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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs July 11, 2023

VICTOR WISE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 16-06899 James M. Lammey, Jr., Judge

No. W2022-01109-CCA-R3-PC

In 2019, a Shelby County jury convicted the Petitioner, Victor Wise, of two counts of aggravated robbery, one count of attempted aggravated robbery, and two counts of aggravated assault. The trial court sentenced him to forty-four years of incarceration. The Petitioner appealed his convictions to this court, and we affirmed the convictions but concluded that the trial court erred by imposing consecutive sentences. This court modified the Petitioner's total effective sentence to twelve years. *State v. Wise*, No. W2018-01343-CCA-R3-CD, 2019 WL 4492910, at *1 (Tenn. Crim. App. Sept. 18, 2019), *no perm. app. filed*. Subsequently, the Petitioner filed a petition for post-conviction relief, claiming that he received the ineffective assistance of counsel, which the post-conviction court denied after a hearing. After review, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which CAMILLE R. MCMULLEN, P.J., and JILL BARTEE AYERS, J., joined.

J. Shae Atkinson, Memphis, Tennessee, for the appellant, Victor Wise.

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilber, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Venecia Patterson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts and Background

This case arises out of a "smash and grab" robbery, planned by the Petitioner and carried out at a Memphis pawn shop, during which the Petitioner's co-defendants robbed the store owner and customers at gun point, stealing approximately $25,000 worth of

jewelry, while the Petitioner acted as a lookout and a getaway driver. *Wise*, 2019 WL 4492910, at *2. A Shelby County grand jury returned an indictment charging the Petitioner and his two co-defendants with two counts of aggravated robbery, one count of attempted aggravated robbery, and two counts of aggravated assault. *Id.* at *1.

A. Trial

The following is this court's summary on appeal of the facts presented at the Petitioner's trial:

> At the February 2018 trial, Cash America Pawn employee Darnell Smith testified that shortly after the store opened on August 4, 2016, two men entered the store. One man stood at the jewelry case while "the other one was like pacing the floor of the store." The man who had been pacing the store "pulled a gun out on the manager" and demanded cash. The man who had been standing at the jewelry counter then smashed the glass of the jewelry case with a hammer and began taking jewelry. The men took more than 20 individual pieces of jewelry, approximately $700 cash, and a car "amp" from the store.
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> Memphis Police Department ("MPD") Sergeant Richard Rouse testified that when he heard "the broadcast over the radio about the robbery," he "followed directions on the radio from some tracking of the possible suspect vehicle." He explained that officers viewing location information from the GPS devices installed on property taken during the robbery relayed that location information over the radio and that he followed those directions onto the interstate and into West Memphis, Arkansas. Sergeant Rouse said that he did not intend "to continue too much into the next state," so he decided "to take the exit and turn around and come back to Memphis." At the end of the off-ramp, Sergeant Rouse saw a blue Nissan Maxima that matched the description of the suspect vehicle. He followed the car.
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> The blue Nissan pulled into the parking lot of the Greyhound Gaming Casino, which was also known as the Southland Gaming Casino ("the Casino"), and parked. Sergeant Rouse parked a short distance away to observe the vehicle. Shortly thereafter, a message came over the radio that "the vehicle was stopped stationary at the southeast corner" of the Casino. Sergeant Rouse immediately radioed to other officers that he had the vehicle in sight and that there were three occupants. At that point, the driver exited the vehicle and began walking toward the Casino. He described the driver as a black male in his late twenties wearing a white t-shirt, gray "camo

pattern" shorts, and particularly distinctive "bright blue shoes."

Surveillance video from outside the Casino captured a man fitting that same description exiting a blue Maxima and entering the Casino. Surveillance video from inside the Casino captured the man coming from what appeared to be the restroom area wearing different pants but the "same blue shoes and same white T-shirt." The man sat down at a slot machine. Officers approached the man and placed him under arrest. Sergeant Rouse identified the [Petitioner] as the man who had exited the driver's side of the Maxima, entered the Casino, and changed his clothes while inside.

