COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1147 **Cir. Ct. No. 2006CF1139**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRENCE C. STOKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Terrence Stokes, pro se, appeals a judgment of conviction and an order denying his WIS. STAT. § 974.06[1] motion for postconviction relief. Stokes challenges the circuit court's partiality during his trial. We conclude his argument is procedurally barred and without merit in any event. Accordingly, we affirm.

BACKGROUND

¶2 An Information charged Stokes with burglary of a building, contrary to WIS. STAT. § 943.10(1m)(a); arson, contrary to WIS. STAT. § 943.02(1)(a); and six counts of first-degree reckless endangerment, contrary to WIS. STAT. § 941.30(1). The charges arose from a fire at an apartment building on October 28, 2006. A trial ensued, and the owner of the apartment building testified that three of the four apartments were being rented at the time of the fire. Six residents were at home when the fire occurred. C.C.[2] testified that on the night of the fire, she called Stokes at approximately 9:00 p.m. and agreed to pick him up at an address in Green Bay. When she arrived, Stokes indicated he was shooting dice and would call her later.

¶3 C.C. initially went home but decided to go back out and meet a female friend. The two women went to a night club until bar time, and then went to a restaurant for approximately half an hour. C.C. then dropped off her friend and proceeded back to her apartment. As C.C. entered the apartment parking lot, a

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Pursuant to WIS. STAT. RULE 809.86, we refer to this witness/victim only by the initials C.C.

man ran up to her car, asked her if she lived there, told her the building was on fire, and directed her to call 911. C.C. attempted to warn other residents of the fire and ultimately used a neighbor's telephone to call 911, as her phone battery had died. C.C. then noticed that the car Stokes often drove was in the parking lot. Concerned for his safety, C.C. telephoned Stokes and told him the apartment building was on fire. Stokes replied that he knew, and "he started the mother fucker." When C.C. asked why, Stokes replied: "Bitch, you want to go out," apparently upset that C.C. had gone out that evening.

¶4 During recorded telephone conversations played for the jury, Stokes made a number of other inculpatory statements. Stokes asked C.C. to retrieve his car keys, indicating he dropped the keys either in the apartment or outside. When C.C. asked, "Why did you do that to me," Stokes replied, "I didn't mean to do that shit. Can you just get the car keys?" C.C. then stated: "You burned my house down because I fuckin' went out. How the fuck you gonna do that shit?" Stokes replied: "Look … I'm sorry … I didn't mean for that shit to happen like that."

¶5 At the close of the State's case, the prosecutor dismissed the burglary charge, but the jury found Stokes guilty of all six counts of first-degree reckless endangerment and the arson count. Stokes sought to appeal his conviction, but his appointed counsel filed a no-merit report. Stokes filed a response to the no-merit report, claiming his trial attorney was ineffective, and also challenging the circuit court's sentencing discretion.

¶6 This court accepted the no-merit report and summarily affirmed the judgment of conviction, concluding there were no arguable meritorious issues that could be raised on appeal. ***State v. Stokes***, No. 2008AP721-CRNM, unpublished slip op. (May 5, 2009). On March 9, 2015, Stokes filed a pro se WIS. STAT.

§ 974.06 postconviction motion. The circuit court denied the motion as both procedurally barred and without merit. Stokes now appeals.

DISCUSSION

¶7 All claims of error that a criminal defendant can bring should be consolidated into one motion or appeal. Claims that could have been raised on direct appeal or in a previous WIS. STAT. § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion, absent a showing of sufficient reason why the claims were not raised on direct appeal or in a previous § 974.06 motion. ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756 (*reaffirming* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994)). Moreover, this procedural bar applies with equal force where the direct appeal was conducted pursuant to the no-merit process, as long as the procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124; ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574.

¶8 Here, the circuit court correctly observed that Stokes had already pursued a direct appeal. Stokes was represented by counsel, who filed a no-merit report. Stokes responded to the no-merit report and failed to raise the issues complained of now. The factual basis for the bias claims Stokes now brings was known to Stokes at the time of the no-merit report, as it occurred during trial and thus before appellate briefing began. Because Stokes received a copy of the no-merit report, Stokes himself had the opportunity to raise any potentially meritorious issue not raised by counsel. Stokes does not provide any sufficient

reason why he now identifies issues, in his postconviction motion, but could not have done so when given an opportunity to respond to the no-merit report.

