COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1953-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NIKOLAS J. TRIES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

¶1 FINE, J. Nikolas J. Tries appeals from a judgment entered by the trial court convicting him of one count of disorderly conduct. *See* WIS. STAT. § 947.01. He claims that the trial court erroneously exercised its sentencing discretion and that the trial court was biased. We affirm.

¶2 Tries was originally charged with three counts: battery, *see* WIS. STAT. § 940.19(1); criminal damage to property, *see* WIS. STAT. § 943.01(1); and disorderly conduct, *see* WIS. STAT. § 947.01. The battery charge resulted from Tries punching a man he allegedly harassed in a tavern. The criminal-damage-to-property charge was based on Tries smashing out a window of the man's car with a beer bottle. Foundation for the disorderly-conduct charge was Tries's violent resistance of attempts by Milwaukee police officers to take him into custody, during which one of the officers was injured. If he had been convicted on all counts, Tries faced a maximum period of incarceration of eighteen months plus ninety days, in addition to total fines of twenty-one thousand dollars.

¶3 The case was plea bargained, and Tries pled guilty to a disorderly conduct charge (the battery charge reduced to disorderly conduct by the prosecution); the other charges were dismissed. Tries also agreed to plead guilty to a driving-while-intoxicated charge, second offense, issued in another case. When the trial court noted that, in its view, Tries was subject to penalties as a third-time offender, *see* WIS. STAT. § 343.307(1)(d), because when Tries was what the trial court referred to as a "fugitive" from Wisconsin (a characterization that Tries does not dispute), he was convicted of drunk driving in another state, Tries decided to go to trial on the drunk-driving charge.

¶4 Although the trial court originally indicated that it was going to sentence Tries on both the drunk-driving and the disorderly-conduct cases together, Tries's decision to go to trial in the drunk-driving case led the trial court to conclude that it was better to sentence Tries on the disorderly-conduct case, which was then almost two-years old, without waiting for the result of the drunk-driving trial. After much analysis and colloquy with the prosecutor, the defense attorney, and Tries, the

trial court imposed the maximum period of incarceration permitted under the plea-bargained disorderly-conduct charge—ninety days, with work-release privileges.

A. *Sentencing*.

¶5 Sentencing is vested in the trial court's discretion, and a defendant who challenges a sentence has the burden to show that it was unreasonable; it is presumed that the trial court acted reasonably. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912, 925 (1998). The primary factors considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for the public's protection. *See* ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559, 561 (1980). If the trial court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless it 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). Here, the trial court touched all of the bases, in a dispassionate, thoughtful analysis. Although Tries argues that the trial court gave too much weight to the seriousness of his rampage that night, "[t]he weight to be given each factor is within the discretion of the trial court." ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984). The trial court exercised its discretion appropriately.

B. *Alleged Bias*.

¶6 Tries claims that the trial judge was biased against him because during the course of the proceedings the trial judge mentioned that he had worked with Tries's father, John Tries, when they were both with the Milwaukee Metropolitan Sewerage District, and the trial judge recognized that John Tries was, in the vernacular, politically well-connected. Additionally, Tries asserts that the trial

judge's bias was evidenced by its questioning whether the fact that the prosecutor originally assigned to Tries's case was engaged to be married to the niece of Governor Tommy Thompson, for whom John Tries worked as a driver, advisor, and appointee, presented a potential conflict of interest.

¶7 WISCONSIN STAT. § 757.19(2) governs judicial disqualification in Wisconsin. It provides:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> (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.
>
> (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. 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.

There is no contention that the trial judge was disqualified under any of the subsections (2)(a) – (f).

¶8 There are two parts to an analysis under WIS. STAT. § 757.19(2)(g). First, the judge determines whether he or she cannot act impartially. Second, the

judge determines whether it appears that he or she cannot act impartially. Both aspects of this analysis are subjective: "the determination of the existence of a judge's actual or apparent inability to act impartially in a case is for the judge to make." ***State v. American TV & Appliance, Inc.***, 151 Wis. 2d 175, 183, 443 N.W.2d 662, 665 (1989). Here, the trial judge determined that it was impartial. That ends our inquiry into § 757.19(2)(g); we are bound by the trial judge's subjective analysis. *See* ***id.***, 151 Wis. 2d at 183–184, 443 N.W.2d at 665. But this does not end our review.

