COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP3002-CR **Cir. Ct. No. 2000CF4953**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALPHONSO MILLER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Alphonso Miller appeals judgments convicting him of second-degree reckless homicide and contempt of court. He argues that the circuit court acted in a biased manner during the hearing on his motion to

withdraw his guilty plea on the homicide charge, violating his right to due process. We affirm.

¶2 Miller contends that the circuit court did not act in an impartial manner during the plea withdrawal hearing because it questioned him extensively, going beyond permissible clarification questions into an adversarial role. He points to our decision in ***State v. Carprue***, 2003 WI App 148, ¶11, 266 Wis. 2d 168, 667 N.W.2d 800, which has since been reversed by the supreme court,[1] in which we stated that "when a trial court's questioning reveals its disbelief of the defendant's testimony, the court has crossed over the line of impartiality," and that such favoritism toward the State and against the defendant violates the defendant's due process rights.

¶3 The supreme court's decision reversing our opinion in ***Carprue*** is determinative of this case, and leads us to reject Miller's claim. The supreme court stated that automatic reversal is constitutionally required where "a judge presides in a case where the judge has a direct, personal, substantial pecuniary interest in the outcome of the proceeding," but that only "in the most extreme cases would disqualification based on *general* allegations of prejudice or bias be constitutionally required (emphasis in original)." ***State v. Carprue***, 2004 WI 111, ¶¶59-60, 274 Wis. 2d 656, 683 N.W.2d 31. Because Carprue's claim was based on a general allegation of bias—that the judge was anti-defendant—the supreme court examined the record to determine whether Carprue's claims about the judge's conduct rose to the level of constitutional violation and concluded that the record did not warrant such a finding. ***Id.***, ¶¶63-66.

[1] *See* ***State v. Carprue***, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31.

¶4 The supreme court also explained that claims of bias grounded on "matters of kinship, personal bias, state policy, [and] remoteness of interest" did "not rise to a constitutional level," but were instead "matters of legislative discretion." ***Id.***, ¶60. The supreme court noted that our legislature "requires disqualification if a judge determines that he or she cannot, or it appears he or she cannot, act impartially in a case," *see* WIS. STAT. § 757.19(2)(g) (2003-04).[2] The court explained that a judge's disqualification decision under § 757.19(2)(g) was a subjective determination that had to be made by the judge himself or herself, *see* ***State v. American TV & Appliance***, 151 Wis. 2d 175, 182-83, 443 N.W.2d 662 (1989), so Carprue's failure to object was fatal to a claim under § 757.19(2)(g). ***Carprue***, 274 Wis. 2d 656, ¶¶61-62. Because "a more thorough record of [the judge's] subjective thought process" was not created due to the failure to object, the supreme court assumed the judge believed she could act in an impartial manner. ***Id.***, ¶62.

¶5 We reject Miller's claim of bias based on the supreme court's reasoning in ***Carprue***. Miller did not object to the judge's questioning, and his failure to object is fatal to a claim under WIS. STAT. § 757.19(2)(g). While the tone of the circuit court's questions to Miller is somewhat troubling, the circuit court's conduct was not so extreme as to implicate due process concerns. Our review of the transcript convinces us that the circuit court had no predetermined opinion about Miller's credibility, but decided that he was not credible *after* he had begun to testify, and thus began to heatedly question him. While we do not

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

condone the circuit court's actions, the judge's conduct did not deprive Miller of due process of the law.

By the Court.—Judgments affirmed.

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