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Judge's hard choices: 'Sometimes I will be wrong'

After Judge Ron Kessler was criticized for freeing a sex offender who then allegedly raped and kidnapped a woman in Seattle, the judge allowed a reporter to sit with him on the bench to see the parade of defendants and how he must balance their right to be presumed innocent versus public safety.

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John Lok / The Seattle Times

King County Superior Court Judge Ronald Kessler presides over a courtroom full of attorneys, defendants and an average of 80 cases a day.



John Lok / The Seattle Times

"Every judge has to confront the element of risk," says the longtime judge. "That's what we do."



John Lok / The Seattle Times

Attorneys pack Judge Ronald Kessler's courtroom. They rate him high on legal acuity, but lower on demeanor.

Only one of the eight convicted sex offenders summoned to appear before Chief Criminal Judge Ronald Kessler on a recent Monday bothered to show up.

Steven G. Pephys, 60, convicted of incest in 2002, had served his prison sentence and then dutifully registered as a sex offender for the next 10 years, according to court documents.

But after he stopped registering with law enforcement in 2012, he was charged with failure to register and ordered to appear in King County Superior Court.

Seated behind a raised bench, Kessler scanned courtroom E1201, filled with court staff, armed jail guards and about a dozen briefcase-bearing attorneys.

All, as well as the defendants, were separated from the audience by bulletproof glass — a grim reminder of the stakes in felony court.

Pephys, with a long, dark ponytail and a resigned look, stood quietly before the judge with his hands clasped behind his back.

He looked up at Kessler, but unlike many of the other defendants in court that day he did not try to catch the judge's eyes.

The deputy prosecutor asked that Pephys be held in jail in lieu of \$30,000 bail, saying he was homeless.

But Pephys' attorney called attention to his client's decade of compliance and said he stopped only because he had mistakenly believed it was a 10-year requirement.

Kessler's fingers flew across his computer keyboard as he read pages of documents and screens of data that include information about Pephys' criminal record, personal and employment history and the case against him.

Seated next to Kessler was a Seattle Times reporter, who was given a rare opportunity by the judge to view the court proceedings that day from his bench and see what he saw as he presided over the court, where an average of 80 or so defendants are processed, sorted and judged each day.

Fifteen seconds after Kessler finished questioning Pephyrs' attorney about his client's living situation, he made his call, one of the 105 actions he would take that day.

"In light of the relatively minor criminal history, the fact that he has been registering for years and that the state knew where Mr. Pephyrs was — because they sent him a summons and he showed up — I will PR Mr. Pephyrs," Kessler said, indicating Pephyrs could walk out of court on "personal recognizance" without having to post bail.

It is a decision, he concedes, that is a gamble.

Many tough calls

Kessler, 66, makes this kind of judgment call hundreds of times each week.

As chief criminal judge, Kessler oversees a factory of justice that keeps cases moving through the system.

He assigns cases to judges, sets trial dates for some and postpones others.

He determines who is a high risk and should be locked up without bail, and how high bail should be set for those deemed worthy of another chance, all the while balancing public safety against the state Supreme Court law that leans in favor of release rather than incarceration for most defendants.

In a March case similar to Pephyrs', Kessler allowed convicted rapist Ricky Lee Lewis, 55, to be freed on personal recognizance.

Lewis was summoned to court after being charged with failure to register. His attorney pointed out it was his first failure-to-register charge and that he'd come to court voluntarily, that he had strong ties to the community, had lived in the area for 48 years and was receiving mental-health treatment.

Kessler released Lewis and ordered him to register. Lewis even returned to court on March 19 to request that his next hearing be delayed until April because of an upcoming surgery. Kessler agreed.

The next day, Lewis allegedly kidnapped and raped an 18-year-old woman he "grabbed" off Aurora Avenue North after offering her a ride home.

A Seattle Times story on Lewis' release and subsequent arrest made national headlines and became fodder for talk shows and online commenters, who assailed Kessler for his decision, calling him "incompetent" and "vermin."

Kessler believed the reaction to the story reflected a lack of understanding of the law. He also was unhappy with the front-page play.

"I thought it was unfair, especially running my picture out there like a mug shot," he said of The Times' story.

Kessler said that when he heard about Lewis' arrest, he felt "a knot" in his stomach. He went to the computer, as he does whenever new crimes are allegedly committed by a released defendant, to see what happened and find out if there is a lesson to be learned.

"I feel terrible when people are victimized if I had any role in it, but that doesn't mean I made the wrong decision. I took an oath to uphold the law," he said.

