COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP2418-CR **Cir. Ct. No. 2010CF248**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. PHILLIPS, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI and THOMAS J. WALSH, Judges. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. John Phillips, Sr., appeals a judgment of conviction for threatening a judge and identity theft, as well as an order denying his postconviction motion.[1] Phillips argues the judge who presided over his trial and sentencing was objectively biased because that judge worked in the same courthouse as the judge Phillips had threatened. Phillips also argues that law enforcement obtained his confession by virtue of an inadmissible "continuation" of a polygraph examination, to which Phillips had consented. We conclude Phillips has not satisfied his burden of proving, by a preponderance of the evidence, that the trial judge was objectively biased. We also conclude the circuit court properly denied Phillips's suppression motion. Accordingly, we affirm.

BACKGROUND

¶2 Phillips was charged in 2010 with threatening a judge, contrary to WIS. STAT. § 940.203(2) (2015-16), and identity theft to avoid criminal penalties, contrary to WIS. STAT. § 943.201(2)(b) (2015-16), both counts as a repeater.[2] The charges were the result of a June 30, 2009 incident in which a suspicious letter was sent to Judge Wexler at the Brown County courthouse.[3] As Judge Wexler's judicial assistant, Janine, opened the envelope, white powder spilled onto her desk and became airborne. Janine set the envelope down, called security, and then

[1] The Honorable Mark Warpinski presided over the trial and entered the judgment of conviction. The Honorable Thomas Walsh entered the order denying Phillips's postconviction motion.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] In accordance with the public policy underlying WIS. STAT. RULE 809.86, we use pseudonyms for the various victims in this case, including the judge, his staff, and the Brown County Sheriff's Department officers who immediately responded to the incident.

notified Judge Wexler, who was located inside his chambers on the courthouse's third floor.[4] The envelope contained a letter directing death threats against Judge Wexler, his family, and an assistant district attorney.

¶3 Brown County Sheriff's Department deputies Bennett and Frump responded to Janine's call for assistance. Deputy Frump quarantined the area while deputy Bennett entered the office and spoke with Janine and Judge Wexler. Bennett considered the white powder to be a threat and requested that the facilities department shut down the third floor air exchange to prevent any potential contamination in the rest of the courthouse. The area was quarantined for three to four hours while a hazardous material team ascertained the nature of the substance, which was later identified as baby powder.

¶4 The United States Postal Inspection Service also commenced an investigation. The envelope's return address identified the sender as Frank, an offender then located at the Wisconsin Resource Center (WRC) in Winnebago, Wisconsin. Frank did not have any cases pending or completed before Judge Wexler, and he denied sending the letter when interviewed by authorities. However, he noted to authorities that the envelope appeared similar to those sold by the institution's canteen, and the letter appeared to have been typewritten on a WRC typewriter.

¶5 At the time the threats were sent, Phillips was also housed at the WRC under a WIS. STAT. ch. 980 commitment order.[5] On July 10, 2009, Brown

[4] The office area in which Janine was located was a separate room attached to Judge Wexler's chambers.

[5] WISCONSIN STAT. ch. 980 governs civil commitments of sexually violent persons.

County Sheriff's Department sergeant Alan Phillips and postal inspector Derek Thieme interviewed the defendant at the WRC.[6] The visit was prompted by a letter Phillips had sent to the Brown County Sheriff's Department, in which he indicated he had information about the courthouse threat that he wished to share with investigators. In exchange for his testimony against Frank, Phillips sought help getting released from his chapter 980 commitment. During the interview, Phillips acknowledged his chapter 980 case was then pending before Judge Wexler, and he also admitted he knew the threatened assistant district attorney.[7] Baby powder was later found in Phillips's room at the WRC.

