

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	Supreme Court No. 20060030
Plaintiff/Appellee,)	District Court No. 22-04-K-176
vs.)	
)	
Todd Dailey,)	
Defendant/Appellant.)	

BRIEF OF APPELLEE

Appeal from the Kidder County District Court
Honorable Robert O. Wefald

Dated: May 23, 2006

Jerod E. Tufte (#05976)
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I. Issue Presented

[¶1] Could a reasonable person, based upon the trial judge’s post-verdict statements to the jury, reasonably question the judge’s impartiality with regard to the sentencing of the defendant?

II. Standard of Review

[¶2] “An appellate court’s standard of review is unlimited in cases alleging judicial misconduct.” State v. Hayden, 130 P.3d 24, 29 (Kan. 2006).

III. Argument

[¶3] Mr. Dailey claims that certain statements made by the trial judge in the presence of the jury after its verdict was returned give rise to at least an appearance of bias against Mr. Dailey. The three statements that Mr. Dailey cites in support of this claim are: (1) the DUI conviction had been “a fifth offense for Mr. Dailey. This is a felony.” (Appellant’s App. at 18); (2) “Mr. Dailey had written a letter to the Court asking that two of the Judges, Judge Hagerty and Judge Haskell not be involved because Mr. Dailey thought they knew too much about him because he had been in drug court.” (Id.); and (3) noting that Mr. Dailey had finished drug court in August 2004 for his fourth DUI, the trial judge went on to comment that “Mr. Dailey is a graduate of drug court, and unfortunately, he’s not a success, one of the people who has not been able to succeed in drug court, and he had that opportunity.” (Id.) Appellant Todd Dailey’s sole argument on appeal boils down to this: while a judge may consider and comment on the defendant’s background *during* a sentencing hearing, that same judge may not refer to facts relating to sentencing after the jury returns its verdict but before commencement of a sentencing hearing. This Court should affirm Mr. Dailey’s sentence because: (1) Mr.

Dailey's proposed rule that comments that are concededly appropriate for sentencing can raise an improper appearance of bias if followed by a delay for presentence investigation is without support; and (2) the comments, although critical of Mr. Dailey, do not reveal the sort of deep-seated favoritism that would make fair judgment impossible.

A. Delay Between Comments Concededly Appropriate for Sentencing and Commencement of the Sentencing Hearing Can Not Create an Appearance of Bias

[¶4] After Mr. Dailey was convicted by a jury of Manslaughter and Driving Under the Influence (Fifth Offense in Seven Years), both felonies, the judge made brief comments to the jury, stated that a presentence investigation would be had, and recessed the court. A presentence investigation is not mandatory prior to sentencing for felony charges of manslaughter and DUI – the trial judge could have immediately moved on to sentencing after the jury returned its verdict. See N.D.R.Crim.P. 32(c) (“The court *may* order a presentence investigation and report at any time.” (emphasis added)); State v. Murchison, 2004 ND 193, ¶ 16, 687 N.W.2d 725 (indicating that the trial judge proceeded to sentencing immediately after the jury found the defendant guilty of felony assault). If Mr. Dailey had been sentenced immediately, even he concedes that the judge's comments would have been unremarkable. If the court had moved immediately to sentencing rather than ordering a presentence investigation, it is possible, if not probable, that some or all of the jurors would have waited in the courtroom to hear what sentence Mr. Dailey would receive. The jurors that stayed in all likelihood would have heard even more extensive details about Mr. Dailey's criminal history and lack of success at previous rehabilitation attempts. It may not have been strictly necessary to inform the jurors of Mr. Dailey's background prior to their leaving the courtroom, but neither was it necessary to keep the jurors in the dark about the defendant's criminal history after their

verdict was in. That the trial judge in this case ordered a pre-sentence investigation and report instead of moving immediately to sentencing supports the appearance and the fact of impartiality in that it tends to show that the trial judge had not prejudged Mr. Dailey but rather sought to gather all relevant information before deciding on a sentence. In short, the trial judge's post-verdict comments about factual matters relating to sentencing do not establish an actual or apparent prejudice against the defendant.

