STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP695-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON A. MARCOTTE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND DECISION AND ORDER ENTERED IN MARINETTE COUNTY CIRCUIT COURT, THE HONORABLE JAMES A. MORRISON, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Was the circuit court objectively biased when it sentenced Jason A. Marcotte to prison for his felony drug crime after he was revoked from probation and terminated from drug treatment court within less than six months of his commencing probation and drug court?

The circuit court said no.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. The parties' briefs should adequately set forth the relevant facts and this Court can resolve the issue presented by applying well-established law.

INTRODUCTION

It was well-understood at Marcotte's initial sentencing hearing that Marcotte—who committed a Class F felony drug crime, who had serious unaddressed substance abuse issues, and who initially received a sentence of probation conditioned on his compliance with drug court requirements—was likely going to receive a prison sentence if he failed drug court and was revoked from probation. And after Marcotte was terminated from drug court and revoked, that's exactly what happened.

Yet Marcotte insists that comments that the court made during Marcotte's drug court appearances that he would go to prison if he was terminated from the program went beyond mere efforts to motivate Marcotte. In Marcotte's view, those statements gave an appearance of objective judicial bias that created a great risk of actual bias in the court's post-revocation prison sentence.

As discussed below, Marcotte is not entitled to relief.

STATEMENT OF THE CASE

Marinette Police set up a controlled buy of methamphetamine using a confidential informant, who purchased the drug from Marcotte and his girlfriend. (R. 1:1–2.) The State charged Marcotte with delivery of methamphetamine as a party to a crime, second and subsequent offense, a Class F felony carrying a maximum of 12-and-a-half years' imprisonment without the enhancer. (R. 1:1.)

The parties reached a plea agreement that was premised on Marcotte's being accepted into the Marinette County Treatment Drug Court Program, which he was. Under the agreement, Marcotte pleaded no contest to the delivery charge, and the State dismissed the second-and-subsequent enhancer. (R. 69:2–3.) The parties also agreed to jointly recommend a withheld sentence and three years' probation, with conditions including Marcotte's compliance with drug court rules; and one year in county jail to be imposed and stayed. (R. 69:2–3.) In addition, a PSI was completed between Marcotte's plea and his sentencing. (R. 24.)

Marcotte began participating in drug court about three weeks before his initial sentencing hearing. (R. 70.) At that sentencing hearing, the court—who was the same judge who presided over drug court—adopted the parties' joint recommendation. (R. 73:3–13.) The parties and the court at the initial sentencing all recognized that drug court was Marcotte's "last chance" to overcome his lifelong addiction to drugs and alcohol, to make positive changes in his life, and to avoid prison for his crime. (R. 73:6–7, 8, 11, 17–18.)

After less than six months, however, Marcotte was terminated from drug court and revoked from his probation. (R. 33:1–2.) The revocation order and warrant detailed the reasons for the termination and revocation, including drug use, absconding from supervision, and failing to report

changes in his address. (R. 33:6.) The report also detailed Marcotte's struggles in the drug court program—including failing to report to drug court, failing to put any effort to the program, and lying to his agents and the drug court team—most of which the agent opined were due to Marcotte's poor attitude and lack of interest and motivation in following drug court rules. (R. 33:9.)

At Marcotte's sentencing-after-revocation hearing, the DOC, the State, and Marcotte's attorney all either recommended prison time or recognized that prison was the only feasible sentence for Marcotte. The DOC recommend three to four years each of initial confinement and extended supervision. (R. 33:10.) The State recommended four years' initial confinement and four years' extended supervision, with eligibility for the Substance Abuse Program after serving two years. (R. 86:6.) Marcotte's counsel did not make a specific recommendation, but his comments reflected an understanding that Marcotte would be sentenced to prison. (*See* R. 86:10, 13 (stating that "whatever sentence the Court does order" should include eligibility for the Substance Abuse Program); *id.* at 12 (noting that "[w]hatever the sentence is, [Marcotte] will be out of custody while still a young man").)

The court addressed the relevant sentencing factors and sentenced Marcotte to five years' initial confinement with eligibility for the Substance Abuse Program after three years, and five years of extended supervision. (R. 86:24–25.)