¶6 On November 17, 2009, Thieme and sergeant Phillips returned to the WRC. They were accompanied by postal inspector Edward Meyle, who was to administer a polygraph examination that Phillips had agreed to take. Thieme and sergeant Phillips monitored the examination from a nearby room while Meyle administered the examination in a vacant office. Upon the conclusion of the examination, Meyle exited the room and asked Thieme if he wanted to interview Phillips. Thieme responded affirmatively, and he and Meyle returned to the office where Phillips had remained. After waiving his ***Miranda***[8] rights, Phillips confessed that he had written the threat letter in an attempt to obtain release from his WIS. STAT. ch. 980 commitment. Phillips believed he would gain leverage in his case by implicating someone else and then volunteering to testify against that person.

[6] All references to sergeant Phillips will include his police rank to avoid confusion with the defendant Phillips.

[7] Judge Wexler subsequently recused himself from Phillips's WIS. STAT. ch. 980 case.

[8] *See* ***Miranda v. Arizona***, 384 U.S. 436, 472-73 (1966).

¶7 The present case against Phillips was assigned to Brown County Circuit Court Judge Mark Warpinski. Phillips filed a motion for disqualification or recusal, requesting that the case be assigned to a judge serving outside of Brown County. Phillips asserted any judge serving within the county would "have the appearance of lacking impartiality when a fellow judge is a possible witness/the victim." Judge Warpinski orally denied the motion at Phillips's arraignment:

> Ms. Patzer [defense counsel], I don't know anything about your client. I don't know anything about what happened up on the third floor other than what anybody would have heard about any of this.
>
> I'm not going to be called upon to make a determination on whether the witnesses are telling the truth. That's really going to be for the jury to decide. At sentencing, I don't know how you would sort out for any judge in this or any other county, to try to ignore the fact that if your client were found guilty, the fact that he did what is accused here happened. You know, that factor's going to be present. You know, the allegation of battery or threat to a judge, some judge is going to have to deal with that, and I don't know how you could separate that out. I'm not satisfied that there is a reason for me to recuse myself in this matter.

¶8 Phillips also filed a motion to suppress all statements and derivative evidence obtained following his polygraph examination. The results of, and statements made during, a polygraph examination are generally inadmissible in criminal proceedings. *See* ***State v. Greer***, 2003 WI App 112, ¶9, 265 Wis. 2d 463, 666 N.W.2d 518. Phillips asserted the interview that followed the polygraph examination was "too closely associated" with the examination and therefore "essentially the same event as the polygraph." The circuit court held an evidentiary hearing on Phillips's motion, during which it took testimony from Phillips and the three investigators present on the day of the polygraph. The court concluded that the "polygraph examination was over" at the time of Phillips's

confession and that "anything that occurred after [the examination's conclusion] was not an extension of the polygraph exam itself." The court therefore denied Phillips's motion.

¶9 A jury convicted Phillips of both counts, and he proceeded to sentencing before Judge Warpinski. Following argument, the court emphasized that Phillips's conduct was "despicable and dangerous" and indicated a lengthy sentence was necessary to punish Phillips for the harm he had caused. The court imposed consecutive ten-year sentences, each consisting of seven years' initial confinement and three years' extended supervision. Phillips now appeals, challenging the denial of his motions for disqualification/recusal and to suppress evidence obtained following the polygraph examination.[9]

DISCUSSION

I. Objective bias

¶10 We first address Phillips's argument that Judge Warpinski was objectively biased and thus constitutionally required to recuse himself from Phillips's case. "A fair trial in a fair tribunal is a basic requirement of due process." ***State v. Carprue***, 2004 WI 111, ¶59, 274 Wis. 2d 656, 683 N.W.2d 31. The type of objective bias Phillips alleges here (the appearance of bias) "offends constitutional due process principles whenever a reasonable person—taking into

[9] Phillips filed a postconviction motion in which he argued he received ineffective assistance of counsel by virtue of his trial counsel's "failure to argue the objective prong for judicial bias in his motion for the honourable [sic] Judge Warpinski to recuse himself from presiding over Phillips' prosecution." Following an evidentiary hearing, Judge Walsh concluded trial counsel had not performed deficiently because the appearance of bias issue had been adequately raised. Given this conclusion, Phillips has adequately preserved the bias issue for direct review.

consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***State v. Gudgeon***, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114. This standard limits recusal to those instances in which the apparent bias reveals a "great risk of actual bias." ***Id.***, ¶23.

