

**RECEIVED**

**12-12-2017**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

Case No. 2017AP1430-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EMERSON D. LAMB,

Defendant-Appellant.

---

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

---

**BRIEF OF PLAINTIFF-RESPONDENT**

---

BRAD D. SCHIMEL  
Wisconsin Attorney General

ABIGAIL C. S. POTTS  
Assistant Attorney General  
State Bar #1060762

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 267-7292  
(608) 266-9594 (Fax)  
pottsa@doj.state.wi.us

## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
ISSUE PRESENTED.....	1
STATEMENT ON ORAL ARGUMENT .....	1
AND PUBLICATION .....	1
STATEMENT OF THE CASE .....	1
STANDARD OF REVIEW .....	4
ARGUMENT .....	4
The record does not reveal an appearance of bias, let alone an appearance sufficient to establish a great risk of actual bias.....	4
CONCLUSION.....	8

## TABLE OF AUTHORITIES

### Cases

<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009) .....	4, 5
<i>State v. Francis</i> , 2005 WI App 161, 285 Wis. 2d 451, 701 N.W.2d 632 .....	6
<i>State v. Goodson</i> , 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385 .....	4, 7
<i>State v. Gudgeon</i> , 2006 WI App 143, 295 Wis. 2d 189, 720 N.W.2d 114 .....	4, 7
<i>State v. Herrmann</i> , 2015 WI 84, 364 Wis. 2d 336, 867 N.W.2d 772.....	4, 5
<i>State v. McBride</i> , 187 Wis. 2d 409, 523 N.W.2d 106 (Ct. App. 1994).....	4

## **INTRODUCTION**

This case challenges the circuit court's decision denying a new sentencing hearing. Emerson Lamb alleges that his sentencing judge was biased. But the record does not reveal even an appearance of bias, let alone one that exposes a great risk of actual bias.

## **ISSUE PRESENTED**

1. Does the record show an appearance of bias that reveals a great risk of actual bias?

The circuit court answered: No.

This Court should answer: No.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument and publication are unnecessary because the issue presented is fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

## **STATEMENT OF THE CASE**

A. On July 6, 2016, pursuant to a plea agreement, Emerson Lamb entered a no contest plea to one count of battery by a prisoner as a repeat offender, which was punishable by up to ten years in prison. (R. 45:6.) Several other charges were dismissed and read-in. (R. 25:2.) After a thorough colloquy, the Court entered a judgment of conviction, ordered a presentence investigation, and released Lamb on postconviction bond. (R. 45:11–12.)

Lamb failed to cooperate with the Department of Corrections' efforts to complete a presentence investigation. (R. 46:2.) At a hearing scheduled in response to this failure, the Court told Lamb it was likely he would be held in

custody until a presentence investigation is completed. (R. 46:3) After hearing he would be placed in custody, Lamb's attorney told the Court that Lamb wished to withdraw his plea. (R. 46:4.) Lamb's attorney asked that the motion be heard after he had time to research the merits of the motion. (R. 46:5.)

As the Court and parties discussed scheduling the sentencing hearing, Lamb interrupted to express his belief that he was falsely charged in some of the read-in charges. (R. 46:6.) Lamb then stood up and left the courtroom. As Lamb was leaving the courtroom, the judge told him to sit down and that he was not helping himself by disregarding the Court's instruction to sit down. (R. 46:6.) After deputies informed the Court that they were unable to locate Lamb before he fled the building, the Court issued a warrant for Lamb's arrest and scheduled the sentencing hearing. (R. 46:7.)

On October 18, 2016, the Court held a hearing on Lamb's motion to withdraw his plea and sentenced Lamb. (R. 47.) The Court began the hearing by asking Lamb why he ran and why he was housed in segregation. (R. 47:3.) The Court then inquired into the status of the case. Lamb's attorney told the Court that they wished to abandon the motion to withdraw the plea and proceed to sentencing without a presentence investigation. (R. 47:5–8.) The Court conducted a colloquy with Lamb on both the decision to forego a presentence investigation and the decision to abandon the motion to withdraw his plea. (R. 47:7–11.)

