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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2020AP001081CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALEXANDREA C.E. THRONDSON

Defendant-Appellant.

On Appeal from a Judgment of Conviction entered
in the Sauk County Circuit Court,
The Honorable Michael Screnock, Presiding.

BRIEF OF DEFENDANT-APPELLANT

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I. Did the circuit court err in sentencing Ms. Throndson because the court deprived Ms. Throndson of her Due Process right to be sentenced by an impartial court by conducting an independent investigation of her prior to sentencing?

The circuit court held it did not violate Ms. Throndson's right to due process even though it conducted an independent investigation.

II. Did the circuit court err in sentencing Ms. Throndson because the court deprived Ms. Throndson of her Due Process right to be sentenced based upon accurate information?

The circuit court held it did not violate Ms. Throndson's Due Process right to be sentenced based upon accurate information.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the briefs will adequately address all relevant issues. Publication may be warranted because this decision may help to clarify an existing rule of law concerning circuit courts, independent investigations, and objective bias. Wis. Stat. § 809.23(1)(a).

STATEMENT OF THE CASE AND FACTS

A. Procedural Background Leading to Appeal

1. Description of the Nature of the Case

This is an appeal of a sentencing following a guilty plea pursuant to Wis. Stat. (Rule) § 809.30(2). Ms. Throndson appeals her sentencing and seeks resentencing by a different judge.

2. Procedural Status of the Case Leading up to Appeal and Decision of the Circuit Court

Ms. Throndson pled guilty to offenses charged by the State. The Circuit Court declined to follow the recommendations of the District Attorney and defense counsel as to sentencing. The Court acknowledged it had conducted an independent investigation into Ms. Throndson's sealed juvenile record. Defense counsel objected to this investigation at the sentencing hearing but was overruled. Ms. Throndson appeals the sentencing and seeks resentencing before a different judge.

B. STATEMENT OF FACTS

Detective George Bonham of the Baraboo Police Department was working with a confidential informant to make controlled purchases of a controlled substance from a residence at 301 7th Street in Baraboo in the spring and summer of 2018. (56:4; A133). The informant claimed Alexandrea Throndson and others, including her boyfriend, Jason James, were selling crack cocaine out of the house, although they did not live in that house. (56:5; A134).

The informant made a controlled buy from Ms. Throndson on June 29, 2018. (56:6; A135). Two other controlled purchases were made from people other than Ms. Throndson in the weeks before and after the purchase from Ms. Throndson. (56:11; A136).

On July 10, 2018, Detective Bonham and other officers executed a search warrant of that house. (56:11; A136). They found heroin, marijuana, and

drug paraphernalia including baggies and scales in the house. (56:11, 12; A136, 137). Ms. Throndson was the named renter of the house at that time. (56:12; A137).

On September 13, 2018, in case No. 2018-CF-426, Ms. Throndson was charged with one count of the Class G felony of Delivery of Cocaine, and one count of the Class I felony of Maintaining a Drug Trafficking Place. (56:21; 1:1; A138, 103).

On June 26, 2019, the State filed an Amended Information adding two counts: Felony Intimidation of a Witness, a Class G felony; and Felony Bail Jumping, a Class H felony. (18:1; A107).

On July 16, 2019, Ms. Throndson pled no contest to Counts 2 and 4: Maintaining a Drug Trafficking Place and Felony Bail Jumping. (59:4, 5, 15, 16; A141, 142, 144, 145). The Court dismissed Counts 1 and 3. (59:16; A145). Case No. 2019-CF-52, the case out of which Counts 3 and 4 arose, was consolidated with and disposed of with 2018-CF-426. (59:2, 12, 16; A139, 143, 146).

After the Court accepted the plea, the Court informed the parties of the following:

> Before I hear from the attorneys, it's important the parties are aware that this morning – I didn't spend a whole lot of time on it, but this morning I did run a search of Ms. Throndson's name in the court record statewide and was able to view the charges and the dispositions of the following matters: 08-JO-24 – oh, some of these are from other counties, and the screen I'm looking at now doesn't indicate exactly which ones are from out of county, but 08-JO-24, 08-JO-492, 08-JO-532, 08-JV-20, 08-JV-20A, 08-JV-20B, 11-CM-162, 11-JO-283, 11-JO-284, 12-FO-1651, 12-TR-2125, 12-TR-9216, 14-CM-122, 14-CM-674, 15-TR-246, 15-TR-1687, 16-CF-154, 16-TR-1625, 16-TR-28463, 17-CF-92, 17-TR-1413, and the two most recent, 19-FO-769 and 19-TR-5045.
>
> I, also, based on the allegations in the complaint in this case, reviewed Jason James's case to try to remind myself what his – what sentences he received. As

> best I could tell, he may still be in prison. I know he had a Dane County case where prison was – he was sentenced to prison and he had his extended supervision revoked it looked like probably from these events, although that's not abundantly certain, ended up on probation in a more recent – well, he's on probation in Sauk County I think based on the same search warrant or search warrants involved in this case. I've reviewed all of that.
>
> Ms. Throndson certainly could ask me to have a PSI prepared before we proceed to sentencing. I can tell both parties it will be a hard sell today to get me to probation without any jail. So two things, first, if the parties wish, I think more importantly for Mr. Meyer-O'Day, if you wish to take time to scroll through those court records to see what it is, and, again, I basically looked at the charges and the outcomes; and then the second question would be, does anybody want me to order a PSI before we proceed to sentencing?

(59:16, 17; A145, 146).