¶11 We presume that a judge has acted fairly, impartially, and without prejudice. ***State v. Herrmann***, 2015 WI 84, ¶24, 364 Wis. 2d 336, 867 N.W.2d 772 (plurality opinion). The presumption is rebuttable; the party asserting bias bears the burden of demonstrating bias by a preponderance of the evidence. ***Id.*** Whether a circuit court's impartiality can be reasonably questioned is a matter of law that we review de novo.[10] ***State v. Goodson***, 2009 WI App 107, ¶7, 320 Wis. 2d 166, 771 N.W.2d 385.

¶12 Phillips's argument is that any judge who worked in the Brown County Courthouse, including Judge Warpinski, would be objectively biased against him—apparently solely by virtue of working in the same building as Judge Wexler. To the extent Phillips's motion can be read to suggest that Judge Warpinski should have recused himself simply because another judge was a victim and a witness in this case, we must reject this argument. As Judge Warpinski

[10] Phillips argues this court should reverse simply because Judge Warpinski failed to consider whether an appearance of bias warranted recusal. Even assuming the premise of this argument is correct (the State disputes that Judge Warpinski's analysis was incomplete), Phillips does not explain why reversal is necessary when the existence of an appearance of bias is a question of law.

Further, the primary authority Phillips cites in support of his "inadequate consideration" argument is ***State v. Harris***, 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409. Yet the appearance-of-bias issue did not even appear in the majority opinion. *See* ***id.***, ¶70 (Bradley, J., concurring). Rather, Phillips cites to Justice Bradley's concurring opinion (albeit without identifying it as such until his reply brief), which is not controlling authority.

observed, some judge must be available to hear the case, and the "appearance of bias" rule cannot be so broad as to permit Phillips to escape punishment for his conduct merely because another judge was the focus of his criminal acts. Thus, the claim here must be that Judge Warpinski was objectively biased because Judge Wexler was another judge *located in the same courthouse facility*.

¶13 To a degree, this argument presupposes a personal or close working relationship between Judge Warpinski and Judge Wexler that is both legally and factually unsupported. Phillips does not directly argue Judge Warpinski had a close personal relationship with Judge Wexler—or any relationship, for that matter, beyond working in the same facility. Phillips did not develop a factual record on that matter or request an evidentiary hearing at the circuit court level.[11] *Cf.* ***State v. Lindell***, 2001 WI 108, ¶¶41-50, 245 Wis. 2d 689, 629 N.W.2d 223 (holding that juror who had close personal and business relationships with the victim was objectively biased and should have been struck for cause).

¶14 Accordingly, Phillips's objective bias argument reduces to the mere fact that Judge Warpinski and Judge Wexler worked in the same courthouse facility. This fact, standing alone, is insufficient to overcome the general presumption that a judge is capable of acting impartially. There is no evidence in the record regarding the judges' working relationship. Even if we presume they exchanged pleasantries in the hallways or otherwise interacted in other manners that co-workers do, we fail to see how such infrequent, insubstantial encounters

[11] Moreover, Judge Warpinski stated he did not know "anything about what happened up on the third floor other than what anybody would have heard about any of this." Phillips did not challenge this assertion or seek to counter Judge Warpinski's assessment of his impartiality with any evidence, including through the testimony of any of the victims.

with the victim judge reveal a "great risk of actual bias" against Phillips. *See* ***Gudgeon***, 295 Wis. 2d 189, ¶23.

