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COURT OF APPEALS

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OF WISCONSIN**

DISTRICT IV

Case No. 2013AP000197-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE L. HERRMANN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
CONVICTION AND ORDER DENYING
POSTCONVICTION RELIEF, ENTERED IN
LACROSSE COUNTY CIRCUIT COURT, THE
HONORABLE ROMONA A. GONZALEZ,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT
AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because

resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts in the “Argument” portion of its brief.

ARGUMENT

THE CIRCUIT COURT WAS NEITHER SUBJECTIVELY NOR OBJECTIVELY BIASED WHEN IT SENTENCED HERRMANN. THE BASIS FOR ITS SENTENCE IS READILY APPARENT FROM THE SENTENCING TRANSCRIPT AND IS IN CONFORMITY WITH ACCEPTABLE SENTENCING FACTORS.

I. APPLICABLE LEGAL PRINCIPLES AND STANDARDS OF REVIEW.

A. Regarding Circuit Court Exercise Of Sentencing Discretion.

Sentencing is committed to the circuit court’s discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197, 203. A defendant challenging a sentence has a burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. *State v. Lechner*,

217 Wis. 2d 392, 418, 576 N.W.2d 912, 925 (1998). Appellate review of a circuit court's sentencing starts with the presumption that the circuit court acted reasonably, and is not interfered with if that discretion was properly exercised. *See Lechner*, 217 Wis. 2d at 418–419.

In the exercise of discretion, the circuit court is to identify the objectives of its sentence, which include but are not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Gallion*, 270 Wis. 2d 535, ¶ 40. In determining the sentencing objectives, the circuit court may consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See e.g. State v. Harris*, 2010 WI 79, ¶ 28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the circuit court's discretion. *Id.* The amount of necessary explanation of a sentence varies from case to case. *Gallion*, 270 Wis. 2d 535, ¶ 39.

Appellate analysis includes consideration of the postconviction hearing because a circuit court has an additional opportunity there to explain its sentence. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

B. Regarding Alleged Bias On The
Part Of The Circuit Court.

Whether a circuit court's partiality at sentencing can be questioned is a matter of law that is reviewed *de novo*. *State v. Rochelt*, 165 Wis. 2d 373, 379, 477 N.W.2d 659 (Ct. App. 1991).

As this court held in *State v. Goodson*, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385,

The right to an impartial judge is fundamental to our notion of due process. We presume a judge has acted fairly, impartially, and without bias; however, this presumption is rebuttable. When evaluating whether a defendant has rebutted the presumption in favor of the court's impartiality, we generally apply two tests, one subjective and one objective.

Goodson, 320 Wis. 2d 166, ¶ 8 (citation omitted).

To 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 v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994).

Subjective Bias

The subjective test is based on the circuit court's own determination of his or her impartiality. *State v. Walberg*, 109 Wis. 2d 96, 106, 325 N.W.2d 687 (1982). A circuit court's declaration that he or she was not biased may satisfy the subjective test. *Rochelt*, 165 Wis. 2d at 379.

Objective Bias

The objective test is based on whether the circuit court's impartiality can reasonably be questioned. *Walberg*, 109 Wis. 2d at 106.

Objective bias can exist in two situations. First, where there is the appearance of bias, which this court has observed is evaluated thusly:

‘[T]he appearance of bias offends constitutional due process principles whenever 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.’ Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the court’s impartiality based on the court’s statements.

Goodson, 320 Wis. 2d 166, ¶ 9 (citation omitted).

The second form of objective bias occurs where “there are objective facts demonstrating . . . the trial judge in fact treated [the defendant] unfairly.” *Id.* (citation omitted).

II. APPLICATION OF PRINCIPLES AND STANDARDS TO FACTS OF THIS CASE.

A. The Circuit Court’s Sentencing Rationale Is Consistent With Existing Law And Shows Reliance On Proper Factors.

Herrmann contends that his due process rights were violated by the circuit court’s sentence in this case (Herrmann’s Brief at 9-10).