The state constitution has inherent contradictions, according to Kessler. It says that defendants are presumed innocent until proved guilty, but it also acknowledges there can be a need for pretrial detention in some cases.

Washington Criminal Rule 3.2, which was written by the state Supreme Court, states that judges are to release a defendant on personal recognizance unless the person is charged with a capital crime, or prosecutors can convince the judge of one of three things: that the defendant would be likely to commit a violent crime; intimidate a witness; or blow off future court dates if released.

Ranked high

Kessler, a graduate of Villanova Law School just outside of Philadelphia, was a King County public defender before he became a Seattle Municipal Court judge in 1985 and then appointed to the King County Superior Court bench in 1999.

He's ruled in all kinds of cases, including juvenile, civil and criminal. Dependency court, where he reunited families or freed children for adoption, was "immensely satisfying."

He is not generally considered a lenient judge, according to Daron Morris, a deputy director at The Defender Association, the Seattle-based nonprofit criminal-law firm.

"If he decides to release someone, it's because the prosecutor has not carried their burden of showing that he has grounds to set bail and detain the person under the court rule," he said.

Kessler was ranked among the county's top judges in legal acuity — garnering a 4.41 out of a possible high score of 5 — by attorneys who've appeared before him, according to a 2012 King County Bar Association judicial survey.

He drew a lower score, 3.76, for temperament and demeanor in the same survey.

It's not uncommon for Kessler to call counsel up to the bench, a bit crossly at times, to explain their reason for delaying a case.

"He can be pretty hard on attorneys who aren't prepared," said Ian Goodhew, deputy chief of staff to King County Prosecuting Attorney Dan Satterberg.

Sometimes, he'll grant the motion for delay, but warns the parties to get ready fast and stamps the document "No further continuances."

On one side of the stamp, though, is a bit of tape that says "Pinocchio stamp." It's an inside joke, Kessler said, because he knows additional continuances will often be granted anyway.

Not easily swayed

Kessler isn't naive. He knows that defendants can and do lie, that defense attorneys want their clients released under nearly any circumstance and prosecutors are bound to warn of the worst outcomes.

But Kessler is also aware that some defendants may have every right to remain free pending trial and that some may even be innocent.

"Every judge has to confront the element of risk," he said. "That's what we do."

The defendants who come before Kessler for arraignment typically face felony charges that range from simple drug possession to homicide, and just about everything in between.

Some defendants, facing a range of charges from burglary to drug possession to assault, stand quietly when they face Kessler, and let their lawyers do the talking.

Others try to explain why they deserve to be freed or placed in the less-restrictive Community Center for Alternative Programs (CCAP), a day-reporting program that allows offenders to keep jobs and connect with social services such as drug treatment.

Anthony Asaro Jr., 42, caught a break after he was arrested in December for allegedly possessing heroin, cocaine, crack and methamphetamines.

He was released from jail on \$10,000 bail and ordered to CCAP in January. He was supposed to check in every day, but he disappeared and police had to go find him.

In his motion to request another chance at CCAP, Asaro claimed that he had relapsed on drugs because he thought he had to be “dirty,” or actively using drugs, to get treatment. Once he started using again, he couldn’t stop, he said.

“When I went to do what I had to do, I didn’t make it back to CCAP and I’m ashamed of myself,” he said. He said he realized “life is precious” and he’d been “a fool.”

Kessler didn’t find the excuse plausible and sent him back to jail pending trial.

“If \$10,000 doesn’t do it, I don’t know what will,” he said about the money Asaro forfeited in bail the last time.

Kessler also didn’t buy Wesley Mitchell’s story.

Mitchell, 27, was charged with attempted robbery for allegedly demanding \$400 from his parents while displaying an ax and alluding to having a gun.

Mitchell’s attorney told Kessler that Mitchell had been diagnosed with schizophrenia or bipolar disorder, had battled drug addictions for many years and needed the help he could get in CCAP.

Kessler said he had no doubt that Mitchell needed help, but it would be more than CCAP could provide.

Further, Kessler said, Mitchell’s alleged threat to “go out in a hail of gunfire” if confronted by police created a “lethality factor” he could not ignore.

The decisions each take a matter of minutes and require Kessler to not only quickly review reams of legal documents, but to be a student of human nature, legal scholar and predict who will obey the law. He’s the first to concede it isn’t a perfect science.

“I know what is at stake and I know that sometimes I will be wrong. That’s what judges have to live with, but there’s no way around it unless you want us to lock everyone up for life. That’s not what this country is about.”

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http://seattletimes.com/html/localnews/2021119711_judgekesslerxml.html