¶15 We also reject the notion that Judge Warpinski was constitutionally required to recuse himself because he was, in a sense, a "victim" in this case. Phillips asserts there was appearance of bias "because Phillips allegedly threatened the entire Brown County Courthouse by sending a letter with an unidentified white powder inside that led the recipients to believe it could be deadly." Although he asserts Judge Warpinski was "affected" by Phillips's threats, he does not explain how this was so and did not develop a factual record on that point. *See also supra* ¶13 n.11.

¶16 Phillips relies on ***In re Nettles***, 394 F.3d 1001 (7th Cir. 2005), in which the defendant allegedly purchased and sold fertilizer to undercover FBI agents as part of a plot to destroy the Dirksen Courthouse, the site of the federal courts in Chicago. ***Id.*** at 1002. One of the federal district court judges in that courthouse was assigned to Nettles's case, and Nettles moved to recuse her and the other judges working in that courthouse based on an appearance of bias. ***Id.*** The Seventh Circuit Court of Appeals ultimately agreed that Nettles's case could not be heard by any judge who was threatened by Nettles's conduct. ***Id.*** at 1003.

¶17 ***Nettles*** is materially distinguishable on several bases.[12] The threat in that case was genuine. *See* ***id.*** at 1002-03. The threat in this case was a foolhardy attempt to influence Phillips's WIS. STAT. ch. 980 commitment by implicating a fellow chapter 980 committee in the crime. By the time Judge Warpinski was assigned to this case, there was no concern that Phillips intended to follow through with his threats, either against Judge Wexler or against the courthouse generally. Thus, unlike in ***Nettles***, no reasonable observer here could conclude that Judge Warpinski would want Phillips to be given a long sentence lest he get "another attempt to destroy the courthouse or its occupants." *See* ***id.*** at 1003. Nor would a reasonable observer conclude Judge Warpinski would be "concerned that a jury might acquit [Phillips], and might therefore rule against him on evidentiary and procedural issues, regardless of the merits." *See* ***id.***

¶18 On this record, we conclude Judge Warpinski was not objectively biased against Phillips. Phillips has not met his burden of showing, by a preponderance of the evidence, that a reasonable observer would determine that Judge Warpinski "could not be trusted to 'hold the balance nice, clear and true'

[12] Although we ultimately agree Phillips is not entitled to relief under the controlling authorities, we admonish the State for failing to respond to Phillips's invocation of ***In re Nettles***, 394 F.3d 1001 (7th Cir. 2005), and for failing to otherwise develop a sufficient response on the judicial bias issue. The substance of the State's application of appearance-of-bias principles consists of a single sentence, in which the State issues the conclusory proclamation that: "A reasonable person would not find the Brown County judge, unfamiliar with the case, biased against Phillips simply because Phillips engaged in a crime against another judge in the Brown County courthouse." The State's failure to develop a cogent argument is dismaying, in particular its failure to address Phillips's central premise—i.e., that the two judges merely working in the same facility is constitutionally problematic.

under all the circumstances."[13] *See* ***Gudgeon***, 295 Wis. 2d 189, ¶24. The general presumption that a judge is capable of acting fairly, impartially, and without prejudice controls here. *See* ***Herrmann***, 364 Wis. 2d 336, ¶24.

II. Suppression of Phillips's confession

¶19 Phillips also argues the circuit court erred by denying his suppression motion. While a defendant's statements made during a polygraph are generally inadmissible, statements occurring after the completion of the polygraph examination may be admissible in evidence. ***Greer***, 265 Wis. 2d 463, ¶9. The question is whether the post-polygraph interview is "so closely related to the mechanical portion of the polygraph examination that it is considered one event." ***State v. Johnson***, 193 Wis. 2d 382, 388, 535 N.W.2d 441 (Ct. App. 1995). If the post-polygraph interview is distinct as to both time and content from the polygraph examination, then any statements made during the interview are generally admissible in evidence. ***Id.***

