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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP197-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE L. HERRMANN,

Defendant-Appellant-Petitioner.

On Petition for Review of a Decision by the Court of Appeals, District IV, Dated February 13, 2014.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. The State's Argument Rests on a Misunderstanding of the Law, a Mischaracterization of Mr. Herrmann's Argument, and a Fundamental Misperception of the Judge's Role.

A. Mr. Herrmann need not prove that the judge was actually subjectively biased or actually treated him unfairly.

Because the State's brief takes shifting positions on what is required for a due process claim based on judicial bias, it is worth restating the various ways of making out such a claim. Judicial bias that violates due process can be shown in three ways: 1) by showing actual subjective bias; 2) by showing that "there are objective facts demonstrating . . . the trial judge in fact treated the defendant unfairly"; and 3) by showing that there is an appearance of bias such that "a reasonable person, taking into consideration human psychological tendencies and weaknesses would conclude that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***State v. Goodson***, 2009 WI App 107, ¶¶ 8-9, 320 Wis. 2d 166, 173, 771 N.W.2d 385, 389 (citations omitted). The State agrees with this statement of the various means of establishing a due process violation. (State's Brief at 12-13).

The State at multiple points in its brief says it agrees with Mr. Herrmann's recitation of the applicable law. The State agrees that a showing of actual bias is not necessary, that the appearance of bias can violate due process, and that,

in fact, the ***Caperton***[1] decision contained a "clear declaration that proof of actual bias was not necessary for a finding of objective bias." (State's Brief at 13, 20, 23, 24).

The State says that the correct standard for evaluating a claim of objective bias based on the appearance of bias is the one set forth by the Court of Appeals in ***State v. Goodson***, 2009 WI App 107, 320 Wis.2d 166, 771 N.W.2d 385, in which the court said "[t]he appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements." (State's Brief at 13, quoting ***Goodson*** at ¶ 9). This was the standard ostensibly employed by the Court of Appeals in this case.

Mr. Herrmann, of course, has no quarrel with any of this. However, despite the State's express approval of due process claims based on the appearance of bias, the State attempts to hold Mr. Herrmann to the burden of proving actual bias and faults him for failing to meet this burden.

As Mr. Herrmann noted in his brief-in-chief, prior to ***Caperton***, there were two lines of cases in Wisconsin, one of which held that a due process claim could never be premised on an appearance of bias, but required either a showing of actual bias or objective evidence that the defendant was treated unfairly. *See, e.g.* ***State v. O'Neill***, 2003 WI App 73, ¶¶ 11–12, 261 Wis.2d 534, 663 N.W.2d 292 (objective test asks whether objective facts reveal actual bias; "It is not sufficient to show that there is an appearance of bias or that the circumstance might lead one to speculate that the judge is biased."); ***State v. McBride***, 187 Wis.2d 409, 417, 523 N.W.2d 106 (Ct.App.1994) ("While the record provides an ample basis for the judge's conclusion that there would be the

[1] ***Caperton v. A.T. Massey Coal Co.***, 556 U.S. 868, 129 S. Ct. 2252, (2009).

appearance of partiality, it does not demonstrate that Judge Koehn was actually biased."); ***State v. Pirtle,*** 2011 WI App 89, ¶ 34, 334 Wis. 2d 211, 799 N.W.2d 492 (Judicial bias may be shown by proof of subjective bias or by proof of objective bias, which requires that the judge actually treated the defendant unfairly.).

The other line of cases, culminating with ***Goodson***, held that an appearance of bias could offend due process. *See, e.g.* ***State ex rel. DeLuca v. Common Council of City of Franklin,*** 72 Wis. 2d 672, 242 N.W.2d 689 (1976). ("We conclude that, in respect to this latter test, the trial judge appeared to base his ruling on whether there were actual bias revealed by the record. We believe this test to be incorrect and that actual bias need not be shown."); ***In the Interest of Kywanda F.,*** 200 Wis. 2d 26, 36, 546 N.W.2d 446 (1996) (Due Process Clause may sometimes bar judges who have no actual bias in order to satisfy the "appearance of justice."). This approach was ultimately vindicated when the United States Supreme Court decided ***Caperton.***

