

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. **99-0145**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIRK ENNENGA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Kirk C. Ennenga appeals from an order denying his motion for resentencing. Ennenga claims the sentencing judge should have recused himself for bias or the appearance of bias. However, we conclude that

Ennenga has failed to show that the sentencing judge had any personal interest in the matter, and affirm the order of the trial court.

¶2 Ennenga was convicted of multiple counts of second-degree sexual assault of a child based on his molestation of a series of boys who were placed in his home as foster children. Judge Andrew Bissonnette had assigned approximately half of the children to the Ennenga home. At the sentencing hearing, before imposing sentences totaling eighteen years in prison plus another twelve years in prison to be stayed pending a period of fifteen years on probation, Judge Bissonnette commented:

[A] case like this, I guess, can be considered every judge's nightmare. That is, to act to remove children from their own home because of abuse or negligence, to place them in what you believe is a safer environment, and then to have this happen. And I pray that it doesn't happen. And you hear horror stories about it, and sometimes it really happens; and it happened here.

....

The social workers involved have expressed their outrage through the presentence report. And they feel like they were used to actually select and deliver victims to a pedophile. [Ennenga] violated their trust; he violated the trust of the court system; he violated his wife's trust; he violated the victim's trust; he violated everyone's trust.

¶3 Ennenga moved for resentencing on the grounds that the judge's comments showed that he had a personal interest in the case sufficient to void the sentence under § 757.19(2)(f) and (g), STATS. Judge Bissonnette denied the motion, stating:

When I commented that it was "every judge's nightmare," I think it was true. But it was a statement made figuratively and literally, in that I did not have any nightmares about this case. But it's a figure of speech that it's a judge's nightmare. And whether the sentencing court was the court who placed the boys in the foster home or it was some

other judge, the sentencing judge could have just as likely made the same statement.

Ennenga then filed this appeal.

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

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

....

(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.

Ennenga concedes that a trial court's subjective determination under paragraph (g) cannot be reviewed by this court. However, paragraph (f) sets forth an objective standard that we review de novo as a question of law. *See State v. Rochelt*, 165 Wis.2d 373, 378-79, 477 N.W.2d 659, 661 (Ct. App. 1991). A judge should be disqualified under paragraph (f) when the circumstances are such that any judge in the same position could be assumed to have a significant financial or personal interest in the outcome of the case. *See State v. American TV and Appliance of Madison, Inc.*, 151 Wis.2d 175, 181-82, 443 N.W.2d 662, 664-65 (1989).

¶4 Ennenga argues that Judge Bissonnette's comments reflect a sense of personal betrayal, giving the judge a personal interest in punishing him. We disagree. We consider Judge Bissonnette's characterization of its "nightmare" comment as a figure of speech, applicable to any judge regardless of whether he or she had actually placed any foster children with Ennenga, to be accurate. In the same vein, the statement that Ennenga "violated the trust of the court system"

could have been made by any judge, regardless of whether he or she had placed any foster children with Ennenga. Neither comment shows that Judge Bissonnette had any personal reason to sentence Ennenga more harshly than the judge would have if he had not placed any of the foster children with Ennenga.

¶5 Nor are we persuaded that, aside from Judge Bissonnette's comments, every judge who has placed children with a foster parent who subsequently abuses them has an objective personal interest in sentencing that foster parent. Rather, we are convinced by the State's argument that the situation is analogous to the sentencing of a violent offender who has violated the conditions of probation which the trial court set by committing additional assaults. In each case, the offender has taken advantage of a position offered by the trial court to harm more innocent people. Thus, in each case, the sentencing judge could subjectively feel a personal sense of outrage or responsibility toward the new victim that would warrant disqualification under § 757.19(2)(g), STATS. In neither case, however, does the mere fact that the sentencing judge had prior involvement with the offender give the sentencing judge an automatic, objective personal interest in sentencing the offender.

By the Court.—Order affirmed.

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

