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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The parties agree that the question of whether the trial court acted impartially in this case is a question of law, reviewed de novo. *See* State v. Goodson, 2009 WI App 107, ¶7, 320 Wis. 2d 166, 771 N.W.2d 385.

The parties also agree that there is a rebuttable presumption that the judge was impartial. State v. Herrmann, 2015 WI 84, ¶3, 364 Wis. 2d 336, 867 N.W.2d 772.

The State merely contends that the record in this case does not demonstrate that Lamb has met his burden of demonstrating by a preponderance of the evidence that the court was biased. *Id.* at ¶24; *citing* State v. Gudgeon, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114; *see also* State v. McBride, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Wis. App., 1994).

Lamb has clearly demonstrated objective bias and should be granted a new sentencing hearing before a new judge.

Lamb has demonstrated that the judge in this case treated him unfairly by prejudging whether he would sentence Lamb to confinement, rather than probation, before the sentencing hearing ever began. When Lamb's sentencing hearing began, the trial court was not impartial, but rather had prejudged his case and determined that Lamb would remain confined.

The State argues that the judge's statements to Lamb in this case prior to sentencing merely demonstrate that the court "attempted to ensure that Lamb had accurate information before abandoning his motion to withdraw his

plea.” *State’s Brief at p. 5.* The problem with the State’s argument is that the facts do not support their contention.

The trial court went beyond ensuring that Lamb understood potential outcomes if he chose not to withdraw his plea. The trial court didn’t tell Lamb what could happen, the trial court told Lamb what would likely happen. In Goodson, 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 here went beyond telling Lamb what *could* have happened.

In this case, the trial court asked Lamb why he wanted to abandon a motion to withdraw his pleas and Lamb replied:

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 - -

R. 47:9-10. The trial court then interrupted Lamb to say:

THE COURT: 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 told the trial court that he wanted to proceed with sentencing and with his pleas because he thought he would benefit from probation and may possibly be released. The judge interrupted him to tell him “not really.” *R. 47:10.* That statement, regardless of context, reflects that the trial court was biased and had prejudged Lamb’s sentencing before the sentencing began.

The trial court went on to elaborate, telling Lamb, “[j]ust thought I’d tell you that so you don’t have any false hopes.” *R. 47:10*. The State argues that the judge in this case merely wanted to be sure that Lamb did not proceed with “false hopes” and “unrealistic expectations.” *State’s Brief at p. 5 and p. 6*.

A false hope is by definition, a desire or hope that will not be attained. An unrealistic expectation is something that is unattainable. Lamb was walking into a sentencing hearing where the State and his attorney were jointly requesting probation. The possibility of release should not be unattainable.

The fact that the trial court and the State think that Lamb’s hope of release was “false” and “unrealistic” concedes bias; it concedes prejudgment. There can be no lack of prejudgment where release on probation is a “false hope” or an “unrealistic expectation.”

Similar to the facts in Gudgeon, where 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, the trial court here planned to confine Lamb before any sentencing hearing began. *See Gudgeon*, 2006 WI App 143 at ¶26.

In Gudgeon, 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. Lamb’s constitutional right to a fair sentencing hearing was violated because Judge McGinnis prejudged Lamb’s case and communicated its intention to confine Lamb further without release.

CONCLUSION

Lamb was denied his constitutional right to be sentenced by an impartial magistrate. Lamb has demonstrated by a preponderance of the evidence, that the trial court was objectively biased. As such, Lamb should be granted a new sentencing hearing before a new judge.

Dated this 16th day of January, 2018.

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 824 words.

Dated this 16th day of January, 2018.

Signed:

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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 16th day of January, 2018.

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