During that colloquy, Lamb stated he no longer wanted to withdraw his plea because he felt like he "could potentially benefit from, you know, maybe being on probation. Also, there's the possibility of leaving today, so I just. . . ." (R. 47:9–10.) The Court responded, "Not really. Okay. Just thought 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?” (R. 47:10.) Lamb acknowledged leaving jail that day was not likely and the Court continued:

“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 want to proceed with sentencing and not argue on your request to vacate the pleas or withdraw the pleas and to waive your right to a PSI?”

(R. 47:10.) Lamb agreed to proceed to sentencing. After confirming with defense counsel that Lamb made the decision freely, intelligently, and voluntarily, the Court asked Lamb, “Is there any reason that you shouldn’t be sentenced today?” (R. 47:11.) Lamb stated, “No, there isn’t.” (R. 47:11.)

Following that colloquy, the Court instructed the parties to make their recommendations. After Lamb finished his allocution, the Court engaged in a long conversation with Lamb searching for mitigating factors. (R. 47:19–33.) After the conversation with Lamb, the Court went through the statutory sentencing factors and discussed the arguments made by counsel and statements made by Lamb during the hearing. (R. 47:34–36.) Then the court sentenced Lamb to two years of initial confinement and two years extended supervision, for a total of four years, which was six years less than the maximum sentence. (R. 25; 47:34–36.)

On April 20, 2017, Lamb filed a motion for postconviction relief requesting a new sentencing hearing in front of a different judge. (R. 28.) Lamb argued that the sentencing judge exhibited bias and that Lamb’s sentence was predetermined. (R. 28.) The State objected to resentencing. (R. 32.) On June 26, 2017, the circuit court held a hearing on Lamb’s resentencing motion, and made an oral ruling denying the motion. (R. 48.) This appeal followed.

## STANDARD OF REVIEW

Whether a judge was objectively not impartial is a question of law that this court reviews independently. *State v. Herrmann*, 2015 WI 84, ¶ 23, 364 Wis. 2d 336, 867 N.W.2d 772.

## ARGUMENT

**The record does not reveal an appearance of bias, let alone an appearance sufficient to establish a great risk of actual bias.**

A. There is a presumption that a judge has acted fairly, impartially, and without prejudice. *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385.; *State v. McBride*, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). The presumption is rebuttable, placing the burden on the party asserting the bias to show that bias by a preponderance of the evidence. *State v. Gudgeon*, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114; *McBride*, 187 Wis. 2d at 415.

“In determining whether a defendant’s due process right to trial by an impartial and unbiased judge has been violated, Wisconsin courts have taken both subjective and objective approaches.” *Herrmann*, 364 Wis. 2d 336, ¶ 26. It is the application of the objective test that is at issue in this case.

The objective test looks at whether a reasonable person could conclude that the trial judge failed to give the defendant a fair trial. *Herrmann*, 364 Wis. 2d 336, ¶ 27. And while courts have since recognized that the right to an impartial decisionmaker stretches beyond the absence of actual bias to encompass the appearance of bias as well, the United States Supreme Court has made clear that it is “an extraordinary situation where the Constitution requires recusal.” *Id.* at ¶ 37 (quoting *Caperton v. A.T. Massey Coal*

Co., 556 U.S. 868, 887 (2009)). And although actual bias need not be shown, the defendant has the burden of proving “an appearance of bias” that “reveals a great risk of actual bias.” *Id.* at ¶ 46.

B. The transcript of the hearing shows that the circuit court judge attempted to ensure that Lamb had accurate information before abandoning his motion to withdraw his plea. While the record reveals that the judge told Lamb he was unlikely to be released that day, it does not reveal any predetermined desire or outcome.

During questioning on Lamb’s request to abandon his motion to withdraw his plea, the circuit court in this case warned Lamb that it was not guaranteed that Lamb would be released that day. (R. 47:9–10.) The transcript of the hearing shows that the judge did not want Lamb pleading guilty with a misunderstanding about his situation or “false hopes” about the effect of his plea. (R. 47:9–10.) To that end, the court explained that it was a possibility that he would leave on probation, but it probably was not going to happen. (R. 47:9–10.) And the court repeatedly asked Lamb if he still wanted to abandon his motion to withdraw his plea, knowing that he might not get released that day. (R. 47:9–10.)

