

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 23, 2009**

David R. Schanker  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2008AP2042**

**Cir. Ct. No. 2007TR5916**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**COUNTY OF FOND DU LAC,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEAN T. KEDINGER,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Fond du Lac County:  
PETER L. GRIMM, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.<sup>1</sup> Dean T. Kedinger appeals from two postjudgment orders arising from a traffic forfeiture judgment for driving with an

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

unsecured load in violation of WIS. STAT. § 348.10(2). Kedinger filed a motion to stay enforcement of the resulting judgment alleging judicial bias. The trial court denied Kedinger's request, as well as his subsequent requests for reconsideration. Kedinger appeals from the trial court's orders denying his postjudgment motions. We affirm.

## **BACKGROUND**

¶2 On June 20, 2007, Kedinger was issued a citation by Fond du Lac Sheriff Michael Hardgrove for operating a motor vehicle with an unsecured load, contrary to WIS. STAT. § 348.10(2). Kedinger was additionally issued a warning for equipment defects: “no muffler,” “improper front tires” and “emergency brake,” to be remedied within fifteen days. In requesting that the deadline to remedy the equipment defects be extended indefinitely, Kedinger additionally urged the court to dismiss the unsecured load citation because “the load was fully secured prior.” On June 29, 2007, Kedinger filed a “not guilty” plea with the court and requested discovery and a jury trial.

¶3 Prior to trial, Kedinger filed a request for substitution of judge and a motion for change of venue alleging “cronyism” in the district and requesting a hearing outside of Fond du Lac and Winnebago counties. The matter was scheduled for a motion hearing on August 3, 2007. Prior to that hearing, the trial court, Judge Robert Wirtz presiding, denied the substitution on grounds that it was not made within ten days of the initial appearance.

¶4 Judgment on the citation was entered following a court trial before Judge Wirtz on August 31 and September 20, 2007. Kedinger was assessed a forfeiture and costs totaling \$375. Kedinger did not take a direct appeal from the forfeiture judgment. Instead, Kedinger moved for a stay of enforcement of the

judgment pending appeal on October 19, 2007, due to newly discovered evidence and reconsideration on November 9, 2007, on grounds of judicial bias.<sup>2</sup> The trial court, now Judge Peter Grimm presiding, held a motion hearing on June 24, 2008.<sup>3</sup> On July 3, 2008, Kedinger filed another motion to stay enforcement of the judgment on grounds that he had filed a tort claim against Judge Grimm on June 23, 2008, just prior to the motion hearing. On July 7, 2008, Judge Grimm issued a summary order denying Kedinger's October 19 and November 9, 2007 motions and summarily dismissing Kedinger's July 3, 2008 motion based on the court's determination that any new issues raised in the July 3 motion were untimely and should have been raised at the June 24, 2008 motion hearing.

¶5 On July 10, 2008, Kedinger filed a second motion for reconsideration, this time alleging judicial bias on the part of Judge Grimm. On

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<sup>2</sup> Kedinger's October 19, 2007 motion cited WIS. STAT. § 806.08(2) in support of his motion for stay of enforcement of judgment pending appeal due to newly discovered evidence. Kedinger's motion asserted that "recently new evidence has been discovered that [Judge Wirtz] **was prior, my personal lawyer** in the late 1980's and **paid business attorney** as late as 1990." Kedinger's § 806.08(2) motion was inapposite because he had not appealed the forfeiture judgment.

Kedinger's November 9, 2007 motion cited to WIS. STAT. § 805.17(3); however, it was brought outside the time limits for such a motion. *See id.* (motions for reconsideration following a trial to the court must be filed within twenty days after entry of judgment). While the County requested that the court deny Kedinger's motions without a hearing as untimely, the record reflects that the court did hold a motion hearing on June 24, 2008. We presume the court considered it as a postjudgment motion to reconsider or a motion pursuant to WIS. STAT. § 806.07.

Kedinger's only challenge to the trial court's forfeiture judgment raised in these motions is newly discovered evidence of judicial bias.

<sup>3</sup> Judge Grimm was assigned on March 20, 2008, after Kedinger filed a claim against Judge Wirtz with the Government Accountability Board.

July 16, 2008, the trial court, Judge Grimm presiding, denied Kedinger's motion for lack of merit and untimeliness.

¶6 Kedinger appeals Judge Grimm's postjudgment rulings.<sup>4</sup> In his statement on transcript to this court, Kedinger indicated that he is indigent. Based on Kedinger's request for production of the transcripts and waiver of transcript fees, this court remanded the matter to the circuit court to determine indigency and whether Kedinger's appeal is arguably meritorious. *See County of Fond du Lac v. Kedinger*, No. 2008AP2042, unpublished order at 2 (WI App Sept. 9, 2008). On remand, the trial court requested briefing to be submitted as soon as possible in order to meet the thirty-day decision deadline imposed by this court. Kedinger failed to submit a brief.

¶7 On October 9, 2008, the trial court issued an order denying Kedinger's motion for production of transcripts finding that Kedinger was

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<sup>4</sup> Kedinger's notice of appeal stated as follows:

Notice is hereby given that D. Kedinger, appeals to the Court of Appeals, District II, from the Order entered on July 7th, and July 16th, 2008, in the Circuit Court for Fond du [L]ac County, the Hon. Peter L. Grimm presiding, in favor of Fond du [L]ac County and against the defendant, D. Kedinger, wherein the court has denied access to evidence, witnesses, clear headed interpreters in case 2007 TR 005916[.]