The State professes agreement with the latter line of cases (those consistent with ***Caperton***), but shifts to relying on the former when it is expedient to do so. For example, the State claims near the beginning of its brief that "[t]o overcome the presumption of non-bias, the party asserting judicial bias must show that the judge *is biased or prejudiced* by a preponderance of the evidence." (State's Brief at 12, emphasis added). In support of this proposition, the State cites ***McBride,*** which is one of those cases in which the Court of Appeals, prior to ***Goodson***, ***Gudgeon***,[2] or ***Caperton,*** held

[2] ***State v. Gudgeon.*** WI App 143, 295 Wis. 2d 189, 720 N.W.2d 114.

that the appearance of bias could *not* form the basis for a due process claim; a showing of actual bias was required.

Later, the State reiterates its claim that Mr. Herrmann must "show by a preponderance of the evidence that the sentencing judge *was not impartial*." (State's Brief at 16, emphasis added). The State again cites ***McBride*** and then cites ***O'Neill*** for the proposition that "[i]t is not sufficient to show that there is an appearance of bias or that the circumstances might lead one to speculate that the judge is biased." (State's Brief at 17). ***O'Neill*** is another in that line of cases in which the Court of Appeals flatly refused to recognize a due process claim premised on the appearance of bias. The notion that the appearance of bias is never sufficient to show a due process violation has since been rejected in ***Goodson*** and ***Gudgeon*** and, as a matter of binding federal constitutional law, in ***Caperton.***

The burden of proof structure from those cases has no place in the analysis, given that the parties are in agreement that some formulation of the ***Goodson*** standard is the law and that there is no need for Mr. Herrmann to prove that the judge was actually subjectively biased or actually treated Mr. Herrmann unfairly. ***Caperton*** and the ***Goodson/Gudgeon*** line of cases in Wisconsin make no mention of a burden of proof simply because they do not contemplate proof of actual bias. Rather, they contemplate a showing that the circumstances give rise to a strong *risk* of bias based on an objective standard. *See* ***State v. Gudgeon***, 2006 WI App 143, ¶ 23, 295 Wis. 2d 189, 205, 720 N.W.2d 114, 122. When the basis for the claim is the appearance of bias, the matter is not decided based on a weighing of the quantum of evidence on both sides; it is decided based on the application of an objective test. In such cases, the presumption of judicial impartiality is

simply a rebuttable presumption. ***Id***.at ¶ 20, 295 Wis. 2d at 203, 720 N.W.2d at 121.

The State, in a similar vein, declares that the judge's remarks about her personal tragedy were "in no way tied to the length of Herrmann's sentence." (State's Brief at 15). First, the State does not know that. No one can. That is the problem. Second, proving that the remarks were "tied to" the sentence would be only one way to show a due process violation. Showing the causal connection between the bias and the sentence would prove *actual* subjective bias. Such proof is almost always impossible. A judge will almost never *expressly* give a longer sentence *because of* a bias (e.g., "because I lost my sister to a drunk driver and am still suffering, I am going to impose a sentence of . . .") But Mr. Herrmann does not need to definitively prove that the remarks were "tied to" the sentence to establish a violation of due process. Due process is violated by an appearance of bias if there is "a serious risk of actual bias—based on objective and reasonable perceptions." ***Caperton v. A.T. Massey Coal Co***., 556 U.S. 868, 884, 129 S. Ct. 2252, 2263 (2009)..

The State's jumbling of the various means of establishing a due process violation is further evident in the closing paragraph of the State's Brief in which the State says that Mr. Herrmann's claim fails because the judge considered the sentencing factors, the sentence was "appropriate," and, therefore, "Herrmann has not shown the existence of any judicial bias." Again, this statement assumes that Mr. Hermann can only show a due process violation if he can prove *actual* subjective bias or that the sentence was objectively unfair. Indeed, proving these things would establish a due process violation. Like proving actual bias at sentencing, showing that a sentence is objectively unfair is nearly always impossible. Sentencing, more than any other

decision a judge makes, is inherently subjective. What is fair in the eyes of one is unfair in the eyes of another. Even when statistical information is employed, the available information will nearly always be "too vague and general" to demonstrate that the defendant "would not receive a similar sentence but for a biased judge" as was the case for Mr. Herrmann. (Court of Appeals Opinion at ¶9; App. 104).

