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STATE OF WISCONSIN  
COURT OF APPEALS – DISTRICT III

Case No. 2019AP000695-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON A. MARCOTTE,

Defendant-Appellant.

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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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## ARGUMENT

### **The appearance of bias revealing a great risk of actual bias exists in this case.**

Mr. Marcotte was denied his due process right to be sentenced by an impartial judge as the circuit court demonstrated objective bias in this case. A reasonable person observing the circuit court's comments, and its dual role as the Drug Court and sentencing judge, would conclude that the court had made up its mind to send Mr. Marcotte to prison prior to the sentencing after revocation hearing and could question the court's impartiality. Consequently, Mr. Marcotte's sentence must be vacated and his case should be remanded to the circuit court for resentencing before a different judge.

A defendant need not show that he was actually treated unfairly in order to establish objective bias and thus, a violation of his right to an impartial judge. *See State v. Herrmann*, 2015 WI 84, ¶¶27, 30, 346 Wis. 2d 336, 867 N.W.2d 772 (“Courts have since recognized that the right to an impartial decisionmaker stretches beyond the absence of actual bias to encompass the appearance of bias as well”). Rather, “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.” *Id.*, ¶46.

The appearance of bias revealing a great risk of actual bias exists in this case. The circuit court's comments during the sentencing and Drug Court proceedings illustrate that it had prejudged Mr. Marcotte's sentence after revocation. *See State v. Goodson*, 2009 WI App 107, ¶17, 320 Wis. 2d 166, 771 N.W.2d 385 (“when a judge has prejudged...the outcome,’ the decision maker cannot render a decision that comports with due process.”). Further, under the circumstances of this case, where the sentencing after revocation judge was also the Drug Court Judge, a reasonable person would conclude that the circuit court “could not be trusted to ‘hold the balance nice, clear and true.’” *State v. Gudgeon*, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114.

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

As the state concedes, the circuit court informed Mr. Marcotte, in no uncertain terms, that he would be going to prison if he were terminated from Drug Court. (Response Br. 10). This promise to send Mr. Marcotte to prison, made well in advance of the sentencing after revocation hearing, along with the court's statement at the hearing that there was “no choice” but to send Mr. Marcotte to prison, constitutes objective bias. (86:23; App. 131). A reasonable person, hearing the Court's comments,

could conclude that the Court had predetermined the type of sentence it would impose before Mr. Marcotte was revoked and before hearing arguments from the parties.

In arguing that the circuit court's comments, including the comment "in your case, discharge from the program means you get sentenced and you go to Dodge," do not constitute objective bias, the state seems to admit that the court had, in fact, predetermined that Mr. Marcotte would go to prison if he was terminated from Drug Court. (Response Br. 6-9, 10, 13)(71:2; App. 105). The state asserts, however, that such a predetermination was ok in this case because, in its view, at the time Mr. Marcotte was placed on probation both the court and parties "understood that a prison sentence was virtually inevitable" and there was no "feasible alternative" to prison available. (Response Br. 6-7, 9, 11-12). Both assertions fail.

First, while the state argues that it "was well-understood" that Mr. Marcotte "was likely going to receive a prison sentence" if he was revoked, it cites to nothing other than the prosecutor's argument to support that proposition. (Response Br. 1-2, 6). It was certainly acceptable for the prosecutor to assert that Mr. Marcotte should go to prison if revoked; the state is an adversary in the case and does not share the circuit court's obligation to be impartial. Mr. Marcotte's attorney, however, did not make any statements at the original sentencing indicating that he agreed that prison was "inevitable." Further, if in

fact the court and parties agreed that Mr. Marcotte would be sent to prison if he failed on probation, there was a way to ensure that – by agreeing to a stayed prison sentence that would be served in the event probation were revoked.

The fact that Mr. Marcotte was placed on probation for a felony, and that participation in Drug Court is reserved for “high-risk, high-need” individuals, also does not support the state’s claim that it was generally understood he would be sentenced to prison if he was unsuccessful in Drug Court. (*See* Response Br. 7). The state does not provide a definition of “high-risk, high-need,” nor does it offer any support for its proposition that essentially, everyone participating in Drug Court should know that they are going to prison if they are terminated from the program. Again, if that were the understanding, and the result of a sentencing after revocation is predetermined to be prison, circuit courts would be imposing and staying those prison sentences at the outset. On the contrary, there is nothing in the Marinette County Treatment Drug Court Policies and Procedures Manual, or in the law, that requires circuit courts to impose prison sentences when a person is revoked from felony probation, even if that probation involves participation in Drug Court.

Moreover, even if the parties and circuit court did share in this supposed “understanding,” it does not explain why the circuit court’s comments promising to send Mr. Marcotte to prison if he failed

in Drug Court do not give the appearance of bias. The state offers no explanation for why a reasonable person, hearing the court's comments in this case, would not conclude that the circuit court had prejudged the type of sentence it would impose by deciding to send Mr. Marcotte to prison well before the sentencing after revocation hearing took place. The existence of objective bias cannot be excused by some general "understanding" of what is likely to happen in the event probation is revoked.

