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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP548-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH C. HENYARD,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Keith C. Henyard pled guilty to four drug-related counts. After sentencing he moved to withdraw his plea, arguing that his retained counsel had a conflict of interest. His motion noted that before being retained, Henyard's counsel acted as court commissioner in Henyard's case, and in that capacity he bound Henyard over for trial. Henyard argues that because his attorney was once the court commissioner, he had an actual conflict of interest when he advised Henyard to plead guilty. And, consequently, Henyard should be allowed to withdraw his plea. Is plea withdrawal warranted?

The postconviction court held no. It concluded that Henyard failed to show an actual conflict of interest.

This Court should affirm.

2. Henyard alternatively requests resentencing. Before he pled guilty, Henyard had already requested a judicial substitution. A new judge was assigned. Henyard now argues that his substituted judge was biased "against those who are convicted of delivering heroin and other drugs." Is Henyard entitled to resentencing?

The postconviction court denied his request, concluding Henyard's claim of judicial bias was "completely unwarranted."

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. This Court can decide this case by applying the facts to well-established legal principles.

STATEMENT OF THE CASE

The complaint, preliminary hearing, and plea

In December of 2016, the State charged Henyard with eight drug-related counts. (R. 23.) Before pleading guilty to four of those counts, Henyard requested a judicial substitution, which was granted. (R. 9, 18.) Also before pleading guilty, Henyard's counsel moved to withdraw, which the court granted. (R. 16.) Henyard then retained attorney Frank J. Parise.

When Henyard appeared at the preliminary hearing for his case, he had not yet retained Attorney Parise. (R. 58:1.) However, at the preliminary hearing, Parise was presiding over Henyard's case as court commissioner. (R. 58.) On record, Henyard waived his right to the preliminary hearing with no offers from the State. (R. 58:2.) Commissioner Parise then conducted a standard colloquy with Henyard about his right to a preliminary hearing, and Commissioner Parise accepted Henyard's waiver before binding the matter over for trial. (R. 58:2–5.) At no time did Commissioner Parise make any contested findings, as a preliminary hearing was not held. (R. 58.) Nor did Henyard contest a finding of probable cause. (R. 58:5.)

Approximately six months later, Henyard discharged his attorney and retained Attorney Parise. (R. 16.) The case proceeded towards trial. In early July 2017, Henyard attacked a woman who was allegedly the mother of one of his children. (R. 68:7.) He was arrested and charged with battery, false imprisonment, disorderly conduct, and felony bail jumping. (R. 65:2.) Judge Schroeder increased Henyard's bond to $250,000 based on the new charges. (R. 65:7.)

Henyard ultimately pled guilty to four counts: manufacture/deliver cocaine, manufacture/delver heroin, possession with intent to deliver cocaine, and possession with intent to deliver heroin. (R. 22.) In return, the State would

dismiss and read-in at sentencing the other four counts. (R. 22:5.)

The record is silent as to Henyard ever showing concern over Attorney Parise's representation. During the plea colloquy, the trial court specifically asked Henyard if he was satisfied with the legal services Attorney Parise provided, to which Henyard responded "oh, yes." (R. 67:8.)

Sentencing

At the sentencing hearing, the State, in addressing Henyard's criminal record, argued to the court that what it found "most striking about the defendant's history is the number of violent domestic abuse incidents." (R. 68:5–6.) The State noted that "a lot of times when we see drug dealers in court, their history doesn't always contain this level of violent, assaultive cases, especially domestic violence cases." (R. 68:6.) The State recommended a term of ten years' initial confinement followed by a length of extended supervision to be determined by the court. (R. 68:4.)

In imposing its sentence, the court told Henyard that he must "[p]ay the price for this to be an example" to his friends, customers, and providers. (R. 68:19–20.) It would show "no mercy" for "this kind of criminality." (*Id.*) It also opined that Henyard's case was "aggravated":

> [Y]our case is aggravated because you are a woman beater, too, and you are the kind of scourge of the community that we really see -- well, we see too much of, but $80,000 child support arrearage, disgraceful. So there is not much to counterbalance. There is nothing to really counterbalance the enormity of this crime and the need to deal with it very aggressively.

