ***Liteky v. United States***, 510 U.S. 540, 555 (1994) (holding that a court's stated opinions based on current or former proceedings may

support a claim of bias if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible"). We disagree.

¶11 While the court used unusually strong and vivid language in imposing its sentence, the court's statements would not lead a reasonable person to believe that the court had a deep-seated antagonism toward Kuenzi that prevented the court from reaching a fair sentencing decision. The court's statements at the OWI sentencing were based on the horrific facts before the court, which included Kuenzi striking the OWI victim with his truck, and then moving the victim's body before leaving the scene, and, as to this case, injuring and killing deer in a particularly cruel manner with a snowmobile. As the State points out, a circuit court judge may become exceedingly ill disposed toward a defendant based on the evidence presented, but the court's critical, disapproving, or hostile remarks do not necessarily show bias. *See **id.*** at 550-55. Such was the case here.

¶12 Next, Kuenzi contends that the same facts that support his claim of a due process violation required Judge Kirk to recuse himself under the Code of Judicial Conduct. Kuenzi cites the requirement that judges recuse themselves when the facts and circumstances would lead a reasonable person to question the judge's ability to be impartial, and for a judge to be dignified and perform duties without bias or prejudice. *See* SCR 60.04(1)(d) and (e); 60.04(4). We have already explained that the record as a whole would not lead a reasonable person to question the judge's impartiality, and that the court's remarks, while unusually harsh, were supported by the facts before the court. Accordingly, assuming without deciding that the Code of Judicial Conduct provides grounds for reversal, we reject Kuenzi's argument that recusal was required.

¶13 Finally, Kuenzi argues that the circuit court erroneously exercised its sentencing discretion by approaching sentencing with a made-up mind. *See* ***State v. Martin***, 100 Wis. 2d 326, 302 N.W.2d 58 (Ct. App. 1981). We review a circuit court's sentencing decision for an erroneous exercise of discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶17.

¶14 As we have explained above, the record reveals that the circuit court did not simply impose a predetermined sentence in this case. Rather, the court in fact exercised its sentencing discretion in determining the sentence to impose. Accordingly, we reject this argument. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).