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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No.2013AP000197 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JESSE L. HERRMANN,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT
OF CONVICTION,
SENTENCE AND ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN THE
CIRCUIT COURT FOR LA CROSSE COUNTY
THE HONORABLE ROMONA GONZALEZ,
PRESIDING

**BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT**

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**BRIEF AND APPENDIX OF
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ISSUES PRESENTED

**Did the sentencing court abused its
discretion and violated Mr. Herrmann's**

**due process rights when it exhibited bias
in sentencing Mr. Herrmann.**

The circuit court answered: No.

**POSITION ON ORAL ARGUMENT
AND PUBLICATION**

The briefs of the parties should fully present the issues on appeal and develop the relevant theories and legal authorities. Therefore, the defendant-appellant does not believe oral argument is necessary.

Publication is not requested.

STATEMENT OF CASE

July 1, 2011, a complaint filed charging Jesse L. Herrmann with one count of Homicide by Intoxicated Use of Vehicle, two counts of Injury by Intoxicated Use of a Vehicle, two counts of Operating a motor vehicle while intoxicated Causing Injury and one count of Hit and Run Involving a Death; Hit and Run Involving Injury; First Degree Recklessly Endangering Safety. All were charged as a repeater.(4).

July 1, 2011, Herrmann waived his right to a preliminary hearing and Herrmann was bound over for trial.(5).

July 1, 2011, an information was filed charging the same offenses.(6)

October 3, 2011, Herrmann pled guilty to one count of Homicide by Intoxicated Use of Vehicle, two counts of Injury by Intoxicated Use of a Vehicle, two counts of

Operating a motor vehicle while intoxicated Causing Injury and one count of Hit and Run Involving a Death. All counts included a repeater enhancer. (45: 15-21).

November 28, 2011, the trial court sentenced Herrmann to 15 years confinement and 20 years extended supervision on the homicide; two consecutive terms of five years confinement and five years extended supervision on the injury by intoxicated use of a vehicle; two consecutive terms of three years confinement and five years extended supervision on the operating a motor vehicle while intoxicated causing an injury and a consecutive term of 20 years confinement and ten years extended supervision on the hit and run imposed and stayed with 15 years probation. Thus, Mr. Herrmann was sentenced, at a minimum, to 31 years confinement and 40 years extended supervision and 15 more years of consecutive probation.(27;47: 87–89)

November 11, 2012, Herrmann filed a timely postconviction motion requesting resentencing before an different judge.(39).

January 4, 2013, the trial court denied Herrmann’s postconviction motion.(43).

January 22, 2013, Herrmann filed a timely notice of appeal.(48).

FACTS

July 1, 2011, following a fatal automobile accident the state filed a complaint charging Jesse L. Herrmann with one count of Homicide by Intoxicated Use of Vehicle, two counts of Injury by Intoxicated Use of a Vehicle, two counts of Operating a motor vehicle while intoxicated Causing Injury and one count of Hit and Run Involving a Death; Hit and Run Involving Injury; First

Degree Recklessly Endangering Safety; and Homicide by Use of Vehicle -all as a repeater.(4).

Herrmann waived his right to a preliminary hearing and pled guilty to one count of Homicide by Intoxicated Use of Vehicle, two counts of Injury by Intoxicated Use of a Vehicle, two counts of Operating a motor vehicle while intoxicated Causing Injury and one count of Hit and Run Involving a Death. All counts included a repeater enhancer. (5; 45: 15-21).

At sentencing the state did not make a specific recommendation.(45:55-56) It asked that Herrmann be incarcerated for a lengthy period and that each sentence be consecutive so that each victim would be recognized.(45:55-56, 61) The defense recommended a total of 12 to 15 years confinement and 20 years extended supervision.(45:67;17:13). The presentence report recommended a total of forty years confinement and twenty years extended supervision.(16:15).