The state similarly fails to explain why its assertion that, after revocation, the court and parties agreed that prison was the only appropriate sentence in this case, negates the appearance of bias. (See Response Br. 3, 7-8). First, Mr. Marcotte's attorney did not request a prison sentence. Second, even if he did, an agreement by the parties at the sentencing after revocation hearing could not undo the appearance of bias created by the circuit court's comments made at Drug Court hearings several months earlier. Again, it is the circuit court that has an obligation to be impartial, and it is the circuit court's predetermination of the type of sentence to be imposed in the event of revocation that violated Mr. Marcotte's due process right to be sentenced by an impartial judge.

As set forth in the Initial Brief, the circuit court's comments at the Drug Court hearings and sentencing after revocation in this case are similar to those at issue in *Goodson*, *Gudgeon*, and *Lamb*, and



demonstrate the appearance of bias revealing a great risk of actual bias. (Initial Br. 13-17).

Similar to *Goodson*, the circuit court here told Mr. Marcotte, prior to the sentencing after revocation hearing, that if he were terminated from Drug Court he would be sent to prison. (71:2; 80:3; 81:2; App. 105, 113, 116); *See Goodson*, 2009 WI App 107, ¶¶1, 5. Later, when Mr. Marcotte's probation was revoked, the court followed through and sentenced him to prison, stating there was "no choice". (86:23; App. 131). While the circuit court in *Goodson* promised to sentence the defendant to the maximum if his probation were revoked, this court's finding that the appearance of bias existed did not turn on the specificity of that promise. Rather, this court made clear that, "[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. The circuit court in this case told Mr. Marcotte what *would* happen – he *would* be sent to prison if his probation were revoked.

This court's decision in *Gudgeon* further illustrates that it is not the specificity of the prejudgment that matters, but the prejudgment itself. In that case, the court, prior to holding a hearing, wrote a note stating that it wanted the defendant's probation extended. *Gudgeon*, 2006 WI App 143, ¶3. Later, after the extension hearing, it ordered that the defendant's probation be extended

for two years. *Id.*, ¶4. The court's note did not specify that the length of the extension, yet this court found objective bias, as 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.*, ¶26.

The state attempts to distinguish *Gudgeon* from this case by arguing that the court in *Gudgeon* had alternatives to choose from after holding an extension hearing, while the court here did not. (Response Br. 11). This argument completely ignores the fact there were alternatives to prison available in this case and that, at the time the circuit court's comments were made, it was not known how Mr. Marcotte would perform in Drug Court and if, or why, he would be terminated from the program. The court was not required to send Mr. Marcotte to prison. Rather it could have imposed a fine, a time-served sentence, home detention, or a jail sentence of up to a year. Wis. Stats. §§ 973.02, 973.03, 973.05. Any of these alternatives could have been reasonable had Mr. Marcotte made significant progress in Drug Court only to be terminated for something minor such as a need to relocate to a different county or failure to be on time for appointments. In light of the possibilities, the circuit court's comments in this case illustrate that, similar to the court in *Gudgeon*, it wanted to send Mr. Marcotte to prison and had already ruled out the alternatives long before the sentencing after revocation hearing took place.

The circuit court's comments promising to send Mr. Marcotte to prison also reveal that, just as the court in *Lamb* did, it had determined prison, not a fine or jail, would be imposed prior to hearing arguments from the parties or Mr. Marcotte's allocution. *See State v. Lamb*, No. 2017AP001430-CR, unpublished slip. op. (WI App Sept. 25, 2018) (App. 168).

The circuit court's comments cannot be excused as merely an attempt to motivate Mr. Marcotte to succeed in Drug Court. (*See* Response Br. 12). As explained above, the court had a number of sentencing options available to it; informing Mr. Marcotte of the alternatives he was facing would not have misled him. Further, if the circuit court had simply reminded Mr. Marcotte that he *could* be sentenced to the maximum term of imprisonment if he failed the program, there would be no appearance of bias in this case. That reminder would certainly be a powerful way to motivate an individual and encourage him to be successful. What the circuit court may not do, and what it did in this case, however, is tell a defendant what *will* happen in the event probation is revoked. Here, the court told Mr. Marcotte that he *would* be sentenced to prison.

The state's argument can be boiled down to a single proposition – that prison was inevitable and there was no alternative available in this case so there was no error when the circuit court gave the appearance that it had decided to send Mr. Marcotte to prison prior to the sentencing after revocation

hearing. But prison was not inevitable in this case; this was not a case where the sentence was imposed and stayed for probation. Instead, the circuit court withheld sentence and when probation was revoked, was required to conduct a sentencing hearing at which, in the exercise of its discretion, it could impose a fine, time-served, home detention, up to a year in jail, or a prison sentence. Those options were all feasible alternatives available to the circuit court.

