COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1693 **Cir. Ct. No. 2012TP15**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO SYDNEY E. J., A PERSON UNDER THE AGE OF 18:

ADOPTION CHOICE, INC,

PETITIONER-RESPONDENT,

V.

JERMAINE K. H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: MARK ROHRER, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] Jermaine K. H. appeals from a final order involuntarily terminating his parental rights (a "TPR" order) in April 2014. He argues that the judge who entered the order should have recused himself because he was the Manitowoc county district attorney when Jermaine was prosecuted for violent acts against the child's mother in 2012. Jermaine argues that recusal was mandatory because the criminal case was the same "matter in controversy" as the TPR under SCR 60.04 and because reasonable persons would question the judge's impartiality under the circumstances. Jermaine further argues that the proceedings violated his due process rights and that he is entitled to a new trial.

¶2 This record reveals no basis for judicial disqualification under WIS. STAT. § 757.19(2) nor any evidence of a probability of actual bias rising to the level of a due process violation. The judge made a determination that he could act impartially, which is all that § 757.19(2)(g) requires. ***State v. Pinno***, 2014 WI 74, ¶93, ___ Wis. 2d ___, 850 N.W.2d 207. The circumstances do "not approach the extreme circumstances that violate due process." *See* ***id.***, ¶94. We affirm.

Facts

¶3 In 2012,[2] Jermaine was prosecuted for violent acts against his girlfriend, Jennifer. District Attorney Mark Rohrer appeared at the preliminary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] In his appellate briefs Jermaine incorrectly states that the criminal complaint against him was filed in 2013, and that the preliminary examination in that case took place in 2014. The transcript of the preliminary hearing that was made part of the record in this appeal confirms that the hearing took place on August 1, 2012, that the complaint was filed before that hearing, and that the crimes in question took place in 2012.

hearing held on August 1, 2012. At that hearing, Jennifer, who was pregnant with Jermaine's child at the time of the hearing, testified concerning the violent incident. Although the criminal proceedings are not part of the record in this appeal in the TPR case, it appears that Jermaine's bond conditions prohibited him from contacting Jennifer and that he was convicted and sentenced for some of the alleged crimes in April 2013.

¶4 In December 2012, soon after the child's birth, while Jermaine's criminal case was still pending, Jennifer filed a petition indicating that she wished to voluntarily terminate her parental rights and had placed the child with an adoption agency. The petition alleged Jermaine as the child's father and petitioned to terminate Jermaine's rights as well. In January 2013, the adoption agency working with Jennifer filed a report that described Jennifer's allegations that her desire to protect the child and herself from abuse by Jermaine was one of the reasons she wished to terminate her parental rights.

¶5 Jermaine contested the petition. After genetic testing confirmed that he was the father of the child, Jermaine moved for substitution of judge.[3] As of July 2013, a new judge, the Honorable Mark Rohrer, had been assigned. In a letter dated July 23, 2013, Judge Rohrer explained that the attorney representing Jennifer and the adoption agency had asked him to determine whether he had a conflict of interest in light of his involvement in Jermaine's 2012 prosecution. Judge Rohrer explained in the letter that he did not believe he had any conflict of

[3] The first proceedings in the case were before the Honorable Patrick Willis. At some point the case was reassigned and proceedings were before the Honorable Jerome L. Fox.

interest because the criminal case against Jermaine was closed and Jermaine was sentenced by a different court.

¶6 On August 14, 2013, Jermaine moved for recusal, asking Judge Rohrer to reconsider his decision. On August 15, 2013, there was a pretrial conference in Judge Rohrer's chambers and the judge told the parties he would seek an outside opinion regarding recusal. After that conference, the judge spoke to Jim Alexander, the executive director of the Wisconsin Judicial Commission. Alexander stated that in his opinion there was no conflict of interest. In Alexander's view, "if the court felt it would not be biased or prejudiced against [Jermaine] in this matter based upon the court's prior knowledge of [Jermaine], it could continue to proceed in this case." Judge Rohrer stated that Alexander's conclusion "seems to be supported by [SCR] 60.04(4)(a) where it is up to the court to determine whether or not a bias or prejudice exists." Judge Rohrer further explained that he did not find SCR 60.04(4)(c) applicable, because he was not previously an attorney associated with this case or a material witness in the case. He also stated that "the court does feel that it will *not* be biased or prejudicial against [Jermaine]."