(R. 68:20.) The court ultimately sentenced Henyard to a total of 12 years of initial confinement followed by 5 years of extended supervision. (*Id.*)

Postconviction motion

Henyard filed a motion to withdraw his plea. (R. 48:2.) He first claimed that his attorney had an actual conflict of interest because his attorney presided over Henyard's preliminary hearing as court commissioner. (*Id.*) According to Henyard, this was a *per se* conflict of interest that was not waivable. (*Id.*) And, this conflict of interest creates a violation of the right to effective assistance of counsel. (*Id.*) Therefore, he should be allowed to withdraw his plea. (*Id.*)

The State responded that the Wisconsin Supreme Court has rejected the "*per se*" conflict of interest advanced by Henyard. (R. 49:1–2.) It also argued that Henyard made no showing that any conflict affected his attorney's performance, and therefore the court should deny Henyard's request:

> Attorney Parise at no point advocated a position different from [Henyard]. While acting as court commissioner, he simply engaged in a colloquy and accepted [Henyard's] waiver of preliminary hearing.
>
> Attorney Parise negotiated a plea agreement in the matter where [Henyard's] total potential prison exposure was reduced from 162 years to 67.5 years in the amended information. Additionally, the State made a sentence concession to seek 10 years initial confinement. There is nothing to show [Henyard] was dissatisfied with his attorney's representation until after he received a sentence of 12 years initial confinement.

(R. 49:4.)

In the alternative, Henyard's postconviction motion requested resentencing. (R. 48:3.) Henyard argued that the sentencing judge harbored "a judicial bias against heroin and /or drug related delivery offenses." (*Id.*) The State countered that the sentencing court appropriately considered the

Gallion[1] factors when it sentenced Henyard, and, therefore, resentencing was unwarranted. (R. 49:5.)

Evidentiary hearing

The postconviction court held a hearing where Parise testified. (R. 69.) He did not recall acting as court commissioner during Henyard's preliminary hearing. (R. 69:14.) According to Parise, Henyard "never mentioned during any of our conversations that I was the court commissioner." (R. 69:15.) Further, Parise did not know that he had acted as court commissioner in Henyard's case until postconviction counsel wrote him a letter. (R. 69:19.)

Parise testified that it was Henyard who wanted to enter into a plea agreement as he wanted to minimize the time incarcerated. (R. 69:19.) Based upon what Henyard wanted and the discussions that Parise had with Henyard, Parise's advice to Henyard was to accept the plea offer. (R. 69:20.) According to Parise, "[Henyard's] objective basically to me was, 'They got me. I know who the CI is, and so I just want you to cut a better deal than what's been proposed previously through my other attorney.'" (R. 69:22.)

The State asked Parise about Henyard's allegation in his postconviction affidavit that there was no contact between him and Henyard between May 30, 2017, and two days before the plea hearing. (R. 69:21.) Parise said that allegation was false. (*Id.*) Parise testified that they "had at least eight meetings." (*Id.*)

Postconviction court's decision

The postconviction court subsequently entered a written order denying Henyard's request to withdraw his plea. (R. 54:1.) It determined that "[w]hile it is true that

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[1] *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

[Henyard's attorney's] actions as court commissioner in binding [Henyard] over for trial would have resulted in his removal as later attorney for him had the court timely been made aware of that fact, it does not follow that the remedy of plea withdrawal is appropriate." (R. 54:2.) It found that Henyard was "fully aware" that his attorney was also his court commissioner, and yet Henyard "knowingly and voluntarily chose to enter a guilty plea based on a substantial charge reduction and sentence recommendation concession." (*Id.*) And, "[a]t no time did [Henyard] make any effort to alert the court to the conflict which he now denounces." (*Id.*) The court determined that "although there was clearly representation not permitted under Supreme Court rules, there is not the slightest aroma of a conflict of interest in this case." (*Id.*) And, the court held, Henyard was required to "show that there was 'actual conflict or a serious potential conflict of interest' in the attorney's representation." (*Id.*)

The postconviction court also denied Henyard's request for resentencing. (R. 54:5.) It rejected Henyard's argument that it harbored "a judicial bias" against those convicted of delivering heroin because the court had made statements in *other* sentencing hearings that a message should be sent to those who sell heroin. (R. 54:3–4.) The court found Henyard's argument "completely unwarranted." (R. 54:4.) It determined that "[t]here was no prejudgment of the outcome of Mr. Henyard's case, but only general statements of the gravity of certain law violations." (R. 54:5.)

