COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2196-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE D. WORBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: JOHN W. MICKIEWICZ,[1] Reserve Judge and DAVID C. RESHESKE, Judge. *Affirmed and cause remanded.*

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

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[1] The Honorable John W. Mickiewicz presided at the trial and entered the judgment of conviction. The Honorable David C. Resheske heard the postconviction motion and entered the order denying postconviction relief.

¶1 PER CURIAM. Lee D. Worby appeals from a judgment of conviction for child abuse and an order denying his sentence modification motion.[2] The issue on appeal is whether a "neutral and detached magistrate" sentenced Worby. We conclude that Worby's sentence was free of bias and it was based upon proper sentencing factors. We affirm and remand for the purpose of correcting the judgment of conviction.[3]

¶2 When eight-year-old Christian Worby arrived home on March 16, 1999, his father, Lee Worby, was in possession of a letter from the boy's school informing him of an altercation involving Christian. Worby became angry, grabbed Christian and pushed him against the dresser, causing Christian to bump his head. Worby then grabbed Christian again, pushed him down on the bed and struck him across the face with an open hand approximately nine times.

¶3 Worby was charged with a single count of intentionally causing bodily harm to a child, pursuant to WIS. STAT. § 948.03(2)(b) (1999-2000).[4] Worby was also subject to penalty enhancement as a person responsible for the welfare of a child and as a habitual criminal, creating a total exposure of twelve years in prison.[5] The defense and the State reached a plea agreement for an

[2] Although the judgment of conviction states that Worby pled guilty in the case, he actually pled no contest. Therefore, the judgment erroneously states the plea entered by Worby. This is a mere defect in the form of the certificate of conviction, which we may direct the trial court to remedy in accordance with the actual determination by the court.

[3] Although Worby filed a notice of appeal stating that he was appealing the judgment of conviction and the postconviction denial of his motion, his entire argument on appeal concerns the sentencing provisions of the judgment of conviction. Therefore, the issue we address on appeal is whether a neutral and detached magistrate sentenced Worby.

[4] All statutory references are to the 1999-2000 version unless otherwise noted.

[5] *See* WIS. STAT. § 948.03(5), which provides for a penalty enhancement of five years, and WIS. STAT. § 939.62(2), which provides for an increased penalty for habitual criminality.

imposed and stayed sentence of twelve years and placement on probation for ten years. Additionally, Worby would serve one year as conditional jail time.

¶4 Worby pled no contest to one count of intentionally causing harm to a child as a person responsible for the welfare of the child and as a habitual criminal. Worby admitted to three prior convictions for misdemeanor disorderly conduct/domestic abuse within the preceding five years. At the sentencing hearing, both parties argued for the joint recommendation.

¶5 Ultimately, Judge Mickiewicz sentenced Worby to four years in prison. Two motions for reconsideration were filed, heard by Judge Resheske, and denied. The court concluded that there was not a sufficient basis for it to independently review the case. The court concluded that the review requested would be tantamount to conducting a resentencing. Further, the court noted that based on Worby's prior record and other matters considered at sentencing, it could not conclude that there was no basis for the sentence. This appeal followed.[6] Other facts will be provided as necessary.

> Whether [a judge is] a "neutral and detached magistrate" is a question of constitutional fact which we review de novo and without deference to the trial court. There is a presumption that a judge is free of bias and prejudice. In order to overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased or prejudiced.

[6] The State argues that Worby has waived the appellate issue because he did not seek Judge Mickiewicz's recusal or object to the judge's statement expressing reservations about the joint sentencing recommendation. We reject this argument as too strict an application of waiver. Judge Mickiewicz's remarks were not an unequivocal rejection of the sentencing recommendation. Instead, the judge was expressing some hesitation about the recommendation and asking for the input of the parties. It was not until the sentence was actually announced that the parties—particularly Worby—knew that the judge was rejecting the recommendation.

State v. Santana, 220 Wis. 2d 674, 684, 584 N.W.2d 151 (Ct. App. 1998) (citations omitted).