Postconviction, Marcotte sought resentencing, arguing that the court was objectively biased when it relied on information it received in its role in drug court and that it prejudged Marcotte's sentence when it told Marcotte he faced prison if he was terminated from drug court. (R. 72.) The court held a hearing on the motion and denied it. (R. 87:26–27.)

Marcotte appeals.

STANDARD OF REVIEW

This Court reviews independently whether a judge is objectively biased. *State v. Herrmann*, 2015 WI 84, ¶ 23, 364 Wis. 2d 336, 867 N.W.2d 772 (citations omitted).

ARGUMENT

There was no judicial bias.

A. Courts are presumptively impartial; a defendant bears a heavy burden of establishing the appearance of bias.

Defendants have a due process right to an unbiased decisionmaker. *Herrmann*, 364 Wis. 2d 336, ¶ 25 (citations omitted). When a party alleges that a court was biased, appellate courts start with the presumption that the court acted "fairly, impartially, and without prejudice." *Id.* ¶ 24 (citations omitted). The party asserting bias must rebut that presumption by a preponderance of the evidence. *Id.* (citations omitted).

In assessing claims of bias, Wisconsin courts apply "both subjective and objective approaches." *Id.* ¶ 26; *see State v. Rochelt*, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991) (stating that the subjective test concerns the judge's own determination while the objective test asks "whether impartiality can reasonably be questioned"). Marcotte limits his claim to objective bias; under that test, "courts have traditionally considered whether 'there are objective facts demonstrating . . . that the trial judge in fact treated [the defendant] unfairly.'" *Herrmann*, 364 Wis. 2d 336, ¶ 27 (quoting *State v. Goodson*, 2009 WI App 107, ¶ 7, 320 Wis. 2d 166, 771 N.W.2d 385).

Under the objective bias test, a defendant may obtain relief by demonstrating either actual bias or—in much more limited situations and as Marcotte alleges here—the

appearance of bias. "[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." *State v. Gudgeon*, 2006 WI App 143, ¶ 24, 295 Wis. 2d 189, 720 N.W.2d 114. The situations in which appearance of bias can offend due process are limited to "when there is 'a great risk of actual bias.'" *Herrmann*, 364 Wis. 2d 336, ¶ 40 (citing *Gudgeon*, 295 Wis. 2d 189, ¶ 23).

B. Here, Marcotte can establish no appearance of bias, let alone a "great risk of actual bias."

In assessing whether a court exhibited the appearance of bias, reviewing courts consider the challenged statements in context of their sentencing duties under Wis. Stat. § 973.017(2) and *State v. Gallion*, 2004 WI 42, ¶¶ 40–45, 270 Wis. 2d 535, 678 N.W.2d 197. *See Herrmann*, 364 Wis. 2d 336, ¶¶ 60–66. In *Herrmann*, for example, Herrmann claimed that the court gave the appearance of bias when the judge discussed her sister's death at the hands of a drunk driver when sentencing Herrmann for his convictions after he drove drunk and killed someone. *Id.* ¶ 48. The supreme court reviewed the "lengthy sentencing hearing" in Herrmann's case. It concluded that the statements, in context, "were used in an attempt to illustrate the seriousness of the crime and the need to deter drunk driving in our society. They do not appear as an expression of bias against Herrmann." *Id.* ¶ 59. And because the statements were consistent with the requirements under section 973.017(2) and *Gallion*, the supreme court concluded that Herrmann failed to rebut the presumption of impartiality. *Id.* ¶ 68.

Similarly, here, a review of the sentencing, post-revocation sentencing, and postconviction transcripts shows

that the court's statements, in context, were consistent with its sentencing requirements and not expressions of personal bias against Marcotte.

To start, it is important to note the circumstances and context of Marcotte's original and post-conviction sentencing. Those transcripts demonstrate that the court and parties understood that a prison sentence was virtually inevitable if Marcotte did not make the effort necessary to succeed in drug court.

At Marcotte's initial sentencing, the parties recognized that drug court was likely Marcotte's last chance to avoid prison. The prosecutor highlighted Marcotte's serious long-term substance abuse issues, which had led to his obtaining "several criminal convictions" and losing custody of his children. (R. 73:4–6.) The prosecutor said, "I think this [drug court] is the last chance he's got before prison, I think that's pretty obvious." (R. 73:6.) The prosecutor noted that Marcotte would have to work hard to succeed in drug court and that he would benefit from it if he did the work. (R. 73:7.) If he failed, the prosecutor explained, "he's on his way to prison and I think there really isn't an alternative." (R. 73:7.) Similarly, Marcotte's counsel agreed that drug court presented Marcotte's "best chance" to improve the rest of his life and told the court that Marcotte nevertheless recognized that his offense was serious. (R. 73:8, 11.)