Henyard appeals.

ARGUMENT

I. The postconviction court properly exercised its discretion when it denied Henyard's motion to withdraw his plea.

Henyard requests to withdraw his plea because his attorney had an actual conflict of interest by presiding over Henyard's preliminary hearing as a court commissioner. (R. 48:2–3; Henyard's Br. 8, 19.) According to Henyard, this conflict constitutes ineffective assistance of counsel, and therefore he is entitled to withdraw his plea. (R. 48:3; Henyard's Br. 10, 22.) Henyard is wrong.

A. Standard of review

Whether a defendant is entitled to withdraw his plea after sentencing "remains in the discretion of the circuit court and will not be disturbed unless the defendant shows that it is necessary to correct a manifest injustice." *State v. Cross,* 2010 WI 70, ¶ 4, 326 Wis. 2d 492, 786 N.W.2d 64; *see also State v. Cain,* 2012 WI 68, ¶ 20, 342 Wis. 2d 1, 816 N.W.2d 177.

In a criminal case, a defendant's conflict of interest claim regarding his attorney is treated analytically as a subspecies of ineffective assistance of counsel. *State v. Love,* 227 Wis. 2d 60, 68, 594 N.W.2d 806 (1999). Whether a defendant was denied the constitutional right to effective assistance of counsel presents a mixed question of law and fact. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115. A reviewing court upholds a circuit court's findings of fact "unless they are clearly erroneous." *Id*. "Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law" reviewed de novo. *Id*. "[T]he ultimate question of whether an actual conflict of interest existed is a conclusion of law that [this Court] decide[s] without deference to the trial court's ruling.

Nonetheless, [this Court] value[s] a trial court's decision on such a matter." *State v. Kalk*, 2000 WI App 62, ¶ 13, 234 Wis. 2d 98, 608 N.W.2d 428.

B. Henyard must prove by clear and convincing evidence that a manifest injustice would result if he is not allowed to withdraw his plea.

"When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" *State v. Brown,* 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906 (citing *State v. Thomas,* 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836). "Ineffective assistance of counsel is one type of manifest injustice." *State v. Shata*, 2015 WI 74, ¶ 29, 364 Wis. 2d 63, 868 N.W.2d 93.

Unlike the usual ineffective assistance claim where a defendant has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense, *State v. Allen,* 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433, a defendant who claims that his attorney was ineffective because of a conflict of interest need only meet his burden on the performance part of the test. *Love,* 227 Wis. 2d at 70–71. If the defendant shows deficient performance because of a conflict of interest, prejudice is presumed. *State v. Street,* 202 Wis. 2d 533, 542, 551 N.W.2d 830 (Ct. App. 1996).

Under the *postconviction* test, in order to establish a Sixth Amendment violation based on a conflict of interest, "a defendant who did not raise an objection at trial must demonstrate by clear and convincing evidence that his or her counsel had an *actual* conflict of interest." *Love,* 227 Wis. 2d at 71 (emphasis added). An actual conflict is not "a mere possibility or suspicion of a conflict [that] could arise under hypothetical circumstances. *State v. Kaye*, 106 Wis. 2d 1, 8,

315 N.W.2d 337 (1982). Rather, "[a]n actual conflict of interest exists when the defendant's attorney was actively representing a conflicting interest, so that the attorney's performance was adversely affected." *Love*, 227 Wis. 2d at 71;. *see also State v. Owen*, 202 Wis. 2d 620, 639, 551 N.W.2d 50 (Ct. App. 1996) (providing that an actual conflict occurs when an "attorney's advocacy is somehow adversely affected by the competing loyalties"); and *Street*, 202 Wis. 2d at 542 (providing that "a defendant who did not raise an objection at trial must demonstrate by clear and convincing evidence that his or her counsel had an actual conflict of interest and that the actual conflict of interest adversely affected his or her lawyer's performance.").

C. Attorney Parise's performance was not adversely affected by any competing loyalties.

The question for this Court is whether Henyard made a showing by clear and convincing evidence that Parise was actively representing conflicting interests and, as a result, his representation of Henyard was adversely affected. Henyard does not make this showing.