¶20 This determination depends on the totality of the circumstances, ***id.*** at 388-89, which we review using a mixed standard of review, *see* ***State v. Davis***, 2008 WI 71, ¶18, 310 Wis. 2d 583, 751 N.W.2d 332. We will uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.*** However, the application of constitutional principles to the evidentiary and historical facts is a

[13] Phillips points to several pretrial statements by a court commissioner opining that the case was likely to be heard by a judge located outside of Brown County. These statements simply reflect what we conclude would have been the better practice of transferring this case to another county. However, here we are not concerned with best practices; the question before us is whether Judge Warpinski was constitutionally required to recuse himself. We conclude he was not.

question of law that we review independently of the circuit court's determination. ***Johnson***, 193 Wis. 2d at 387.

¶21 To determine whether a post-polygraph interview is distinct from a polygraph examination, we must consider and weigh five factors:

> (1) whether the defendant was told the test was over; (2) whether any time passed between the analysis and the defendant's statement; (3) whether the officer conducting the analysis differed from the officer who took the statement; (4) whether the location where the analysis was conducted differed from where the statement was given; and (5) whether the [polygraph examination] was referred to when obtaining a statement from the defendant.

Davis, 310 Wis. 2d 583, ¶23. Here, the facts applicable to these factors are largely undisputed, and though the circuit court's articulation of its factual findings in this case was relatively short, "we assume that the [circuit] court made such findings in the way that supports its decision." *See* ***State v. Long***, 190 Wis. 2d 386, 398, 526 N.W.2d 826 (Ct. App. 1994).

¶22 On the date of the polygraph examination, Meyle, who was to administer the examination, accompanied inspector Thieme and sergeant Phillips to the WRC. The polygraph examination took place in an office with a desk and two chairs in a vacant unit. According to Meyle, the polygraph examination consisted of three parts: a pre-test interview; the "end-test phase" during which the polygraph charts are collected; and a post-test interview.[14] The pre-test interview commenced at 10:09 a.m. At the inception of the pre-test interview, Thieme was present and administered a consent form and ***Miranda*** warnings to

[14] This post-test interview, which is part of the polygraph examination itself, is factually distinct from the post-polygraph interview during which Phillips confessed in this case. *See infra* ¶24 & n.15.

Phillips. Thieme then left the room while Meyle conducted the polygraph examination.

¶23 At some point prior to 11:20 a.m., Phillips was connected to the polygraph equipment, including a movement sensor device on the seat of his chair. At 11:20 a.m., Phillips was disconnected from the equipment to use the bathroom. He was reconnected to the equipment upon his return, and the "machine" portion of the test concluded at 11:54 a.m., at which time Phillips was disconnected from the equipment.

¶24 Upon the conclusion of the polygraph examination at approximately 1:05 p.m., Meyle exited the room to ask Thieme if he wanted to interview Phillips.[15] Phillips was left alone in the examination room for approximately five to ten minutes. At 1:14 p.m., Thieme and Meyle reentered the examination room and again administered ***Miranda*** warnings to Phillips. Phillips initialed and signed a ***Miranda*** form for the second time, and he then stated he wished to speak with Thieme. Thieme then interviewed Phillips for approximately forty-five minutes, during which time Phillips confessed to the crimes.

¶25 The record does not demonstrate that Meyle or Thieme expressly told Phillips that the polygraph examination was over before the post-polygraph

[15] The record is unclear as to what occurred during the period between 11:54 a.m. and 1:05 p.m. Meyle was alone with Phillips in the room during this time. The State, relying on Meyle's testimony, posits that Meyle was administering the post-test during this time. Phillips argues this time period "could be viewed as a 'warming up' of Phillips so he would say what the investigators wanted in continued questioning." While the State's construction of what occurred during this time period is based on reasonable inferences from the record, Phillips's narrative is complete speculation. Our standard of review requires us to assume the circuit court rejected Phillips's constitutionally problematic sequence. *See* ***State v. Long***, 190 Wis. 2d 386, 398, 526 N.W.2d 826 (Ct. App. 1994).

