**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

February 19, 1997



**No. 96-0405-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**MARK H. PRICE,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

BROWN, J. Mark H. Price pled no contest to a charge of delivering a controlled substance as a repeat offender and a charge of threatening to injure a public official, the Winnebago county district attorney.

Price raises challenges to the conviction and to the repeat offender portion of the sentence. He first argues that the trial court judge should have recused himself because the judge had a close working relationship with the district attorney. Because of the trial judge's alleged bias, Price argues that his due process right to appear before a neutral and detached judge was violated. Second, Price argues that the repeat offender portion of the sentence is void because the prosecution did not adequately prove that he had a prior conviction, nor did the trial court make a finding to that effect.

We reject both challenges. With regard to recusal, we note that the only proceeding of substance was sentencing. Further, we conclude that the record from this proceeding contains nothing which suggests that the trial judge acted impartially. And with regard to Price's repeat offender sentence, we conclude that there was adequate proof of his earlier conviction; the presentence investigation (PSI) report contained a complete record of Price's earlier offenses. Moreover, since this PSI report was presented to the trial court, we are satisfied that this penalty enhancer is legally valid even though the trial court never made an express finding that Price was a repeat offender.

In August 1994, Price was charged as being a party to the crime of drug delivery and a related drug tax stamp violation, both as a repeat offender. *See* §§ 139.88, 139.95, 161.41(1)(h)1, 939.05 and 939.62(1)(b), STATS., 1993-94. The

penalty enhancer was based on Price's first-degree homicide conviction in January 1991. Although Price was incarcerated when the drug charges were filed, he was accused of arranging marijuana sales outside the prison.

Subsequently, in February 1995, an amended criminal complaint was filed. The amended complaint added an allegation that Price solicited someone outside the prison to kill the district attorney. *See* § 939.30(2), STATS. The district attorney had prosecuted Price for the intentional homicide sentence which he was then serving.

By June 1995, Price accepted a plea agreement. The drug tax stamp charge would be dropped and the solicitation charge would be changed to a charge of threatening to injure a public official. *See* § 943.30, STATS. Price pled no contest to the two charges on June 2, 1995. The trial court sentenced Price to nine years of imprisonment on the drug count and five years of imprisonment on the threat to injure an official count. Price now appeals this conviction and the order denying postconviction relief.

We first turn to Price's claim that the trial judge was not impartial. Two standards apply when gauging if there was a violation of a defendant's due process right to an impartial trial judge. *See* ***State v. Rochelt***, 165 Wis.2d 373, 378, 477 N.W.2d 659, 661 (Ct. App. 1991). One is termed the "subjective test" and measures the judge's own perception of his or her impartiality. *See* ***id.*** In this case, however, the trial judge determined that he was impartial and

Price properly concedes that this declaration ends this line of inquiry.[1] *See* ***id***. at 379, 477 N.W.2d at 661.

The alternative manner for gauging the impartiality of the trial judge is termed the "objective test." As its name implies, this test requires that we review the record de novo and make a determination of "whether impartiality can reasonably be questioned." *See* ***id.***

Price outlines his argument under the "objective test" as follows. He relies heavily on a theory that the district attorney (the intended victim) naturally had a close working relationship with this trial judge, as he did with the other judges in the county, and that this relationship impacted the trial judge's ability to make impartial rulings. He then explains how other members of the courthouse community removed themselves from these proceedings, including the district attorney who sought and obtained a special prosecutor and two of the other circuit court judges. Moreover, Price notes that another judge was substituted after he refused to recuse himself from this case, seemingly suggesting that the trial judge who stayed on the case should have also recused himself. Finally, Price adds that he received the maximum sentence. Price concludes that he has thus raised a reasonable question about the trial judge's impartiality.

[1] The trial judge, the Honorable Bruce K. Schmidt, stated: "I haven't been shown anything that would indicate, nor do I feel that there is any reason that I can not [sic] act in an impartial manner in this case."

We begin by observing that the central theory underlying Price's challenge, that the special working relationship between a trial judge and the local district attorney is a strong signal of bias, is rebutted by ***State v. Harrell***, 199 Wis.2d 654, 546 N.W.2d 115 (1996). There, the supreme court faced a claim that the trial judge should have recused himself because his spouse was a local assistant district attorney. The court held, however, that the statute governing recusal[2] did not mandate that the judge be recused in such circumstance provided that his spouse was not involved in the actual prosecution. *See* ***id***. at 656-57, 546 N.W.2d at 116. We believe that ***Harrell*** illustrates that the possibility of a special working relationship developing between a trial judge and a local prosecutor does not *automatically* mean that the trial judge will be biased against criminal defendants. *Cf.* ***id***. at 662, 546 N.W.2d at 118 ("The thought that a judge would have an increased propensity to convict criminals because of such a relationship is ... preposterous") ( quoted source omitted).