The court also recognized that probation with drug court was the only feasible alternative to prison in Marcotte's case. It told Marcotte then that "drug court offers the only realistic chance you have for successful rehabilitation," and that it is generally more effective than treatment in prison. (R. 73:14.) It emphasized to Marcotte that success in drug court was vital to saving his life based on his heavy drug and alcohol use. (R. 73:17.) It also made clear to Marcotte that drug court was his last opportunity to get clean as well as to avoid prison, telling him that if he could not succeed in drug

court, "when you come back before me for sentencing, there is going to be no mercy." (R. 73:17–18.)

And that understanding—that prison likely would follow if Marcotte failed to apply himself to the drug court treatment program—is consistent with what most defendants in drug court face. According to the drug court manual, the program is designed "to handle cases involving offenders whose drug use is a significant factor in their criminal behavior." *Marinette County Treatment Drug Court Policies and Procedures Manual*, 3, available at http://www.marinettecounty.com/i/f/HHSD/Drug%20Court/drugcourt%20policyandproceduresmanual%20updated%205-17.pdf. Defendants eligible for the program must have a felony charge or charges associated with or motivated by substance abuse. *Id.* at 8.

And as the statewide drug court standards state, the target population for drug court is "high-risk, high-need" individuals. *Wisconsin Treatment Court Standards* (Rev. 2018), at 15, 17, available at https://www.watcp.org/wp-content/uploads/2013/07/WATCP-Wisconsin-Treatment-Court-Standards-Publication-Revised-2018.pdf. Marcotte's PSI included an assessment that he was such a high-risk, high-need individual. (R. 24:21–23.) And, as the State argued in the postconviction hearing, for high-risk, high-need individuals, drug court is generally understood by defendants, defense lawyers, prosecutors, and the court to be the last resort before prison. (R. 87:14–15.)

Consistently, at the sentencing-after-revocation hearing, the parties and court agreed that prison was the only appropriate sentence for Marcotte. That was so given his lack of motivation and effort in drug court leading to his termination there and his revocation from probation. As noted, the DOC recommended a six- to eight-year sentence. (R. 33:10.) The State recommended eight years (four years' initial confinement and four years' extended supervision),

with eligibility for the Substance Abuse Program after serving two years. (R. 86:6.) Marcotte's counsel also recognized that Marcotte would be sentenced to prison. (*See* R. 86:10, 13 (stating that "whatever sentence the Court does order" should include eligibility for the Substance Abuse Program); *id.* at 12 (noting that "[w]hatever the sentence is, [Marcotte] will be *out of custody* while still a young man").)

In its remarks, the court weighed and applied the relevant factors—the protection of the community, punishment, rehabilitative needs, deterrence, Marcotte's past record and character, and the seriousness of the crime. (R. 86:15–23.) Based on Marcotte's lack of motivation in drug court, his history of drug abuse and crimes as a result, the high need to protect the community from Marcotte's dealing, and Marcotte's strong need for rehabilitation in a controlled setting, the court sentenced Marcotte to five years' initial confinement and five years' extended supervision. (R. 86:24.) It deemed Marcotte eligible for the Substance Abuse Program after he'd served three years, explaining that that structure was in line with "basically the State's recommendation" and would give Marcotte "the opportunity to get out after [he] served three years by being the in Substance Abuse Program." (R. 86:24–25.)

Marcotte does not challenge the court's exercise of sentencing discretion or its application of the appropriate sentencing factors. Rather, he insists that the court—based on statements it made during the drug court hearings—made Marcotte "an unequivocal promise" that would prompt "a reasonable person [to] conclude that the circuit court had, therefore, made up its mind about Mr. Marcotte's sentence long before the sentencing after revocation hearing." (Marcotte's Br. 13.)