¶7 The court denied the motion for recusal on these grounds. Jermaine petitioned for leave to file an interlocutory appeal, but that petition was denied.

¶8 A jury trial took place in March 2014, and the jury unanimously found that Jermaine had failed to assume parental responsibility. The court denied Jermaine's motion for judgment notwithstanding the verdict and found a basis for the jury's verdict. Based upon the jury's verdict, the court found that there were grounds for terminating Jermaine's parental rights. The adoption agency explained that it would send a representative to the dispositional hearing in

April 2014 and that Jennifer continued to desire voluntary termination of her parental rights. At that April hearing, the court accepted Jennifer's voluntary termination of her rights and concluded that termination of Jermaine's rights and Jennifer's rights was in the best interests of the child. Jermaine appeals.

Discussion

¶9 When reviewing a claim of judicial bias, we presume the judge was impartial. ***Pinno***, 850 N.W.2d 207, ¶92. That presumption may be rebutted by a showing that the recusal was required by WIS. STAT. § 757.19(2) or the Due Process Clause. *See* ***Pinno***, 850 N.W.2d 207, ¶94 ("In addition to the requirement that a judge must reach a subjective determination that he is not biased under … § 757.19(2)(g), the Due Process Clause requires an objective inquiry.").

¶10 WISCONSIN STAT. § 757.19(2) identifies seven situations in which recusal is required. ***State v. American TV & Appliance of Madison, Inc.,*** 151 Wis. 2d 175, 181-82, 443 N.W.2d 662 (1989). The first six situations, § 757.19(2)(a)-(f), are "susceptible of objective determination," but the seventh situation, § 757.19(2)(g), is purely subjective: it applies when "a judge determines that, for any reason, [the judge] cannot, or it appears [the judge] cannot, act in an impartial manner." ***American TV***, 151 Wis. 2d at 182. On appeal from a recusal determination under § 757.19(2)(g), the appellate court's review is limited to whether the judge actually made a subjective determination of his or her ability to be impartial. ***Pinno***, 850 N.W.2d 207, ¶93. A declaration by the judge that he or she can act impartially satisfies § 757.19(2)(g). ***Pinno***, 850 N.W.2d 207, ¶93; *see also* ***State v. Carviou***, 154 Wis. 2d 641, 646, 454 N.W.2d 562 (Ct. App. 1990) ("[O]nce a trial judge determines that there is no partiality or appearance of partiality under [§]757.19(2)(g), [that] decision … is reviewable only to establish

whether the trial judge … made a determination requiring recusal and failed to heed [that] finding.").

¶11 The Due Process Clause in "extreme circumstances" requires recusal based upon an objective inquiry into an appearance of bias. ***Pinno***, 850 N.W.2d 207, ¶94. The Due Process Clause guarantees a right to a fair trial by an impartial judge, and the question whether that due process right has been violated is reviewed de novo. ***State v. Hollingsworth***, 160 Wis. 2d 883, 893, 467 N.W.2d 555 (Ct. App. 1991). A Due Process Clause violation only occurs when the judge's conduct is so egregious that the probability of actual bias rises to an unconstitutional level. *See* ***id.*** 894-95; *see also* ***Caperton v. A.T. Massey Coal Co.***, 556 U.S. 868, 877 (2009). In analyzing whether a judge's conduct is objectively so egregious as to create an unconstitutional probability of bias, we may consider the supreme court rules that govern judicial conduct. *See* ***Pinno***, 850 N.W.2d 207, ¶94 ("Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution." (quoting ***Caperton***, 556 U.S. at 890)). However, a violation of the judicial conduct rules themselves "do[es] not constitute grounds for recusal." ***Carviou***, 154 Wis. 2d at 644; *see also* ***American TV***, 151 Wis. 2d at 185 ("The Code of Judicial Ethics governs the ethical conduct of judges; it has no effect on their legal qualification or disqualification to act").