Officers from the West Memphis Police Department arrived, and Sergeant Rouse flagged them down to explain the situation. At that point, the two occupants of the Maxima got out of the car and began running away. Sergeant Rouse chased one of the men, while an officer of the West Memphis Police Department pursued the other. The man that Sergeant Rouse was chasing, who was later identified as Cortavius Grove, ran into a nearby field, where Sergeant Rouse later located him with assistance from a West Memphis Police Department Canine Unit. The other man, later identified as Aaron Cathey, was also apprehended at the scene.

Officers found the jewelry display cases and jewelry taken from Cash America Pawn inside the blue Maxima along with "piles of money." Officers also discovered "burglary tools," including "sledge hammers, hammers, [and] bolt cutters," and a pistol inside the Maxima.

MPD Sergeant Taurus Nolen testified that he was a member of the Federal Bureau of Investigation Safe Streets Task Force, which was tasked with investigating business and bank robberies in Memphis. He stated that the GPS tracking system associated with the devices placed on the items taken from Cash America Pawn was "live-wired" so that "every time it goes off, we get a ping on our phones." Sergeant Nolen "tracked the pings, live time," and "[t]hey ended up at a point of rest at" the Casino. Sergeant Nolen and other Task Force members traveled to the Casino, and they made the decision to transport all three suspects to the West Memphis Police Department to be interviewed.

Sergeant Nolen interviewed co-defendant Aaron Cathey, whom he described as "very smart" looking. Mr. Cathey told Sergeant Nolen that he and Mr. Grove entered Cash America Pawn and that he demanded money at gunpoint while Mr. Grove "smashed the display cases and took jewelry." He said that the gun, which was actually a BB gun, had been given to him by the [Petitioner], who had acted as a lookout and getaway driver. After robbing

the store, Mr. Cathey and Mr. Grove ran into an abandoned house, where they changed clothes before getting into the car with the [Petitioner]. The [Petitioner] drove them to the Casino, where they had planned to get something to eat. Mr. Cathey identified the [Petitioner] and Mr. Grove from two separate photographic arrays and wrote on the [Petitioner's] photo, "'He also planned it and sent me and Tave in.'"

Mr. Cathey testified that the [Petitioner] texted him early on the morning of August 4, 2016, and asked him to "[d]o a smash and grab" at Cash America Pawn. Mr. Cathey agreed to participate, and the [Petitioner] and Mr. Grove picked him up a short time later. They drove around briefly "[t]o scope out the scene" before parking "on the east side of McLemore" to await the store's opening. Mr. Cathey said that the [Petitioner] provided him with a BB gun and told him to pull the gun when he heard Mr. Grove smash the glass. Mr. Cathey stated that all three men were to get a share of the proceeds of the robbery.

Shortly after the store opened, Mr. Cathey, armed with the BB gun, and Mr. Grove, armed with a hammer, entered and began executing their plan. Mr. Grove smashed the display case with a hammer, and Mr. Cathey "raised the gun and . . . told 'em, 'You all know what it is - everybody get down.'" Mr. Cathey took the cash while Mr. Grove took the merchandise. After the robbery, Mr. Cathey and Mr. Grove "[r]an on the backside and went to James Street. Ran into an abandoned house and disregarding our clothes that we had on." They then called the [Petitioner] to pick them up, and the three men fled in Mr. Grove's blue Nissan Maxima "down Walker headed towards East Crump." They traveled to the Casino, and the police arrived shortly thereafter.

During cross-examination, Mr. Cathey testified that he had not been given any consideration in exchange for his testifying against the [Petitioner]. He said that the robbery plan was "just to go in and snatch the jewelry" and not to take the cash from the customers. He admitted that he made the decision to take cash from the customers.