The State attempts to hold Mr. Herrmann to a burden that the Due Process Clause does not require. Mr. Herrmann does not assert that he can prove that this judge was actually subjectively biased or that his sentence was empirically unfair. He does not need to. He asserts that the judge's remarks about her history, in the context of this particular case, and what those remarks revealed about her state of mind at the sentencing would lead a reasonable observer to conclude that there was a "serious risk of actual bias." ***Caperton***, 556 U.S. at 884, 129 S. Ct. at 2263.

Although Mr. Herrmann cannot prove that the judge was actually subjectively biased against him, he has come awfully close. There was strong circumstantial evidence of actual bias in the judge's statements about the pain she still felt every day as a result of a crime strikingly similar to his, her complete identification with the victims, and her belief that her pain – far from being something she should strive to set aside – actually made her uniquely qualified to preside over this case. Mr. Herrmann has at least established that there is a serious risk of actual bias that is constitutionally intolerable.

B. It does not matter that in addition to making the statements that revealed judicial bias, the court also discussed the appropriate sentencing factors.

The state makes much of Mr. Herrmann's "admission" that after making the remarks at issue, the judge did consider the sentencing factors that she was required to consider under ***McCleary v. State,*** 49 Wis.2d 281, 182 N.W.2d 512 (1971), and its progeny. (State's Brief at 19). The State also tries to make something of the timing of the judge's remarks about her own enduring pain. The State describes these remarks as having come "prior to" her exercise of discretion in sentencing Mr. Herrmann, as if the State can separate the judge's bias-indicating statements from her pronouncement of sentence. But as Mr. Herrmann noted in his principal brief, there is no reason to believe that after discussing her personal tragedy and her belief that she was tasked with Mr. Herrmann's sentencing as a result of divine intervention, the judge then returned to a state of proper judicial neutrality in time to consider the appropriate factors and impose sentence. In fact, the judge's odd stricture at the close of the hearing that Mr. Herrmann must submit any letters expressing an opinion about the case to prescreening by the district attorney's office would indicate the contrary.

The fact that after the judge made remarks revealing objective bias she went on to also say things that were proper is beside the point. Heaping unobjectionable sentencing remarks on top of objectionable ones does not render the entire proceeding unobjectionable. For example, if a judge uttered a racial slur applicable to the defendant at the outset of the sentencing hearing, it would not matter that the judge then went on at great length to discuss all of the proper sentencing factors. The bias of the judge would be obvious, and the

proceeding tainted, no matter how long the judge continued to speak or what else he said.

The question is not whether the judge said some things that were proper and even admirable. The question is whether "a reasonable person — taking into consideration human psychological tendencies and weaknesses — concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***State v. Gudgeon.*** WI App 143, ¶ 23- 24, 295 Wis. 2d 189, 205-06, 720 N.W.2d 114, 12224, 295 Wis. 2d at 205-06, 720 N.W.2d at 122.

The State relies on the circuit court's statement in its decision denying Mr. Herrmann's postconviction motion that the sentence was "not based on bias or emotion." (State's Brief at 19, quoting R. 43: 6). Dependence on the judge's *post hoc* denials of bias is no more appropriate than dependence on a judge's *post hoc* denials of reliance on inaccurate information. ***State v. Travis***, 2013 WI 38, 347 Wis. 2d 142, 164, 832 N.W.2d 491, 502. ("circuit court's after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance.").

The objective standard for determining judicial bias is necessary precisely because a circuit court judge's self-assessment cannot end the inquiry. As the ***Caperton*** Court said :

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be

> grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Caperton, 556 U.S. at 883, 129 S. Ct. at 2263.

C. The State argues effectively against a position Mr. Herrmann has never taken.

The State sets up a straw man and ably knocks it down. The State agrees with the Court of Appeals that it is not uncommon for judges or their family members to be crime victims. The State then declares:

> And a rule mandating recusal in such a circumstance, no matter the judge's on-the-record-remarks, disregards the strong presumption that judges are impartial.

