COURT OF APPEALS
DECISION
DATED AND RELEASED

January 15, 1997

NOTICE

No. 96-2124-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY A. GIBBS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

SNYDER, P.J. Gregory A. Gibbs (hereinafter, Gibbs) appeals from a judgment of conviction finding him guilty of marijuana possession contrary to §§ 161.41(3r)[1] and 939.05(1), STATS. On appeal, Gibbs contends that the judge who authorized the search warrant was not a neutral and detached magistrate, as required by the United States and Wisconsin

[1] Redesignated § 961.41(3g)(e), STATS., by 1995 Wis. Act 448, § 262, effective July 9, 1996.

Constitutions, and therefore the evidence obtained as a result of the search should be suppressed. We disagree with Gibbs's contention that under § 757.19(2)(g), STATS., there was an "appearance of impropriety" and consequently affirm.

Judge Michael S. Gibbs signed a search warrant for the police to search property occupied by Gibbs and his wife June. The search warrant was for the police to locate marijuana and paraphernalia related to the possession of marijuana. As a result of the search, Gibbs and his wife were charged with possession of THC and possession of drug paraphernalia.[2] After entering a plea of not guilty, Gibbs filed a motion to suppress the evidence obtained by the search based on his belief that Judge Gibbs could not act as a "neutral and detached magistrate." *See* ***State v. DeSmidt***, 155 Wis.2d 119, 131, 454 N.W.2d 780, 785 (1990); *see also* WIS. CONST., art. I, § 11.

Gibbs based his claim that Judge Gibbs was not neutral and detached on the fact that "some time in either '82 or early '83" when Judge Gibbs was a practicing attorney, he had represented June on controlled substance charges. At that time, Gibbs met with then Attorney Michael Gibbs about the charges issued against June. Gibbs testified that those discussions included his own past use of marijuana and that he discussed with Attorney Gibbs a request by the police to assist their investigation.

[2] The disposition of the case filed against June is not at issue in this appeal.

On several occasions after that, Gibbs saw Attorney Gibbs in social situations. Gibbs testified that Attorney Gibbs knew who he was and that they had discussed the fact that they had the same last name. However, Gibbs was not related to Attorney Gibbs, and except for the one time when Attorney Gibbs represented June, he did no other legal work for the Gibbses.

After Judge Robert J. Kennedy denied Gibbs's motion to suppress, Gibbs pled guilty pursuant to a plea agreement. Gibbs now renews his argument that because of Attorney Gibbs's previous representation of his wife and their subsequent social contacts, there was an appearance of impropriety when Judge Gibbs signed the search warrant. Therefore, he reasons, Judge Gibbs was not a neutral and detached magistrate and on that basis Gibbs now appeals.

Whether Judge Gibbs was a neutral and detached magistrate as required by the United States and Wisconsin Constitutions is a question of constitutional fact which we review de novo. *See* ***State v. McBride,*** 187 Wis.2d 409, 414, 523 N.W.2d 106, 109 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1796 (1995). There is a presumption that a judge is free of bias and prejudice. ***Id.*** Furthermore, to overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is prejudiced or biased. ***Id.*** at 415, 523 N.W.2d at 109.

Section 757.19(2), STATS., provides that "any judge shall disqualify himself or herself from any ... proceeding when one of the following situations occurs ...." The list which follows includes "six fact-specific situations, the

existence of which can be determined objectively, and one general subjective situation which is based solely upon the judge's state of mind." ***State v. Harrell,*** 199 Wis.2d 654, 658, 546 N.W.2d 115, 116-17 (1996). None of the six fact-specific situations are applicable to this case.[3] We consider then the subjective situation:

> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

Section 757.19(2)(g). Gibbs claims that based on the above language, Judge Gibbs was required to recuse himself because of an appearance of impropriety.

