

IN THE COURT OF APPEALS OF IOWA

No. 9-094 / 98-0351

TYRE DAMOND ADAMS,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

On appeal from the dismissal of his postconviction action, the applicant claims
the judge was not fair and impartial. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Christopher Cooklin, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Kasey Wadding, Assistant
County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Zimmer, JJ.

PER CURIAM

Tyre Adams contends the trial court was biased against him and, as a result, he was denied a fair and impartial post-conviction hearing. Because we find Adams has not preserved his claim for appellate review and he cannot prove his substantial burden of proving impartiality, we affirm.

Adams was convicted of three counts of first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1993). His convictions were affirmed on appeal. He filed a postconviction action raising several claims of ineffective assistance of counsel and trial error. At the conclusion of the postconviction hearing, after all of the evidence had been received and counsel had made their arguments, the court made the following statements:

Okay. I've still got the court file. I'll re-review it. I've got the transcripts from the trial; I'll review those. And if any of Mr. Adams' rights were violated and he's entitled to a new trial or some relief, I'll promptly order it.

I certainly hope there is no error because the pre-sentence investigation indicates that Mr. Adams has been involved in criminal activity since the age of thirteen, that he had become a career criminal, and if the minutes of testimony are correct, he and his accomplices terrorized a number of innocent victims because he was a robber. And I hope that the record supports the action taken by the trial court and I hope his conviction stands, but if it doesn't we will certainly grant him every bit of relief he's entitled to. We'll close the hearing. Good luck to you Mr. Adams.

Counsel made no objection to the statements at the hearing. The next day, the court filed a written order denying the application. The court addressed and rejected each

of Adams' claims. The proper procedure to preserve error for a claim of judicial misconduct is to make a record in chambers of the offending conduct coupled with an objection. *State v. Larmond*, 244 N.W.2d 233, 237 (Iowa 1976). Because no objection was made to the statements, the claim has not preserved for appellate review.

Even if the claim had been properly preserved, however, Adams has not proved the merits of his claim. Basic due process requires a fair trial in a fair tribunal. *State v. Larmond*, 244 N.W.2d 233, 235 (Iowa 1976). It is imperative the court not become an advocate of any party's cause. *State v. Voelkers*, 547 N.W.2d 625, 631 (Iowa App. 1996). A presiding judge over a criminal case should not only be fair and impartial, he or she should conduct themselves to constantly manifest those qualities. *Id.* The judge must avoid conduct which may infer bias against either party. *Id.*

However, "[t]he law imposes a substantial burden on one who seeks to prove the trial judge is not impartial." *State v. Bear*, 452 N.W.2d 430, 434 (Iowa 1990). The decision of the trial judge will not be overturned unless there has been an abuse of discretion. *State v. Harry*, 311 N.W.2d 108, 109 (Iowa 1981). In order to constitute the prejudice necessitating a different judge, "(t)he alleged bias and prejudice ... must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *State v. Smith*, 282 N.W.2d at 142 (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778, 793 (1966)).

The judge's statements in this case did not reflect hostility toward the defense and a bias in favor of the State. Although the statements by the trial judge may have been injudicious, because they could be given the interpretation the judge had a preference for the outcome of the case, we do not find the conduct prejudiced Adams' constitutional right to a fair trial. *See State v. Manning*, 224 N.W.2d 232, 237 (Iowa 1974). The reasonable interpretation of the judge's remarks is that the judge was expressing his hope no mistakes had been made by the court system, that the defendant had not be wrongfully convicted, and that reversible error had not been committed. The court clearly said that if such an occurrence happened Adams would get relief.

We find Adams has not met his substantial burden to prove the judge possessed a bias against him which resulted in prejudice. We reject his claim of judicial bias.

AFFIRMED.

No. 98-0351. [9-094] ADAMS v. STATE

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.
AFFIRMED. Considered by Huitink, P.J., and Streit and Zimmer, JJ. Per Curiam.
(4 pages \$1.60)

Tyre Adams contends the trial court was biased against him and, as a result, he was denied a fair and impartial postconviction hearing. The district court judge's statements in this case did not reflect hostility toward the defense and a bias in favor of the State. Although the statements by the trial judge may have been injudicious, because they could be given the interpretation the judge had a preference for the outcome of the case, we do not find the conduct prejudiced Adams' constitutional right to a fair trial. The reasonable interpretation of the judge's remarks is that the judge was expressing his hope no mistakes had been made by the court system, that the defendant had not be wrongfully convicted, and that reversible error had not been committed.