The court sentenced Mr. Herrmann to to 15 years confinement and 20 years extended supervision on the homicide; two consecutive terms of five years confinement and five years extended supervision on the injury by intoxicated use of a vehicle; two consecutive terms of three years confinement and five years extended supervision on the operating a motor vehicle while intoxicated causing an injury and a consecutive term of 20 years confinement and ten years extended supervision on the hit and run imposed and stayed with 15 years probation. Thus, Mr. Herrmann was sentenced, at a minimum, to 31 years confinement and 40 years extended supervision and 15 more years of consecutive probation. (27;47: 87–89)

During the sentence, the trial judge referred to her own family experience with a homicide by intoxicated

use of a motor vehicle. The judge said,

In 1976 five young women got into a vehicle, and only one of them survived. The two gentlemen in the other vehicle were 17, drunk out of their minds, and they did not survive. That was my personal story, and I will tell you that the day does not go by that I do not think of that personal tragedy, and I wish that I could tell these victims that that pain will one day disappear, but it doesn't. Time makes it less. We redirect ourselves to other things, and a day does go by when we don't think of our loved ones and then we feel guilty at night because that happened, but life does go on and I am very grateful today that I'm looking at four lovely young ladies and that only one family has had to go through the pain that my family and the other three young ladies's families had to endure in 1976.

And so perhaps it is again destiny or a higher power or, Pastor, probably the prayers of many others that bring me to be the judge on this particular case because I probably more than anyone else who would be able to sit on this bench in this county understand the pain that these victims are feeling, but I have had the benefit of all those years since 1976 to understand that I have to make Mr. Herrmann pay, but that nothing I do to him will lessen that pain, and that if I don't do more than just incarcerate Mr. Herrmann, if I don't speak out on behalf of my community today, then this tragedy will continue to happen on our streets, and more families will suffer that way these families suffer today.

(47:78-79).

Mr. Herrmann filed a timely motion for resentencing on the ground that the court erroneously exercised its discretion and violated due process when it sentenced Mr. Herrmann.(39).

The trial court denied Mr. Herrmann's motion(43), and Mr. Herrmann now appeals the sentence and the decision denying him a resentencing.

ARGUMENT

The sentencing court abused its discretion and violated Mr. Herrmann's due process rights when it exhibited bias in sentencing Mr. Herrmann.

State v McCleary, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971), holds that "[t]he sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."

When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis.2d 535, 678 N.W.2d 197.

Appearance of bias is an "objective standard[] that do[es] not require proof of actual bias." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252, 2263, 173 L.Ed.2d 1208 (2009).

Caperton v. A. T. Massey Coal Co. held that there is a serious risk of actual bias when a person with a personal stake in a particular case has a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. However *Caperton* makes abundantly clear that is not the only situation where a judge could have an objective bias.

Caperton noted that the Due Process Clause incorporates the common-law rule requiring a judge to

recuse him or herself when the judge has "a direct, personal, substantial, pecuniary interest."(Slip Op 10), However, the *Caperton* court also noted that it has identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (Id.)

Caperton explained that the proper constitutional inquiry was not whether in fact judge was influenced, but whether sitting on a particular case would offer a possible temptation to the average judge to "lead him or her not to hold the balance nice, clear and true." (Slip Op 11). While the degree or kind of interest sufficient to disqualify a judge can not be defined with precision the test does have an objective component.(Slip Op 13).

Caperton held that the objective inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or there is an unconstitutional potential for bias. (Slip Op. 9-11).

In *State v. Goodson*, 2009 WI App 107, ¶ 9, 320 Wis.2d 166, 771 N.W.2d 385, the Wisconsin Court of Appeals ordered a new reconfinement hearing where it held the trial court had been bias when it confined Goodson to the maximum possible period. In that case, the court recognized that objective bias can exist in two situations. *Goodson*, 2009 WI App 107, ¶ 9. The first is the appearance of bias, and the second, is actual bias. Id. at ¶ 9. However, the *Goodson* court also addressed whether apparent bias was sufficient to show objective bias or whether actual bias was required. Id. at ¶14.

