

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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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

REPLY BRIEF

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The trial court was bias

**1. The trial court was
objectively bias**

The state argues, in part, that the court was not bias because the judge informed Herrmann at the beginning of the sentencing hearing of her family's experience with a death caused by a drunk driver and

that she told the defendant that she has “zealously tried to set that aside.”(47:4).(State’s brief at 7). Herrmann and his counsel both said they had no problem with that.(47:4).

The state cites no cases to suggest that a defendant can waive judicial bias. That, Herrmann and his counsel originally felt confident in the court’s assurance that it would not be bias, does not establish that the court was not, in fact, objectively bias as reflected by its later comments.

For example, once it came to sentencing, 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 fuilyt 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 that just incarcerate Mr. Herrmannm, 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).

2. Mr. Herrmann was treated unfairly.

While Mr. Herrmann had a prior record, it was not particularly extensive. He had one non-criminal OWI conviction, several misdemeanor convictions and one Federal drug felony conviction.(16: 8).

Nevertheless, contrary to the state assertion, Mr. Herrmann was sentence more severely than others in a similar situation.(state's brief at 10). Mr. Herrmann was sentenced to 15 years confinement and 10 years extended supervision for homicide by intoxicated use of the motor vehicle.

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 vehicle¹ cases in Wisconsin, only 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).

In addition to the 15 years confinement, Mr

¹

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

Herrmann was sentenced to additional 16 years confinement for the other counts.(27;47: 87–89).

Finally, the judge made it clear that she wanted Mr. Herrmann to remain on supervision for the rest of his life.(47:89). Indeed, when even the prosecutor expressed concern that Mr. Herrmann would not start his probation sentence until he was nearly one hundred years old(47:91-92), the judge commented,

...I want to make sure that he's under supervision until he dies.

(47:93).

It is clear, that the judge's own personal experience with a death of a loved one caused by a drunk driver, influenced her to sentence Mr. Herrmann more severely than was "consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *McCleary v. State*, 49 Wis.2d 263, 276, 182 N.W.2d 512,(1971)

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: May 13, 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, 14 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 1301 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.

Patricia A. FitzGerald