interview began. The record in ***State v. Schlise***, 86 Wis. 2d 26, 271 N.W.2d 619 (1978), suffered from a similar deficit and, as a result, our supreme court concluded the polygraph examination and post-polygraph interview were too closely related because: (1) the "mechanical" part of the test had been preceded by a lengthy pre-test interview; (2) the investigator himself considered the "mechanical" test and the subsequent interview to be parts of one unified procedure; and (3) during the post-polygraph interview, the investigator "made frequent use of and reference to the charts and tracings he had just obtained." ***Id.*** at 42-43.

¶26 Here, the officers evidently considered the polygraph examination and post-polygraph interview to be discrete events, as Thieme administered a fresh set of ***Miranda*** warnings upon the post-polygraph interview's commencement. This renewal of the warnings would have signaled to a reasonable person that the polygraph interview had concluded. Moreover, although there was a lengthy pre-test interview in this case, Thieme at no point referenced the results of the polygraph examination during the post-polygraph interview.[16] Thus, while the first ***Davis*** factor inures to Phillips's benefit, the officers' re-administration of ***Miranda*** warnings and "walling off" of the information gathering during the polygraph demonstrates the examination and the post-polygraph interview were discrete events.

¶27 Phillips challenges the circuit court's specific factual findings that, at the time the post-polygraph interview began, "[t]he motion cushion had been

[16] Thieme was not aware of the specific results of the polygraph; he testified that upon exiting the room at 1:05 p.m., Meyle gave only a general indication about how Phillips had performed.

removed, and the machine, in effect, had been shut down." There was conflicting testimony on this point. Meyle testified Phillips was physically detached from the machine at 11:54 a.m. He responded in the negative to a question regarding whether Phillips was "ever again put in connection, physically or in any way, with the polygraph machine" after that time. Although Phillips testified that the sensor cushion remained on his chair during the post-polygraph interview, Meyle testified it was his routine to remove the cushion after collecting the polygraph charts. The circuit court's finding that Meyle had acted in accordance with his routine on this occasion is not clearly erroneous.

¶28 Phillips argues that the second ***Davis*** factor supports his position. Assuming the post-test portion of the polygraph examination ended at 1:05 p.m., there was a five-to-ten minute break before the post-polygraph interview. But the fact that "very little time passed between the examination and interview … is not dispositive." ***Davis***, 310 Wis. 2d 583, ¶31. Even when the examination and interview are "virtually seamless," a statement is admissible if the record shows "two totally discrete events occurred." ***Id.*** Here, as in ***McAdoo v. State***, 65 Wis. 2d 596, 223 N.W.2d 521 (1974), the post-polygraph interviewer never referred back to the examination or results, and the equipment was removed from the defendant. *See* ***Davis***, 310 Wis. 2d 583, ¶31. This is sufficient attenuation despite the closeness in time between the two events. *See* ***Johnson***, 193 Wis. 2d at 389.

¶29 In reaching this conclusion, we acknowledge that the post-polygraph interview occurred in the same room as the examination, and that Meyle was present for both events. *See* ***Davis***, 310 Wis. 2d 583, ¶23. However, Meyle did not conduct the questioning in the subsequent interview. The circuit court specifically found that "it was Officer Thieme who came in and asked the

questions, having no specific knowledge of the … questions put by Inspector Meyle [during the polygraph examination] and the responses from Mr. Phillips." This finding was not clearly erroneous.

¶30 Statements given during a distinct post-polygraph interview are "also subject to ordinary principles of voluntariness." ***Davis***, 310 Wis. 2d 583, ¶21. For the first time in his reply brief, Phillips argues his interview was "strategically coercive." Because his failure to raise the issue in his brief-in-chief deprived the State of the ability to respond, we do not consider the voluntariness issue further. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256 ("[W]e do not consider arguments raised for the first time in a reply brief.").

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).