COURT OF APPEALS
DECISION
DATED AND RELEASED

June 25, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1944-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY HICKS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

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

PER CURIAM. Anthony Hicks appeals from a judgment of conviction for attempted delivery of cocaine, as party to a crime. *See* §§ 161.16(2)(b)1, 161.41(1)(cm)4, 939.32, and 939.05, STATS. On appeal, Hicks argues that: (1) the trial judge's refusal to recuse himself mandates a new trial; and (2) his right to a fair trial was prejudiced by improper remarks by a witness for the State. We affirm.

1. *Recusal.*

Hicks was arrested and charged with attempted delivery of cocaine as part of an undercover sting operation set up by the Milwaukee County Police Department and Gerald Laymond, a drug dealer who had been previously arrested, charged, and eventually convicted of a cocaine-related offense. After a hung jury in the first trial, Hicks was convicted as charged. Before the second trial began, James Shellow, defense counsel, learned that Judge Jeffrey A. Kremers, who presided over both of Hicks's trials, had contacted Laymond's sentencing judge in order to attest that Laymond had testified truthfully during Hicks's first trial. Shellow then sought Judge Kremers's recusal, based upon what Shellow perceived to be Judge Kremers's personal interest in Laymond's credibility.[1]

In denying recusal, Judge Kremers conceded that "[i]f this were a court trial," his actions on behalf of Laymond "might be somewhat problematic" but determined that he had no personal interest in the case under § 757.19(2)(f), STATS., and that his conduct did not evidence either actual partiality or the appearance of partiality.

Section 757.19(2), STATS., governs when a judge should disqualify himself or herself.[2] Hicks argues that Judge Kremers's recusal was required

[1] Shellow's affidavit in support of his motion seeking Judge Kremers's recusal alleged that Judge Kremers's actions on Laymond's behalf permitted the inference that Judge Kremers "has prejudged the credibility of a state's witness [Laymond] and become an advocate on his behalf."

[2] Section 757.19(2), STATS., provides:

> **(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.

under § 757.19(2)(f) & (g), STATS., and that the judge's "implied bias in favor of the state and against the defense, or the likelihood and appearance of such bias, denied Hicks effective assistance of counsel," as well as due process.

> The standard by which to measure the basis for disqualification under sec. 757.19(2), Stats., is evident. The situations requiring disqualification under subs. (a) through (f) are objectively measurable. However, in sub. (g), because the basis for disqualification is subjective, requiring the judge's determination of an actual or apparent inability to act impartially, there is no standard to apply on review other than an objective one limited to establishing whether the judge made a determination requiring disqualification.

State v. American T.V. and Appliance, 151 Wis.2d 175, 186, 443 N.W.2d 662, 666 (1989).

Section 757.19(2)(f), STATS., requires a trial judge to recuse himself or herself: "[w]hen a judge has a significant financial or personal interest in the outcome of the matter." As noted, Hicks claims that Judge Kremers had a "personal interest in the outcome" because of his advocacy on behalf of (..continued)

> (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.

Laymond, and that this "personal interest" was in having the accuracy of his opinion about Laymond confirmed by others and in not appearing "foolish."

Judge Kremers's comments to the judge who was to sentence Laymond did not give Judge Kremers a personal interest in the outcome of Hicks's second trial. It is quite common for a judge to comment on the credibility of witnesses, and the general rule is that "ordinarily [a judge] is not so disqualified where he expresses such an opinion as to [the credibility of] a witness who is not a party." *See* 48A C.J.S. *Judges* § 118, 773 (1981). Here, Laymond was a witness, not a party. Moreover, Judge Kremers was not the fact-finder. Hicks offers no evidence how Judge Kremers's statement on behalf of Laymond affected the result in this case. Judge Kremers did not err in refusing to recuse himself under § 757.19(2)(f), STATS.

Every defendant has a constitutional right to a trial before a fair and impartial judge. ***State v. Rochelt***, 165 Wis.2d 373, 378, 477 N.W.2d 659, 661 (Ct. App. 1991). Thus, § 757.19(2)(g), STATS., requires a judge to disqualify himself or herself when the "judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Section 757.19(2)(g) requires a two-step inquiry: does the judge believe that he or she is impartial (a subjective test); and, can the judge's impartiality-in-fact "reasonably be questioned" (an objective test). ***Rochelt***, 165 Wis.2d at 378-379, 477 N.W.2d at 661. Section 757.19(2)(g) looks to the appearance of impartiality, as well as actual impartiality, and makes the judge whose recusal is sought the sole arbiter. ***American T.V.***, 151 Wis.2d at 182-183, 443 N.W.2d at 665.