Thus, the circuit court's comments amounting to an unequivocal promise to send Mr. Marcotte to prison, along with its statement at the sentencing after revocation that there was "no choice" but prison, demonstrate the appearance of bias and reveal a great risk of actual bias in this case. Mr. Marcotte is entitled to resentencing before a different judge.

B. Mr. Marcotte's due process right to be sentenced by an impartial court was violated by the circuit court's dual role as the Drug Court and sentencing judge.

A reasonable person, viewing the circuit court's comments and role as both the Drug Court Judge and the sentencing after revocation judge, could question the court's impartiality.

Although Mr. Marcotte is not asserting that simply because the circuit court presided over Drug Court it was prohibited from also presiding over the sentencing after revocation hearing, there is support for such a blanket rule. The Drug Court Judicial Benchbook, issued by the National Drug

Court Institute, notes that “[s]ome commentators have taken the position that drug court judges should not sentence participants who are terminated from their programs because they have a heightened familiarity with the case, and thus may not be adequately neutral.”<sup>1</sup> The Drug Court Judicial Benchbook, 41, available at <https://www.ndci.org/wp-content/uploads/2016/05/Judicial-Benchbook-2017-Update.pdf>. It takes the position that the safest course of action is “to offer the offender the option to be sentenced by the drug court judge or by another neutral magistrate, and to entertain petitions for recusal” if made by either side. *Id.*

In this case, the circuit court’s comments at the sentencing after revocation hearing, along with its dual role, give the appearance of bias revealing a great risk of actual bias, violating Mr. Marcotte’s right to be sentenced by an impartial court.

The court’s comments reveal that it, as the Drug Court Judge in Marinette County, had knowledge and access to information about Mr. Marcotte that a different judge would not have had. (86:14-15, 21; App. 122-123, 129)(“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.”). While the state notes that judges may obtain

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<sup>1</sup> See also *Alexander v. State*, 48 P.3d 110 (Okla. 2002), in which the Oklahoma Supreme Court, recognizing the potential for judicial bias claims against drug court judges due to information obtained in that role, recommended that an alternate judge handle termination proceedings.

transcripts from treatment court hearings and information from DOC revocation packets, it ignores the fact that Drug Court also consists of closed, off-the-record staffings and that the judge learns a lot about the individual from his demeanor and its personal interactions with him.<sup>2</sup> Due to its very nature, this information is not easily passed on or shared with another judge, and the court in this case relied heavily on that information and its personal knowledge of Mr. Marcotte's participation in Drug Court while imposing its sentence. (*See* 86: 14, 19 21-22; App. 122, 127, 129-130)(“Have you frustrated me over the time you’ve been in drug court? Absolutely;” “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.”).

The court's statements at the sentencing after revocation hearing also demonstrate that it was personally invested in Drug Court and Mr. Marcotte's success in that program. While the court's investment in Mr. Marcotte was appropriate, its comments

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<sup>2</sup> The Drug Court Judicial Benchbook, at page 204, notes:

Because of the continuing personal engagement between participants and the drug court judge, the judge runs the risk of being influenced by factors other than the merits of each participant's case. Participants with friendly dispositions or particularly compelling experiences may attract the judge's compassion and leniency, while those with less friendly personalities may provoke the opposite response.

demonstrate why this investment gives the appearance that it could not be impartial when sentencing him. The court repeatedly included itself in comments about the opportunities offered in Drug Court, expressed its frustration in Mr. Marcotte's failure to take advantage of those opportunities, and even went so far as to say that it had Mr. Marcotte's best interests at heart more than he did. (*See* 86:15-19, 22; App. 123-127, 130). A reasonable observer, hearing such statements, and understanding the court's dual role, would question its ability to "hold the balance nice, clear and true." *See Gudgeon*, 2006 WI App 143, ¶24.

These comments, along with the sentence imposed in this case – two years greater than that requested by the DOC and state – give the appearance of bias revealing a great risk of actual bias. Unlike the court's comments in *Herrmann*, the circuit court's comments in this case were not used to "illustrate the seriousness of the crime" or deter drug use; rather, they were expressions of the court's personal knowledge of, frustration with, and disappointment in, Mr. Marcotte's time in Drug Court. *Herrmann*, 2015 WI 84, ¶60. A reasonable person would conclude, based on these statements, that the circuit court was sentencing Mr. Marcotte more harshly than requested by the parties, at least in part, due to these personal feelings and knowledge.

Accordingly, Mr. Marcotte was denied his right to be sentenced by an impartial court and his request for resentencing must be granted.

### **CONCLUSION**

For the reasons stated above, and in the initial brief, 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 9<sup>th</sup> day of September, 2019.

Respectfully submitted,

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## **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 2,996 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.

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 9<sup>th</sup> day of September, 2019.

Signed:

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