Moreover, after reviewing the record, we conclude that Price has failed to satisfy the "objective test." Owing to Price's decision to enter a plea

[2] *See* § 757.19(2), STATS.

agreement, the only proceeding of substance was his sentencing. While Price argues that the decision to give him the maximum possible sentence suggests that the judge was not impartial, the judge arrived at this decision in a careful and objectively reasonable manner.

The judge took steps to ensure that there was a complete record regarding Price's criminal and personal history as well as possible mitigating factors. The judge heard testimony on Price's behalf from five witnesses and from Price himself. The judge also had the results of a PSI report and heard the arguments of counsel.

Furthermore, once the trial judge reached his sentencing decision, he was able to carefully explain the rationales supporting his conclusion. The judge noted that he was grounding the decision on Price's "substantial criminal record involving very violent crimes." And although the trial judge recognized that Price did not have a history of drug offenses, the judge was nonetheless concerned because Price had planned this criminal act while in prison and Price had hoped to use the proceeds from this drug activity to finance even more criminal activity. The judge also noted that the PSI report recommended incarceration.

Since the judge ensured that he had a complete record and was able to explain what aspects of the record were utilized in his reasoning, we cannot conclude that the trial judge's decision-making was motivated by a special relationship with the district attorney. In addition, the trial judge's careful attention to the facts during sentencing negates any possible theory that

this trial judge should have been recused from the case, as his other colleagues were. We hold that Price's right to an impartial judge was preserved.

We next turn to Price's challenge to the repeat offender enhancer. Although Price dissects this claim into two separate parts, his basic contention is that this portion of his sentence is legally void because the requirements of § 973.12(1), STATS., were not met. This issue presents a question of law which we decide independently of the trial court. *See* ***State v. Koeppen***, 195 Wis.2d 117, 126, 536 N.W.2d 386, 389-90 (Ct. App. 1995).

Price first argues that his prior conviction was not adequately proven. He directs us toward the written plea agreement and the transcript from the plea hearing. Although he acknowledges that the terms "as a repeater" were used in the document and during his colloquy with the trial court, he argues that his admission to the repeater allegation was not sufficient. *See* § 973.12(1), STATS. ("If prior convictions are admitted by the defendant ....").

Nonetheless, we are satisfied that there was legally adequate proof of Price's prior conviction. In ***State v. Goldstein***, 182 Wis.2d 251, 513 N.W.2d 631 (Ct. App. 1994), this court held that a PSI report containing the date of a prior conviction qualifies as an "official report" which may be used to prove that a defendant has a prior conviction. *See* ***id.*** at 259, 513 N.W.2d at 635; *see also* § 973.12(1), STATS. ("An official report ... shall be prima facie evidence of any conviction ...."). The PSI report prepared for Price's sentencing clearly reveals the date of his prior homicide conviction and thus, under ***Goldstein***, it

constitutes adequate proof of his prior conviction for the purposes of sentencing enhancement.

The second argument Price raises concerns the manner in which the prosecution presented this information and the way in which the trial court reacted to it. He again directs us to the record and claims that it does not reveal that he was "adjudged a repeater."

However, as we noted at the beginning of this discussion, whether a penalty enhancer is valid presents a question of law which we answer independently of the trial court. *See* ***Koeppen***, 195 Wis.2d at 126, 536 N.W.2d at 389-90. We previously elaborated about what this meant in ***State v. Zimmerman***, 185 Wis.2d 549, 518 N.W.2d 303 (Ct. App. 1994). There, we explained that review of the trial court's enforcement of a penalty enhancer turns on the application of § 973.12, STATS., to an undisputed set of facts gathered from the record. *See* ***Zimmerman***, 185 Wis.2d at 554, 518 N.W.2d at 304-05.

Thus, contrary to Price's contention, our assessment of whether his penalty enhancer is valid does not turn on whether the trial court expressly found that the prosecution met its burden of proving that the defendant was a repeater in accordance with § 973.12(1), STATS. In fact, in ***Zimmerman***, we expressly rejected the proposition that we owed deference to such a finding during our appellate inquiry into the validity of a penalty enhancer. *See* ***Zimmerman***, 185 Wis.2d at 304, 518 N.W.2d at 304. Rather, we independently examine the record to determine if it shows either of two things: one, that the

defendant made a sufficient admission to his or her prior crime; or two, that there was before the court an official record showing that the defendant had a prior conviction when a plea was accepted or when the sentence was imposed. *See* § 973.12.

When we apply these standards to this case, it is clear that the requirements of § 973.12, STATS., have been satisfied. At sentencing, the court was shown Price's PSI report which, as we explained above, properly documented his prior conviction. Moreover, the transcript reveals that Price (through counsel) acknowledged receiving a copy of the report and reveals that Price made corrections to other facts within this report, but not his prior record. We are satisfied that the requirements of § 973.12(1) have been fulfilled and that Price's repeater enhancer is valid.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.