Judge Kremers was convinced that he was able to be impartial and that there was no appearance of partiality. That, standing alone, satisfies both the impartial-in-fact element of § 757.19(2)(g), STATS., and the impartial-in-belief step. *See* ***Rochelt***, 165 Wis.2d at 378–379, 477 N.W.2d at 661; ***American T.V.***, 151 Wis.2d at 182–183, 443 N.W.2d at 665. Thus, recusal under § 757.19(2)(g) was not required.

Hicks also claims that he was denied due process because of Judge Kremers's alleged partiality. "A litigant is denied due process only if the judge, in fact, treats him or her unfairly." ***State v. Hollingsworth***, 160 Wis.2d 883, 894, 467 N.W.2d 555, 560 (Ct. App. 1991). Hicks has not made this showing.

Although Hicks claims that Judge Kremers exhibited prejudice toward him during the trial by making rulings that were adverse to his interests, Hicks does not indicate how any of the rulings about which he complains were erroneous, or, if so, how he was prejudiced. Hicks has not shown that Judge Kremers's alleged partiality denied him due process.

Hicks also claims that he was denied his right to effective counsel because of friction between Judge Kremers and Shellow. Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to establish violation of this fundamental right, a defendant must prove: (1) that his or her lawyer's performance was deficient; and, if so, (2) that "the deficient performance prejudiced the defense." ***Id.***, 466 U.S. at 687. Essentially, Hicks argues that his trial counsel, Shellow, was forced to "temper the zealous representation" of him because of Judge Kremers's alleged partiality. Other than this conclusory allegation, however, Hicks points to nothing that would raise an issue under either prong of the required ***Strickland*** analysis. Hicks, therefore, has not shown that he was denied effective assistance of counsel. *See* ***State v. Bentley***, No. 94-3310-CR, slip op. at 9-14 (Wis. May 22, 1996).

2. *Witness's statement.*

Hicks argues that he did not receive a fair trial because Judge Kremers refused to instruct the jury properly after a witness for the State interjected an improper comment during his testimony. Detective John Hepp testified on direct examination that he saw Hicks talking to Laymond prior to Hicks's arrest. On cross-examination, Hepp admitted that three weeks after the incident, he prepared a report stating that he saw someone he believed was Hicks talking to Laymond. On redirect, Hepp repeated that Hicks was the man he saw talking to Laymond shortly before the two men were arrested. On re-cross-examination, Hepp was asked:

QBut you put in your report not that you were certain but that it was your belief. Do I have that correct?

A(no answer)

QIs that correct?

AThat's the way it was worded, sir. It's semantics. I know what transpired, and you know what transpired.

QOh, you know not to say that, Mr. Hepp, don't you?

The trial court struck Shellow's last question. Shellow then moved to strike Hepp's answers. Out of the presence of the jury, the trial court ruled that Shellow invited the responses from Hepp, and offered to instruct the jury that Hepp was merely giving his opinion. Shellow asked the trial court to instruct the jury that Hepp was expressing his opinion and that there was no basis in the record for the opinion. The trial court denied Shellow's request and instructed the jury as follows:

Ladies and gentlemen, the last portion of the last witness's answer has been stricken, and you are to disregard that as merely an opinion that was expressed by that witness and nothing more.

Hicks argues that because the trial court did not inform the jury of the lack of a basis for Hepp's opinion, the instruction left the jury to conclude on its own that there may be some basis for Hepp's accusation. We disagree. An instruction telling the jury to disregard testimony presumptively cures any prejudice. ***Robinson v. State***, 100 Wis.2d 152, 169, 301 N.W.2d 429, 437 (1981); ***State v. Hilleshiem***, 172 Wis.2d 1, 19–20, 492 N.W.2d 381, 388–389 (Ct. App. 1992). This is not one of these rare instances where "a limiting instruction will not adequately protect a defendant's constitutional rights." ***Hilleshiem***, 172 Wis.2d at 20, 492 N.W.2d at 389.

By the Court.—Judgment affirmed.

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