COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1769-CR **Cir. Ct. No. 2005CF3434**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK YAWFE ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Derrick Robinson appeals an amended judgment of conviction on two felony counts. He also appeals an order denying his postconviction motion. Robinson challenges his sentences on the grounds that the

judge was biased against him and that one of the conditions of his extended supervision is unconstitutional. We affirm for the reasons discussed below.

BACKGROUND

¶2 Robinson was awaiting sentencing on another drug case when he was charged in the present case with one count of possessing cocaine with intent to deliver as a second or subsequent offense and one count of felony bail jumping. At the sentencing hearing in the other case, Judge William Sosnay commented that:

> [W]hat concerns the court is your pattern of conduct and your criminal history. You obviously haven't gotten the message….
>
> ….
>
> … [There are] other cases pending now that apparently occurred allegedly after this did ….
>
> ….
>
> … I gave you the 12 months here primarily because of your past record, and I want you to get the message. Get out of the business. You didn't learn after you were charged on this case. You didn't learn on the cases that you had before this. You come back again or if you go to court in Racine or someplace else, you may go up to prison again….
>
> ….
>
> … If you're in a gang or gang member, you better get out of the business. Do you understand that?
>
> ….
>
> … Either that or you better hope you never see me again, okay?

¶3 Robinson subsequently entered guilty pleas in this case, and the matter proceeded to sentencing, again before Judge Sosnay. The State

recommended a combined sentence of thirty months of initial confinement and thirty months of extended supervision. The court ultimately exceeded that recommendation, imposing sentences of thirty months of initial confinement and thirty-six months of extended supervision on the drug charge, and one year of initial confinement and one year of extended supervision on the bail jumping count, consecutive to each other and consecutive to any other sentence. One of the conditions for the extended supervision was that Robinson was "not to associate with any known drug users or any known drug dealers." The court noted that the sentences were "particularly based upon [Robinson's] past criminal record," further stating:

> You committed this offense while the other case was pending and [with] the serious nature of your criminal record the Court again feels if I were to give you concurrent time here, I would be depreciating the seriousness of this offense in the eyes of the community. You obviously did not get the message.

¶4 Robinson filed a motion for a new sentencing hearing and/or modification of the conditions of the extended supervision, which was denied. Robinson appeals.

DISCUSSION

Impartiality of the Judge

¶5 Robinson first claims that he was deprived of his due process right to be sentenced by an impartial judge, and that trial counsel provided ineffective assistance by failing to raise the issue. He claims Judge Sosnay's comments at the earlier sentencing hearing that Robinson "better hope [he] never see[s the judge] again," and "may go up to prison again" if he were to come back before the judge, show subjective bias, while the judge's statement at the latter sentencing hearing

that Robinson "obviously did not get the message" and the court's decision to exceed the State's sentencing recommendation show objective bias. We disagree.

¶6 Subjective bias is based on a judge's own determination that he or she cannot act impartially in a matter, or believes there would be an appearance of partiality. *See* ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). When no disqualification is made, a judge is presumed to have believed himself or herself capable of acting impartially. ***Id.*** Here, the judge's own explicit determination that he harbored no personal bias against Robinson ends the subjective inquiry.

¶7 Objective bias is based upon facts showing that the trial court in fact treated a defendant unfairly, ***id.*** at 416, or that a reasonable person could not expect an average judge to be impartial under the circumstances of the case. ***State v. Gudgeon***, 2006 WI App 143, ¶24, __ Wis. 2d __, 720 N.W.2d 114, *review denied*, 2006 WI 126, __ Wis. 2d __, 724 N.W.2d 204 (No. 2005AP1528). We are not persuaded that any of the judge's comments at either sentencing hearing would lead a reasonable person to believe that the judge had any personal animosity or bias against Robinson. Rather, the statements that Robinson could well go to prison again were routine warnings against continued criminal activity. The statements that Robinson had not gotten the message—which the judge made at both sentencing hearings—referred to Robinson's failure to learn from his past criminal history in general, not just his commission of the present crime while awaiting sentencing. Looking at the transcripts as a whole, it is clear that the judge was not operating under a mistake of fact as to when the offenses were committed. Finally, the mere fact that the sentences exceeded the State's recommendation does not demonstrate bias or make the sentences inherently unfair. The sentences were relatively moderate, given Robinson's overall sentence

exposure of thirty-seven years, and the court adequately explained why it was making the sentences consecutive. We conclude that the record shows no bias and that counsel was not ineffective for failing to raise the issue.

Conditions of Extended Supervision

¶8 Robinson next challenges the condition of his extended supervision that prohibits him from associating with known drug users or dealers. He first argues that this condition is unconstitutionally overbroad because it prohibits him from exercising his First Amendment right to assemble. *See generally* ***State v. Lo***, 228 Wis. 2d 531, 538, 599 N.W.2d 659 (Ct. App. 1999) (the overbreadth doctrine applies when the normal meaning of the language at issue "'is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate'" (citation omitted)).

¶9 However, conditions of extended supervision "may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." ***State v. Trigueros***, 2005 WI App 112, ¶11, 282 Wis. 2d 445, 701 N.W.2d 54 (citations omitted), *review denied*, 2005 WI 136, 285 Wis. 2d 629, 703 N.W.2d 378 (No. 2004AP1701-CR). In ***Trigueros***, we held that a restriction against associating with those in the drug community was not overbroad because it was reasonably related to the defendant's crime and rehabilitative needs, as well as to the protection of the community. ***Id.***, ¶12.

¶10 Robinson claims that the association prohibition here is broader and less related to his rehabilitative needs than that at issue in ***Trigueros*** because, Robinson argues, it is "not limited to the current time." That is, Robinson interprets the phrase "any known drug users or any known drug dealers" to include anyone who has ever, at any time, used or sold drugs, no matter how long in the

past. He claims this would prevent him from attending AA or NA meetings. We do not agree that the normal meaning of "known drug users" and "known drug dealers" includes those who are no longer using or dealing, or who are actively seeking help for a substance abuse problem. Rather, common sense dictates that the language in fact refers to those who are currently using or dealing drugs. *See* ***Lo***, 228 Wis. 2d at 538-39 (construing prohibition against association with gang members to refer to current gang members). It would be absurd to construe the phrase used here as prohibiting participation in substance abuse programs.

¶11 Robinson also contends that the phrase "any known drug users or any known drug dealers" is unconstitutionally vague because it does not give reasonable notice as to who he is prohibited from associating with. *See generally* ***State v. Tronca***, 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978) (the test for vagueness is whether the language at issue "'gives reasonable notice of the prohibited conduct to those who would avoid its penalties'" (citation omitted)). Robinson argues that it is unclear whether a drug user or drug dealer has to be "known" as such to Robinson, to law enforcement, or to the general community. Again, we find Robinson's argument entirely unpersuasive. The only reasonable reading of the extended supervision condition is that it requires that Robinson himself either know or reasonably could be expected to know that a certain individual is a drug user or drug dealer.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5. (2003-04).