¶9 Furthermore, we conclude the no-merit procedures in this case were, in fact, followed and the record demonstrates a sufficient degree of confidence in the result. Upon reviewing Stokes' bias claims, we conclude the matters Stokes addresses do not alter our confidence in the result. Accordingly, we conclude the circuit court did not err in denying the postconviction motion based on the procedural bar.

¶10 Regardless, we would affirm even were we to reach the merits. Stokes contends the circuit court's admonishment of C.C. and explanation of her Fifth Amendment rights when she initially refused to answer the State's questions and asked to "plead the Fifth" showed judicial bias. We conclude the court's comments were entirely appropriate.

¶11 We presume a judge has acted fairly, impartially, and without bias. ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. A defendant asserting judicial bias must overcome the presumption of nonbias by a preponderance of the evidence. ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). We generally apply both a subjective and an objective test when evaluating bias. The subjective test is based on the circuit court's own determination of its impartiality. A judge's decision that he or she was not biased may satisfy that test. The objective test is based on whether the court's impartiality can be reasonably questioned, and can exist when there is an appearance of bias or when there are objective facts demonstrating the court in fact treated the defendant unfairly. *See* ***State v. Walberg***, 109 Wis. 2d 96, 106, 325 N.W.2d 687 (1982).

¶12 C.C. was called as the State's witness under subpoena, and the State began the questioning by asking how old she was. C.C. did not respond. The court indicated C.C. needed to answer the question, and C.C. stated, "I know, but." The State asked if there was something wrong, and whether C.C. could state her age. C.C. then responded: "Your Honor, can I say something? … I mean, do I have any rights at all?" The court then excused the jury and took a recess. When the court went back on the record the State explained that it had spoken with C.C., and she was "extremely upset about being here." The State noted it intended to play portions of the tape recordings of Stokes and C.C.'s conversation the night he burned down her apartment building. The State indicated this would cause C.C. "emotional turmoil." The court then stated:

> THE COURT: [C.C.], it is not uncommon for witnesses to become emotional when something, when they are testifying or something is happening in here and for me to extend to them an opportunity to take a break. So, if you are up here on the witness stand and it's just getting very difficult for you emotionally, you should let me know. I will authorize the taking of a break.

¶13 The jury was brought back in, and C.C. was asked to state her name. However, when again asked her age, C.C. responded, "Can I – um, can I plead the Fifth on everything?" The circuit court asked C.C., "What do you mean by plead the Fifth? C.C. indicated she did not "want to say anything that can incriminate myself, so." The court asked, "Well, how does telling us your age expose you to any sort of criminal prosecution? That's what pleading the Fifth means, that you can be charged." C.C. responded, "But I know it is going to eventually get to questions that I really don't want to answer." C.C. also indicated that she did not want to answer the questions because she did not want to get Stokes in trouble, and that she was "afraid about being here."

¶14 The circuit court again excused the jury and engaged C.C. in a colloquy explaining what her oath meant, what her Fifth Amendment rights against self-incrimination would protect her from and what they would not, including lying on the stand or not answering questions that did not tend to incriminate her. The court concluded, "[C.C.], there is nothing that I heard today that relieves you of your responsibility to get on the stand and tell the truth. You need to do that. Are you prepared to do that if I bring the jury back out?" C.C. agreed and direct examination proceeded.

¶15 Our review of the record reveals the circuit court acted fairly, impartially, and without bias. The court merely responded to a situation developing at trial with a witness. The court did not threaten or cajole the witness; it explained what her rights and obligations were. We specifically reject Stokes' suggestion of bias from the court's statement, "I don't know if it's that if you plan to lie today. If so, you could be charged with perjury." Although Stokes focuses on this statement out of context, the statement was made when the court was attempting to determine C.C.'s purpose in attempting to invoke the Fifth Amendment and does not "reveal[the court's] bias."

¶16 Quite simply, the circuit court exercised reasonable control over the manner of questioning a witness so as to ascertain the truth. As the court correctly observed in its decision denying WIS. STAT. § 974.06 relief, it determined upon questioning outside the presence of the jury that C.C. was not actually in fear of incriminating herself, but rather simply reluctant to offer testimony against Stokes. As such, clearly the court did not subjectively determine it was impartial. Furthermore, that C.C.'s testimony was unfavorable to Stokes and C.C. may have incorrectly attempted to invoke the Fifth Amendment to hedge her testimony does not demonstrate objective bias.

By the Court.—Judgment and order affirmed.

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