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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP1430-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EMERSON D. LAMB,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN
OUTAGAMIE COUNTY CASE 2016CF24, THE
HONORABLE JUDGE MARK J. MCGINNIS PRESIDING,
AND FROM AN ORDER DENYING THE DEFENDANT'S
MOTION FOR A NEW SENTENCING HEARING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

Issue presented: Should Lamb be granted a new sentencing hearing because there is evidence of objective bias by the sentencing court?

The trial court answered: No.

STATEMENT ON ORAL ARGUMENT

Oral argument would be of marginal value in this case because the issues on appeal can be fully developed in writing with citations to the record and citation to relevant legal authorities.

STATEMENT ON PUBLICATION

The law relating to a defendant's right to be sentenced by an impartial judge is well-established. However, there are few published decisions that address the type of structural error alleged in this case, where objective bias is alleged wherein the trial court makes statements evidencing prejudgment of a defendant's sentence. Therefore, the defendant believes that publication of this decision would further clarify and develop existing case law.

STATEMENT OF THE CASE

Emerson D. Lamb ("Lamb") was charged with two counts of felony bail jumping, battery by prisoners and disorderly conduct. *R. 2; R. 4*. Lamb entered a no contest plea to count three, battery by prisoner and was convicted of

the same, as a repeater, contrary to secs. 940.20(1) and 939.62(1)(b), Wis. Stats. *R. 12; R. 45; R. 22.*

In preparation for sentencing, the trial court ordered a presentence investigation report be completed. *R. 13.* Lamb appeared for sentencing on September 6, 2016 and the trial court addressed Lamb regarding his alleged failure to comply with the presentence investigation. *R. 46.* According to the Department of Corrections, Lamb had communicated with their office via telephone but was reportedly homeless and therefore could not receive mail. *R. 14.* Therefore, the Department of Corrections reportedly made arrangements for Lamb to retrieve his paperwork. However, Lamb reported to the wrong probation office and was directed to go to the other location. According to the Department of Corrections, Lamb never reported to the second address and did not report for his interview.

In court on September 6, 2016, before inquiring about whether Lamb had any explanation for not reporting for his presentence investigation interview, the trial court announced its intention to place Lamb in custody for non-compliance. *R. 46-1 to 46-3.* Lamb, by and through counsel, advised the trial court of his desire to withdraw his no contest plea and therefore, newly appointed trial counsel requested time to review the file and consider the appropriateness of such a motion. *R. 46-4.* Before sentencing was rescheduled and bond addressed relating to Lamb's non-compliance, Lamb left the courtroom. *R. 46-6 to 46-7.*

Lamb was subsequently arrested and reappeared for sentencing on October 18, 2016. *R. 19; R. 47.* Lamb apologized for leaving the courtroom September 6, 2016 before the proceedings were concluded. *R. 47-3.* Next, the trial court inquired why Lamb was wearing clothing

indicative of being placed in segregation in the jail. Lamb responded by advising the trial court that he voluntarily requested to be placed in segregation because he didn't want to be around other inmates and risk any confrontation with other inmates. Lamb continued to explain that he is diagnosed with Asperger's Syndrome and therefore, he feels judged by others and feels it leads to confrontation because he is often picked on. *R. 47-4*. The trial court responded by telling Lamb he anticipated Lamb to make an "uneducated, kind of dumb response." *R. 47-4*. Lamb again apologized.

Judge McGinnis then addressed a second letter that was received by the Department of Corrections, explaining why a presentence investigation was still not completed. *R. 47-5; see R. 23*. Lamb's attorney interjected to apologize and explain that the delayed completion of the presentence report was due to counsel's need to examine the issue of plea withdrawal and was not attributable to Lamb's conduct or fault.

Lamb advised the trial court of his desire to waive the completion of a presentence report and proceed to sentencing. *R. 47-6*. The State agreed to proceed without a presentence report and conveyed that the State was prepared to proceed with sentencing and would be recommending that Lamb be placed on probation. The parties agreed before proceeding that Lamb was entitled to 113 days of sentence credit and that no restitution was requested by the victim.¹ *R. 47-6 to 47-7*.

¹ Lamb also filed a post-conviction motion, challenging the 113 days credit given to him originally. That motion was not contested and the trial court granted that motion, issuing an amended judgment of conviction which provided for the appropriate 115 days credit to which Lamb was entitled. Therefore, this appeal does not further address that issue.

The trial court then addressed Lamb, directly, in relation to his decision to abandon a presentence report and his decision to abandon a motion to withdraw his plea:

THE COURT: And are you in agreement with that?

THE DEFENDANT: Yes, I am.