Although Herrmann engages in no analysis of the applicable due process principles, a review of the circuit court’s sentencing remarks makes clear that it properly addressed the statutory factors set forth in Wis. Stat. § 973.017(2) and those outlined in *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971): the gravity of the offense, the character and rehabilitative needs of

the offender, and the need for protection of the public.

The circuit court remarked on the need to protect the public from the significant danger that drunk drivers pose, as directly and poignantly shown in this case by the four young women who were severely injured by Herrmann and the one young woman who tragically died (*See e.g.* 4:4-6, 47:75-79). It also discussed the gravity of the offense, and how Herrmann's decisions had caused a "ripple effect" throughout the community whose effect would be felt for years to come (47:81-83). Finally, it addressed Herrmann's prior convictions for OWI and other matters for which he was already on federal parole in rejecting probation and imposing a substantial period of confinement for each count, and its view that consecutive sentences were necessary to honor each victim and to rehabilitate Herrmann (47:75, 80-81, 83). The circuit court mitigated those issues with the recognition that Herrmann did not pursue a trial, that he had a family, and that he was still young (47:83-84). Thus, the circuit court addressed the proper factors in meting out an appropriate sentence from Herrmann. *See Wis. Stat. § 973.017(2).*

And, in any event, this court has held that a point-by-point discussion of the sentencing objectives is not necessary to demonstrate a circuit court's exercise of sentencing discretion. *See State v. Matke*, 2005 WI App 4, ¶ 19, 278 Wis. 2d 403, 692 N.W.2d 265 (If the circuit court "has considered the proper factors, explained its rationale for the overall sentence it imposes, and the sentence is not unreasonable, the court does not erroneously exercise its discretion simply by failing to separately explain its rationale for each

and every facet of the sentence imposed.”) The State respectfully submits that the circuit court met that objective here.

B. Herrmann Has Not Shown That
The Circuit Court Was Biased;
Either Objectively Or
Subjectively.

Before making the statements with which Herrmann takes issue on appeal, the circuit court, out of an abundance of caution, put on record its own experience with drunk driving and inquired if Herrmann or his trial counsel had any issue with that history:

Okay. Mr. Herrmann, there is a matter that I'd like to put on the record again just before we begin. It's not a secret that I lost a sister to a drunk driver in the summer of 1976. I made this known. I don't believe that this will have any impact on my ability to set that aside and sentence you based upon the information presented on your case and not my sister's case, but I want you to understand right off the get-go that that is something that I have very zealously tried to set aside, and I do believe that I am able to do that. If you have any issues or questions that you want to ask relative to that, you're certainly welcome to ask them now.

HERRMANN: I have none.

THE COURT: No problems?

ATTORNEY DOERFLER: No problems.

(47:4.)

Thus, before hearing from the victims and the parties as to their sentencing recommendations, the circuit court had already alerted and secured assurances from Herrmann and his trial counsel of the issue now complained of on appeal. Neither objected or took any issue with the circuit court's admission.

Subjective Bias

The circuit court's statements that it didn't "believe that this will have any impact on my ability to set that aside and sentence you based upon . . . your case" and that the circuit court's experience "is something I have very zealously tried to set aside, and I do believe that I am able to do that[]" would seem to satisfy any concerns regarding possible subjective bias. *See Rochelt*, 165 Wis. 2d at 379 (a circuit court's declaration that he or she was not biased may satisfy the subjective test), *see also* 43:6, "When the record is reviewed in its entirety, it is clear that the court pronounced an individualized sentence, not based on bias or emotion, but based on a careful and thorough consideration of the need for punishment and future deterrence to protect the community . . ." *Cf. Fuerst*, 181 Wis. 2d at 915 (appellate sentence review includes consideration of the postconviction hearing because a circuit court has an additional opportunity there to explain its sentence).

Herrmann does not dispute that the circuit court made these statements, and does not counter them with any argument or evidence which would suggest, by a preponderance of the evidence, anything which would overcome the presumption of non-bias. *See McBride*, 187 Wis. 2d at 415.

