COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP878 **Cir. Ct. No. 2000CF0379**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEON J. LACE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge.[1] *Affirmed.*

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[1] The Honorable Jacqueline D. Schellinger presided over the trial and entered the judgment of conviction. The Honorable Timothy G. Dugan issued the order denying Leon J. Lace's WIS. STAT. § 974.06 motion. This appeal concerns Lace's appeal from the order entered by Judge Dugan.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Leon J. Lace appeals from an order denying his *pro se* WIS. STAT. § 974.06 motion for postconviction relief. Lace alleges that he was denied the effective assistance of postconviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). We affirm.

I.

¶2 Lace was charged with the possession of more then 2500 grams of tetrahydrocannabinols, with intent to deliver, as a party to a crime, for trafficking marijuana through the mail. He pled not guilty and was tried before a jury, along with codefendant Everton Taylor. At Lace's trial, United States Postal Inspector Daniel Kakanis testified that, on January 21, 2000, a California postal inspector told him that members of a Jamaican gang had recently sent two express-mail packages suspected of containing marijuana from San Diego, California, to Milwaukee. Kakanis intercepted the packages in Milwaukee, and a police dog indicated that it had detected controlled substances in them.

¶3 Kakanis testified that he then applied for and received a federal search warrant, and took the packages to the Milwaukee Police Department. The packages were opened and the police found approximately eighteen pounds of marijuana in the first package and fifteen pounds of marijuana in the second package. The packages were resealed, and their controlled deliveries were arranged, with Kakanis posing as a letter carrier while surveillance units watched the delivery areas.

¶4 Kakanis attempted to deliver one of the packages to an "Alice Rhodes" at 2829 North 49th Street. After two unsuccessful attempts, a woman, later identified as Tamitha King, came around the corner of the house, told Kakanis that the package was hers, and claimed that it was supposed to have gone to 2831, rather than 2829 North 49th Street. King then accepted delivery of the package, writing and printing the name "Alicia Rhodes."

¶5 After King accepted the package, surveillance team members saw her walk to the alley behind the house and put the package in the trunk of a Buick Regal. A Mitsubishi Diamante then drove up, and, according to the testimony of one of its members, the surveillance team saw nonverbal communication between King and the Mitsubishi's occupants, Lace and his brother, Taylor. The cars drove off, and the police stopped the Buick and arrested King. King allegedly told the police that the package belonged to an "E.T." The police had information that "E.T." either owned or was in the Mitsubishi. After a brief chase, the police pulled the Mitsubishi over and arrested Lace and Taylor. A search of Lace's house resulted in the seizure of, among other things, express mailing boxes, envelopes, and mailing labels.

¶6 The jury found Lace guilty of possession of more then 2500 grams of tetrahydrocannabinols, with intent to deliver, as a party to a crime. On his direct appeal, Lace argued that the trial court erred when it denied a motion to suppress evidence. We affirmed, concluding that the police had probable cause to arrest Lace, and a search of Lace's house was supported by a valid warrant. *See* ***State v. Lace***, No. 01AP1238-CR, unpublished slip op. (WI App June 25, 2002). The Wisconsin Supreme Court denied Lace's petition for review on September 26, 2002.

¶7 Lace's *pro se* WIS. STAT. § 974.06 motion alleged that his postconviction counsel was ineffective because the lawyer did not file a postconviction motion claiming, among other things, that the trial judge was biased against him. *See* ***Rothering***, 205 Wis. 2d at 682, 556 N.W.2d at 139 (allegation of ineffective assistance of counsel sufficient reason to permit additional issues to be raised in § 974.06 motion). The trial court held a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and denied Lace's motion.

II.

¶8 On appeal, Lace points to what he alleges are two instances of trial-court bias. We address each one in turn.

A. *Trial Judge's Questioning of Kakanis.*

¶9 Lace argues that his postconviction lawyer was ineffective because the lawyer did not raise in a postconviction motion a claim that Lace's trial lawyer was ineffective when the trial lawyer did not object to the trial judge's allegedly improper questioning of the postal inspector, Kakanis. At Lace's trial, the State asked Kakanis, whether, based on his training and experience, there was anything suspicious about mailing labels Kakanis had discovered during his investigation that were on or for packages going from Milwaukee to San Diego, apparently from Lace and his brother:

> Inspector, during the course of your investigation, you testified that you look for certain factors about suspicious packages that may be coming into the area or leaving the area relating to narcotics trafficking.
>
> These labels you just testified to seem to have a lower weight. From your training and experience, in relation to plans that may have been involved in other kinds

> of narcotics trafficking, is there any significance to these packages which all appear to be at a lower weight?