Following that colloquy, the Court instructed the parties to make their recommendations. After Lamb finished his allocution, the Court engaged in a long conversation with Lamb searching for mitigating factors. (R. 47:19–33.) After the conversation with Lamb, the Court went through the statutory sentencing factors, including discussing arguments made by counsel and statements made by Lamb during the hearing, and sentenced Lamb to four years in the Wisconsin Prison System, a full six years less than the maximum sentence. (R. 47:34–36.)

The exchange between the judge and Lamb does not show bias. Instead, it shows the judge attempting to protect

Lamb by ensuring he was not pleading guilty based on inaccurate expectations.

Lamb argues that the portion of the hearing transcript related to the plea withdrawal shows that the judge had predetermined the outcome or prejudged the sentence. (Lamb's Br. 10.) But Lamb's characterization of the transcript is not reasonable when the context is considered. The circuit court had an obligation to make sure Lamb knew the likely effect of his decision to abandon his motion to withdraw his plea and to make sure Lamb's decision was based on the merits of the case, and not the unrealistic expectation that he would be released that day. *See generally, State v. Francis*, 2005 WI App 161, ¶ 31, 285 Wis. 2d 451, 701 N.W.2d 632. The judge had a duty to ensure Lamb was not convicted of a crime he wanted to contest. In order to ensure Lamb's decision was based on the merits of his plea withdrawal motion, and not based on a desire for time served, the court informed Lamb that it was not likely he would be released.

In an attempt at manufacturing evidence of bias, Lamb's brief critically misquotes the transcript. Lamb argues that the circuit court told Lamb, "you're not going to get out today." (Lamb's Br. 11.) But what the court actually said was, "

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.) (Emphasis added). As the transcript shows, the judge merely asked whether Lamb still wanted to abandon his motion to withdraw his plea, knowing that he **probably** was not getting out that day. This question does not show the appearance of bias or prejudgment. It shows that the



judge was trying to avoid Lamb making a plea decision based on unrealistic expectations.

Finally, Lamb's brief relies heavily on the *Goodson* and *Gudgeon* cases, but they do not support Lamb's position. While *Goodson* and *Gudgeon* do discuss objective bias, they also both involved cases where the sentencing judge expressed a predetermined desire or decision. In *Gudgeon*, the judge expressly said, "I want his probation extended" prior to the resentencing hearing. *Gudgeon*, 295 Wis. 2d 189, ¶¶2–3. And in *Goodson*, the sentencing court told the defendant that he would be sentenced to the maximum if he was ever revoked. *Goodson*, 320 Wis. 2d 166, ¶2. And upon revocation, the judge did just that. *Id.*

Unlike *Goodson* and *Gudgeon*, the sentencing judge in this case did not express any predetermined desire or certain outcome. Instead, just the opposite happened. During a colloquy on a plea withdrawal motion, the trial judge told Lamb that he should not plead guilty thinking that his release was certain. The judge asked Lamb whether he still wanted to abandon his motion to withdraw his plea, knowing that it was unlikely he would get released that day. (R. 47:9–10.) In this case, the judge was not revealing a predetermined outcome or desire, he was making it clear to Lamb that no specific outcome was certain.

## **CONCLUSION**

For these reasons, the State respectfully requests that the Court affirm the circuit court and deny Lamb's motion for a new sentencing hearing.

Dated this 12th day of December, 2017.

Respectfully submitted,

BRAD D. SCHIMEL  
Wisconsin Attorney General

ABIGAIL C. S. POTTS  
Assistant Attorney General  
State Bar #1060762

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 267-7292  
(608) 266-9594 (Fax)  
pottsa@doj.state.wi.us

## **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 1,923 words.

Dated this 12th day of December, 2017.

---

ABIGAIL C. S. POTTS  
Assistant Attorney General

## **CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 12th day of December, 2017.

---

ABIGAIL C. S. POTTS  
Assistant Attorney General