COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3113-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT J. STYNES,

DEFENDANT-APPELLANT.

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

NETTESHEIM, J. Robert J. Stynes appeals from a judgment of conviction for bail jumping as a repeater contrary to §§ 946.49(1)(a) and 939.62(1)(a), STATS., and an order denying his motion for postconviction relief. Stynes argues that the trial court committed reversible error when it failed to disqualify itself pursuant to § 757.19(2)(g), STATS. Stynes additionally contends that the sentence imposed by the trial court was unduly harsh and unconscionable.

We reject each of Stynes' arguments. We affirm the judgment of conviction and the order denying postconviction relief.

Stynes was convicted of bail jumping as a repeater on April 21, 1997, following his plea of guilty. The facts underlying the bail jumping charge are undisputed. On January 8, 1997, Stynes was found guilty of a misdemeanor offense and was sentenced to a period of jail time. On January 24, Stynes was released from jail pending his appeal from that conviction. Upon releasing Stynes, the court reinstated his original bond and imposed as a condition of release that Stynes have no contact with his father, Frederick Stynes.

On January 31, 1997, several officers from the City of Delavan Police Department witnessed Stynes exit the Delavan House Hotel accompanied by his father. As a result, Stynes was charged with intentionally violating the conditions of his bond contrary to § 946.49, STATS. Stynes initially appeared before Judge John R. Race at which time Stynes pled not guilty to the offense and requested a jury trial. Prior to his arraignment, Stynes requested a substitution of judge and the case was assigned to Judge Robert J. Kennedy.

On March 11, 1997, Stynes filed a motion requesting Judge Kennedy to disqualify himself for the following reasons:

> 1. Your Honor, when employed in the district attorney's office, prosecuted the defendant in other criminal cases.
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> 2. Your Honor when employed in the district attorney's office prosecuted the defendant's father and sister.
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> 3. The pending case is a Bail Jumping, which consists of the defendant and his father having contact in violation of a no contact order.
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> 4. The defendant has been sentenced by Your Honor on another occasion, when Your Honor stated being familiar to the defendant and his family and criminal history.

On June 11, 1997, Judge Kennedy addressed Stynes' motion for recusal. After reviewing the reasons underlying the motion, Judge Kennedy stated that he did not believe grounds existed for substitution because any information the court had gained from previous contacts with Stynes and his family would be information which would be provided to the court prior to sentencing. When asked if any other reasons existed warranting recusal, Stynes responded, "No, I just feel that I'm not going to be getting a fair hearing in here." Judge Kennedy then denied Stynes' motion stating, "I appreciate you may not feel you're going to be getting a hearing. I will give you a fair hearing, and that's my job. And I don't see any reason to believe I won't …."

On April 21, 1997, Stynes pled guilty as charged and acknowledged his repeater status. Stynes was sentenced to the maximum of three years' imprisonment. Stynes filed a postconviction motion requesting a sentence modification. The court denied the motion.

We first address Stynes' claim that Judge Kennedy should have recused himself. Section 757.19(2), STATS., sets forth seven situations in which a judge shall disqualify himself or herself.[1] *See* ***State v. Harrell***, 199 Wis.2d 654,

[1] Section 757.19(2), STATS., provides in relevant part:

> **(2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
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> (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, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.
>
> (c) When a judge previously acted as counsel to any party in the same action or proceeding.

(continued)

658, 546 N.W.2d 115, 116-17 (1996). The first six situations are fact specific and involve an objective inquiry into whether, for example, the judge is related to any party or counsel or whether the judge is a party or a material witness. *See* ***id.***; *see also* § 757.19(2)(a) and (b). Stynes does not argue that Judge Kennedy should have recused himself due to any situation set forth under § 757.19(2)(a) through (f). Instead, Stynes argues that Judge Kennedy should have recused himself under § 757.19(2)(g).

Paragraph (g) of § 757.19(2), STATS., provides that recusal must occur "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." That paragraph presents a subjective situation which requires disqualification only if the judge determines that he or she cannot remain impartial. *See* ***Harrell***, 199 Wis.2d at 658, 546 N.W.2d at 117. Our review of this subjective determination is limited to establishing whether the judge made a determination requiring disqualification. *See* ***id.*** at 663-64, 546 N.W.2d at 119.