Ultimately, the court concluded that the underlying concern of an objective bias analysis is whether there was actual bias or the great risk of actual bias. *Id.*

The guarantee of due process is violated when, “under a realistic appraisal of psychological tendencies and human weakness,” there exists “a risk of actual bias or prejudice.” *Withrow v. Larkin* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). *State v. Goodson*, 2009 WI App 107, ¶ 14.

Thus, the appearance of bias offends due process “whenever a reasonable person-taking into consideration human psychological tendencies and weaknesses-concludes that the average judge could not be trusted to ‘hold balance nice, clear and true’ under all the circumstances.” *Goodson*, 320 Wis. 2d at ¶ 9. Indeed, “the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements.” *Id.*

State v. Gudgeon, 2006 WI App 143, ¶ 26., 295 Wis.2d 189, 720 N.W.2d 114 another case, where the court of appeals found the trial court bias in a probation extension case, made clear that the determination of objective bias is based on whether, under the circumstances, the ordinary reasonable person, not a reasonable trial judge, a reasonable appellate judge, or even a reasonable legal practitioner, would believe there is a great risk that the judge had already made up his or her mind.

Objective bias has been found where a juror’s emotional involvement was demonstrated by the close similarity of her experience with the crimes charged so

as to create a likelihood it would affect the ability of any reasonable person to be impartial in such circumstances. *State v. Delgado* 223 Wis.2d 270, 285-86, 588 N.W.2d 1 (1999).¹ While, *Delgado* is a juror bias case, it ought not be dismissed for that reason. The standard for objective bias for both jurors and judges are similar. The question for both is whether a reasonable person under the circumstances could question the decision makers ability to be impartial. There is no justification to assume that the circumstances that reflect “objective bias” on the part of a juror would not also reflect “objective bias” on the part of a judge.

In this case, the judge made statements that indicated the emotional pain that she endured following circumstances similar to Mr. Herrmann’s case. Her statement also suggested she felt a certain sense of mission to make Mr. Herrmann pay that would not likely be felt by a judge less emotionally involved.

Indeed, Mr. Herrmann was sentenced to 31 years confinement and 40 years extended supervision and 15 more years of consecutive probation, overall, and to 15 years confinement and 20 years extended supervision for homicide by intoxicated use of a motor vehicle. Mr. Herrmann’s sentence appears to be disproportionately high based upon Court Tracker analysis provided to the court on November 23, 2011, by Attorney Doerfler. (22). The analysis reflects that of 1,039 homicide by intoxicated use of a vehicle² cases in Wisconsin, only

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Although *Delgado* was decided before *State v. Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), *State v. Lindell*, 2001 WI 108, ¶¶38, 46-48, 245 Wis. 2d 689, 629 N.W.2d 223 explains that *Delgado* was an objective bias case, even though *Delgado* predated the adoption of that “objective bias” terminology in *Faucher*.

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The query was for s, 940.09(1)(a) cases closed in Wisconsin,

39.85% of the cases resulted in a prison sentence. Of the prison sentences, 36% were for sentences of 5 to 10 years.. About 27% of the sentences were for less than 5 years and about 36% (about 140) were for more than 10 years.(22:1).

Where there was judicial bias in sentencing, resentencing before a different judge is an appropriate remedy. See *State v. Goodson*, 2009 WI App 107, ¶ 18.

CONCLUSION

Mr. Herrmann asks this court to order a resentencing before a different judge because that the court erroneously exercised its discretion and violated due process because it was biased when it sentenced Mr. Herrmann.

Dated: March 25, 2013

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CERTIFICATIONS

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, maximum of 60 characters per full line of body text. The length of the brief is 2949 words.

Patricia A.FitzGerald

I hereby certify that with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19 (2)(a) and that contains at a minimum : (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, an final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Patricia A. FitzGerald

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date .A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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