¶9 Every person appearing in court is entitled to have a judge who is free from bias, and it would defeat this right if the judge's self-analysis could not be reviewed. Thus, we must evaluate "whether there are any objective facts demonstrating that" the trial judge here "was actually biased." ***State v. Santana***, 220 Wis. 2d 674, 685, 584 N.W.2d 151, 156 (Ct. App. 1998). This inquiry, however, requires more than a party's unhappiness over either a result of a case or a trial judge's analysis of the issues; a party complaining that a trial judge was "actually biased" must "show that the judge 'in fact treated him unfairly.'" ***Ibid.*** (quoted source omitted). There is a presumption that a trial judge is "free of bias and prejudice." ***Id.***, 220 Wis. 2d at 684, 584 N.W.2d at 156. A party can overcome this presumption by proving bias or prejudice by a preponderance of the evidence. ***Ibid.***

¶10 Tries points to the following as evidence of the trial judge's actual bias:

> 1. The trial judge's disclosure that he and Tries's father had worked together.
>
> 2. The trial judge's recognition on the record that Tries's father was politically well-connected.
>
> 3. The trial judge's inquiry whether there was a conflict of interest in having the person assigned to prosecute Tries be

> engaged to the governor's niece, when Tries's father and the governor were, apparently, personal and political friends.
>
> 4. The trial judge's decision to treat Tries's drunk-driving charge as a third offense, not a second.
>
> 5. The trial judge's decision to sentence Tries on the disorderly-conduct charge separately from the drunk-driving case, which, other than it also being assigned to the trial judge, was unrelated to the case underlying Tries's guilty plea to the disorderly conduct charge.

We discuss these allegations in turn, to see if they show that the trial judge was actually biased against Tries—that is, whether the trial judge treated Tries unfairly.

¶11 The trial judge knew and worked with Tries's father. He disclosed this fact, as was appropriate. There is nothing in the record that supports even an inference that the trial judge and Tries's father did not get along or that their relationship was other than professional. Tries has not sustained his burden of proof with respect to assertion number one.

¶12 By acknowledging on the record who Tries's father was, and who his connections were, the trial judge merely took judicial notice of what a reasonably knowledgeable person in our community would be aware. *See* WIS. STAT. RULE 902.01(2)(a) (judge may judicially notice fact that is "generally known within the territorial jurisdiction of the trial court"). This was no mere gratuitous reference, however. The trial judge had a duty to determine either whether Tries was being shown favoritism because of his father, or whether there was an impermissible appearance of favoritism. The trial judge's inquiry was consistent with his oath to see that the laws of our state be administered impartially. *See* WIS. STAT. § 757.02(1). He should be commended, not condemned.

¶13 The trial judge's concern that Tries was getting a pass from the Milwaukee County District Attorney for what the trial judge believed was a third,

not second, drunk-driving offense under the statutes was also a commendable exercise of his responsibilities; it does not prove bias or prejudice. *See* ***State ex rel. Dressler v. Circuit Court***, 163 Wis. 2d 622, 644, 472 N.W.2d 532, 542 (Ct. App. 1991) ("trial judge may express his or her opinion" on issues in cases over which judge presides "without being subject to recusal").

¶14 The trial judge's decision to sentence Tries on the disorderly-conduct charge without waiting until completion of the drunk-driving trial was clearly within his discretion. Tries has not, beyond his obvious unhappiness, even alleged how this was an erroneous exercise of discretion.

¶15 In sum, Tries has made a scatter-shot attack on a trial judge whose analysis shows a careful and thoughtful discharge of his duties. Tries has not, by any stretch of the imagination, shown either bias or prejudice, or that the trial judge treated him unfairly.

By the Court.—Judgment affirmed.

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