The Court has ignored the injunction and tort claim papers that were received by him on the [a.m.] of June 24th, 2008, as admitted in [the] Court and proceeded to refuse the defendant his rights, with giving notice that he had rescinded any oppositions to denying claims under [WIS. STAT.] § 814.29 WITH CASE 07 TR 6277, but refusing D. Kedinger's rights under this case, a case he did not hear prior, appears to be duplicity w/ discrimination.

indigent, but that his appeal was not arguably meritorious as a matter of law. Acknowledging Kedinger's objection to the trial court's determination, we denied Kedinger's request for waiver of the transcript fee based on his failure to provide any basis upon which to conclude that his appeal had arguable merit. *See Kedinger*, No. 2008AP2042, unpublished order at 2. Kedinger's appeal then proceeded to date.

## DISCUSSION

¶8 Kedinger raises the following issues on appeal: (1) he was denied his right to trial by jury, (2) the circuit court erroneously exercised its discretion by demanding excessive costs, and (3) the circuit court erroneously exercised its discretion by failing to be impartial and unbiased.<sup>5</sup> However, the only issue raised in Kedinger's postjudgment motion for reconsideration, and addressed by Judge Grimm in his postjudgment orders, was judicial bias. We therefore address only that issue properly before this court: whether Kedinger's trial judge, Judge Wirtz, and subsequently Judge Grimm, when considering his postjudgment motions, were unbiased and impartial.<sup>6</sup>

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<sup>5</sup> Kedinger, who is pro se on appeal, raises numerous challenges in passing that are not identified in his statement of issues and are not adequately briefed. We therefore limit our discussion to those issues identified in his statement of issues; however, we need not address his contention that the circuit court erroneously exercised its discretion by failing to provide him with transcripts. This argument was previously addressed and rejected by this court. *See County of Fond du Lac v. Kedinger*, No. 2008AP2042, unpublished order at 2 (WI App Nov. 10, 2008).

<sup>6</sup> Kedinger's argument regarding the trial court's failure to waive jury fees is not properly before this court. Kedinger did not appeal the forfeiture judgment. Moreover, Kedinger did not raise this issue in his postjudgment motions. Finally, even if he had sought to do so, he could not have raised this issue because it could have been raised on direct appeal from the judgment. *See Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 24-26, 197 N.W.2d 752 (1972) (whether one can appeal from an order denying a motion to vacate or modify or for a rehearing on prior appealable judgments depends on whether the issues raised in the postjudgment motion could have been reviewed on an appeal from the judgment itself).

¶9 “A person’s right to be tried by an impartial judge stems from his/her fundamental right to a fair trial guaranteed by the due process clause of the [F]ifth [A]mendment of the United States Constitution.” *State v. Hollingsworth*, 160 Wis. 2d 883, 893, 467 N.W.2d 555 (Ct. App. 1991). “A litigant is denied due process only if the judge, in fact, treats him or her unfairly.” *Id.* at 894. Here, Kedinger contends that the trial court’s bias and partiality is evident in the body language of the judge, in the trial court’s denial of his postjudgment motions and its denial of his subsequent request for a waiver of transcript fees (which would reveal “duplicity and cover up of Officers lying in court”), and in the imposition of the maximum allowed fine for the cited violation. In regard to alleged bias, it is not enough that there be an appearance of or speculation about impartiality by the trial court. *Id.* Kedinger’s allegations are just that and therefore fail to raise an issue of bias. While we need not further address the issues of body language, the denial of his motions and waiver of transcript fees, we address Kedinger’s claim that the trial court erred in “max-ing out the fine” for the cited offense insofar as it relates to the issue of bias.<sup>7</sup>

¶10 Kedinger contends that the trial court evidenced bias by denying his request for equitable relief and by imposing excessive costs related to the violation. Kedinger’s argument fails. A violation of WIS. STAT. § 348.10(2) results in a penalty of not less than \$10 nor more than \$200. *See* WIS. STAT. § 348.11(1). “[I]n assessing a forfeiture, a trial court must exercise its discretion within the mandatory statutory range.” *State v. Schmitt*, 145 Wis. 2d 724, 730,

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<sup>7</sup> We question whether Kedinger properly raised this issue in postjudgment motions before the trial court; however, one can infer from his arguments before the trial court that he believed the excessive fine to be the result of judicial bias.

429 N.W.2d 518 (Ct. App. 1988). Here, the court ordered forfeiture of \$200 was within the statutory range. While we would normally look to the transcript to review the trial court's exercise of discretion, we have no transcript of the proceedings in this case. Absent a transcript, every fact essential to sustain the trial court's exercise of discretion is assumed to be supported by the record.<sup>8</sup> *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233, 239 (1979). We must, therefore, assume the trial court properly exercised its discretion when it imposed the maximum allowable forfeiture for the cited violation.

### CONCLUSION

¶11 We conclude that Kedinger failed to establish that either Judge Wirtz or Judge Grimm treated him unfairly during the proceedings. Kedinger was cited for violating WIS. STAT. § 348.10(2), he was found guilty and assessed a forfeiture within the permissible statutory range. We therefore reject Kedinger's challenges to the postjudgment orders and affirm.

*By the Court.*—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

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<sup>8</sup> Pursuant to this court's order dated November 10, 2008, Kedinger was responsible for the cost of the preparation of the transcripts for the appeal, if he desired to make them part of the appellate record. See *Kedinger*, No. 2008AP2042, unpublished order at 2. As noted earlier, Kedinger failed to file a brief in the trial court in support of his motion for waiver of transcript fees and had the opportunity to address the trial court's order before this court but failed to set forth any "facts or argument which [were] sufficient to permit this court to conclude that his appeal ha[d] arguable merit," such that he was entitled to a waiver of transcript fees. See *id.*