Wise, at *1-3. Based on this evidence, the jury convicted the Petitioner of two counts of aggravated robbery, one count of attempted aggravated robbery, and two counts of aggravated assault. *Id.* at *1. The trial court imposed sentences of twelve years for each of the Petitioner's convictions of aggravated robbery and sentences of ten years each for the Petitioner's convictions of attempted aggravated robbery and aggravated assault. The trial court merged the Petitioner's convictions for the aggravated assault and attempted aggravated robbery of Mr. Berry into a single conviction. The court ordered consecutive sentencing for a total effective sentence of forty-four years of incarceration. *Id.* at *3.

The Petitioner appealed, alleging that, among other issues, the trial court erred by imposing a total effective sentence of forty-four years of incarceration because his role in the crimes "did not mandate consecutive sentences." *Id.* at *6. This court agreed, concluding that the record did not support the trial court's conclusion that the Petitioner had an extensive record of criminal activity that would justify the imposition of consecutive sentences. *Id.* at *7. Accordingly, this court reversed the imposition of consecutive sentences and remanded the case for the entry of judgments reflecting concurrent alignment of all the sentences for a total effective sentence of twelve years. *Id.* at *8.

B. Post-Conviction Proceedings

In 2020, the Petitioner filed a petition for post-conviction relief, *pro se*, which was later amended by appointed counsel, alleging that he had received the ineffective assistance of counsel on numerous bases. Relevant to this appeal, he alleged that trial counsel ("Counsel") was ineffective by failing to discuss plea negotiations with the Petitioner.

The following evidence was presented at a hearing on the petition: Counsel testified that he had been practicing criminal law for thirty-seven years. Counsel provided the Petitioner with the paper discovery file, which they reviewed together, as well as the recorded security footage from the casino. Counsel recalled that the State's prosecution theory was that the Petitioner had been waiting for his co-defendants in the alley behind the pawn shop. Law enforcement tracked the vehicle being driven by the Petitioner to a nearby casino and observed the Petitioner go inside and change clothes. Counsel said that was a bad fact for the Petitioner. Counsel recalled that a co-defendant testified against the Petitioner about his role in the crimes but that the Petitioner maintained he had only given the co-defendants a ride. The State produced text messages from the day of the crimes, sent between the Petitioner and his co-defendants. Counsel asked the Petitioner whether he should view them and the Petitioner advised him not to because they would not be helpful to his case. The Petitioner, however, maintained that he had nothing to do with the robbery and did not know that a robbery was planned. Counsel was aware that the co-defendants might be getting plea agreements for their testimony.

Counsel recalled that the Petitioner changing clothes inside the casino made it look like he was hiding as opposed to innocently giving the co-defendants a ride. Counsel recalled that they initially received an eight-year offer from the State, which he communicated to the Petitioner. Counsel was "flabbergasted" when the Petitioner turned it down. The offer remained on the table after trial and prior to sentencing, and Counsel communicated this to the Petitioner. Counsel recalled that he advised the Petitioner that he probably would not receive consecutive sentences and that the evidence against him was not strong. Counsel explained criminal responsibility to the Petitioner and how, if he was the "mastermind" behind the robbery, he would be as guilty as those who committed the robbery.

About the Petitioner testifying, Counsel explained to him that the video showing him changing clothes inside the casino would be difficult to explain. About the State's offer, which remained open prior to sentencing, Counsel felt it was a good offer because it meant the Petitioner avoided the possibility of consecutive sentencing. The Petitioner felt he was innocent and thus refused the offer.

On cross-examination, Counsel recalled that he asked the Petitioner's opinion on whether the text messages between the Petitioner and his co-defendants should be introduced. He also asked whether the Petitioner wanted to accept the eight-year offer and whether he wanted to testify. Counsel recalled specifically that the Petitioner actually took off a layer of clothing inside the casino and had a full outfit underneath, which was harmful to the Petitioner's contention that he was simply giving the other perpetrators a ride.

