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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed August 9, 1979
vs.)
TERRY LEE EBERHART,) 205
Defendant-Appellant.) 63083

Appeal from Butler District Court - B. C. Sullivan, Judge.

Defendant appeals from sentence imposed upon plea of guilty to the offense of theft in the second degree. AFFIRMED.

Schoeneman Law Firm, P.C., of Aplington, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Lona Hansen, Assistant Attorney General; for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals from sentence imposed upon plea of guilty to the offense of theft in the second degree. We affirm the judgment of the trial court.

Defendant was originally charged with burglary in the second degree, contrary to section 713.2, Supplement to the Code 1977, and unlawful possession of a firearm by a convicted felon, contrary to section 724.26, Supplement to the Code. Pursuant to a plea bargain entered into with the county attorney, defendant entered a plea of guilty to an amended charge of theft in the second degree, contrary to section 714.2, Supplement to the Code. On December 11, 1978, he was sentenced to a term of not more than five years in the Iowa Men's Penitentiary. Fifteen days later, defendant filed a motion to reconsider sentence. This motion was amended to request a sentencing hearing before a different judge. At the hearing on these motions before the sentencing judge, the motions were overruled.

Defendant contends on appeal that the trial court erred in failing to disqualify itself from sentencing defendant and in overruling defendant's motion for a new sentencing hearing before a different judge. These claims are premised on certain comments made by the judge about defendant at the presentence hearing, and the fact that the judge had previously sentenced defendant for another felony conviction and had presided at a probation revocation hearing incident to that sentence. Canon 3C(1)(a) of the Iowa Code of Judicial Conduct provides that "a judge should disqualify himself in a proceeding where his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has personal bias or prejudice concerning a party . . . ." Canon 3C(1)(a) provides a general standard by which a judge should "sua sponte determine matters of self-recusation." State v. Smith, 242 N.W.2d 320, 323 (Iowa 1976). Of course, "only personal bias or prejudice, as distinguished from judicial predilection, constitutes a disqualifying factor." Id. at 324.

The burden is upon the defendant to establish the basis for disqualification. Id. at 324. We find, after a comprehensive review of the record, that he has failed to show personal bias on the part of Judge Sullivan. The judge's previous encounters with defendant at an earlier sentencing hearing and at a probation revocation hearing do not stem from an extrajudicial source. Nor do the comments made by Judge Sullivan at the sentencing hearing indicate any personal bias or prejudice as contrasted with judicial predilection. The trial court has broad discretion to determine, "sua sponte" whether or not to step aside so as to insure the parties involved a fair hearing. We find no evidence that Judge Sullivan abused this discretion and affirm the sentence imposed.

AFFIRMED.