Lace's lawyer objected, and the trial judge took the objection under advisement pending a sufficient foundation. Kakanis then testified that the labels on the packages from Milwaukee to San Diego were consistent with being used to mail money to a drug supplier:

> Q What is it about what you see on these labels that causes you to suspect that those may have been payment back out to San Diego?
>
> A Just the fact that the same name is used, at various addresses, the handwriting is the same, the address of where they are going to …

Lace's lawyer moved to have Kakanis's testimony stricken, and the trial judge questioned Kakanis:

> THE COURT: Before I [rule on the motion to strike], I need to get the answer to one question. Please, would you for the jury, outline all of the criteria you use based on your training and experience with currency being sent, as part of the transaction that you described, please tell us all the reasons why you believe the packages you described as those you suspected contained money, what are the reasons why you did that?
>
> THE WITNESS: These particular ones or just any one in general?
>
> THE COURT: When you look at these packages, in your training and experience that it contains money, what goes into that consideration?
>
> THE WITNESS: I look for person to person, generally, look for hand written labels, look for the size, weight and feel of the package.
>
> THE COURT: When you go through each one of these things, tell us when you suspected that it is consistent with your belief. Start with the first one.
>
> THE COURT: [Prosecutor], I do think this one is yours, do you know what I'm saying?

> [PROSECUTOR]: Judge, frankly, I disagree with counsel[.] I think I went through some extensive --
>
> THE COURT: The court declines to ask any further questions of this witness, continues to take the motion under advisement. And [prosecutor] -- You may proceed.

The State then asked Kakanis questions about the labels on the packages, and Kakanis testified that, based on the dates on the labels, weight of the packages, and handwriting on the labels, it was his opinion that the packages were used to mail currency. Although not specifically ruling on Lace's objection, the trial court allowed the State to show the labels to the jury, thus, implicitly overruling the objection.

¶10 Lace claims that the trial judge's questioning of Kakanis violated his due-process right to be tried by a fair and impartial judge. This assertion presents three issues: (1) whether the trial judge erred by exceeding her authority to interrogate witnesses under WIS. STAT. RULE 906.14; (2) whether Lace was denied the effective assistance of counsel because his trial lawyer did not object to the trial judge asking Kakanis questions, and his postconviction lawyer did not raise the issue; and (3) whether the trial judge violated Lace's due-process right to a fair trial before an impartial judge. *See* ***State v. Carprue***, 2004 WI 111, ¶29, 274 Wis. 2d 656, 670–671, 683 N.W.2d 31, 38. We address the first two issues together.

¶11 Under WIS. STAT. RULE 906.14(2), a judge may interrogate a witness called by the judge or by a party.

> There is a fine line which divides a judge's proper interrogation of witnesses and interrogation which may appear to a jury as partisanship. A trial judge must be sensitive to this fine line. However, the trial judge is more than a mere referee. *The judge does have a right to clarify questions and answers and make inquiries where obvious*

> *important evidentiary matters are ignored or inadequately covered on behalf of the defendant and the state.* A judge does have some obligation to see to it that justice is done but must do so carefully and in an impartial manner.

State v. Asfoor, 75 Wis. 2d 411, 437, 249 N.W.2d 529, 540–541 (1977) (emphasis added).[2] As we have seen, Lace's trial lawyer did not object when the trial judge questioned Kakanis. Accordingly, this claim is waived, and we must address it under the two-part test for ineffective-assistance-of-counsel claims. *See* RULE 906.14(3) ("Objections to the calling of witnesses by the judge or to interrogation by the judge may be made at the time or at the next available opportunity when the jury is not present."); ***Carprue***, 2004 WI 111, ¶¶35, 47, 274 Wis. 2d at 672, 678, 683 N.W.2d at 39, 41.

¶12 To prove ineffective assistance of counsel, a defendant must show: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. There is a "strong

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[2] WISCONSIN STAT. RULE 906.14 provides:

> **Calling and interrogation of witnesses by judge. (1)** CALLING BY JUDGE. The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
>
> **(2)** INTERROGATION BY JUDGE. The judge may interrogate witnesses, whether called by the judge or by a party.
>
> **(3)** OBJECTIONS. Objections to the calling of witnesses by the judge or to interrogation by the judge may be made at the time or at the next available opportunity when the jury is not present.

presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶13 To satisfy the prejudice aspect, a defendant must demonstrate that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

¶14 Our standard for reviewing an ineffective-assistance-of-counsel claim involves mixed questions of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless clearly erroneous. ***Ibid.*** Conclusions, however, as to whether the lawyer's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** aspects if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶15 Here, the postconviction court determined, as a matter of law, that the trial judge's questioning of Kakanis was proper to clarify the foundation for Kakanis's testimony:

> As to the conduct during the course of the trial, there was a series of questioning that was pointed out in the briefs. The trial court then did ask several very short questions, summary questions, and they were substantially along the same lines as those that the District Attorney had been asking that same particular witness. And the court was doing it in response to the specific objection that was raised at the moment and clarifying for the court to be able to make a ruling on the objection.