Henyard claims that there was an actual conflict of interest because Parise previously acted as court commissioner and, as commissioner, he found probable cause and bound Henyard over for trial. (Henyard's Br. 8, 19, 23.) Henyard is wrong.

As the postconviction court found, Henyard had "full awareness of Commissioner Parise's earlier role in his case when he selected and employed him." (R. 54:2.) The court continued: "Fully aware of the dual role, Mr. Henyard knowingly and voluntarily chose to enter a guilty plea based on a substantial charge reduction and sentence recommendation concession." (*Id.*) The court found that Henyard "knew that his attorney had presided at the

bindover, and nevertheless voluntarily entered his plea, indicating that he was satisfied with the legal services which he had received." (*Id.*) The general rule is that "a defendant who validly waives his right to conflict-free representation also waives the right to claim ineffective assistance of counsel based on the conflict."[2] *State v. Demmerly*, 2006 WI App 181, ¶ 16, 296 Wis. 2d 153, 722 N.W.2d 585. And in this case, it would be illogical to let Henyard withdraw his plea based on ineffective assistance of counsel when he knowingly waived his right to conflict-free representation.

But Henyard argues that this is a non-waivable conflict. (Henyard's Br. 8, 19.) Henyard notes that Supreme Court Rule 20:1.12 prohibits a lawyer from representing a party in connection with a matter where the lawyer participated "personally and substantially as a judge or other adjudicative officer." He relies on a Committee Comment to this Rule, which provides that such a conflict is not subject to waiver. (Henyard's Br. 9, 18–19, citing Committee Comment SCR 20:1.12.) According to Henyard, "under Wisconsin law," this is not a waivable conflict. (Henyard's Br. 18.) But Committee Comments to rules of professional conduct are not law or controlling authority. *State v. Williquette*, 190 Wis. 2d 677, 692, 526 N.W.2d 144 (1995); *see also Wenke v. Gehl Co.*, 2004 WI 103, ¶ 47, n.25, 274 Wis. 2d 220, 682 N.W.2d 405. Therefore, contrary to Henyard's suggestion, this Committee Comment does not control.

And, Henyard points to no case law that provides a trial court *is required* to reject a defendant's voluntary waiver of the right to conflict-free representation. Doing so would

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[2] While *State v. Demmerly,* also provided that "[t]here may be instances in which counsel's performance is deficient *and* unreasonably so even in light of the waived conflict of interest," 2006 WI App 181, ¶ 17, 296 Wis. 2d 153, 722 N.W.2d 585, this is not one of those instances.

infringe upon a defendant's right to retain counsel of his or her choice.

But Henyard argues that a violation of SCR 20:1.12 constitutes an actual conflict of interest that causes counsel to *automatically* be deemed ineffective. (Henyard's Br. 19–20.) This is incorrect. The law in Wisconsin is that an actual conflict of interest exists "only when the attorney's advocacy is somehow adversely affected by the competing loyalties." *See State v. Cobbs,* 221 Wis. 2d 101, 107, 584 N.W.2d 709 (Ct. App. 1998) (citation omitted). And as the postconviction court correctly determined, "[w]hile it is true that Attorney Parise's actions as court commissioner in binding [Henyard] over for trial would have resulted in his removal as later attorney for him had the court timely been made aware of that fact, it does not follow that the remedy of plea withdrawal is appropriate." (R. 54:2.) Even if Attorney Parise violated SCR 20:1.12 by being "personally and substantially" involved, Henyard must still make a showing that this conflict of interest adversely affected his Attorney's performance. (R. 54:2–3, citing *Owens*, 202 Wis. 2d at 639.)

In *Street*, this Court considered whether an actual conflict of interest creates a violation of the right to effective assistance of counsel. 202 Wis. 2d 533. Like Henyard's case, *Street* concerned an attorney that the defendant had retained. The same attorney was also representing the detective in the case in the detective's divorce proceeding. *Id.* at 538. *Street* provided that "[i]n order to establish a Sixth Amendment violation on the basis of a conflict of interest, a defendant who did not raise an objection at trial must demonstrate by clear and convincing evidence that his or her counsel had an actual conflict of interest and that the actual conflict of interest adversely affected his or her lawyer's performance." *Id.* at 542.