¶12 We reject Jermaine's argument that ***Pinno*** changed this well-established legal framework when it discussed the supreme court rules governing judicial conduct in its analysis of recusal. Jermaine points out that the court in ***Pinno*** "engaged in an extended discussion of Supreme Court Rules bearing upon disqualification without citing ***Carviou*** and without holding that only [WIS. STAT. §]757.19(2) … was a basis for mandatory disqualification." But the fact that the

court relied on those rules to explain why nothing overcame the presumption of impartiality in that case, ***Pinno***, 850 N.W.2d 207, ¶¶95-96, does not imply the converse, that violation of those rules necessarily would violate due process. Nowhere in ***Pinno*** did our supreme court state that it was changing the framework for appellate review of judicial recusal claims, and we are bound by our prior decisions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶13 Turning to Jermaine's appeal, he argues that Judge Rohrer could not act impartially because of his involvement as district attorney in Jermaine's prior criminal proceedings. Jermaine seems to concede that the criminal and TPR cases are not "the same action or proceedings" under WIS. STAT. § 757.19(2)(c) and does not argue that § 757.19 provides a basis for a new trial in his case. He also takes pain to distinguish ***State v. Henley***, 2010 WI 12, 322 Wis. 2d 1, 778 N.W.2d 853, which involved Justice Roggensack's participation in an appeal in which the defendant alleged she had previously judged the "same case" at the court of appeals level as prohibited by § 757.19(2)(e). *See* ***State v. Henley***, 2011 WI 67, ¶42 n.22, 338 Wis. 2d 610, 802 N.W.2d 175 (Abrahamson, C.J., Bradley, J., and Crooks, J., dissenting).

¶14 Though Jermaine never argues that recusal was required by WIS. STAT. § 757.19(2), he insists that recusal was mandatory because his prior criminal proceedings and the current proceedings are so closely related that they are the same "matter in controversy" within the meaning of SCR 60.04(4)(c). In addition, he insists, without citing authority, failure to recuse entitles him to a new trial, because "facts and circumstances created conditions under which reasonable and well-informed persons would question" the judge's ability to be impartial.

¶15 As Jermaine apparently concedes, nothing in WIS. STAT. § 757.19(2) provides a basis for granting him a new trial. None of the objective bases for disqualification under § 757.19(2)(a)-(f) apply here, and as for the alleged appearance of impartiality, the subjective determination required by § 757.19(2)(g) was made. On two separate occasions, Judge Rohrer determined, on the record, that he could act impartially in Jermaine's TPR case: first in his July 2013 letter and again when he denied Jermaine's motion for recusal.

¶16 With respect to SCR 60.04(4)(c), even if we thought these were the same "matter in controversy," which we do not, no legal authority authorizes us to grant a new trial on the basis that the judge who handled a trial violated the code of judicial conduct. Just the opposite: binding precedent holds that a violation of the judicial conduct rules provides no independent basis for a new trial unless circumstances are so extreme as to violate due process. ***Carviou***, 154 Wis. 2d at 644 (citing ***American TV***, 151 Wis. 2d 175). While the judicial conduct rules may be relevant in determining whether alleged bias is so egregious as to violate due process, "codes of judicial conduct provide more protection than due process requires." ***Pinno***, 850 N.W.2d 207, ¶94 (citation omitted).

¶17 Turning to Jermaine's due process argument, the only objective grounds that Jermaine asserts as a basis for Judge Rohrer's actual bias are the situation itself: Judge Rohrer participated in Jermaine's criminal prosecution, and some facts from that prosecution were relevant in Jermaine's TPR case. Jermaine points to nothing in the record to suggest the actual bias in the court's conduct of the proceedings. Jermaine's assertions are mere allegation or speculation. They do not support the conclusion that this trial was a violation of due process.

By the Court. —Order affirmed

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.