Lace argues that the trial judge's questions did not clarify the evidence, and demonstrated that the trial judge was partial to the State. We disagree.

¶16 The trial judge's questions do not implicate improper motive or partiality in any way. As the postconviction court recognized, the trial judge's questions were well within her responsibilities both under the common law and WIS. STAT. RULES 906.11 (trial judge entrusted superintending the trial) and, as we have seen, 906.14(2). The trial judge was asked to rule on Lace's objection; its questions were wholly directed to its being able to rule fairly and objectively. Nothing said by the trial judge even approaches expressing an opinion about either Lace or the merits of the State's case. Accordingly, Lace's trial lawyer was not ineffective for not objecting, and his postconviction lawyer was not ineffective for not raising this issue in a postconviction motion. We thus turn to the third issue, whether the trial court's questioning of Kakanis is evidence that the trial judge was biased against Lace. *See* ***Carprue***, 2004 WI 111, ¶57, 274 Wis. 2d at 681, 683 N.W.2d at 43 (judicial bias is structural error that cannot be waived).

¶17 Whether a trial judge's partiality violates a defendant's right to due process is a question of constitutional fact that we review *de novo*. ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106, 109 (Ct. App. 1994). There is a presumption that a judge is free of bias and prejudice. ***Ibid.*** To overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge was biased or prejudiced. ***Id.***, 187 Wis. 2d at 415, 523 N.W.2d at 109.

¶18 Whether a judge is biased has both subjective and objective components. ***Id.***, 187 Wis. 2d at 415, 523 N.W.2d at 110. The subjective component is based on the judge's own determination of whether he or she will be

able to act impartially. ***Ibid.***; *see also* WIS. STAT. § 757.19(2)(g) ("Any judge shall disqualify … herself from any … criminal action or proceeding when … a judge determines that, for any reason, … she cannot, or it appears … she cannot, act in an impartial manner.").[3] Lace has pointed to nothing that contradicts the

[3] WISCONSIN STAT. § 757.19(2) provides seven situations where it is mandatory for judges to disqualify themselves:

> **(2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> (a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.
>
> (b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.
>
> (c) When a judge previously acted as counsel to any party in the same action or proceeding.
>
> (d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.
>
> (e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.
>
> (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.

The first six subsections, (a)-(f), are fact specific situations, which can be determined objectively, that is without recourse to a judge's state of mind. *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis. 2d 175, 182, 443 N.W.2d 662, 664–665 (1989). The seventh subsection, (g), is a general subjective situation that is based solely on the judge's state of mind. ***Id.***, 151 Wis. 2d at 183, 443 N.W.2d at 665.

reasonable assumption that by presiding, the trial judge believed that she could act impartially. *See* ***Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d at 684, 683 N.W.2d at 45. We thus turn to the objective component.

¶19 Under the objective component, we must determine whether there are objective facts that demonstrate actual bias. ***McBride***, 187 Wis. 2d at 416, 523 N.W.2d at 110. The party asserting bias must show that the trial judge treated the party unfairly, not that there was merely an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial. ***Ibid.*** Lace has not even approached meeting this burden of proof. Lace does not claim that the trial judge was disqualified as a matter of law. *See* WIS. STAT. § 757.19(2)(a)–(f). Rather, Lace merely points to the trial judge's questioning of Kakanis, discussed above, as evidence that the trial judge was generally biased against him. As we have already indicated, the trial judge's questions were perfectly proper and appropriate; they were evidence of a judge carefully doing her job—not, by any stretch of the imagination, bias.

B. *Ex Parte Communication.*

¶20 Lace alleges that an *ex parte* conversation the trial judge had with the prosecutor and a state witness also violated his due-process right to a fair and impartial trial. The State contends that this claim is waived because Lace did not frame it as an ineffective-assistance-of-postconviction-counsel claim in his brief on appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Lace did raise the issue, however, in his postconviction motion. Accordingly, we review Lace's *ex parte* claim under our discretionary power of review. *See* ***Saenz v. Murphy***, 162 Wis. 2d 54, 57 n.2, 469 N.W.2d 611, 612 n.2 (1991) ("this court is not bound by the issues as they are framed by the parties"),

overruled on other grounds, ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821; ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (waiver is rule of judicial administration not appellate jurisdiction).