THE COURT: Okay. First off, you have a, not necessarily a right, but I had ordered a presentence investigation be done before sentencing, and it's my understanding that you don't want to have that done; is that correct?

THE DEFENDANT: If that's what my attorney thinks is best, then yeah.

THE COURT: Okay. Well, that's what he told me he thought was best, but I'm asking you because what I want to do is when I have people like you, I want to avoid future issues on appeal, so let me finish so that there's no game playing. When I read a letter that says though he wants to withdraw his plea and vacate his plea and all this, I want to make sure that you and I are on the same page, okay?

THE DEFENDANT: Yeah.

THE COURT: That's my purpose in asking these questions.

THE DEFENDANT: Yeah. I don't want a PSI done.

THE COURT: Okay. And you've had enough time to think about it and you've gone through it with Mr. Rashid?

THE DEFENDANT: Yeah.

THE COURT: You've discussed the advantages and disadvantages?

THE DEFENDANT: Yes, I have.

THE COURT: You've had your questions answered?

THE DEFENDANT: Yes.

THE COURT: You're making that decision today free from any threats or promises?

THE DEFENDANT: Yes.

THE COURT: Okay. So I'm going to accept the waiver of the PSI on both sides. There was also in this letter, there was mention that you potentially wanted to withdraw or vacate your pleas, so are you familiar with that?

THE DEFENDANT: Yes, I am.

THE COURT: Okay. And that's something that you wanted to do once upon a time.

THE DEFENDANT: It was, but not -- after further discussion with my attorney, I don't want that anymore.

THE COURT: Okay. Why is that?

THE DEFENDANT: Because I feel like I could potentially benefit from, you know, maybe being on probation. Also, there's the possibility of leaving today, so I just --

THE COURT: not really. Okay. Just though I'd tell you that so you don't have any false hopes. I mean, there's a possibility, but it's probably not going to happen. Do you understand that? Yes?

THE DEFENDANT: Yes.

THE COURT: Okay. And I know you're shaking your head, but you need to answer out loud, okay? So I don't want you waiving your rights thinking something that might happen that maybe isn't going to happen. So now that you know that it probably isn't going to happen that you're going to get out today, do you still want to proceed with sentencing and not argue on your request to vacate the pleas or to withdraw the pleas and to waive your right to have a PSI?

THE DEFENDANT: Yes.

R. 47-7 to 47-11. After the trial court was done addressing Lamb and telling him he was probably not going to be released, the court proceeded with the sentencing hearing.

The State recommended probation, as they indicated they would do before the hearing began. *R. 47-11 to 47-17.*

Lamb's attorney also made a recommendation for probation. *R. 47-17 to 47-19.*

Lamb made a brief statement, again apologizing and acknowledging that he has rehabilitative needs he needs to change to be productive and handle situations better. *R. 47-19 to 47-20.*

Before pronouncing sentence, the trial court made further inquiries into Lamb's background. *R. 47-20 to 27.* During that colloquy, Lamb reported having attended college for a period of time at Fox Valley Technical College. *R. 47-21.* In addition, the trial court addressed Lamb's mental health:

THE DEFENDANT: I have two older brothers and one younger brother.

THE COURT: Do you keep in contact with them?

THE DEFENDANT: They don't like me too much.

THE COURT: Why is that?

THE DEFENDANT: 'Cause I'm different, just -- that's pretty much -- that's why nobody likes me really 'cause I have a hard time socializing and stuff.

R. 47-21. The trial court also inquired about Lamb's employment history:

THE COURT: When's the last time you were employed?

THE DEFENDANT: 2011-ish.

(paragraphs omitted)

THE COURT: Why haven't you worked in the last five years?

THE DEFENDANT: Well, I mean, I get supplemental security income, so.

THE COURT: That's not what I asked.

R. 47-21 to 47-22. Although Lamb provided information to the court that he was deemed to at least have a partial disability for purposes of income assistance, the trial court continued to inquire why Lamb didn't have any employment history. In response, Lamb explained his difficulty working and spending large quantities of time with coworkers due to his socialization difficulties from his mental health diagnosis. *R. 47-23.* Lamb advised the trial court that he has struggled with depression as a result of his difficulties socializing. In response, the trial court advised Lamb that he would expect his depression to come from his failures in terms of his life. *R. 47-24.*

The trial court sentenced Lamb to serve a four-year prison sentence with two years initial confinement and two years extended supervision. *R. 47-28 to 47-36; R. 22.*

Lamb filed a post-conviction motion, seeking a new sentencing hearing before a new judge, on the grounds that the record in this case demonstrates evidence of objective bias because Judge McGinnis prejudged Lamb. *R. 28.* Specifically, the motion alleges that Judge McGinnis had already decided that Lamb would be confined further before the sentencing hearing even began.

