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**DISTRICT IV**

May 21, 2019

*To:*

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You are hereby notified that the Court has entered the following opinion and order:

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2018AP500-CR

State of Wisconsin v. Jonathan L. Franklin (L.C. # 1996CF1902)

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Jonathan L. Franklin appeals an order denying his request for the appointment of counsel and investigator services to assist with the preparation of a sentence modification motion. Based

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>1</sup> We affirm.

In 1998, upon his guilty plea to felony murder, Franklin received an indeterminate 50-year sentence. His conviction was affirmed on direct appeal. Since then, Franklin has challenged his conviction and sentence in various motions, appeals, and writs filed in both state and federal court.

In August 2017, Franklin wrote a letter to the circuit court asking “for an order directing the State Public Defender Office to appoint counsel pursuant to [a] payment plan” because Franklin “wish[ed] to exercise [his] right to file [a] Sentence Modification motion.” In addition to requesting appointed counsel, Franklin’s letter asked the circuit court to “consider” arranging payment to Huffman’s Services<sup>2</sup> as part of his “obligations & court debt.”

The circuit court issued notice that the Honorable Ellen K. Berz was assigned to Franklin’s case. Judge Berz construed Franklin’s letter as a “Motion for Appointment of Counsel and Investigator Services.” The court denied the motion, stating that Franklin was free to “contact the Public Defenders Office or private counsel to arrange representation with a payment plan,” and to make a payment arrangement for investigator services, but that the court “will not be the middle-man in these arrangements.”

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

<sup>2</sup> Attached to Franklin’s letter was what appeared to be a payment agreement with Huffman’s Services. According to its paperwork, Huffman’s was located in Pennsylvania and the business provided non-lawyer “Federal and State Negotiation Specialists” that “only earn[ed] a profit from the reward payable for assisting law enforcement.”

On appeal, Franklin does not argue that the circuit court erroneously exercised its discretion or otherwise erred in denying his motion. Instead, he raises a wholly new claim, namely, that Judge Berz should have recused herself due to her past work as a defense attorney for K.H., an individual who provided incriminating information to the State in Franklin's 20-year-old criminal case. According to Franklin, Judge Berz was disqualified from deciding his motion either by statute, *see* WIS. STAT. § 757.19(2), or because she was somehow biased in violation of Franklin's due process right to a fair and impartial magistrate.

We conclude that Franklin forfeited his statutory and constitutional judicial disqualification claims by failing to raise them in the circuit court. *See State v. Huebner*, 2000 WI 59, ¶11 & n.2, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not presented to the circuit court are forfeited on appeal). Franklin received notice that Judge Berz was assigned to his case months before she issued a decision on his construed request for appointed counsel and investigator services. He did not file a motion for recusal or any objection to Judge Berz's assignment. After the court's decision, Franklin neither moved for reconsideration nor informed Judge Berz of any alleged conflict of interest.

Although we affirm the circuit court based on forfeiture, we choose to briefly address why Franklin's statutory disqualification claim lacks merit. In attempting to construe Franklin's amorphous arguments, the State's brief addresses the application of WIS. STAT. § 757.19(2)(c), which requires a judge to disqualify himself or herself if the judge "previously acted as counsel to any party in the same action or proceeding." As argued by the State, the record shows that K.H. was not a party or codefendant in the complaint against Franklin. The documents submitted as part of Franklin's 1996 motion to dismiss indicate that Judge Berz represented K.H. in a separate case that predated Franklin's offense.

Franklin fares no better in citing to WIS. STAT. § 757.19(2)(f), which mandates disqualification “[w]hen a judge has a significant financial or personal interest in the outcome of the matter.” Because of his failure to seek recusal, Franklin cannot show that Judge Berz was even aware that she represented K.H. some 20 years ago, or that her former client had any relation to Franklin’s case. Franklin has not set forth any cognizable theory under which Judge Berz would have a personal stake in the outcome of his motion to appoint counsel and investigator services.

In sum, Franklin has forfeited any claim that Judge Berz was statutorily or otherwise disqualified from hearing his motion to appoint counsel and investigator services. Further, Franklin’s claim that Judge Berz “erred as a matter of law in failing to disqualify [herself]” under WIS. STAT. § 757.19(2) lacks merit because she did not represent an actual party in Franklin’s case, and Franklin has not identified any personal stake she might have in the outcome of his motion.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*