Counsel recalled that the Petitioner's co-defendant accepted an eight-year deal from the State.

The Petitioner testified that Counsel provided him with the discovery file but that they never reviewed it together or discussed his case. He was not shown the casino video prior to trial. He stated that Counsel visited him infrequently at the jail, no more than three times, for five minutes. The Petitioner stated that he did not want to go to trial after all the co-defendants' cases were severed on the day of trial. The Petitioner did not know he was going to trial until the day of and pleaded with Counsel not to proceed. He learned that a co-defendant was planning to testify against him and maintained to Counsel that he knew nothing about the robbery. The Petitioner provided Counsel with an affidavit from a co-defendant who said that the Petitioner had only been called after the robbery and had nothing to do with the crime.

The Petitioner said he was fearful of going to trial, but Counsel never communicated the State's offer to him. Counsel told him there was "no way" he would be found guilty of robbery because he had not stolen anything. He testified that Counsel did not explain criminal responsibility to him or his sentencing exposure if convicted. The Petitioner told the trial court at his motion for new trial hearing that he had not known of the State's offer prior to trial. The Petitioner reiterated that Counsel did not have a trial strategy and advised the Petitioner not to testify despite the Petitioner's wish to tell his part of the story. The Petitioner did not learn of his full sentencing exposure until the sentencing hearing and did not know the State's offer remained open after conviction, which he stated he would have accepted.

On cross-examination, the Petitioner was shown the transcript of his trial during which it was noted that he had officially rejected the State's eight-year offer; the Petitioner stated that he did not remember that happening. The Petitioner explained that he did not tell Counsel he was innocent, only that he might be guilty to "after the fact." He stated

that, had he testified at trial, he would have testified that he had picked up his co-defendants from a residence rather than the alley behind the pawn shop. He would have testified that he told them he would help them sell the jewelry. He stated that there was no plan prior to the robbery.

The parties informed the post-conviction court that the Petitioner's co-defendants had each pleaded guilty in exchange for sentences of eight and ten years.

At the conclusion of the proof, the post-conviction court made the following statement:

> [A]fter reviewing the testimony of both witnesses, I put a great deal of weight into what [Counsel] has to say and I put absolutely no weight into [the Petitioner's] testimony. . . . . [T]he State would've just had a heyday with him had he elected to testify because there would be no way to explain how you could be wearing two sets of clothes and was -- means that you were involved. It means you knew exactly what you were doing. And that's the reason why he got convicted.
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> He was the ringleader, and he was hoping to get away with this but for the fact that there was a tracking device and there was a police car following them all the way over to the place. The two other guys bail out, leaving him in the car, and -- and yet he goes in and he hides in the casino. I just feel bad now after hearing him lie under oath that the Court of Criminal Appeals gave him such a good remittitur. But, you know, it is what it is. I really think that when someone commits an aggravated robbery like this one, he's responsible for everything those two people did when they went into the -- when they went into the jewelry store, placing them in fear. And basically that he got two aggravated robberies for the price of one. And he didn't -- it wasn't like he had no previous record. I forgot exactly what his record was, but he had a record.
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> [The Petitioner] got a tremendous break there. But I think he lied to me under oath today. . . . I put absolutely no weight in what he has to say, and I believe [Counsel]. [The Petitioner] knew what his offer was. He just figures since he didn't go in [the pawn shop] and he wasn't caught in the act . . . that perhaps he would get [] facilitation. . . . [T]hen he insults all of us by coming in here and [saying] that [Counsel] did something [ineffective]. The only thing [Counsel] did was not convince him to take the eight year [deal]. But [] he got [] 12 years at 85 percent.