Stynes argues that because of Judge Kennedy's prior contacts with himself and his family, Judge Kennedy's failure to recuse himself amounted to

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> (d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.
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> (e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.
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> (f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.
>
> (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.

reversible error. Stynes' argument overlooks that § 757.19(2)(g), STATS., "does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification ... in a situation in which the judge's impartiality 'can reasonably be questioned' by someone other than the judge." ***Harrell***, 199 Wis.2d at 663-64, 546 N.W.2d at 119 (quoting ***State v. American TV & Appliance***, 151 Wis.2d 175, 183, 443 N.W.2d 662, 665 (1989)). Thus, Stynes' objective belief that Judge Kennedy was biased does not provide grounds for disqualification.

Here, Judge Kennedy considered each reason presented by Stynes' motion for recusal. He stated: "I will give you a fair hearing, and that's my job. And I don't see any reason to believe I won't …." We conclude that Judge Kennedy subjectively determined that he could be impartial despite his previous contacts with Stynes and with Stynes' family. As such, his recusal was not mandated under § 757.19(2)(g), STATS.

Next, we address Stynes' claim that the sentence was unduly harsh. Stynes argues that "[a]s a direct result of the trial court's inability [to] separate its bias from the facts of the case, the defendant was sentenced to the three year maximum prison term for bail jumping." Stynes contends that this sentence should be modified because it is unduly harsh and unreasonable. We are unpersuaded.

A reviewing court will uphold a trial court's sentencing decision unless it reflects an erroneous exercise of discretion. *See* ***State v. Scherreiks***, 153 Wis.2d 510, 517, 451 N.W.2d 759, 762 (Ct. App. 1989). In reviewing whether a trial court erroneously exercised sentencing discretion, we consider whether the

trial court considered appropriate factors and whether the trial court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). The trial court's sentence is presumed reasonable; therefore, the burden is on the defendant to show that the sentence is based upon an unjustifiable or unreasonable basis. *See* ***State v. Roubik***, 137 Wis.2d 301, 310, 404 N.W.2d 105, 108 (Ct. App. 1987). We will uphold a sentence unless "'[i]t is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Dietzen***, 164 Wis.2d 205, 213, 474 N.W.2d 753, 756 (Ct. App. 1991) (quoted source omitted). Based on our review of the record, we are satisfied that the trial court's sentence was not unreasonable.

The trial court sentenced Stynes to three years' imprisonment, the maximum sentence for bail jumping as a repeater. *See* §§ 946.49(1)(a) and 939.62(1)(a), STATS. In doing so, the trial court considered the appropriate factors: the gravity of the offense, the character and rehabilitative needs of the defendant and the need to protect the public. *See* ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984).

In its sentencing remarks, the trial court first observed that Stynes had a prior traffic conviction in 1993 for operating a motor vehicle while intoxicated and a conviction for fleeing an officer at that time. The court also noted that Stynes has been arrested twenty-one times in Wisconsin. The State then provided additional information that Stynes had been arrested six times in Florida. The trial court reviewed the causes for the arrests on the record.

The trial court further determined that although the bail jumping offense was not "vicious or aggravated," it was "the tip of an iceberg" of an extensive criminal record of property offenses and violent offenses against people. The court found that Stynes' violation of the bond conditions was "blatant" and that Stynes had a history of a criminal lifestyle and violent behavior. The court stated:

> The past record tells me that Bob is directed towards criminal type of conduct or at least disobedience of … legitimate authority. His history of undesirable behavior patterns is … tied up in the criminal history he has and the abuse of substances.
>
> Personality, character and social traits, he has a very serious drinking problem that for years he's had, hasn't been adequately addressed…. It's led to repeat criminal conduct in multi-states obviously, Wisconsin and Florida.

The court then found that Stynes' culpability was total, that he had a great need for rehabilitation and that the public needs were also implicated.

We conclude that the trial court stated an adequate basis for the sentence based upon the facts of this case. We further conclude that the sentence was not unduly harsh so as to shock public sentiment. We are satisfied that the trial court did not erroneously exercise its discretion when it sentenced Stynes to three years in prison.

In conclusion, we hold that Judge Kennedy did not erroneously fail to recuse himself from the proceedings in this case. The record clearly reflects that Judge Kennedy made a subjective determination that his prior contacts with Stynes would not affect his impartiality. In addition, we reject Stynes' contention that Judge Kennedy's bias led him to impose an unduly harsh sentence. We therefore deny Stynes' request for a new trial or a remand to the trial court for

resentencing before a different judge. We affirm the judgment of conviction and the order denying Stynes' motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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