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Court of Appeals
Division I
State of Washington

NO. 73291-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARIO HUMPHRIES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

BRIEF OF RESPONDENT

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A. ISSUE

To prevail on an appearance of fairness claim, a defendant must provide evidence of a judge's actual or potential bias. Here, Humphries provides no evidence that the trial court had any actual or potential bias against him. He offers only that the court, after imposing a less than mid-range sentence and offering words of compassion and encouragement, had expressed disagreement with an appellate decision. Has Humphries failed to meet his burden of proving actual or potential bias?

B. STATEMENT OF THE CASE

Mario Humphries was charged with second degree assault (with a sentencing enhancement allegation of being armed with a firearm), assault in the third degree, and unlawful possession of a firearm in the first degree. CP 6-8. It was unlawful for Humphries to possess a firearm because he had prior convictions for robbery in the first degree, robbery in the second degree, and attempted robbery in the second degree. CP 8.

The Honorable Regina Cahan presided over a jury trial at which the parties agreed to stipulate that Humphries had been convicted of a "serious offense."¹ Defense counsel indicated he did not want the jury to hear about the underlying convictions, but informed the court that Humphries disagreed with the stipulation. The defense attorney and Judge

¹ All information included in this paragraph is taken from State v. Humphries, 181 Wn.2d 708, 711-12, 336 P.3d 1121 (2014).

Cahan discussed the matter and agreed that stipulating to an element was a tactical decision that did not require the defendant's consent. Before the State rested a stipulation was read to the jury stating that Humphries had previously been convicted of a serious offense. Before the jury began deliberations, defense counsel indicated that Humphries would sign the stipulation, which he did.

Humphries was convicted of all charges and the firearm enhancement. He was sentenced to 70 months in prison for assault in the second degree, with 36 months imposed consecutively for the firearm enhancement. CP 12. His conviction for assault in the third degree was dismissed at sentencing. CP 10. Humphries was sentenced to 75 months for the unlawful possession of a firearm conviction, to be served concurrently with the sentence for assault in the second degree. CP 12. Humphries appealed only the firearm conviction. On review, the court of appeals held that by ultimately signing the stipulation Humphries had waived any objection he originally had to it. State v. Humphries, 170 Wn. App. 777, 798, 285 P.3d 917 (2012).

On review, the supreme court held that although the decision to stipulate to an element of the crime does not generally require a colloquy on the record with the defendant, such a decision may not be made over the defendant's known and express objection. State v. Humphries, 181

Wn.2d 708, 714, 336 P.3d 1121 (2014). The court also held that Humphries's late signature on the stipulation had not been an effective waiver of a constitutional right. Id. at 718. The supreme court reversed the decision of the court of appeals and remanded for retrial of the firearm conviction only. Id. at 721.

On remand, the State decided not to retry the firearm charge and Humphries was resentenced on his assault in the second degree conviction. RP 3. At his original sentencing, Humphries's offender score on the assault in the second degree conviction was "9+," giving him a standard range sentence of 63 to 84 months in custody. CP 10. At resentencing, his offender score was still "9," as that score had not been dependent on counting the reversed firearm conviction as a current conviction in calculating his offender score. CP 54; RP 5. Thus, his standard range sentence remained 63-84 months in custody. CP 54. The State recommended a sentence of 70 months; the defense requested a sentence of 63 months. RP 5, 7. The court imposed a sentence of 70 months in custody, the same as the original sentence, for the assault in the second degree conviction, and the mandatory 36-month firearm enhancement. RP 7-9; CP 53-61.

C. ARGUMENT

HUMPHRIES HAS FAILED IN HIS BURDEN TO ESTABLISH ACTUAL OR POTENTIAL BIAS ON THE PART OF THE TRIAL COURT AND HIS REQUEST TO BE RESENTENCED BY A DIFFERENT JUDGE SHOULD BE REJECTED.

Citing the appearance of fairness doctrine, Humphries claims that his due process right to a fair sentencing hearing was violated, and he asks that his sentence be vacated and his case remanded for resentencing before a different judge. In support of his argument, Humphries relies not on any comments made by the sentencing court about Humphries, but, rather, solely on comments made by the court regarding an opinion of the state supreme court. Because Humphries cannot establish any actual or potential bias by the sentencing court against him, his claim must be rejected.

Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, § 22; U.S. Const. amends. VI, XIV. Impartial means the absence of actual or apparent bias. State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992) (quoting State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). The appearance of fairness doctrine seeks to prevent “the evil of a biased or

potentially interested judge or quasi-judicial decisionmaker.” Post, 118 Wn.2d at 619.

Under the appearance of fairness doctrine, a judicial proceeding is valid if a reasonable person, who knows and understands all the relevant facts, would conclude that the parties received a fair, impartial, and neutral hearing. State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010); Sherman v. State, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995). It is presumed that a judge acts without bias or prejudice. In re Personal Restraint of Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (citing Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945 (1993)). A defendant claiming an appearance of fairness violation has the burden to provide evidence of a judge’s actual or potential bias. Post, 118 Wn.2d at 619. “Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” Id.

In the case at bar, Humphries provides no evidence that the sentencing court had any actual or potential bias against him. Humphries concedes that there is no evidence of actual bias, but he claims that comments made by the sentencing court about a supreme court opinion demonstrated a “seeming” bias. Brief of Appellant, at 6. After imposing sentence and while waiting for the paperwork to be completed, Judge Cahan and the deputy prosecutor engaged in the following discussion:

THE COURT: I have to tell you -- and this is complete commentary -- I don't understand the -- I don't understand the Supreme Court's decision.

MS. MONTGOMERY: It was a tough one for me. I -- Yes.

THE COURT: You know, I respect the Supreme Court. I will follow it. I don't quite understand it. I think it puts people in a catch-22, but -- Did you want to file the certified copies?

MS. MONTGOMERY: Yes, thank you.

THE COURT: Okay. And I have looked at them.

MS. MONTGOMERY: Yes, there certainly could have been a different claim on appeal if we had not gone forward and had the -- just had the prior convictions, in my mind. But that's -- is what it is.

THE COURT: Yeah, it is what it is. Now we know. So I just -- what -- what -- I -- I reviewed it, and I think, "Well, if that is not a strategic decision and a decision of counsel, what else isn't?"²

MS. MONTGOMERY: Right.

² In his brief, Humphries significantly misquotes the record, asserting that the trial court said: "...if that is not a strategic decision and a decision of counsel, *what else is it?*" Brief of Appellant, at 4. "What else is it" reads as overtly critical of the Supreme Court. What the court actually said, "what else isn't," taken together with the court's next comment, indicates the court was expressing a concern that there may be other matters that litigants have believed to be strategic decisions of counsel that may also be found to require consent of the client.

THE COURT: So that's what worries me about this opinion, but so be it.

RP at 10-11.

The above-quoted exchange constitutes the entirety of what Humphries puts forth to carry his burden of proving actual or potential bias on the part of the sentencing court. He points to no negative comments or perceived ill treatment by the trial court actually directed toward Humphries. The presumption that a judge acts without bias or prejudice can only be overcome by the production of evidence. "A party asserting a violation of the [appearance of fairness] doctrine must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision maker; mere speculation is not enough." In re Personal Restraint of Haynes, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

It is well-settled that production of evidence is required to prevail on a due process claim alleging actual or potential bias of a judge. In State v. Dominguez, 81 Wn. App. 325, 329, 914 P.2d 141 (1996), the court of appeals held that despite the facts that the trial judge had in two previous cases both prosecuted and defended Dominguez, and Dominguez having orally represented that he had filed either a lawsuit or bar complaint against the judge when the judge had been his defense attorney, there was

insufficient evidence of either actual or potential bias “to meet Post’s evidentiary requirement.”

Similarly, in Swenson, supra, the court of appeals held that Swenson failed to produce evidence that proved actual or potential bias by his sentencing judge, who had previously been involved as a prosecutor in a case against him. Swenson, 158 Wn. App. at 822. Swenson, in addressing the issue of potential bias rather than actual bias, adopted an objective test set out by the United States Supreme Court that “asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias’ that is ‘too high to be constitutionally tolerable.’ ” Swenson, 158 Wn. App. at 822 (citing Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 872, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975))). Here, Humphries points to nothing more than the sentencing judge expressing a difference of opinion regarding a decision by an appellate court. It cannot reasonably be argued that an “average judge,” presumed under the law to be unbiased, would be less than neutral toward a given defendant simply because of the commonplace occurrence of an appellate court reversing a trial court’s decision.