However, in making our determination of whether Judge Gibbs should have disqualified himself, we must evaluate the existence of both subjective and objective bias. *See* ***McBride,*** 187 Wis.2d at 415, 523 N.W.2d at 110. The subjective component refers to the judge's own determination of whether he or she will be able to act impartially. *See* ***id.*** If Judge Gibbs himself

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[3] The six fact-specific situations enumerated in § 757.19(2), STATS., are:

> (a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.
>
> (b) When a judge is a party or a material witness ....
>
> (c) When a judge previously acted as counsel to any party in the same action or proceeding.
>
> (d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.
>
> (e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.
>
> (f) When a judge has a significant financial or personal interest in the outcome of the matter.

thought he was biased, he was required to disqualify himself from hearing the application for the search warrant. *See* ***id.***; *see also* § 757.19(2)(g), STATS.

Section 757.19(2)(g), STATS., requires a judge's disqualification only when *the judge makes a determination that he or she cannot act in an impartial manner.* ***State v. American TV & Appliance,*** 151 Wis.2d 175, 183, 443 N.W.2d 662, 665 (1989). It does not require disqualification where one other than the judge believes that the judge's impartiality can reasonably be questioned. ***Id.*** The determination of a judge's actual or apparent inability to act impartially is left solely to the discretion of the judge. *See* ***id.*** Furthermore, a challenge to the judge's decision on disqualification under § 757.19(2)(g) is subject to our objective review of whether Judge Gibbs made this subjective determination. *See* ***Harrell,*** 199 Wis.2d at 664, 546 N.W.2d at 119.

Since Judge Gibbs did not disqualify himself, we can presume that he believed that he was capable of acting in an impartial manner.[4] Therefore, any inquiry into the subjective propriety of Judge Gibbs acting on the application for a search warrant is at an end. *See* ***McBride,*** 187 Wis.2d at 415, 523 N.W.2d at 110. We next examine whether there are any objective facts demonstrating bias. ***Id.*** at 416, 523 N.W.2d at 110.

[4] Gibbs argues that under this analysis, there is no review of whether Judge Gibbs considered his ability to act impartially because the issuance of a search warrant is an ex parte action. As such, a defendant is unaware of the court's action and therefore unable to raise the issue. However, we conclude that since Gibbs has not claimed that the warrant was issued without probable cause, this negates any contention that Judge Gibbs acted improperly or unfairly in authorizing the search warrant. *See* ***State v. McBride***, 187 Wis.2d 409, 417, 523 N.W.2d 106, 110 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1796 (1995).

In applying the objective test, it is necessary that Gibbs show that Judge Gibbs treated him unfairly. *See* ***id.*** A mere showing of an *appearance* of partiality or impropriety, or suggesting that the circumstances might lead one to speculate that the judge was biased, is not sufficient. ***Id.*** In the instant case, Gibbs has presented the court with two facts: (1) that more than ten years earlier, Judge Gibbs, while still an attorney, had represented his wife; and (2) that he and Judge Gibbs had met socially on several occasions in the ensuing years. There is nothing in the record to suggest that Judge Gibbs acted unfairly. In response to questioning on cross-examination, Gibbs admitted that he had no reason to believe that Judge Gibbs had any actual bias against him. Rather, Gibbs's argument is that "this is the situation where the suggestion of impropriety is on a par with actual impropriety."

Our review of the case law, however, persuades us that this is not the standard in Wisconsin.[5] Based on our review of the case law, we conclude that unless a judge determines that his or her own sense of propriety requires recusal, the statutory guidelines do not call for recusal merely because a party suggests an appearance of impropriety. *Cf.* ***Sturdevant v. State,*** 49 Wis.2d 142, 145-46, 181 N.W.2d 523, 525 (1970).

Gibbs also argues that the evidence seized when the search warrant was executed should be suppressed because the warrant was not

[5] While Gibbs contends that "[o]ther jurisdictions have held that previous representation in a same or similar case constitutes an appearance of impropriety and [a situation where] a judge should recuse or disqualify himself," the development of the law in this state provides us with a clear standard. We therefore do not further consider Gibbs's authority to the contrary.

issued by a neutral and detached magistrate. Because of our conclusion that there is no evidence that Judge Gibbs acted improperly in authorizing the search warrant, it is not necessary to address the suppression argument. *See* ***State ex rel. Wis. Envt'l Decade v. Joint Comm.,*** 73 Wis.2d 234, 236, 243 N.W.2d 497, 498 (1976) (a reviewing court will usually decline to address moot issues).

By the Court. – Judgment affirmed.

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