B. The Trial Judge's Factual Comments About Mr. Dailey Are Insufficient to Support the Claimed Appearance of Bias

[¶5] “The law presumes a judge is unbiased and not prejudiced.” Farm Credit Bank of St. Paul v. Brakke, 512 N.W. 2d 718, 720 (N.D. 1994) (citation omitted). A judge is required to disqualify himself if his “impartiality might reasonably be questioned.” N.D. Code Jud. Conduct 3E(1). As a test of reasonableness, many factors may be considered, but “[o]f principal importance is whether it appears the litigant is using the claim as a vehicle for judge shopping, or for some other improper agenda.” Brakke, 512 N.W. 2d at 721. Mr. Dailey retained experienced and able counsel to defend him at trial. The comments at issue on appeal were made on November 16, 2005, and Mr. Dailey was sentenced two months later on January 17, 2006. Mr. Dailey made no disqualification motion to the judge in the intervening two months. Only after the trial judge imposed a sentence at the high end of the range did Dailey first contend the judge's comments raised an appearance of bias. If the comments had been so outrageous as to suggest bias, there was plenty of time for Mr. Dailey or his able counsel to request a different sentencing judge. The comments speak for themselves. They were simple statements of fact that were pertinent to determining the appropriate sentence at the upcoming sentencing hearing. They were not the sort of statements that courts have

found to require disqualification. See State v. Hayden, 130 P.3d 24, 29 (Kan. 2006) (remanding for new trial based upon the trial judge’s disrupting and discourteous comments that amounted to a “pattern of hostility”).

[¶6] Precedents under the analogous federal statute also do not support a remand for resentencing in this matter. Mirroring North Dakota Code of Judicial Conduct Rule 3E(1), section 455(a) of Title 28 of the United States Code requires a judge to disqualify himself when “his impartiality might reasonably be questioned.” The Supreme Court has rejected a claim of bias where the trial judge allegedly exhibited “impatience, disregard for the defense and animosity” toward the defendants. Liteky v. United States, 510 U.S. 540, 542 (1994). In addition to the trial judge’s cautioning defense counsel and witnesses to restrict themselves to material issues, the petitioners cited as evidence of bias the sentence given the defendants, which they considered excessive. Id. The Court explained:

[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Id. at 555. The threshold for triggering a judge’s disqualification for appearance of bias is necessarily a high one. Id. at 558 (Kennedy, J., concurring in the judgment) (“I think all would agree that a high threshold is required to satisfy this standard.”). Although the Supreme Court did not endorse harsh comments toward a defendant, it recognized that judges are “imperfect men and women,” and their occasional expression of “impatience, dissatisfaction, annoyance, and even anger” does not establish bias or partiality. Id. at 555-56; United States v. Pearson, 203 F.3d 1243, 1278 (10th Cir. 2000) (“[E]ven when

angry, a judge must be fair and take care not to cross the line separating righteous criticism from injudicious damnation.”). The comments made by the trial judge in this case after verdict and before sentencing were simple statements about the defendant’s background relevant to sentencing; they were critical of the defendant, but they were not hostile or antagonistic. Although we have justifiably high expectations of fairness and impartiality in our judges, we should not be surprised when judges, imperfect as are we all, occasionally exhibit frustration and even anger toward parties at trial. See United States v. Young, 45 F.3d 1405, 1414 (10th Cir. 1995) (finding recusal not required where, after rejecting a guilty plea, the trial judge opined that it was “obvious” the defendant was “going to get convicted”); In re Huntington Commons Assocs., 21 F.3d 157, 158 (7th Cir. 1994) (finding that a judge’s acknowledged predisposition did not require recusal where it was based on matters of record in the case); United States v. Barry 938 F.2d 1327, 1341-42 (D.C. Cir. 1991) (finding trial judge’s statement at sentencing that jurors who voted to acquit would have to answer to themselves and their fellow citizens was insufficient to require remand for sentencing before a different judge). Of course we have to draw the line at statements that are truly outrageous, such as those based on group stereotypes or on knowledge the judge obtained outside the evidence presented at trial. The simple factual statements about the defendant in this case are insufficient to establish an appearance of bias.

IV. Conclusion

[¶7] For all the foregoing reasons, the State respectfully requests this Court to affirm the District Court’s sentence in this case.

Dated: May 23, 2006

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STATE OF NORTH DAKOTA)
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COUNTY OF KIDDER)

Jerod E. Tufte, being of legal age and a resident of Kidder County, North Dakota,
and being first duly sworn on oath, deposes and says that on May 23, 2006, I served via
email the following documents:

Brief of Appellee

and that said e-mail was served on the address of David Ogren, whose email address is
holaw@bektel.com.



Jerod E. Tufte

Subscribed and sworn to before me this 23, May, 2006.

Kari Enzminger, Deputy
Kari Enzminger, Deputy, notary public
My commission expires: 12-31-06

