

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 13, 1997

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

NOTICE

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

No. 96-0878-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER EDGE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT A. DE CHAMBEAU, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Peter Edge appeals from a circuit court judgment of conviction and sentence, resulting from his guilty plea to burglary, contrary to § 943.10(1)(a), STATS., with an increased penalty for habitual criminality, contrary to § 939.62, STATS. He argues that the circuit court judge should have recused himself *sua sponte*, and that the court erred in failing to honor his timely request for substitution of judge. For the reasons set forth below, we affirm.

BACKGROUND

Edge and another individual were jointly charged with burglary while armed, contrary to § 943.10(2)(a), STATS.,¹ and Edge was additionally charged with habitual criminality, contrary to § 939.62, STATS. While the cases remained joined,² Edge moved for substitution of judge, but his co-defendant did not.

The co-defendant pleaded guilty and was sentenced, before the same judge, prior to Edge. At the co-defendant's sentencing hearing, the judge admonished the co-defendant to avoid Edge in the future because:

Mr. Edge has been and will probably continue to be an active participant in the criminal justice system.... If you hang around with him it will quite honestly drag you down.... So you can take it or leave it but that's the best advice I can give you ... to stay away from Mr. Edge.

APPLICABLE STATUTES

Section 757.19, STATS., reads in relevant portion:³

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

¹ As part of the plea agreement, the charge was changed to simple burglary as reflected *supra*.

² See text accompanying footnote 5.

³ Section 757.19(2)(a) through (f), STATS., sets forth the factors to be used when an objection exists capable of objective analysis, such as a blood relationship, etc. Edge, however, claims only an objection under subsec. (g).

....

(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 971.20, STATS., reads in relevant portion:

(2) In any criminal action, the defendant has a right to only one substitution of a judge...

(4) A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

....

(6) In actions involving more than one defendant, the request for substitution *shall* be made jointly by all defendants. If severance has been granted and the right to substitute has not been exercised prior to the granting of severance, the defendant or defendants in each action may request a substitution under this section.

(Emphasis supplied).

ANALYSIS

Edge argues that the circuit court erred in failing to *sua sponte* disqualify itself, because remarks made at the co-defendant's sentencing hearing reveal that the circuit court was prejudiced against Edge. We reject this argument.

Edge does not dispute that at his co-defendant's sentencing colloquy, the circuit court's characterization of Edge as a person familiar with the Wisconsin Criminal Justice System was an accurate statement of fact. Edge's own sentencing colloquy makes clear that Edge is a career criminal.⁴

Prejudice arises when the judge cannot act in an impartial manner § 757.19(2)(g), STATS. Whether a judge is impartial is a subjective matter which must be determined by the judge. *State v. American T.V. & Appliance*, 151 Wis.2d 175, 186, 443 N.W.2d 662, 666 (1989).

Edge's only argument for partiality is the court's accurate recitation of his criminal record. Normally, partiality is a matter which must be raised before the circuit court in question. *State v. Harrell*, 199 Wis.2d 654, 664, 546 N.W.2d 115, 119 (1996). Once the circuit court has ruled, we review its determination only to see whether the court "failed to heed [its] ... own finding" that recusal was required. *State v. Carviou*, 154 Wis.2d 641, 646, 454 N.W.2d 562, 564 (Ct. App. 1990). However, because Edge failed to raise the prejudice issue before the circuit court, the standard for review is set forth in *State v. Marhal*, 172 Wis.2d 491, 493 N.W.2d 758 (Ct. App. 1992), where the court stated:

Since Marhal did not assert the disqualification issue before the trial court, we do not have direct evidence of the trial

⁴ At Edge's own sentencing, the circuit court stated:

I think the other thing that there has to be a recognition that we can't condone or tolerate repeat offenders. And there is a recognition of that, and the fact that you are, and the district attorney decided to charge you as a repeater. So I think to that extent there is a necessity to, to deter not only you, but other people who choose to constantly take as their own other people's property....

Accordingly, Judge Bartell gave you 10 years last time, it didn't seem to strike a responsive note. At a minimum I have to give you that, but I think in recognition of the fact that you are a repeat offender and continue to repeat and repeat and repeat, that there has to be some additional sentence to recognize your repeater status and that the community can't tolerate that type of repeat conduct.

court's view of [whether she met the subjective standard for determining appearance of prejudice under 757.19(2)(g).]... Nevertheless, it is clear from the record that the trial judge never doubted that she was impartial nor believed that [her comments] ... would give anyone reason to doubt her impartiality.... Under these circumstances, we can conclude without the necessity for a remand that the factors mandating the trial judge's disqualification pursuant to section 757.19(2)(g) were not present.

Id. at 506, 493 N.W.2d at 765.

As is evident from the standard of review set forth in *Carviou* and *Marhal*, our role on review is quite restricted. Like the *Marhal* court, we conclude from a review of the record that no factors exist which require disqualification. In our analysis, an accurate rendition of Edge's criminal history, later supported by a colloquy with Edge himself at sentencing, does not constitute proof of prejudice of the type which triggers necessity for remand for a § 757.19(2)(g), STATS., subjective prejudice analysis.

Edge also argues that the circuit court failed to honor his timely substitution request. We disagree. Edge requested substitution at a point in time when his case was joined to his co-defendant's. As set forth above, § 971.20(6), STATS., requires that "the request for substitution *shall* be made jointly by all defendants." (Emphasis supplied.)

Edge does not argue that his co-defendant joined in his request. Instead, he appears⁵ to be arguing either improper joinder or *de facto* non-joinder. Because his argument is unsupported by citation to the facts of this case, to statutes or to case law, we would normally decline to address it. *In re Balkus*, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985). We note, however, that Edge failed to seek any sort of review of his request. It is the defendant's obligation to promptly seek review. *State ex rel. Nowak v. Circuit Court for Waukesha County*, 169 Wis.2d 395, 397, 485 N.W. 2d 419, 421 (Ct. App. 1992). Failure to do so results in waiver. *Id.* at 398, 485 N.W.2d at 421. The matter was accordingly waived.

⁵ Edge references a statute, but fails to cite it. Therefore, we can only surmise what he intends to argue.

By the Court.—Judgment affirmed.

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