¶6 In determining whether the judge was actually biased, we must evaluate the existence of bias in both a subjective and objective light. ***Id.*** The subjective component is based on the judge's own determination of whether he or she will be able to act impartially. ***Id.*** In determining whether the subjective test is satisfied, it is only necessary to examine Judge Mickiewicz's actions at sentencing. ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). If Judge Mickiewicz subjectively believed that he would not be able to act impartially, he would have been required to recuse himself from the sentencing hearing. ***Id.*** Because he did not, we may presume that he believed himself capable of acting in an impartial manner. ***Id.*** Therefore, our subjective test inquiry is at an end. ***Id.***

¶7 Next, we examine the objective test. We must determine whether there are objective facts demonstrating that Judge Mickiewicz was actually biased. ***Id.*** at 416. "Under this test, the defendant must show that the 'trial judge in fact treated him unfairly.' Merely showing that there was an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial is not sufficient." ***Id.***

¶8 Worby contends that the sentencing court was biased and, therefore, a neutral and detached magistrate did not sentence him. The record does not support Worby's contention. As the prosecutor argued for the joint recommendation at sentencing, the court interrupted her and stated:

> Well, leave me interrupt you *because you may want to react to this*. I take it when you talked about the 12

> months, that you were inferring that perhaps the two of you would make a joint recommendation as to condition time.
>
> I'm telling you on the front end I'm having real trouble with the concept of not even sending him to prison at this point. Okay, it's a child abuse case. *I read it.* I think you know I'm familiar with CHIPS, I'm always concerned about the kid or kids. It looks like if I put him in prison, the young man doesn't have the mother as an option, that's pretty much gone by the wayside. So it's either him or the foster home.
>
> But frankly, reading the report – and I'll tell you then you both can react and argue where I'm going and try and convince me otherwise—there is nothing much that can be said about this guy in terms of the report. I can guess where an eight-year-old develops this violent behavior at school from. He gets it from his father. There is a long record of criminal background here, and I viewed the slapping of an eight-year-old boy across the head as serious stuff. So if I dealt with that on my own, my own inclination is enough already, he's got a criminal record a mile long, it doesn't look to me like the eight-year-old is ever going back with him so I'm not sacrificing that. My initial impression would be, send him to prison and send him now. (Emphasis added.)

¶9 The court alerted the parties to reservations about the plea agreement and invited them to convince it otherwise. These concerns were premised upon the information the court had gleaned *from the PSI and the facts of the case*. The court informed the parties that the serious nature of the offense and Worby's criminal record formed the basis for those reservations.

¶10 The prosecutor then continued her argument in favor of the joint recommendation, followed by defense counsel's argument affirming the joint agreement request. The court then proceeded to pronounce sentence. A court must consider three primary factors in exercising discretion in sentencing: the gravity of the offense, the character of the offender and the need to protect the public. ***State v. Rodgers***, 203 Wis. 2d 83, 93, 552 N.W.2d 123 (Ct. App. 1996). The court discussed precisely those factors in sentencing Worby.

¶11 The trial judge discussed the gravity of the offense, noting that Worby struck his son across the head and ears "strong enough to leave them with marks." He reiterated the maximum penalty of twelve years and stated that in sentencing he would consider "who you are, and where you have been and what kind of record you have got." He further noted Worby's eleven prior convictions, including three recent convictions for disorderly conduct/domestic abuse. The court considered the criminal record, especially the recent domestic abuse convictions, to be indicative of Worby's character.

¶12 Worby argues bias but he provides this court with nothing more than the bald assertion that the court "held the preconceived notion that all child abuse cases should result in a prison sentence." A trial judge may entertain general predispositions, based on criminal sentencing experience, regarding when certain types of sentences are appropriate. ***State v. Ogden***, 199 Wis. 2d 566, 573, 544 N.W.2d 574 (1996). However, such predispositions may not be so rigid as to ignore the particular circumstances of an individual offender. ***Id.*** "Merely showing that there was an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial is not sufficient." ***McBride***, 187 Wis. 2d at 416.

¶13 Although the court informed the parties of its concern for children in CHIPS and child abuse cases, there is no evidence that this was the determinative factor in the sentence imposed. As stated above, the court considered the primary sentencing factors to support the imposed sentence. The trial judge also stated that he felt "obligated to send a message with respect to child abuse." The general deterrent effect of a sentence is a proper consideration in sentencing. ***State v. Sarabia***, 118 Wis. 2d 655, 674, 348 N.W.2d 527 (1984).

¶14 Worby's challenge to the sentence fails for an additional reason. Had Judge Mickiewicz not revealed his reservation about the joint sentencing recommendation until the sentence was actually pronounced, Worby might well have argued that the sentencing was unfair because he did not have an opportunity to address the judge's concern. While we need not answer this question because that situation is not before us, we nonetheless think that the procedure employed by Judge Mickiewicz in this case was the preferred and fairer one. Worby knew up front about the judge's concern and he was properly given the opportunity to address it.

¶15 Upon remand, the trial court shall correct the judgment of conviction to reflect Worby's actual plea of no contest. Because Worby has not made a sufficient showing that he was treated unfairly by the trial judge or that the trial judge was biased or prejudiced, the challenge to the sentence fails.

By the Court.—Judgment and order affirmed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.