But the court's telling Marcotte that he would face prison if he failed drug court was simply stating the obvious. As discussed above, it was clear at Marcotte's original

sentencing that drug court was a last-ditch effort to keep him out of prison. Everyone understood that if Marcotte's conduct caused him to be terminated from drug court, prison was the only viable option. Marcotte himself acknowledged as much during his drug court treatment that he knew he would go to prison if he could not satisfy the program requirements. (R. 81:2.) Indeed, Marcotte expressed to his probation agent that he would take prison over the program. (R. 33:8 ("The offender stated drug court was not doing anything for him and he would get the same in prison. He stated he would probably have more freedom in prison."); *id.* ("He went on to say it would just be easier to go to prison so he could get out and live at his dad's cabin and work at his shop.").)

And the court's comments regarding prison were never equivocal promises, such as a promise that it would sentence him to the maximum or to prison term of a particular length. The court's comments were not a reflection of its bias or prejudgment but simply a reflection of the reality of Marcotte's situation: that prison was the next step if he continued to refuse to comply with drug court rules and requirements.

C. In addition, case law does not assist Marcotte.

Despite Marcotte's efforts to align the facts here with those in *Goodson*, *Gudgeon*, and *Lamb* (Marcotte's Br. 13–17), those cases illustrate why the court's comments here did not reflect the appearance of bias.

In *Goodson*, the court sentenced Goodson to a bifurcated sentence and promised him that he would get the maximum sentence if he were ever revoked. *Goodson*, 320 Wis. 2d 166, ¶ 2. After Goodson was revoked, the court sentenced Goodson to the maximum, referencing its original sentencing remarks. *Id.* ¶ 5. This Court held that the circuit court's statements carried the appearance of bias because it

"unequivocally promised to sentence Goodson to the maximum period of time if he violated his supervision rules." *Id.* ¶ 13. This Court also held that there was actual bias, because the court sentenced Goodson to the maximum by referencing "the agreement you and I had back at the time you were sentenced," a statement that "could not be . . . more explicit [in] confirming that the sentence was predecided." *Id.* ¶ 16.

Here, unlike in *Goodson*, the court did not unequivocally promise a particular prison sentence to Marcotte. It did not threaten to sentence him to the maximum or even the 10-year sentence it ultimately imposed. It simply told Marcotte the truth—his lack of effort and motivation in drug court would result in termination and prison.

Gudgeon, 295 Wis. 2d 189, is also distinguishable from the situation here. There, Gudgeon was placed on probation with a condition that he pay restitution to the victim. *Id.* ¶ 2. Just before his probation was about to expire, Gudgeon's agent contacted the court to let it know that Gudgeon was in custody and subject to out-of-state charges, and that he still owed a substantial amount of restitution to the victim. *Id.* ¶ 3. The agent proposed that the court, rather than extending his probation time, convert the restitution obligation to a civil judgment. *Id.* The agent explained that doing so would generate interest for the victim, unlike extending probation, and noted that Gudgeon "may not be available to earn money in the community" if he was convicted of his new charges. *Id.* The judge responded, writing, "No—I want his probation extended" on the letter and sent it to the agent and parties. *Id.* At a subsequent hearing, the court extended Gudgeon's probation for two more years. *Id.* ¶ 4.

This Court concluded that the judge's notation demonstrated the appearance of bias creating a great risk of actual bias under the circumstances. *Id.* ¶¶ 25–26. That was so because the court's language—"I want"—signified a

personal desire and telegraphed the ultimate desired outcome of an extension hearing where alternatives (i.e., a civil judgment) were available to extending probation. *Id.* ¶ 26. Given that, "[t]he ordinary reasonable person would discern a great risk that the trial court in this case had already made up its mind to extend probation long before the extension hearing took place" and "nothing in the transcript of the extension hearing would dispel these concerns." *Id.*

Unlike the situation here, where prison was the only reasonable option left for Marcotte, in *Gudgeon* there appeared to be a least two feasible outcomes from the extension hearing: an extension of Gudgeon's probation, or a conversion of the restitution order to a civil judgment. Moreover, the *Gudgeon* court's telegraphing, in that case, a personal desire for a specific outcome risked the appearance that the court would not consider the probation agent's recommendation of a civil judgment. In contrast and as noted, the court here was providing Marcotte facts in an effort to motivate him, not expressing a personal desire or desired outcome when it told Marcotte that he'd be facing prison if he failed drug court.