A hearing was held June 26, 2017. Judge McGinnis denied Lamb's post-conviction motion for a new sentencing

hearing. *R. 48-15 to 48-19; R. 34*. Lamb now appeals from the judgment sentencing him to prison and denying his motion for a new sentencing hearing. *R. 35*.

ARGUMENT

Lamb is entitled to a new sentencing hearing because the sentencing judge prejudged Lamb's sentence by determining that Lamb would be confined in violation of Lamb's due process rights guaranteed to him by the United State and Wisconsin Constitutions which constitutes objective bias. *See Franklin v. McCaughtry*, 398 F.3d 955, 961 (7th Cir., 2005).

The Court of Appeals of Wisconsin has decided two cases wherein a magistrate prejudged an outcome before the parties could be heard.

In *State v. Gudgeon*, the Court of Appeals held that the circuit court was objectively biased because the record reflected that the judge communicated that he "wanted" to extend a defendant's probation, rather than convert outstanding restitution to a civil judgment and did so prior to any hearing on the matter. *State v. Gudgeon*, 2006 WI App 143, ¶ 26, 295 Wis. 2d 189, 720 N.W.2d 114. The Court of Appeals held that when a circuit court "predetermines how it will rule, the error is structural and poisons the entire proceeding." *Id.* at ¶31.

In *State v. Goodson*, the Court of Appeals held that the record reflected that Judge McGinnis was objectively biased when he told a defendant he would be sentenced to the maximum if he was ever revoked and later sentenced the defendant to the maximum sentence, reflecting back on his earlier warning. *State v. Goodson*, 2009 WI App 107, ¶ 10,

320 Wis. 2d 166, 771 N.W.2d 385.. The Court of Appeals admonished that a circuit court can tell a defendant what *could* happen but cannot tell a defendant what *will* happen. Id. at ¶17.

The Court in Goodson summarized that objective bias can be shown to rebut the presumption that a judge has acted fairly and impartially, in two situations. First, objective bias can be shown “when a reasonable person could question the court’s impartiality based on the court’s statements.” Id. at ¶9; citing State v. Rochelt, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Wis. App., 1991). Alternatively, a second form of objective bias can be shown then “there are objective facts demonstrating ... the trial judge in fact treated [the defendant] unfairly.” Id. at ¶9; citing State v. McBride, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Wis. App., 1994).

Similar to the facts in Goodson, Lamb’s sentence was prejudged. Goodson, 2009 WI App 107 at ¶ 13. Before Lamb’s sentencing hearing even began and before any argument was heard by any party, Judge McGinnis told Lamb he was not going anywhere and was not being released:

THE DEFENDANT: Because I feel like I could potentially benefit from, you know, maybe being on probation. Also, there’s the possibility of leaving today, so I just --

THE COURT: not really. Okay. Just though I’d tell you that so you don’t have any false hopes. I mean, there’s a possibility, but it’s probably not going to happen.

R. 47-9 to 47-10. Again moments later, Judge McGinnis told Lamb that he

THE COURT: Okay. And I know you're shaking your head, but you need to answer out loud, okay? So I don't want you waiving your rights thinking something that might happen that maybe isn't going to happen. So now that you know that it probably isn't going to happen that you're going to get out today, do you still want to proceed with sentencing and not argue on your request to vacate the pleas or to withdraw the pleas and to waive your right to have a PSI?

R. 47-10. Judge McGinnis told Lamb "you're not going to get out today." Id.

The State was recommending probation in this case, with the possibility for further conditional jail. Lamb had been confined for 115 days as of his sentencing hearing. There is no mandatory minimum sentence and therefore, the trial court had authority to release Lamb immediately to probation, without further jail, or to further confine him.

Judge McGinnis told Lamb he didn't want Lamb to get his hopes up because he probably wasn't going anywhere and he didn't want Lamb making any decisions about proceeding with the "false hope" of being released. *R. 47-9 to 47-10.*

The repeated comments by the judge, telling Lamb that he wasn't going to be released constitute prejudgment of Lamb's sentence. Judge McGinnis predetermined whether to confine Lamb as opposed to releasing him on probation. Therefore Lamb is entitled to a new sentencing before a new judge.

CONCLUSION

Lamb was denied his constitutional right to be sentenced by an impartial magistrate and the record in this case provides evidence that the trial court was objectively biased. As such, Lamb is entitled to a new sentencing before a new judge.

Dated this 9th day of November, 2017.

Respectfully submitted,

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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 2,459 words.

Dated this 9th day of November, 2017.

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**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 9th day of November, 2017.

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APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed 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 circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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, and 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.

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