The Wisconsin Supreme Court has also addressed a similar situation in *Love*, 227 Wis. 2d 60. In that case, a

former prosecutor represented the State in a sentencing hearing for Love, and that prosecutor later became an assistant public defender. That former prosecutor ended up representing the defendant in a later sentencing after revocation hearing. *Id*. at 64–65. Ultimately, because Love had not shown his attorney knowingly failed to disclose her prior representation of the State, nor that she represented the defendant in a manner that adversely affected the defendant's interests, the supreme court did not find a violation of the defendant's right to counsel. *Id*. at 83–84.

Despite Wisconsin case law directly on this issue, Henyard argues that this Court should instead follow a Seventh Circuit Court of Appeals case, *United States v. Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989), and find a *per se,* automatic violation of his right to counsel. (Henyard's Br. 11–24.) But *Ziegenhagen* is inapposite and it does not, contrary to Henyard's request, "control." (Henyard's Br. 20.)

In *Ziegenhagen*, the defendant was represented on a firearms possession charge by counsel who appeared on behalf of the district attorney's office twenty years earlier to recommend a sentence on two convictions. 890 F.2d at 938. The government intended to use those two 20-year-old convictions to enhance Ziegenhagen's sentence on the possession charge. *Id*. Counsel learned of his role in Ziegenhagen's former sentencing proceeding prior to trial, and counsel discussed the possible conflict with the prosecutor (who felt there was no conflict) and with Ziegenhagen (who did not say anything regarding that information). *Id*. at 939. However, counsel did not inform the district court of the situation. *Id*.

The Seventh Circuit found "[t]his former representation amounted to an actual conflict of interest," noting "the prosecutorial role that Ziegenhagen's counsel took in the earlier convictions was substantial enough to represent an

actual conflict of interest." *Id.* at 940–41. Upon finding a conflict, the Seventh Circuit went on to explain:

> Despite the fact that Ziegenhagen had been convicted by a jury of the present offense, that does not mean that [his counsel] could not decide his defense strategy either at sentencing or on appeal on the basis of the conflict. Needless to say, there may be countless ways in which the conflict could have hindered a fair trial, the sentencing hearing or even this appeal. We cannot say that there was nothing another attorney could have argued based on the record to more zealously advocate on this defendant's behalf. Thus, we presume Ziegenhagen was prejudiced by [counsel's] representation.

Id. at 941 (citation omitted).

In *Ziegenhagen*, decided in 1989, the Seventh Circuit did not have the United States Supreme Court's clarification in 2002 that "'an actual conflict of interest' mean[s] precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).[3] Therefore, the above-excerpted passage in *Ziegenhagen* indicates that the Seventh Circuit did not apply that standard. Instead, because the Seventh Circuit could not say that the conflict did *not* affect counsel's performance, it presumed prejudice. *Ziegenhagen*, 890 F.2d at 941.

Further, in finding a Sixth Amendment violation, *Ziegenhagen* held, *categorically*, that "government

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[3] *Mickens v. Taylor* also held that a defendant must "establish that the conflict of interest adversely affected his counsel's performance." 535 U.S. 162, 174 (2002). *See also Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (providing that where the trial court is not apprised of the potential conflict, then reversal of the conviction will only be had upon a showing that "an actual conflict of interest adversely affected" counsel's performance.).

employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper." *Id.* at 940. Henyard is urging this Court to apply this broader, *per se* rule to his case. (*See* Henyard's Br. 20, 24.) It shouldn't. As the postconviction court in this case determined, "[t]he fact that Attorney Parise ought not have accepted the defendant's offered employment does not *ipso facto* amount to a conflict of interest." (R. 54:3.) And, as this Court has provided, determining what constitutes an actual conflict of interest requires looking to the fact of each particular case. *State v. Villarreal*, 2013 WI App 33, ¶ 9, 346 Wis. 2d 690, 828 N.W.2d 866 (citing *Love*, 227 Wis. 2d at 71).

And in this case, Henyard argues that because Attorney Parise was once a court commissioner and then later "advised Mr. Henyard that he should take a plea," he was adversely affected. (Henyard's Br. 18.) According to Henyard, as court commissioner, Parise had "pre-judged" Henyard's case. (*Id.* at 17.) But these are the definition of conclusory allegations. *Allen*, 274 Wis. 2d 568, ¶ 21. Henyard points to no specific defect in Parise's strategy, tactics, or decision-making. He points to no facts in the record to support his assertion that Parise's role in ordering a bindover adversely affected his later representation of Henyard. Indeed, as Parise testified, it was *Henyard* who wanted to enter into a plea agreement because he wanted to minimize the time incarcerated. (R. 69:19.) According to Parise, "[Henyard's] objective basically to me was, 'They got me. I know who the CI is, and so I just want you to cut a better deal than what's been proposed previously through my other attorney.'" (R. 69:22.) Further, as the postconviction court determined:

> Nothing in the function performed by Commissioner Parise in accepting the waiver of preliminary and ordering a bindover was in any way inimical to [Henyard's] interests. . . . Commissioner Parise heard no evidence and found no facts, performing what was most likely understood by the

> parties and in fact amounted to little more than a ministerial act. There was nothing close to a conflict of interest in this case, and there is no basis in state or federal constitutional law to artificially create one merely because of a rule violation.

(R. 54:3.) The postconviction court noted that Parise "negotiated a plea agreement where Henyard's total potential prison exposure was reduced from 162 years to 67.5 years in the amended information." (*Id.*) And, it further noted that nothing *Commissioner* Parise did in accepting Henyard's waiver of a preliminary hearing and ordering a bindover "was inimical to Henyard's interests." (*Id.*) The record does not show an actual conflict of interest that adversely affected Parise's performance as Henyard's lawyer.

Henyard has failed in his effort to show such an actual conflict that adversely affected Parise's performance. And so he is essentially asking this Court to forgo requiring a showing of adverse effects and instead adopt a *per se* rule as annunciated in *Ziegenhagen*. But the United States Supreme Court, the Wisconsin Supreme Court, and this Court have rejected this rule and instead require a defendant to demonstrate an adverse effect. Because there was no adverse effect, there was no actual conflict of interest in Attorney Parise's representation. As Henyard has not shown that there was an actual conflict of interest that adversely affected Attorney Parise's performance, this Court should affirm the postconviction court's denial of Henyard's request to withdraw his plea.

II. The postconviction court correctly denied Henyard's motion for resentencing because Henyard fails to show by a preponderance of the evidence that Judge Schroeder appeared biased or was actually biased.

Henyard alternatively requests resentencing because Judge Schroeder harbored a judicial bias against those who

are convicted of delivering heroin and other drugs. (Henyard's Br. 24.) This Court should reject this argument. Judge Schroeder's comments on other cases were not a prejudgment in *Henyard's* sentencing.

A. Henyard has a high burden to show bias.

A biased judge is "constitutionally unacceptable." *State v. Herrmann*, 2015 WI 84, ¶ 25, 364 Wis. 2d 336, 876 N.W.2d 772 (lead opinion). A judge is presumed to have "acted fairly, impartially, and without prejudice." *Id.* ¶ 24. The burden of rebutting this presumption is on the party asserting bias, which it must do by a preponderance of the evidence. *Id.*; *State v. Neuaone*, 2005 WI App 124, ¶ 16, 284 Wis. 2d 473, 700 N.W.2d 298. This is a question the appellate court reviews de novo by evaluating the existence of bias in both a subjective and an objective light. *State v. Rochelt*, 165 Wis. 2d 373, 379, 477 N.W.2d 659 (Ct. App. 1991).

The subjective component is satisfied by examining the judge's own determination of whether he will be able to act impartially. *State v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). The test for objective bias asks whether a reasonable person could question the judge's impartiality. *State v. Gudgeon*, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114. There are two types of objective bias. *See id.* ¶¶ 23–24. The first is the appearance of bias. *See id.* "[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." *Id.* ¶ 24. "[T]he appearance of partiality constitutes objective bias [if] a reasonable person could question the [judge's] impartiality. *State v. Goodson*, 2009 WI App 107, ¶ 9, 320 Wis. 2d 166, 771 N.W.2d 385. The second type of objective bias occurs where "there are objective facts

demonstrating . . . the 'trial judge in fact treated [the defendant] unfairly.'" *McBride,* 187 Wis. 2d at 416 (citation omitted).

A judge's negative comments do not automatically indicate bias. *State v. Pirtle*, 2011 WI App 89, ¶ 34, 334 Wis. 2d 211, 799 N.W.2d 492. At sentencing, the judge must discuss the gravity of the offense, which includes acknowledging the effects of the crime on the community or specific victims. *See Herrmann*, 364 Wis. 2d 336, ¶ 65 (lead opinion). As a result, the judge may make comments that do not cast the defendant in a positive light. *See id.* ¶¶ 63–66.

B. Henyard has waived the argument that Judge Schroeder appeared biased or was actually biased.

First, Henyard never raised an issue of judicial bias with Judge Schroeder. He never asked Judge Schroeder to recuse himself or take other action because of his alleged bias. As such, Henyard has waived his right to make this argument. *See State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (providing, "a party must raise and argue an issue with some prominence to allow the trial court to address the issue and make a ruling."). But even if this Court reaches this argument, it has no merit.

C. Henyard fails to show either an appearance of bias or actual bias.

Henyard does not argue that he can show Judge Schroeder was subjectively biased. (Henyard's Br. 24–32). Therefore, this Court need only determine whether Judge Schroeder was objectively biased. *See Goodson*, 320 Wis. 2d 166, ¶ 8.

With respect to objective bias, Henyard argues that Judge Schroeder had both an appearance of bias and an actual bias "against those who are convicted of delivering

heroin."[4] (Henyard's Br. 27, 31.) But Henyard fails to overcome the presumption that the sentencing judge was unbiased. He presents no evidence of bias or prejudgment in his specific case. There is no appearance of bias because a reasonable person would not question Judge Schroder's impartiality. *Goodson*, 320 Wis. 2d 166, ¶ 9. There also exists no objective facts that demonstrate Judge Schroeder "in fact treated [Henyard] unfairly." *McBride*, 187 Wis. 2d at 416.

But in support of his claim in his postconviction motion that Judge Schroeder had a judicial bias against those convicted of delivering drugs, Henyard cites to newspaper articles. (R. 48:26–31.) Those news articles concern prior sentencings of *other* defendants in which Judge Schroeder expressed his view that a message should be sent to those who sell heroin that they should anticipate stern punishments. (*See id.*; 54:3–4.) In addition, Henyard argues that Judge Schroeder was biased or appeared bias because during the August 7, 2017 hearing (where the court altered Henyard's bond), Judge Schroeder mentioned the severity of Henyard's crime and the publicity of one of those news articles. (R. 48:10; *see also* Henyard's Br. 27–28, 30.)

The postconviction court squarely addressed these articles as well as the claim that it harbored a judicial bias against those convicted of delivering heroin:

> Of course, when I sentence defendants, including those described in the news articles relied upon, I am required to state the reasons which justify the sentence. Reference can be made to the sentence transcripts in those cases which note that the primary justification in each case was to send a message to the then-present defendant, his friends and acquaintances, and the community at large that I do believe that stern sentences save lives. I think that

[4] Henyard does not argue that the sentencing court failed to or improperly applied the *Gallion* factors.

> the suggestion that because I have made such obligatory statements in other cases, that I have "a judicial bias" against those convicted of delivering heroin is completely unwarranted.

(R. 54:4.)

As the postconviction court concluded, "[t]here was no prejudgment of the outcome of Mr. Henyard's case, but only general statements of the gravity of certain law violations." (R. 54:5.)

But Henyard argues that *Goodson* supports his claim that Schroeder harbored both the appearance of impartiality and was actually impartial. (Henyard's Br. 26–31.) *Goodson* is inapposite.

In *Goodson* a judge told a defendant during sentencing that if he violated the rules of extended supervision "you will come back here, and you will be given the maximum, period." *Id.* ¶ 2. Later, at a reconfinement hearing after the defendant's supervision was revoked, the judge ordered the defendant reconfined for the maximum period. *Id.* ¶ 5. On appeal, Goodson argued he was entitled to resentencing because the trial court had been biased. *Id.* ¶ 6. This Court found Goodson had established both the appearance of bias, as well as actual bias. *Id.* ¶¶ 13, 16. In so finding, the Court stated that while a trial "court may certainly tell a defendant what *could* happen" at a future sentencing, the court may not tell "a defendant what *will* happen" because to do so "imperils the defendant's due process right to an impartial judge." *Id.* ¶ 17. This is so because "[o]ur jurisprudence eschews the notion that a court may determine a sentence without scrutinizing individual circumstances." *Id.* Therefore, the defendant's due process rights were violated because a reasonable person would conclude "that the judge had made up his mind about [the defendant's] sentence before the reconfinement hearing." *Id.* ¶ 13.

Henyard's case is distinguishable from *Goodson*. Here, Judge Schroeder sentenced Henyard after presiding over the trial, hearing the parties during sentencing, and reading the presentence report. (R. 68:2; 26.) At the time of sentencing, Judge Schroeder was aware of the charges at issue.

Also, in *Goodson*, this Court was concerned with the circuit court's bias because the court had prejudged the defendant's sentence before the court had all of the relevant information. These concerns are not present here. In this case, Judge Schroeder sentenced Henyard based upon "the enormity of this crime," Henyard's criminal record, protection of the public, Henyard's character of being a "woman beater," and deterrence. (R. 68:16–20.) The only support Henyard offers is Judge Schroeder's publicized comments on other cases and drug offenses in general. (Henyard's Br. 28–31.) Henyard conflates separate comments on the same topic to be evidence of bias. But Henyard does not present any evidence of actual bias or the appearance of bias in *his specific case.* The *Goodson* case is simply inapposite to Henyard's case. There is no showing of the appearance of bias or actual bias against Henyard.

Henyard next relies on *Herrmann*, 364 Wis. 2d 336, to support his claim of the appearance of bias and actual bias. But *Herrmann* is also inapposite.

Herrmann drunk drove his truck into a car, killing one of its passengers and injuring four others. *Herrmann,* 364 Wis. 2d 336, ¶¶ 5–6. He pleaded guilty to several crimes. *Id.* ¶¶ 6–7. When sentencing Herrmann, the judge commented that her sister had died after a drunk driver hit a car the sister was riding in. *Id.* ¶¶ 16–17. The judge discussed the accident's circumstances and the effect it had on her. *Id.* Herrmann claimed that these comments gave rise to the appearance that the judge was biased against him. *Id.* ¶ 48.

The supreme court disagreed. *Hermann,* 364 Wis. 2d 336, ¶¶ 48–66. It explained that the judge's comments, while personal, "were used in an attempt to illustrate the seriousness of the crime and the need to deter drunk driving in our society." *Id.* ¶ 60. Because the judge's comments were made as part of her consideration of the required sentencing factors, they did not create an appearance that she was biased. *Id.* ¶¶ 61–66.

The facts in *Herrmann* are, if anything, more indicative of the appearance of bias than those here. The judge in *Herrmann* discussed at length the facts of her sister's death and the effect it had on her. 364 Wis. 2d 336, ¶¶ 16–17. The judge in *Herrmann* also directly connected the pain she felt from her sister's death to the pain felt by the victims and their families. *Id.* ¶ 17. She said, "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." *Id.*

In contrast, Judge Schroeder said nothing similar to the comments in *Herrmann*. If the judge's comments in *Herrmann* did not give rise to the appearance of bias or actual bias, then neither did Judge Schroeder's comments at sentencing here. Rather, Judge Schroeder's rationale for the sentence he imposed was "consistent with the requirements placed on judges to discuss the objectives of the sentence." *Herrmann*, 364 Wis. 2d 336, ¶ 61. (*See also* R. 68:16–20.) The only common themes between Judge Schroeder's comments in his other cases and his comments at Henyard's sentencing involve the judge's consideration of the protection of the public from the effects of drugs and his interest in deterring drug-related offenses in the future, as required by statute and by *Gallion*. And, as previously indicated, Henyard does not argue that Judge Schroeder's statements were not in compliance with the requirements of *Gallion*.

In this case, objective facts regarding Judge Schroeder's bias do not exist. There is no appearance of bias or actual bias. Henyard is not entitled to relief.

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 20th day of August 2019.

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 5,986 words.

Dated this 20th day of August 2019.

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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 20th day of August 2019.

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