Finally, *State v. Lamb*, No. 2017AP1430-CR, 2018WL 4619535 (Wis. Ct. App. Sept. 25, 2018) (unpublished), does not offer persuasive support for Marcotte's position. There, the court made statements before it heard the sentencing arguments indicating that it was going to impose a prison term to Lamb. *Id.* ¶ 5 (A-App. 167). This court concluded that those statements created "a serious risk of actual bias because reasonable lay observer would interpret them as prejudging Lamb's sentence." *Id.* ¶ 14 (A-App. 169). But that was so because "[b]oth Lamb and the judge were aware that the State and Lamb's attorney would be recommending probation." *Id.* ¶ 14 (A-App. 169). Moreover, the court in Lamb's case made the statement without the benefit of any previous sentencing

hearings, the parties' arguments, Lamb's allocution, or a PSI. *Id.* ¶ 15.

Against that background, *Lamb* aligns much closer to *Gudgeon* than it does the facts of this case. Here, the post-revocation sentencing court had the benefit of a previous sentencing hearing (including arguments, a PSI, and Marcotte's allocution). In addition, here, no one recommended probation. Rather, the parties and DOC all recommended prison. And here, unlike in *Lamb*, there was no realistic alternative to prison—such as additional probation or other sanctions—available to Marcotte, who had committed a drug-related felony, who had serious unaddressed substance abuse issues, who posed a high risk to reoffend, and who was terminated swiftly from drug court and revoked from probation based on his lack of motivation.

Marcotte finally claims, again invoking *Lamb*, that it did not matter that the court made the comments in the drug court proceedings to motivate Marcotte to succeed there and that it otherwise considered appropriate sentencing factors; in his view, those facts "do[] not alter the appearance of bias those statements created." (Marcotte's Br. 16–17.) But in *Lamb*, the problem was that the court went too far in telling Lamb that he was highly likely to go to prison when, under the circumstances, it could have simply reminded him that the court was not bound by the parties' recommendations. *Lamb*, 2018 WL 4619535, ¶ 19 (A-App. 170).

In contrast, there was no such obvious alternative language here to allow the judge, sitting in drug court, to motivate Marcotte to participate. Under the circumstances, had the judge here told Marcotte that more probation or other sanctions were possible if he was revoked, that wouldn't have been true. Again, everyone understood as of Marcotte's initial sentencing that prison was going to be the next logical step if he could not succeed in drug court. Had the judge suggested that a possibility of a non-prison alternative remained, he

would have distilled the motivational effect of his warning and given Marcotte false hope that he could fail drug court and still avoid prison.

In sum, a reasonable person would have taken the court's remarks during the drug court proceedings as reminders to Marcotte of the reality of his situation and attempts to motivate him to apply himself to the program. They would not cause someone to believe that the court had prejudged Marcotte's exact post-revocation sentence or that the judge could not be fair and impartial in sentencing Marcotte.

D. The judge's dual role presiding in drug court and in Marcotte's criminal case did not make him impartial.

Finally, Marcotte claims that the court's acting both as the judge in drug court and in Marcotte's sentencing after revocation violated Marcotte's due process rights. (Marcotte's Br. 17.) He asserts that in its role as drug court judge, the 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." (Marcotte's Br. 18.) In Marcotte's view, the court knew too much about Marcotte and was too invested in Marcotte's performance in drug court to sentence him after his revocation without the appearance of bias. (Marcotte's Br. 18–22.)

None of those arguments are persuasive. To start, due process does not require a drug court judge to recuse him- or herself from later sentencing proceedings. Marcotte identifies no cases or authorities holding otherwise. Accordingly, to the extent that Marcotte suggests that no drug court judge could fairly sentence a participant who was terminated from the program, that claim is unfounded.

And to the extent that Marcotte suggests that another judge would not have had access to information from

Marcotte's drug court proceedings, that is not necessarily the case. Courts at sentencing after revocation hearings have access to all manner of information about the defendant, including information from the drug court coordinator and team and other information that may otherwise be confidential from the general public. The treatment court hearings are all part of Marcotte's underlying criminal case; those transcripts are all part of Marcotte's criminal appellate record.