Humphries relies almost entirely on State v. Ra, 144 Wn. App. 688, 175 P.3d 609 (2008), the facts of which bear no resemblance to this case, and the holding of which did not, as Humphries claims, find constitutional error. In Ra, the court of appeals reversed the conviction on other grounds and did not hold, as represented by Humphries, that comments by the trial court had violated the defendant's due process right to a fair trial.

Because we reverse for admitting the gang evidence, we need not consider whether the trial court's appearance of partiality alone would warrant reversal. But on remand, we direct that the case be assigned to another judge.

Ra, 144 Wn. App. at 705. Nonetheless, the Ra court certainly found a number of the trial court's comments to have been improper:

We agree with Ra that the trial court's comments suggesting that Ra was "some distorted character who breeds and lives violently," and scolding him for apparently nodding "as if you are agreeing with me," were inappropriate, "[did] not show proper restraint[,] and should not have been made. Moreover, we find inappropriate the trial court's proposal of theories for the State to use in admitting improper ER 404(b) evidence. A trial court should not enter into the "fray of combat" or assume the role of counsel. Finally, the trial court's evident and potentially undue concern for the victim's war record is troubling.

Ra, 144 Wn. App. at 705 (citations omitted). None of the trial court's comments here approached the relatively egregious improper comments detailed in Ra. In fact, unlike Ra, none of the comments of Judge Cahan,

about which Humphries now complains, were even directed toward him personally.

Here, there was no violation of the appearance of fairness doctrine. A reasonable person, knowing all the facts, would conclude that Humphries received a fair, impartial, and neutral sentencing hearing. The record includes no evidence of bias against Humphries, and, in fact, shows that the trial court treated Humphries not only with respect but with kindness and leniency. Humphries's trial counsel had filed a pre-sentence report that addressed Humphries's family history. CP 141-43. At sentencing, counsel asked the court to take it into consideration. RP 6-7. In imposing sentence on Humphries, whose assault in the second degree conviction involved shooting at a police officer, Judge Cahan, far from showing any signs of bias or animosity toward Humphries, was remarkably compassionate and encouraging:

It's -- it is hard for me to give a low-end sentence, given the criminal history and the facts of this case. You know, you're shooting at an officer -- I just can't justify a low-end sentence. But I won't give a high-end sentence either, given that the -- kind of past family history.

Mr. Humphries, I want you to do well. I wish you had proceeded with your plans of Bellevue College instead of this incident. I really hope that when you get out, you do that. I do not want the "rotating door" for you. That is just so not what I want to see for your future.

So I know there are some opportunities in prison. I hope you take advantage of those. I sincerely don't want to see you again in this circumstance. I so much would want to see you in a different one. And I hope that you can do that for yourself. I really do.

I will impose the 70 months....

RP 8-9.

The sentence of 70 months was less than even a mid-range standard sentence (73.5 months), hardly an indicator of real or potential bias. After imposing the 70-month sentence, Judge Cahan, while waiting for the completion of the paperwork, continued to engage Humphries and his attorney. The court continued to encourage Humphries to go to college after prison, and to take advantage of any educational and employment opportunities that might be available to him while in custody.

RP 11-12.

Humphries has failed in his burden to present evidence that would overcome the presumption that a judge acts without bias or prejudice. A reasonable person, knowing and understanding all the relevant facts, would conclude that Judge Cahan provided Humphries with a fair, impartial, and neutral sentencing hearing.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reject Humphries's request to be resentenced by a different judge.

DATED this 27 day of October, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Oliver R. Davis, containing a copy of the Brief of Respondent, in STATE V. MARIO HUMPHRIES, Cause No. 73291-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

A handwritten signature in black ink, which is mostly illegible but appears to be a name, is written above a horizontal line.

Done in Seattle, Washington

10-27-15
Date : Oct. 27, 2015