¶21 On the morning of the trial, the trial judge told Lace's and Taylor's lawyers that she had conducted an off-the-record discussion with one of the State's witnesses, Tamitha King, about possible threats:

> Before going forward today, with the trial, I was advised by Tamitha King of some concern she had with regard to communication that was made with her, that if it's true, is potentially an effort at intimidation.
>
> ….
>
> I will say that we did have an off the record conversation with Ms. King, so that she could explain what her fears were. And, at this time, it's the court's opinion it's more important to act on the better side of caution and to avoid any discussions about Ms. King's concerns.
>
> ….
>
> [Lace's and Taylor's lawyers], … it's my understanding from [the prosecutor] you don't have to fear that anything about these conversations that we had to have this morning outside your presence and off the record will effect [*sic*] any way the evidence going in the trial.
>
> No one is going to accuse your client on the witness stand of the opportunity to be threatening.

Lace's trial lawyer objected to the off-the-record discussion, arguing "if it's anything to do that might affect trial testimony, I was very upset about that, and I don't think we should have been excluded from that." The trial judge then explained that it had excluded Lace's and Taylor's lawyers because it did not want to put them in a "compromised situation" where they would feel obligated to tell Lace and Taylor what King had said during the conversation, and assured the

lawyers that "the prosecutor is not intending, according to what he said, to introduce any evidence that either one of your clients, or for that matter anyone else, has attempted to influence [King's] testimony."

¶22 Lace claims that the trial judge's off-the-record conversation with King violated his due-process right to a fair and impartial trial, pointing out that the trial judge did not give the defense lawyers notice of the discussion or have the discussion transcribed. As with Lace's questioning-of-a-witness claim, this contention presents three issues: (1) whether the trial court erroneously exercised its discretion when it held the conversation off the record without the defense lawyers present, *see* ***United States v. Napue***, 834 F.2d 1311, 1316 (7th Cir. 1987) (reviewing *ex parte* communication for erroneous exercise of discretion); (2) whether Lace was denied the effective assistance of counsel because his postconviction lawyer did not raise this issue; and (3) whether the trial judge violated Lace's due-process right to a fair trial before an impartial judge. *See* ***Carprue***, 2004 WI 111, ¶29, 274 Wis. 2d at 670–671, 683 N.W.2d at 38. Again, we address the first two issues together.

¶23 In this case, the postconviction court determined that the *ex parte* communication was harmless error because it did not "contribute[] to [Lace's] conviction":

> the judge … clearly indicated that although this communication that would be an attempt to intimidate the witness may have occurred, no testimony regarding that was going to be allowed in the course of the trial; and that, therefore, the fact that the discussion regardless -- regarding a potential threat to a witness was not recorded, there is no possibility that that contributed to the conviction of the defendant. In fact, to the extent that it may have involved intimidation of a witness by the defendants or representatives of the defendants, it wasn't admitted.

Although we disagree that what the trial judge did was error, it had absolutely no effect on the fairness of Lace's trial. While *ex parte* communications are not favored, they are not necessarily improper, particularly when the safety and physical well-being of a potential witness is involved. *See* ***Napue***, 834 F.2d at 1316.

> [I]n the exercise of the court's residual power to ensure a just trial, and protect jurors and witnesses, a judge may in very rare circumstances feel it essential to confer with a juror or witness on the record but outside the presence of others, including the defendant. One example of such a conference might be where a juror or witness, having been threatened, wished to speak to the judge privately about the threat.

LaChappelle v. Moran, 699 F.2d 560, 565 (1st Cir. 1983); *see also* SCR 60.04(1)(g) (when judge may engage in *ex parte* communication).

¶24 Lace's claim fails because he does not show how the *ex parte* communication adversely affected him. The trial judge did not make any factual or legal determinations based on the *ex parte* discussion. Also, the jury was not aware that the discussion occurred or that King had claimed being the subject of attempted intimidation. Thus, Lace's postconviction lawyer was not ineffective for failing to raise this claim, and we now turn to the third issue, whether the *ex parte* discussion is evidence that the trial judge was biased against Lace. *See* ***Carprue***, 2004 WI 111, ¶57, 274 Wis. 2d at 681, 683 N.W.2d at 43.

¶25 As we have seen, the party asserting judicial bias must show by a preponderance of the evidence that the judge was biased or prejudiced. ***McBride***, 187 Wis. 2d at 415, 523 N.W.2d at 109. Lace claims that the *ex parte* discussion "presents a strong appearance of impropriety." We disagree. The trial court's actions were merely an exercise of the trial court's function to oversee the trial and

ensure that witnesses are not intimidated. *See* ***LaChappelle***, 699 F.2d at 565 (judge's residual power to protect witnesses). Lace has not presented any evidence that the trial judge was biased against him.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.