Further, even though drug court files are confidential and not available to the public, information from that program would not necessarily be off-limits to the court or parties at a post-revocation sentencing. In this case, for example, Marcotte had started the drug court program before his initial sentencing. For the PSI prepared for the initial sentencing, the PSI writer interviewed the drug treatment court coordinator and incorporated her comments on his progress in the PSI. (R. 24:18, 26.) At that sentencing, the prosecutor likewise had available to her progress reports from the drug court coordinator. (R. 73:3.) Moreover, at the sentencing-after-revocation hearing, the parties and court had available the revocation summary, in which the DOC agent detailed Marcotte's record in drug court and meetings with the drug court coordinator. (R. 33:6–8.)

Hence, while it is true that the judge in this case had first-hand knowledge of Marcotte's performance in drug court, even if a different judge had presided over the post-revocation sentencing, he or she would have had the PSI and revocation summary available. Marcotte's performance in drug court was unquestionably relevant to his post-revocation sentencing; there is no authority to support the idea that any information regarding Marcotte's time in drug court would have been off-limits.

To be sure, a judge's presiding over drug court can give rise to the *potential* for the appearance of bias when a drug

court judge sentences a participant after his termination from the program. But Marcotte likewise fails to persuade that this particular judge, by having a personal investment in his work with the drug court and the success of its participants, created the appearance of bias.

As the court explained in the postconviction motion hearing, the drug-court judge's commitment in the program is crucial: "judicial engagement is one of the pillars of drug court success." (R. 87:22.) The court emphasized that the drug-court judge's investment is vital to fostering success for the participants: "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 [Marcotte] actually going to prison is less if I can connect with him and I can encourage him." (R. 87:24–25.)

And while the court, at the sentencing after revocation hearing, expressed frustration with Marcotte regarding his performance in drug court, it made clear that it was not sentencing him for his failures. After discussing the details of Marcotte's crime and substance abuse issues, the court clarified that it was only sentencing Marcotte "for this charge, and I want to make that clear. . . . [Y]ou're not being sentenced for screwing up royally in the drug court. . . . [Y]ou're an addict and your conduct is absolutely what we would have expected of an addict." (R. 86:17–18.) The court went on to note that while Marcotte bore responsibility for absconding from drug court, for lying to the team, and for using drugs while in the program, those things were "the product of your addiction." (R. 86:18.)

The court also mentioned some of the other barriers to Marcotte's success in drug court, including Marcotte's unaddressed mental health issues and his lack of motivation. (R. 86:18.) Yet it reiterated that its focus was "how we deal with you now, not the fact that we tried a drug court solution

and it failed." (R. 86:18.) The court further acknowledged that failing drug court was neither uncommon nor necessarily the last chapter for a person in Marcotte's position: "That happens, people fail in the drug court and come back again at a later time and are successful. Failing in the drug court is important, don't misunderstand me, but it's not fatal to your ultimate progress here." (R. 86:18–19.)

In addition to explaining that it was not punishing Marcotte for failing drug court, the court also said that it was sentencing Marcotte to five years' confinement to give him "the opportunity to get out after you served three years by being in the Substance Abuse Program." (R. 86:24.) It designated five years of extended supervision because Marcotte was "going to need all the support that we can give you going forward." (R. 86:25.) Accordingly, that the court sentenced Marcotte to longer than what the State and DOC recommended does not "underscore[]" the appearance of bias or reveal a great risk of it. (Marcotte's Br. 21–22.) Rather, it structured its sentence to give Marcotte the opportunity to spend less time in confinement and provide him maximum support in meeting his significant rehabilitative needs. Like in *Herrmann*, 364 Wis. 2d 336, ¶ 60, the court's decision was consistent with its sentencing duties and did not appear as an expression of bias against Marcotte.

In all, Marcotte failed to overcome the presumption of impartiality and demonstrate that the judge here showed the appearance of bias creating a great risk of bias. A judge's presiding over drug court and demonstrated interest in a defendant's success in that program does not—either as a matter of course or in this case specifically—disqualify him or her from sentencing that defendant later. Marcotte is not entitled to resentencing.

CONCLUSION

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

Dated this 23rd 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 4,715 words.

_____
SARAH L. BURGUNDY
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 23rd day of August 2019.

_____
SARAH L. BURGUNDY
Assistant Attorney General