The post-conviction court also found that the Petitioner was not prejudiced if in fact Counsel had advised him not to take the State's eight-year plea offer. Accordingly, the post-conviction court denied his petition. It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that the post-conviction court erred when it denied his petition because he received the ineffective assistance of counsel. He contends that Counsel did not inform him of the eight-year plea deal and did not discuss plea negotiations with him. He also contends that the post-conviction judge was not impartial, as evidenced by his comments at the hearing, and that he should have recused himself. Lastly, the Petitioner contends that the post-conviction court erred when it failed to enter a written order denying the Petitioner relief. The State responds that the record makes clear that Counsel effectively represented the Petitioner and made him aware of the plea offer from the State. The State further responds that the post-conviction court judge's comments did not show bias to the point of recusal, and that the post-conviction court's oral findings at the conclusion of the hearing were incorporated into an order and were sufficient for review by this court. We agree with the State.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2018). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2018). The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates against them. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's conclusions of law, however, are subject to a purely *de novo* review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by

> the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). "The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation." *House*, 44 S.W.3d at 515 (quoting *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)).

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must

be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

The Petitioner contends that Counsel was ineffective for failing to present him with the eight-year offer from the State. The post-conviction court found that Counsel had spoken to the Petitioner about the offer and advised the Petitioner to accept it. The post-conviction court fully accredited Counsel's testimony that he advised the Petitioner to take the offer and was "flabbergasted" when he declined it. The post-conviction court also found that the Petitioner had lied under oath and so was not credible. The evidence does not preponderate against the post-conviction court's findings. Counsel testified that he advised the Petitioner of the State's offer both before trial and before sentencing, and he recalled that the Petitioner turned down the offer because he felt he was innocent because he had not gone inside the pawn shop. Counsel explained criminal responsibility to the Petitioner, but he remained steadfast in not taking the plea deal. The post-conviction court questioned the Petitioner as to whether he had been asked in open court that he wished to reject the plea deal, and the Petitioner was evasive in his response, thereby leading the post-conviction court to further discredit the Petitioner's testimony that Counsel completely failed to convey the State's offer to him. The Petitioner has not presented evidence, other than his non- credible testimony, that Counsel failed to communicate the eight-year offer to him. Thus, the Petitioner has not met his burden of proving that Counsel failed to convey the State's offer to him, and he is not entitled to relief.

As for the Petitioner's contention that the post-conviction court judge should have recused himself based on his comments about the Petitioner's perjured testimony at the hearing, we conclude that the judge upheld his required duty to ensure that the proceeding was free from perjured testimony. The post-conviction court judge gave the following admonishment to the Petitioner regarding his testimony: "I would be careful about speaking the truth, sir[.] Aggravated perjury carries [a sentence of] two to twelve years[.]" The judge noted that he had presided over the Petitioner's trial and recalled conducting a voir dire with the Petitioner about his decision to reject the plea offer. The post-conviction judge's comments do not amount to a showing of bias warranting recusal, but rather "a reasonable effort to keep [the] court free of perjured testimony when it is within [the judge's] personal knowledge that this has occurred or is occurring." *State ex rel. Phillips v. Henderson*, 423 S.W.2d 489, 492 (Tenn. 1968) (stating that "[I]t was not error for the trial judge to point out to the petitioner . . . that it was obvious the petitioner was perjuring himself" and that such action did not "exhibit the prejudice necessary for reversal.").

Additionally, as to the Petitioner's contention that the post-conviction court erred by not filing an official order denying his petition, we note that the post-conviction court's findings of fact and conclusions of law were stated in open court and later incorporated into a written order. Tennessee Code Annotated section 40-30-111(b) requires the post-conviction court to state its findings of facts and conclusions of law in a written order. This court, however, has concluded that this failure to put the findings and conclusions in written

form is rendered harmless as the oral statement constitutes a sufficient record upon which this court can conduct its review. *See State v. Higgins*, 729 S.W.2d 288, 290 (Tenn. Crim. App. 1987). We reach the same conclusion here and conclude that the Petitioner is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude the post-conviction court properly denied the Petitioner's petition for post-conviction relief. In accordance with the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

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ROBERT W. WEDEMEYER, JUDGE