COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP712 **Cir. Ct. No. 2007TR6277**

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

FOND DU LAC COUNTY,

PLAINTIFF-RESPONDENT,

V.

D. T. KEDINGER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] D.T. Kedinger appeals from orders denying him an interpreter based on trial court findings that he does not have a hearing disability

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

and denying reconsideration of the judgment against him. He makes four discernable claims: that he was improperly denied an interpreter, that he did not receive notice of the trial on the merits, that he was improperly denied a trial by jury on the merits, and that the judge was biased.[2] None of his claims are persuasive, so we affirm.

¶2 Kedinger was issued a citation for speeding (69 mph in a 55 mph zone) on July 2, 2007. There have been many motions and hearings in this case, but the facts relevant to this appeal are few. The trial court held evidentiary hearings on November 7, 2008, and December 28, 2009, to address whether Kedinger was entitled to an interpreter at public expense based on his claimed hearing disability. At the first hearing, several witnesses testified that they had interacted with or witnessed others interacting with Kedinger by telephone or in person without seeing any signs of a hearing disability.[3] Kedinger then submitted letters from two doctors indicating that he did have a hearing disability. Their statements were based on a subjective hearing test and their interactions with him. The County deposed both physicians and then requested an auditory brain stem

[2] Though it is not listed in his statement of the issues, Kedinger also claims that the record is incomplete. However, we already addressed claims by him that the record was incomplete in orders dated April 19, 2010, August 11, 2010, and September 2, 2010. To the extent that it is raised, we will not entertain that issue further here.

[3] We are sensitive that lay witnesses may not be in the best position to judge when behavior is consistent with a hearing disability. However, in this case, the witnesses who testified were court staff and police who were quite familiar with Kedinger, who regularly communicated with them by passing notes back and forth. They had witnessed him in other public places using his voice to speak with people who were facing away from him while they were speaking to him. In one case, an officer who knew him shouted from behind Kedinger's back, and Kedinger turned around to look and respond. This is not a case of witnesses merely claiming that Kedinger did not look like someone with a hearing disability or that he seemed to function normally.

response test, which would test Kedinger's hearing without relying on his own statements of whether he could hear certain sounds.

¶3 The trial court ordered Kedinger to submit to the brain stem test at the County's expense. The exam failed, primarily because Kedinger did not follow basic instructions (provided through an interpreter) to sit still and keep his eyes close. Because of Kedinger's behavior, the facility would not schedule him for a second test. Two other facilities also refused to schedule him, as well. On December 28, 2009, after testimony from the person who performed the brain stem test, the trial court declined to order an interpreter or other assistance to Kedinger because it believed the County had successfully rebutted the presumption that he had a hearing disability. Kedinger did not appear at that hearing.

¶4 In a written order dated January 27, 2010, the trial court summarized its findings of fact in support of its decision not to order assistance to Kedinger. It outlined the testimony of witnesses who had observed Kedinger interacting with people in a way that was not consistent with a hearing disability. It also noted the audiologist's observation that he was intentionally uncooperative with the brain stem test.

¶5 Kedinger's trial on the merits was scheduled for January 29, 2010. Notice was filed with the court on January 8, 2010. The distribution list included Kedinger at his last known address. Kedinger did not appear at the hearing, and default judgment was entered against him. He moved for reconsideration, alleging that he did not receive notice of the January 29, 2010 hearing, and that contrary to the court's findings and order, he did have a hearing disability. The motion was

denied in a letter from the trial court dated February 18, 2010. Kedinger appeals from the January 27 and February 18, 2010 orders.[4]

¶6 We begin with Kedinger's claim that he was improperly denied an interpreter. In ***Strook v. Kedinger***, 2009 WI App 31, ¶¶19, 21, 316 Wis. 2d 548, 766 N.W.2d 219, we noted that once a party properly notifies the trial court of the need for an interpreter, a hearing must be conducted on that issue unless an interpreter is appointed without a hearing. The trial court in this case conducted several hearings on this subject over the course of more than a year.

¶7 We also noted in ***Strook*** that the ultimate determination of whether a defendant is in need of an interpreter is a factual one. *See* ***id.***, ¶24 (citing ***State v. Yang***, 201 Wis. 2d 725, 734-35, 549 N.W.2d 769 (Ct.App.1996)). We will uphold a trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Here, the trial court found that Kedinger did not have a hearing disability based on the testimony and observations of several witnesses and Kedinger's own obstructive behavior at a hearing test that was provided to him at no cost. The trial court's findings are supported by the record and we will not disturb them.[5]

[4] Kedinger actually appealed from a February 19, 2010 order. Since no such order exists, and since there was an order issued February 18, 2010, we are treating this as an appeal from the February 18, 2010 order. The County did the same in its brief.

[5] We are aware that Kedinger has been involved in more than one case where he claims to have a hearing disability. The evidence in this record well supports the trial court's finding that Kedinger does not have a hearing disability. As such, to the extent that Kedinger serially mounts this same hearing disability assertion in future proceedings, opposing parties may want to consider using this opinion to support a claim of issue preclusion.

¶8 On to Kedinger's claim that he was not provided proper notice of his January 29, 2010 trial. WISCONSIN STAT. § 801.14(2) provides that "[s]ervice … upon a party shall be made by delivering a copy or by mailing it to the last-known address." The record shows that notice—with Kedinger on the distribution list—was filed on January 8, 2010, twenty-one days before trial.

¶9 In his brief, Kedinger asserts a blanket claim that he had no notice and refers to two documents in the record. The first contains no information to support his claim. The second document he cites to appears to state that he did not receive notice because he was in another state and did not have his mail forwarded to him there. Particularly since late December filings by Kedinger himself show that he was well aware that proceedings were pending, leaving the state and making himself unavailable to receive notice by mail without giving the court a way to contact him does not form the basis of a claim of improper notice. We will not discuss this issue further.

¶10 Kedinger next claims that the judge had a "pre-disposed conclusion before [] trial start[ed]." We interpret this to be a claim of judicial bias. However, he does not give any reasons for his interpretation that the judge was biased or pre-disposed in a certain way. We will not develop his argument for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987); *see also* WIS. STAT. RULE 809.19(1)(e) ("The argument on each issue must … contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.")

¶11 Finally, Kedinger claims that he was improperly denied a trial by jury. The County argues that this claim is waived because it was not the subject of the documents appealed from. We likewise could not find any reference to the

denial of a trial by jury in the orders or the materials that were the subject of the orders. Kedinger did not file a reply brief or otherwise direct us to where he believes he raised those issues, so we deem them either waived or underdeveloped. *See* ***Preuss v. Preuss***, 195 Wis. 2d 95, 105, 536 N.W.2d 101 (Ct. App.1995) (issues not raised before the trial court are generally waived); *see also* ***Gulrud***, 140 Wis. 2d at 730.

By the Court.—Orders affirmed.

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