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DISTRICT III

September 8, 2021

To:

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

2020AP1453-CR State of Wisconsin v. Joseph L. Slater (L. C. No. 2002CF149)

Before Stark, P.J., Hruz and Nashold, 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).

Joseph Slater appeals from an order denying his postconviction motion for sentence modification. 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 (2019-20).[1] We affirm.

The State charged Slater in March 2002 with three counts of armed robbery with threat of force, in violation of WIS. STAT. § 943.32(2) (1999-2000), each as a repeat offender. The complaint categorized the counts as Class B felonies and alleged that the robberies had occurred in February 2002. After a jury found Slater guilty on all three counts, the circuit court sentenced Slater to concurrent sentences, each consisting of twenty years' initial confinement and ten years' extended supervision. This court affirmed the judgment of conviction on appeal.

In 2020, Slater filed a pro se motion seeking sentence modification on the grounds that his sentences were illegal and unduly harsh and that a new factor existed.[2] All of Slater's claims were premised on an allegation that the armed robbery counts of which he was convicted were, at the time the offenses were committed, actually Class C rather than Class B felonies. The State opposed the motion. It agreed that the relevant statute had been amended to reduce the felony classification level of armed robbery by threat of force, but it asserted that the effective date of the change was February 1, 2003—after the commission of the offenses at issue here.

The circuit court held a hearing on Slater's sentence modification motion. The court prefaced its remarks by noting that it "had an opportunity to do some research, and [it] also had

[1] Citations in this opinion to the current statutory provisions applicable to summary disposition refer to the 2019-20 version of the Wisconsin Statutes, while citations to statutory provisions that were in effect when Slater was charged refer to the 1999-2000 version of the Wisconsin Statutes, unless otherwise noted.

[2] Slater further alleged that his prior attorneys had provided ineffective assistance of counsel by failing to raise the felony classification issue, but he has not advanced those arguments on appeal.

[its] law clerk look into the matter." The court then observed that the punishment for WIS. STAT. § 943.32(2) had been changed from a Class B felony to a Class C felony by § 767 of 2001 Wis. Act 109. The court next noted that other sections of that Act set the effective date of changes to the statute as the first day of the seventh month beginning after publication of the Act—which occurred on July 29, 2002. Finally, the court calculated that the changes to the statute went into effect on May 1, 2003, and concluded that Slater had been correctly charged with, convicted of, and sentenced on Class B felonies. When asked if it had anything to add, the State advised the court that it agreed with the court's rationale, even though the court had determined a different effective date for the statute than the State had asserted.

Slater raises three related issues on appeal. He contends that: (1) the circuit court acted as an advocate for the State at the hearing; (2) the court and its law clerk improperly investigated the facts of the case prior to the hearing; and (3) the prosecutor acquiesced in the court's advocacy. The State first responds that Slater forfeited these issues by failing to raise them in the circuit court. On the merits, the State interprets Slater's arguments as raising claims of judicial bias and responds accordingly.

Because forfeiture is a doctrine of judicial administration, we retain the authority to address an issue on appeal even if it has not been properly preserved. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by statute*, WIS. STAT. § 895.52, *as recognized in* ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶29, 234 Wis. 2d 626, 610 N.W.2d 821. We will do so here in recognition of the difficulty a pro se litigant may have in raising contemporaneous objections to legal issues that first arise during the course of a sentencing hearing. Also in the interest of fairness, we will address the issues raised by Slater both as he framed them and as the State interpreted them.

First, we disagree that the circuit court acted as an advocate for the State. Both parties advocated their own positions in written submissions to the court. The court then scheduled what it labeled as a "review hearing" to address Slater's sentence modification motion. At that hearing, the court provided an oral ruling explaining its decision to deny the motion. The court had no obligation to hold an evidentiary hearing or to entertain additional arguments from either party before issuing its ruling on a claim that presented solely a legal question. Neither the fact that the court's ruling was favorable to the State, nor the fact that the court adopted a rationale that differed to some degree from that advanced by either party, means that the court acted as an advocate for the State. Rather, the court properly conducted its own evaluation of the claim before it.

Second, we disagree that the circuit court independently investigated the facts of the case. Reviewing the legislative history of the statute at issue, including its effective date, was a matter of determining the applicable legal authority for Slater's sentence modification claim, not of finding evidentiary facts. The legislative history was available to either party through legal research, and it was not required to be disclosed to Slater as some sort of discovery prior to the hearing, or to be introduced as evidence. Moreover, contrary to Slater's apparent belief, communication between a circuit court judge and a law clerk does not constitute impermissible "ex parte" communication—which typically occurs when a judge communicates with one party about the merits of a case outside the presence of another party. To the contrary, SCR 60.04(g)3. explicitly permits a judge to consult with other court personnel. In short, it was entirely proper for the court to conduct its own legal research and to review legal research conducted by a law clerk.

To the extent that either or both of Slater's first two issues could be construed as a claim of judicial bias, we agree with the State that Slater has failed to establish the elements of such a claim. In analyzing a claim of judicial bias, we begin with the presumption that a judge is fair, impartial, and capable of ignoring any biasing influences. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. To overcome that presumption, a party must demonstrate the objective existence of "actual bias" (i.e., that the judge in fact treated the party unfairly), or the "appearance of bias" (i.e., that there are circumstances present under which "a reasonable person—taking into consideration human psychological tendencies and weaknesses—[would conclude] that the average judge could not be trusted to hold the balance nice, clear and true"). ***Id.***, ¶¶20-24 (citation and internal quotations omitted). Opinions formed by a judge based upon facts introduced or events occurring during the course of a current or prior proceeding involving a party do not constitute the basis for a bias or partiality motion unless they display "a deep-seated favoritism or antagonism that would make fair judgment impossible." ***State v. Rodriguez***, 2006 WI App 163, ¶36, 295 Wis. 2d 801, 722 N.W.2d 136.

Here, Slater has not alleged that the circuit court judge had any personal interest or stake in the outcome of his motion for sentence modification. Nor has Slater alleged that the judge made ad hominem attacks or derogatory comments about him in any prior decision that would indicate some deep-seated personal antagonism. Rather, Slater merely takes umbrage at the procedures the judge used to research Slater's claim and orally announce its decision. As we have explained above, however, the procedures used by the judge were appropriate, and do not raise any due process concerns of judicial bias.

Finally, Slater's third claim—i.e., that the prosecutor improperly acquiesced in the circuit court's advocacy—is derivative of his failed claim that the court engaged in advocacy for the

State. Because we conclude there was no advocacy, it necessarily follows that there was no acquiescence.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals