

RECEIVED

06-25-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT III

Case No. 2019AP000695-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON A. MARCOTTE,

Defendant-Appellant.

Appeal of a Judgment and Order Entered in
the Marinette County Circuit Court,
the Honorable James A. Morrison, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender
State Bar No. 1085045

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
grotelueschenk@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
Issue Presented	1
Statement On Oral Argument And Publication	2
Statement of the Case and Facts	2
Argument.....	10
Mr. Marcotte is entitled to resentencing as the appearance of bias revealing a great risk of actual bias exists in this case.....	10
A. Legal standard and standard of review.....	11
B. The circuit court violated Mr. Marcotte's due process right to be sentenced by an impartial judge when it promised to send Mr. Marcotte to prison if he did not succeed in Drug Court.	13
C. The circuit court's position as both the judge presiding over Drug Court and the sentencing judge in this case violated Mr. Marcotte's due process right to be sentenced by an impartial court	17
Conclusion	23
Certifications.....	24
Index to Appendix.....	100

CASES CITED

- State v. Goodson*,
2009 WI App 107, 320 Wis. 2d 166,
771 N.W.2d 385 12, 13, 22
- State v. Gudgeon*,
2006 WI App 143, 295 Wis. 2d 189,
720 N.W.2d 114 11 passim
- State v. Herrmann*,
2015 WI 84, 364 Wis. 2d 336,
867 N.W.2d 772 11, 12, 22
- State v. Lamb*,
No. 2017AP001430-CR,
unpublished slip. op.
(WI App Sept. 25, 2018)..... 14, 15, 16
- State v. Washington*,
83 Wis. 2d 808, 266 N.W.2d 597 (1978).... 11, 21

OTHER AUTHORITIES CITED

- <https://www.marinettecounty.com/i/f/HHSD/Drug%20Court/drugcourt%20policyandproceduresmanual%20updated%205-17.pdf> 18

ISSUE PRESENTED

Mr. Marcotte was placed on probation with a condition that he participate in the Marinette County Treatment Drug Court (Drug Court). He was subsequently terminated from that program and his probation was revoked. The circuit court judge who presided over the plea, sentencing, and sentencing after revocation proceedings, was also the judge who presided over Drug Court. During various Drug Court proceedings the judge told Mr. Marcotte that he would go to prison if he was terminated. Later, at the sentencing after revocation hearing, the court sentenced Mr. Marcotte to prison, noting, among other things, that it had more information about Mr. Marcotte than it had about 99% of the other defendants that came before it for sentencing and that it was disappointed in Mr. Marcotte's performance in Drug Court.

Did the circuit court's comments regarding prison, or its role as both the judge presiding over Drug Court and the judge presiding over the sentencing after revocation hearing, rise to the level of objective bias, denying Mr. Marcotte his due process right to be sentenced by an impartial court?

Circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The briefs should adequately set forth the arguments and publication will likely be unwarranted as the issue presented can be decided on the basis of well-established law.

STATEMENT OF THE CASE AND FACTS

On February 7, 2017, the state filed a complaint charging Jason A. Marcotte with delivery of methamphetamine, second and subsequent offense, as a party to the crime. (1:1). The complaint alleged that Mr. Marcotte and his girlfriend sold a substance that tested positive for methamphetamine to a confidential informant. (1:1-3).

The case eventually resolved in a plea agreement, pursuant to which Mr. Marcotte pled no contest to delivery of methamphetamine as a party to the crime. (22:1; 69:3-5). In exchange, the state agreed to jointly recommend a withheld sentence and three years of probation with various conditions, including that Mr. Marcotte comply with all terms and conditions of the Marinette County Treatment Drug Court (Drug Court). (69:3).

The circuit court, the Honorable James A. Morrison, accepted Mr. Marcotte's plea, found him guilty, ordered a presentence investigation report,

and set the case over for sentencing.¹ (69:21). The court also modified the conditions of Mr. Marcotte's bond to require that he be in full compliance with all requirements of the Drug Court (69:21-22).

Mr. Marcotte participated in Drug Court prior to his sentencing hearing and, at a treatment court hearing held on October 16, 2017, he and the circuit court had the following exchange:

THE COURT: I'm not going to ask you about driving without a driver's license because that would be asking you to incriminate yourself, so I'm not going to ask you about that, but I'm thinking about it. All right?

THE DEFENDANT: Me too.

THE COURT: And all I'm going to say to you is that was terminally stupid and it has to stop.

THE DEFENDANT: I agree.

THE COURT: Because conviction of another offense is grounds for immediate discharge from the program. Do you understand that?

¹ The Honorable James A. Morrison presided over all of the proceedings in this case and was the Drug Court Judge for the Marinette County Treatment Drug Court.

THE DEFENDANT: Yes, sir.

THE COURT: And *in your case, discharge from the program means you get sentenced and you go to Dodge*. Jason, really, is that what you want the future to be?

(71:2; App. 105)(emphasis added).

The sentencing hearing was held on October 27, 2017. (73). After hearing from the parties and defendant, the circuit court adopted the joint recommendation, withheld sentence and placed Mr. Marcotte on probation for three years. (27:1; 73:3-13). Among the conditions of probation was a requirement that Mr. Marcotte comply with all requirements of Drug Court. (27:1). The circuit court warned Mr. Marcotte that if he couldn't make it work in Drug Court, when he came back before the court for sentencing after revocation, "there [was] going to be no mercy." (73:17-18).

Mr. Marcotte struggled during his time in Drug Court and was eventually terminated from the program. (35). At a treatment court hearing on January 8, 2018, the court was explaining that it was not going to give up on Mr. Marcotte despite his violations and stated:

And part of the reason that we're frustrated about this, Jason, is when you were asked whether you really wanted to do this, you said you'd try. You never volunteered 100 percent

effort, you never told Chad that you really were willing to do what's needed to do here, and *apparently you think if you go to prison, it's going to be easier for you*. Well, I'm sorry, my friend, we're not going to make it easier for you. Do you understand me?

(80:3; App. 113)(emphasis added). At the next hearing, on January 22, 2018, the circuit court had the following exchange with Mr. Marcotte:

THE COURT: What should I be worried about with you, do you think?

THE DEFENDANT: Probably my attitude.

THE COURT: Okay. What about your attitude should I be worried about?

THE DEFENDANT: I was ready to give up on drug court and stuff for a while there.

THE COURT: Well, if you gave up on drug court, what would the consequence be?

THE DEFENDANT: *I'd go to prison.*

THE COURT: *Yeah.* Is that a good choice?

THE DEFENDANT: No. Just seemed like the -- I don't know, like the easiest choice at the time.

THE COURT: Well, let's assume you gave up on drug court,

*you went to prison, you
went through all their
happy delightful
programming, you got
out. What would happen
when you got out?*

(81:2; App. 116)(emphasis added). A month later, Mr. Marcotte was terminated from Drug Court. (85).

Mr. Marcotte's probation was then revoked. (33:1). In the revocation summary, the Department of Corrections recommended that the court sentence Mr. Marcotte to three to four years of initial confinement and three to four years of extended supervision. (33:14).

A sentencing after revocation hearing was held on April 9, 2018, and the circuit court sentenced Mr. Marcotte to ten years of prison, as five years' initial confinement and five years' extended supervision. (39:1; 86; App. 101). While imposing sentence, the court made the following statements indicating that it had no choice but to impose prison and that it was frustrated and disappointed in Mr. Marcotte:

Okay. Well, first of all, I'm obviously very familiar with your circumstances. I don't know exactly how many drug court sessions we had, it was many. *I know we spent many hours talking about your various problems when we were staffing this program week after week.* And I don't say that because I'm beating up on you, I'm just pointing out that I am very familiar with your circumstances, with the circumstances of Dana, with the circumstances with respect to your

children because I've been sitting on those cases as well, so I have a very good grasp of -- at least of the directory facts, so to say, with respect to you, Mr. Marcotte. I don't for a minute think that I can climb inside your brain and figure out how much it works, I know I can't. If I could, we wouldn't be here. We would have been more effective in the drug court.

And I think it is clear that the drug court was not the answer for you, at least not that -- the time around that you did it. *An understandable frustration of the drug court team is my God, we gave him every tool, why didn't he just grab them*, and I understand that, and I understand the -- you know, that we could all say let's just throw the book at this guy because he really screwed up. Well, you did really screw up repeatedly in every way imaginable, frankly. You let down yourself. You let down Dana. *You let down the team*. Most importantly, you let down your children and yourself. That's all true, you know all that.

....
I mean, *I'm really focusing on -- on the Jason Marcotte that I know because I really have an advantage. 99 percent of the people that I have to sentence, I don't know nearly as well as I know you*. But I've -- I've basically lived with you every Monday for more than a year, and so I got my arms around your problem much better than most, and I think your problem is 99 percent drug -- drug-abuse related.

...
PSI was helpful, *but not nearly as helpful as the advantages I just talked about of actually seeing -- seeing how you did this and how you did in drug court*. Bottom line is Ms. Morrow is right, you were never all in. You never were willing to surrender to *the rest of us who understood better and had your best interest at heart more than you did, frankly*.

...

Are you culpable? Of course. Your demeanor today is fine, *but your demeanor throughout the drug court was frustrating, to put it mildly*. We saw glimmers of possibility and then we saw constant lying and things of that sort, which are classic addict behavior. It's all tied to being an addict, I know that.

...

All right. Do you need close rehabilitative control? Of course. I mean, you failed on probation. *You failed on drug court. You are going to prison. There is no choice.*

(86: 14-15, 21-23; App. 122-123, 129-131).

Mr. Marcotte filed a postconviction motion seeking resentencing. (52). In it, he alleged that he was denied his due process right to be sentenced by an impartial judge as the circuit court demonstrated objective bias by presiding over Drug Court and his sentencing after revocation hearing, and by prejudging his sentence after revocation. (52). The state filed a response opposing Mr. Marcotte's motion. (58). The state asserted that the fact that the same judge presided over the Drug Court proceedings and the sentencing after revocation did not create a serious risk of actual prejudice, and that the statement that the defendant would go to prison without a specific length of prison, made in the context of Drug Court proceedings, did not show that the court had pre-determined the outcome of the case. (58:2-5).

The circuit court held a hearing on the motion for resentencing and, after hearing arguments, denied it. (59; 87; App. 137-164). The court reiterated that it was “invested in the success of drug court participants and [it is] disappointed when drug court participants are not successful.” (87:22; App. 158). It also stated that it was “terribly disappointed for Jason and about Jason,” as it was invested in his success, and stressed that its comments about prison were “completely appropriate.” (87:24; App. 160). In denying the motion, the circuit court explained,

Anybody who participates in the drug court, anybody who watches the drug court, any participant in the drug court knows that this drug court is a cheerleader for every single person in the drug court and utilizes every possible device we can to help them be successful to avoid what happened to Mr. Marcotte.

The fact that Mr. Marcotte admitted -- Excuse me. Mr. Marcotte admitted early on in the program that he understood that Dodge was a problem and the fact that I said that in the context of all the other positive comments I made to him would not have -- would not have established bias in the minds of any sensible person. In my mind, I cannot imagine it. People who sit here every week and watch this know better than that, and your claim is that what I said did not necessarily reach a bad result, but could give the impression to other people that I was objectively biased, and I - - I don't think it could have. I think it's part of the nature of the drug court. I have to continue to encourage people and I have to continue to tell them what the alternatives are.

The alternative in the Marinette County Drug Court for failure is almost always going to be prison, because regrettably, it's always felonies, there are almost always multiple felonies, and the conduct has almost always occurred in the past, so the factors that would normally cause me to send somebody to prison almost always apply. I can't think of any case when they do not apply to the drug court population. It doesn't mean that I've decided in advance, because I work my head off so that people don't face that, but when they do, those are people that are very likely candidates for prison by the conduct, not by the comments that I made.

(87:26-27; App. 162-163).

This appeal follows.

ARGUMENT

Mr. Marcotte is entitled to resentencing as the appearance of bias revealing a great risk of actual bias exists in this case.

Mr. Marcotte was denied his fundamental right to be sentenced by an impartial court. A reasonable person observing the circuit court's statements at the sentencing and treatment court hearings – warning Mr. Marcotte that he would be sent to prison if he failed in Drug Court – and its comments at the sentencing after revocation hearing indicating that it was frustrated and let down by Mr. Marcotte's performance in the program, could question the court's impartiality. Further, the appearance of bias in this case reveals a great risk that the circuit court

was actually biased against Mr. Marcotte and did prejudice the type of sentence it would impose. Consequently, objective bias exists and Mr. Marcotte is entitled to resentencing before a different judge.

A. Legal standard and standard of review.

Mr. Marcotte was denied his due process right to an impartial judge. The circuit court demonstrated objective bias in two, independent ways. First, the circuit court's comments reveal a great risk that it had determined what type of sentence it would impose in Mr. Marcotte's case long before the sentencing after revocation hearing. Second, the circuit court's involvement as the presiding judge in Drug Court, coupled with its comments at the sentencing after revocation hearing, give the appearance of partiality.

"Due process requires a neutral and detached judge. If the judge evidences a lack of impartiality, whatever its origin or justification, the judge cannot sit in judgment." *State v. Washington*, 83 Wis. 2d 808, 833, 266 N.W.2d 597 (1978). While a judge is presumed to have acted fairly, impartially, and without bias, that presumption can be overcome if the defendant shows, by a preponderance of the evidence, that bias exists. *State v. Herrmann*, 2015 WI 84, ¶¶3, 24, 364 Wis. 2d 336, 867 N.W.2d 772; *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114.

The objective test for bias “asks whether a reasonable person could question the judge’s impartiality.” *Gudgeon*, 2006 WI App 143, ¶21. There are two types of objective bias that violate due process: 1) actual bias, and 2) the appearance of bias. *State v. Goodson*, 2009 WI App 107, ¶9, 320 Wis. 2d 166, 771 N.W.2d 385. Actual bias occurs “where ‘there are objective facts demonstrating...the trial judge in fact treated [the defendant] unfairly.’” *Id.* On the other hand, “the 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.” *Gudgeon*, 2006 WI App 143, ¶24.

“In sum, when determining whether a defendant’s right to an objectively impartial decisionmaker has been violated [this court] consider[s] the appearance of bias in addition to actual bias. When the appearance of bias reveals a great risk of actual bias, the presumption of impartiality is rebutted, and a due process violation occurs.” *Herrmann*, 2015 WI 84, ¶¶30, 46 (“the right to an impartial decisionmaker stretches beyond the absence of actual bias to encompass the appearance of bias as well.”).

“Whether a circuit court’s partiality can be questioned is a matter of law” that this court reviews independently. *Goodson*, 2009 WI App 107, ¶7.

- B. The circuit court violated Mr. Marcotte's due process right to be sentenced by an impartial judge when it promised to send Mr. Marcotte to prison if he did not succeed in Drug Court.

The circuit court repeatedly informed Mr. Marcotte that he would be sentenced to prison if he was not successful in Drug Court. These repeated comments were an unequivocal promise and a reasonable person would conclude that the circuit court had, therefore, made up its mind about Mr. Marcotte's sentence long before the sentencing after revocation hearing. This, along with the circuit court's statement at the sentencing after revocation hearing that there was "no choice" but to send Mr. Marcotte to prison, constitutes objective bias; the circuit court's comments give the appearance of bias and reveal a great risk of actual bias in this case. (86:23; App. 131). *See Goodson*, 2009 WI App 107, ¶13.

In *State v. Goodson*, 2009 WI App 107, the circuit court told Goodson, at his initial sentencing hearing, that if his probation or extended supervision were ever revoked he would get the maximum sentence. *Id.*, ¶1. When Goodson's supervision was subsequently revoked, the court did as promised and sentenced him to the maximum, referencing its statements at the original sentencing hearing. *Id.*, ¶5. On appeal, this court found that Goodson was entitled to resentencing as both the appearance of bias and actual bias existed in his case:

Here, the court unequivocally promised to sentence Goodson to the maximum period of time if he violated his supervision rules. A reasonable person would conclude that a judge would intend to keep such a promise - that the judge had made up his mind about Goodson's sentence before the reconfinement hearing. This appearance constitutes objective bias.

...

The court began [the reconfinement hearing] by noting its decision was "pretty easy." The court said the maximum was appropriate "not because that's the sentence I'm giving you today, [but] because that's the agreement you and I had back at the time you were sentenced." There could not be a more explicit statement confirming that the sentence was predecided. This is definitive evidence of actual bias.

Id., ¶¶13, 16. The court explained, "[a] court may certainly tell a defendant what *could* happen if his or her extended supervision is revoked. But telling a defendant what *will* happen imperils the defendant's due process right to an impartial judge at a reconfinement hearing." *Id.*, ¶17 ("when a judge has prejudged...the outcome,' the decision maker cannot render a decision that comports with due process.").

Similarly, in *State v. Gudgeon*, 2006 WI App 143, and *State v. Lamb*, No. 2017AP001430-CR, unpublished slip. op. (WI App Sept. 25, 2018). (App. 166-170), this court found objective bias based on the judges' statements which, made prior to hearing evidence or arguments, indicated that it had already decided the contested issue.

In *Gudgeon*, the circuit court’s handwritten note that it wanted the defendant’s probation extended, made prior to any extension hearing, constituted objective bias. *Gudgeon*, 2006 WI App 143, ¶26. This court found that a reasonable person “would discern a great risk that the trial court ... had already made up its mind to extend probation long before the extension hearing took place.” *Id.*

In *Lamb*, this court found that the defendant was denied his right to an impartial judge when the circuit court indicated, prior to hearing sentencing arguments, that it would not place the defendant on probation despite the joint recommendation from the parties. The court found that the defendant had “met his burden of demonstrating objective bias by showing a serious risk that Judge McGinnis prejudged his sentence.” *Lamb*, No. 2017AP001430-CR, unpublished slip. op., ¶11 (WI App Sept. 25, 2018). (App. 168). The court noted that the timing of the circuit court’s exchange with the defendant was important, as the court’s statements indicating that the defendant would not be placed on probation “occurred prior to his hearing any formal sentencing arguments from the parties,” and failed to account for the sentencing factors a court must consider. *Id.*, ¶¶15-16. (App. 169).

The circuit court in this case similarly prejudged Mr. Marcotte’s sentence after revocation. The court made several comments, prior to the sentencing after revocation hearing and even prior to Mr. Marcotte’s termination from Drug Court, which

revealed that it had already determined it would sentence Mr. Marcotte to prison if he was not successful. (*See* 71:2; 80:3; 81:2; App. 105, 113, 116). A reasonable person hearing those comments would conclude that the court had predetermined whether Mr. Marcotte would be sentenced to a fine, jail, or prison if revoked. In fact, Mr. Marcotte himself took the circuit court's comments to mean that he would be going to prison if he was terminated from Drug Court. (81:2; App. 116).

The circuit court's statements were an unequivocal promise to send Mr. Marcotte to prison if he failed in Drug Court. Moreover, they were made prior to the sentencing after revocation hearing and thus, prior to hearing the sentencing arguments from the parties and Mr. Marcotte's allocution. The court could not have considered any of the sentencing factors at the time those comments were made. The fact that the circuit court may have intended the comments to be motivation, and otherwise considered appropriate sentencing factors, does not alter the appearance of bias those statements created. *Lamb*, No. 2017AP001430-CR, unpublished slip. op., ¶¶19-20 (WI App Sept. 25, 2018). (87:23-27; App. 159-163, 170).

The circuit court told Mr. Marcotte what was going to happen in his case, not what could happen. "The ordinary reasonable person would discern a great risk that" the court had already made up its mind to send Mr. Marcotte to prison long before the sentencing after revocation hearing took place. *See*

Gudgeon, 2006 WI App 143, ¶26. Moreover, the circuit court's statement at the sentencing after revocation hearing – “You failed on drug court. You are going to prison. There is no choice” – reinforced the appearance of bias and revealed a great risk of actual bias in this case. (86:23; App. 131).

As a reasonable person would interpret the circuit court's comments, including that in Mr. Marcotte's case, termination from Drug Court meant that he “would end up in Dodge,” as the court having made up its mind about the revocation sentence prior to the sentencing after revocation hearing, objective bias exists in this case. Mr. Marcotte is entitled to resentencing before a different judge.

- C. The circuit court's position as both the judge presiding over Drug Court and the sentencing judge in this case violated Mr. Marcotte's due process right to be sentenced by an impartial court

The circuit court's position as both the Drug Court Judge and the judge presiding over Mr. Marcotte's sentencing after revocation hearing also gave the appearance of bias revealing a great risk of actual bias in this case. Due to its position with Drug Court, the circuit court admittedly had more information about Mr. Marcotte and his progress in Drug Court than it otherwise would have had. (86:14-15, 21-22; App. 122-123, 129-130). This fact, along with the court's comments at the sentencing after revocation hearing regarding

Mr. Marcotte and his time in Drug Court, would cause a reasonable person to question the circuit court's impartiality.

According to the Marinette County Treatment Drug Court Policies and Procedures Manual, in addition to proceedings held on the record, the Drug Court Team holds regular closed staffings. Drug Court Manual, 9, available online at <https://www.marinettecounty.com/i/f/HHSD/Drug%20Court/drugcourt%20policyandproceduresmanual%20updated%205-17.pdf>. At these staffings, “the Treatment Drug Court Team will advise the Treatment Drug Court Judge of the progress or any violation of each Treatment Drug Court Team Participant.” *Id.* Further, the Treatment Drug Court Judge has the sole and exclusive control of the Treatment Drug Court files, which are confidential, not open to the public, and separate from circuit court files. *Id.*

Thus, as the Drug Court Judge, the circuit court had access to information that was discussed outside of Mr. Marcotte's presence, and that no other judge, or the public, would have access to. *Id.* (87:20-21; App. 156-157). The court acknowledged as much when it made comments such as, “I am obviously very familiar with your circumstances... I know we spent many hours talking about your various problems when we were staffing this program week after week,” and “99 percent of people that I have to sentence, I don't know nearly as well as I know you.” (86:14, 21; App. 122. 129). These comments, in

addition to the court's comments expressing a personal investment in Drug Court and frustration with Mr. Marcotte for failing, would cause a reasonable person to question the Court's ability to "hold the balance nice, clear and true." *See Gudgeon*, 2006 WI App 143, ¶24.

At the sentencing hearing, the circuit court repeatedly included itself in comments about the opportunities offered to Mr. Marcotte in Drug Court, stating things such as "we offered you lots of mental health treatment," and "[y]ou had serious problems that have never been addressed. We tried to get you to address them. We weren't successful." (86:17-18; App. 125-126). The court also expressed frustration and disappointment as a result of Mr. Marcotte's behavior and failure to succeed in Drug Court:

An understandable frustration of the drug court team is my God, *we* gave him every tool, why didn't he just grab them, and I understand that, and I understand the -- you know, that *we* could all say let's just throw the book at this guy because he really screwed up. Well you did really screw up repeatedly in every way imaginable, frankly. You let down yourself. *You let down Dana. You let down the team.*

...
Have you frustrated me over the time you've been in drug court? Absolutely. Have you frustrated every member of the team? Of course. Did you frustrate yourself? I do not doubt it. We are all disappointed in your result, but your result is the product of your addiction and you need to get your arms around that.

...

PSI was helpful, but not nearly as helpful as the advantages I just talked about of actually seeing -- seeing how you did this and how you did in drug court. Bottom line is Ms. Morrow is right, you were never all in. You never were willing to surrender to *the rest of us who understood better and had your best interest at heart more than you did, frankly.*

(86: 15, 19, 22; App. 123, 127, 130)(emphasis added). Further, at the time of the first sentencing hearing the circuit court informed Mr. Marcotte that if he did not succeed in Drug Court, when he came back for sentencing, “there [was] going to be no mercy.” (73:17-18).

The circuit court confirmed this frustration with Mr. Marcotte and its personal investment in Drug Court participants during the postconviction motion hearing. In denying the motion, it explained:

I’m to be criticized because I’m invested in the success of drug court participants and I’m disappointed when drug court participants are not successful, that is ridiculous. That is ridiculous, judicial engagement is one of the pillars of drug court success, and the fact that if I can -- if I can deal with the people that sit in the jury box every week and I can have them know that we care about them and that I care about them and their success and that means that I cannot -- ultimately, if I have to send them away, I can’t do it, is ridiculous.

...
Obviously, I was disappointed that Jason Marcotte failed in the drug court. I’m disappointed when every -- anybody fails in any kind of probation, but especially the drug court. I was terribly disappointed for Jason and about

Jason. And throughout the whole course of the drug court, we try to impress upon the defendants that we're invested in their success because evidence tells us that when the judges make that clear, there is a higher rate of success, and the chance of Jason actually going to prison is less if I can connect with him and I can encourage him.

(87:22, 24-25; App. 158, 160-161).

All of these comments reveal why a judge presiding over both the Drug Court and the sentencing after revocation proceedings gives the appearance of bias; the public could reasonably perceive that the circuit court was imposing a sentence based, at least in part, on information that it learned from off the record staffings. *See Washington*, 83 Wis. 2d 808, 836. Further, a reasonable lay person, viewing the comments above, could conclude that the court had a personal investment in Drug Court and was not impartial in imposing this sentence after Mr. Marcotte failed that program. *See Id.*, at 833 (stating that “If the judge evidences a lack of impartiality, whatever its origin or justification, the judge cannot sit in judgment,” and noting that a judge’s bias may arise from the judge becoming personally involved in the proceeding). If a person is invested in a program and/or another person’s success in that program they are understandably upset and frustrated when that other person fails to succeed. The fact that the circuit court ultimately imposed a sentence which was two years longer than that requested by the state and

the DOC only underscores this point and reveals a great risk of actual bias in this case.

“[T]here is a ‘vital state interest’ in safeguarding ‘public confidence in the fairness and integrity in the nation’s elected judges.’” *Herrmann*, 2015 WI 84, ¶39. A reasonable person viewing the circuit court’s dual roles and statements in this case could question the fairness and integrity of the judicial system. A person familiar with human nature would conclude that the average judge could not be trusted to “‘hold the balance nice, clear and true’ under all the circumstances” present in this case. *See Goodson*, 2009 WI App 107, ¶9. Consequently, Mr. Marcotte was deprived of his due process right to be sentenced by an impartial court and, accordingly, is entitled to resentencing before a different judge.

CONCLUSION

Mr. Marcotte respectfully requests that this court reverse the circuit court's denial of his postconviction motion and remand the case for resentencing before a different judge.

Dated this 25th day of June, 2019.

Respectfully submitted,

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender
State Bar No. 1085045

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
grotelueschenk@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,841 words.

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.

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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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.

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 25th day of June, 2019.

Signed:

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender

APPENDIX

INDEX TO APPENDIX

	Page
Judgment of Conviction.....	101-102
Order Denying Postconviction Motion.....	103
Transcript of Treatment Court Hearing Held on October 16, 2017.....	104-110
Transcript of Treatment Court Hearing Held on January 8, 2018.....	111-114
Transcript of Treatment Court Hearing Held on January 22, 2018.....	115-120
Excerpt from the Sentencing After Revocation Hearing Held on April 9, 2018	121-136
Transcript of the Postconviction Motion Hearing Held on April 4, 2019	137-165
<i>State v. Lamb</i> , No. 2017AP001430-CR, unpublished slip. op. (WI App Sept. 25, 2018).....	166-170