

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 12, 2008**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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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. 2007AP2322-CR**

**Cir. Ct. No. 2006CT440**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES H. KLICK,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Walworth County:  
JAMES L. CARLSON, Judge. *Affirmed.*

¶1 ANDERSON, P.J.<sup>1</sup> James H. Klick appeals from a judgment finding him guilty of operating under the influence of an intoxicant in violation of

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

WIS. STAT. § 346.63(1)(a), fourth offense, as well as operating with a prohibited alcohol concentration in violation of § 346.63(1)(b), fourth offense. Klick argues that his past relationship with Judge Carlson should have been grounds for disqualification under WIS. STAT. § 757.19(2)(g). Klick also argues that Judge Carlson's denial of his motion violated his due process rights by not allowing him a fair and impartial trier of fact. We disagree with Klick's arguments and, therefore, we affirm the judgment.

¶2 On October 23, 2006, Klick was found guilty of operating a motor vehicle under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a), fourth offense, and operating with a prohibited alcohol concentration in violation of § 346.63(1)(b), fourth offense. Klick does not contest any of the facts leading to his conviction, but rather contends that the circuit court judge (Judge Carlson) should have disqualified himself under WIS. STAT. § 757.19(2)(g). Klick based his motion for disqualification upon several past interactions he and his former wife had with Judge Carlson that Klick believes would cause Judge Carlson to be biased in his trial. These factors include Klick's work for Judge Carlson as a clerk while Klick was in law school; Judge Carlson's presiding over the marriage of Klick and his former wife; Klick and Judge Carlson's past golf outings; and, finally, Judge Carlson's participation in interventions concerning Klick.

¶3 After considering Klick's motion, Judge Carlson determined that his past interactions with Klick would not impair his ability to preside over the case. In making his determination, Judge Carlson noted that the interactions Klick referred to occurred roughly ten years prior to the trial. Judge Carlson denied the motion for disqualification, and Klick appeals, arguing that Judge Carlson should

have disqualified himself and that his failure to do so violated Klick's due process rights.

¶4 WISCONSIN STAT. § 757.19(2)(g) requires disqualification when “a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.” The determination of whether there is a basis for disqualification is a subjective one. *State v. American TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 182, 443 N.W.2d 662 (1989). Section 757.19(2)(g) requires disqualification only when the judge determines that he or she cannot act impartially. *American TV*, 151 Wis. 2d at 183. It does not require disqualification when someone other than the judge objectively believes there is an appearance that the judge will not be able to act impartially, or when someone other than the judge can reasonably question the judge's impartiality. *Id.* Therefore, the subjective determination of whether the judge can act impartially is for the trial judge alone to make. *Id.* Because the basis for disqualification is a subjective one for the trial judge to make, a reviewing court will have no other standard to apply other than to objectively determine whether the trial judge made such a determination as to whether he or she could act impartially. *Id.* at 186.

¶5 In the present case, we find that Judge Carlson did make a subjective determination as to whether he could act impartially. The supreme court justice in *American TV* was found to have made such a determination after he sent a letter to each party disclosing his interactions with an employee of American TV along with his thoughts that he could act impartially despite these past interactions. *Id.* at 187-88. In the present case, Judge Carlson informed both parties in open court that he had no doubts of his ability to preside over the case impartially. We find that Judge Carlson's declaration satisfied the requirement of a subjective

determination and, therefore, we reject Klick's argument that Judge Carlson should have disqualified himself.

¶6 Klick further argues that his due process rights were violated because he was not afforded the chance to go before a fair and impartial judge. The question of whether a judge is a neutral and detached magistrate is a question that the appellate court reviews de novo and without deference to the trial court. *State v. McBride*, 187 Wis. 2d. 409, 414, 523 N.W.2d 106 (Ct. App. 1994). Although there is no deference given to the trial court, there is a presumption that judges are unbiased, honest and have integrity. *Id.* To overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge was biased. *Id.* at 414.

¶7 Klick attempts to overcome these presumptions by presenting evidence of social interactions between Judge Carlson and himself that Klick argues demonstrate an appearance of impartiality. Supreme court precedent has presented three scenarios where an appearance of bias rather than actual bias requires disqualification. *Crater v. Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007), *petition for cert. filed Feb. 11, 2008*. Those three situations are (1) when the judge has a direct or substantial pecuniary interest in the case, (2) when the judge becomes involved in an ongoing, bitter controversy with one of the litigants, and (3) when the judge acts as part of the accusatory process. *Id.*

¶8 In the present case, we find that none of these situations exist. Klick presents case law that supports judges being disqualified when an appearance of bias arises that he feels are applicable to his case. However, we find that those cases are distinguishable from Klick's because they contain one of the three situations that require disqualification given by the supreme court, and Klick's

case does not. One case involves a judge who prejudged the guilt of a defendant, therefore becoming a part of the accusatory process, *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005), and another case involved a judge who had a strong pecuniary interest in the case he presided over, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986). In the present case, however, Judge Carlson had no pecuniary interest in the case, did not engage in any ongoing controversies with either litigant, and did not prejudge the guilt of Klick or become part of the accusatory process in any other way. Judge Carlson was more like the justice in *American TV* who had past interactions with an employee of one of the parties and was still able to act impartially. *American TV*, 151 Wis. 2d at 189.

¶9 The fact that Klick had prior interactions with Judge Carlson does not rise to the level of an appearance of bias that requires disqualification to ensure due process. We therefore disagree with Klick and reject his argument that his due process rights were violated.

¶10 As a final note, there are certain basic requirements for form and documentation with regard to motions. Among those requirements are that a motion must be supported by evidentiary support if alleging facts for the court to consider. See WIS. STAT. §§ 802.01(2) and 802.05(2)(c). Also, a motion must include the signer's telephone number and address. Sec. 802.05(1).

¶11 Klick's motion fails to meet these basic requirements. Klick's motion does not provide any support for the alleged facts in the motion such as a marriage license showing Judge Carlson presided over the ceremony or any documents showing when he worked for Judge Carlson as a law student. Klick also fails to include any contact information in the motion such as a telephone

number or address. Therefore, upon these form violations alone we could find that Klick's motion fails.

¶12 We conclude that it was not error for Judge Carlson to not disqualify himself from presiding over Klick's case. We find that Klick's due process rights were not violated as a result of Judge Carlson presiding over the case.

*By the Court.*—Judgment affirmed.

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