Objective Bias

Following statements made by the surviving victims of the accident, all of the victims' families, and the defendant's family, the circuit court heard argument from District Attorney Gruenke and Herrmann's trial counsel, Attorney Doerfler (*see* 47:55-67).

District Attorney Gruenke focused on the significant "ripple effect" Herrmann's actions had upon a sizable portion of the community, which the victims who preceded his argument had made plain for the circuit court (*see e.g.* 47:5-42). He argued that while "[m]any of our crimes affect maybe one person, maybe one family, and doesn't go much beyond that[,] [t]his crime is something that has affected so many people in so many different ways that that reflects on the seriousness of the crime." (47:57). District Attorney Gruenke also noted that Herrmann had a substantial prior criminal record, including a prior OWI, and that he had left the scene of the accident and had to be apprehended by law enforcement officers who arrived on scene (47:57-61). Then, following Attorney Doerfler's sentencing argument, the remarks regarding the circuit court's personal experience followed shortly thereafter (*see* 47:78-79).

Respectfully, the circuit court's comments as selectively highlighted by Herrmann's brief simply follow and track the plain, painful realities which the victims and District Attorney Gruenke had already spoken to and which undeniably exist in this case. They do not provide an additional or objectionable basis for Herrmann's sentence because, as argued above, the basis for a

substantial prison sentence is readily apparent from the record (*see e.g.* 4:4-6; 47:55-62)

Thus, there is no basis for concluding that the circuit court was objectively biased in either fashion because the court's sentencing remarks provide a clearly stated, readily reviewable basis to conclude that Herrmann's sentence was not the product of any judicial bias.

And as a result, the circuit court's comments do not offend due process because a reasonable person could not question the court's impartiality based on the court's statements which simply reiterated statements already made by others regarding Herrmann's crime. *See Goodson*, 320 Wis. 2d 166, ¶ 9 ("Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements.").

Likewise, the court's comments do not present "objective facts demonstrating . . . the trial judge in fact treated [the defendant] unfairly." *Id.* Specifically, Herrmann takes issue with the severity of his sentence, contending that it is out of line with others of an apparently similar nature (Herrmann's Brief at 9).

However, the data cited by Herrmann does not appear to take into account that his sentence was not simply one single but horrific homicide by intoxicated use charge, but included four other similar charges, including two counts for injury by intoxicated use of a vehicle, as a repeater, two counts for operating while intoxicated causing injury, as a repeater, and three additional charges including hit and run involving injury, first degree

recklessly endangering safety, and homicide by use of a vehicle with a prohibited alcohol content, which were dismissed but read in (*see* 4; 6; 26; 45:2-3; 47:87-89; *see also* Wis. Stat. §§ 346.63(2)(a)1, 346.67(1), 939.50(3), 939.62(1)(b-c), 940.09(1)(a), 940.09(1)(b), 940.25(1)(a), 941.30(1)).

Additionally, as set forth in the plea questionnaire/waiver of rights form (13:1), Herrmann's sentence is within appropriate bounds based upon the maximum penalties for the crimes to which he pled, the repeater enhancers which he did not and does not dispute, and the degree of trauma which his crime inflicted on the community. Thus, Herrmann's sentence is well within the range authorized by law, and is not so excessive as to shock the public's sentiment. *See State v. Scaccio*, 2000 WI App 265, ¶ 18, 240 Wis. 2d 95, 622 N.W.2d 449. *see also Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). As such, Herrmann has not shown the existence of "objective facts demonstrating . . . the trial judge in fact treated [him] unfairly." *Goodson*, 320 Wis. 2d 166, ¶ 9.

Because the circuit court properly exercised its sentencing discretion on the basis of acceptable and apparent factors, yielding an appropriate sentence which serves the sentencing objectives as outlined by statute and case law, Herrmann has not shown the existence of any judicial bias, and his sentence was not the product of same.

CONCLUSION

For the foregoing reasons, this court should affirm Herrmann's judgment of conviction and order denying his motion for postconviction relief.

Dated this 26th day of April, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,322 words.

Robert G. Probst
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 26th day of April, 2013.

Robert G. Probst
Assistant Attorney General