(State's Brief at 19). The quoted statement is true enough, but beside the point. Mr. Herrmann has never proposed a rule mandating recusal whenever the judge or a family member has been a crime victim. In fact, Mr. Herrmann disavowed any intent to seek such a rule clearly, expressly, and more than once. (Herrmann's Brief-in-Chief at 10-11, 26).

It was not the bare fact that the judge lost her sister to a drunk driver that disqualified her. It was her inability to set her personal tragedy aside during this sentencing proceeding, as evidenced by her statements.

D. The State's conclusion that there was no due process violation flows from the State's fundamental misunderstanding of the judge's role.

The State says that when the judge made the statements at issue here, she simply "acknowledged and affirmatively responded to the community's comments." (State's Brief at 25). But the judge did far more than "acknowledge" the victims. She placed herself in their shoes. She did not simply understand their pain. She felt it herself. When she talked about the pain suffered by victims of a crime like this, she said "we." The State contends that there was no appearance of bias because the judge's statements "simply reiterated statements already made by others regarding Herrmann's crime." (State's Brief at 25). This means nothing. The fact that the *victims* of the crime talked of their pain does nothing to erase the grave concerns raised when the *judge* then made similar statements about her own.

The State's position is understandable as an outgrowth of the State's fundamental misunderstanding of the judge's basic role. The State proclaims:

> Perhaps at no time more than at sentencing is a circuit court a representative of its community. It is tasked with identifying a specific violation of the criminal code against its people.

(State's brief at 24). The State then goes on to describe the role of the judge at sentencing as "speaking on behalf of the community in holding accountable a defendant who has inflicted harm on the community." The State opines that "in a very real way, the circuit court is a representative of the community which it serves." (State's Brief at 25).

It is no wonder the State sees no problem with the judge in this case wholly identifying with the victims and sentencing Mr. Herrmann with her own suffering — caused by conduct identical to his — at the very forefront of her thoughts. To the State, the judge is just a part of the aggrieved community whose job is to speak for them.

It is not the function of a judge to be a "representative" of the community. That is the job of the prosecutor. It is the prosecutor, not the judge, who identifies violations against the people and speaks "on behalf of" the community.

The State cites ***Gallion*** in support of its formulation of the judge's role, but nothing in ***Gallion*** casts the judge as the community's representative. All circuit court judges in this state swear the following oath:

> I, the undersigned, who have been elected (or appointed) to the office of [circuit court judge], but have not yet entered upon the duties thereof, do solemnly swear that I will support the constitution of the United States and the constitution of the State of Wisconsin; that I will administer justice without respect to persons and will faithfully and impartially discharge the duties of said office to the best of my ability. So help me God.

Wis. Stat § 757.02.

Judges do not swear to represent anyone. The oath is all about the two basic components of the judge's duty: 1) to uphold the law, and 2) to do so impartially. It is the function of the judge to *hear from* the representative of the community (the prosecutor) as well as all of the other voices in the criminal justice system, including the defendant. See ***State v. Gallion***, 2004 WI 42, ¶ 29, 270 Wis. 2d 535, 551, 678 N.W.2d 197, 205, quoting State of Wisconsin Criminal Penalties Study Committee, Final Report, August 31, 1999, at

i. ("Judges are on the front lines of the criminal justice system every day, listening to victims and their families, defendants and their families, and law enforcement, prosecutors, defense attorneys, and the public.") It is the judge's job to take in all of this information and consider it impartially — to be a *neutral* decision-maker as between the parties (here, Mr. Hermann on one side and the people of the State of Wisconsin on the other).

It is only by disregarding the judge's role as an impartial decision-maker that the State can conclude that there was no strong risk of impermissible bias and no due process violation in this case.

CONCLUSION

Mr. Herrmann asks that his Court reverse the decision of the Court of Appeals and remand the case to the circuit court for sentencing by a different judge.

Dated this_____ day of December, 2014.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,326 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of December, 2014.

Signed:

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