Defense attorney objected:

> For the record to any consideration of – of anything that's not been presented to you by the parties. I understand you've gone through and looked at all of this and aren't going to be able to take it out of your brain, but I do think I need to object for the record.

(59:18; A147).

At the outset of this plea hearing, defense counsel had stated that the DA and defense counsel had agreed to a joint recommendation for 36 months of probation, with the conditions of paying $618 in costs, receiving an AODA assessment, doing recommended follow-up, and having no possession or consumption of controlled substances without a prescription, having no contact with the confidential informant, having a DNA sample taken, and having counseling. (59:2, 3; A139, 140).

The Court ordered a PSI before sentencing, although both the DA and defense counsel stated one was not necessary. (59:19, 20; A148, 149).

A sentencing hearing was held on September 24, 2019. (60:1; A150). At that hearing, the Court did not follow the recommendation, but sentenced Ms. Throndson to a period of 9 months in the Sauk County Jail on Count 2. (60:36; A155). On Count 4, the Court sentenced Ms. Throndson to a period of four years of probation. (60:33; A154).

Ms. Throndson's attorney did not want Ms. Throndson to serve time in jail because she takes care of her son and would have to leave him if she were sent to jail. Defense counsel stated:

> …It's true to say that Ms. Throndson has been continuously employed and that she has continuously taken responsibility for her children – or her child.

(60:26; A151).

At the same sentencing hearing on September 24, 2019, the circuit court stated the following:

> And so I'm presented with a defendant that hasn't yet demonstrated a willingness and ability to follow the rules of society or our laws, a defendant who isn't always truthful, and a defendant who deflects blame everywhere when things don't go right rather than reflecting internally that, hey, I've made some bad – I've made some bad choices. Hey, I started dating a guy right after he got out of prison and I got impregnated and then before my child was born he was back in prison again and now my son is fatherless, essentially, and those are due to choices she made. It's not her dad's fault that – that her dad doesn't necessarily like that guy, and there may be many reasons why he doesn't like him besides the color of his skin, but that's what Ms. Throndson focuses on, well, my dad doesn't like black people.
>
> For Ms. Throndson to be the mother that her son needs her to be and for Ms. Throndson to be successful whether she's running her mother's business or something else or doing anything else in life, she needs to get off on a different track. She needs to find a different set of friends. She needs to not be living in homes where drugs are being sold and then say, well, I

> love the guy, and I'm just a sucker for trying to help people out.

(60: 31, 32; A152, 153).

Defendant filed a Motion for Release or a Stay Pending Appeal on September 24, 2019. (27:1; A108). That Motion was heard on September 30, 2019, (61:1; A156).

At the hearing on the Motion for Release or a Stay Pending Appeal on September 30, 2019, the Court again stated that he had looked up past records of Ms. Throndson:

> …I said on July 16th, [I] did plug Ms. Throndson's name into the court records that are available to judges and identified a number of cases, and the Court listed them all off, I'm not going to again, but listed off 23 different cases. Now, a number of those are citations, they're not all criminal cases, but those cases that Ms. Throndson's name appeared in, identified them by case number, and, again, more than two months prior to the sentencing hearing advised the parties that the Court had looked at the charges and the outcomes of each one of those cases, and so the parties had over two months to explore those.
>
> …As part of Ms. Throndson's motion here today, one of the concerns is that to the extent that those involve juvenile records, that those records may not have been available to her attorney. I'm not aware that any request was made to explore those case files and to which Mr. Meyer-O'Day may have been thwarted in his attempt, and if that were the case, that would be a new factor that has not been presented to the Court up till now.
>
> And I want the record to be clear on that because I want to be clear, and Mr. Meyer-O'Day appropriately raised a concern on July 16th – I mean, "appropriately" from his perspective – and he objected to the Court looking at anything that the parties did not bring to the table with respect to Ms. Throndson's background and character. I heard that objection on July 16th, and I said I

wasn't – I don't have the words I said – but it didn't cause me to believe that the Court had done anything improper, and I remain steadfast in that belief.

And if the Court of Appeals or our Wisconsin Supreme Court want to and think it's appropriate to tell circuit judges that they may not even review court records to understand the background of defendants that are coming before them for sentencing, I welcome that direction from the appellate courts. But I would frame it this way, and I've done the research that I've been able to do in the last few days since Ms. Throndson filed her motion here, and I remain convinced that Ms. Throndson has no right, constitutional right or statutory right, to be sentenced based on a whitewashed record only upon information that the parties choose to provide to the Court, and that is how I would frame that issue. Court – circuit judges around the state have access to the court files from other counties, and it's not difficult to get to.

I do believe, and I – I believe strongly, that defendants, including Ms. Throndson, have the right to know what the Court is considering and that the reason I outlined all of the cases that I had found at the plea hearing was to make sure that the parties – both parties knew what the Court had seen and what it may be relying on for purposes of sentencing, because I do believe – and I believe one of the cases Mr. Meyer-O'Day cited in his – in his motion here for today said the Court cannot sandbag a defendant with information that the Court found that the parties were unaware of and then proceed to sentencing without giving the defendant the opportunity to explore that and perhaps refute or provide more accurate information about that.

But, again, I do not believe that any defendant has the right to have the Court be unaware of what are abundantly, easily obtainable, obvious information about their criminal background because to do so would create a system within our criminal justice system where a court could impose a sentence on a defendant and the next morning open up the newspaper and learn for the first time of the defendant's criminal history and find out that the newspaper knows far more than the judge knew at sentencing about the defendant's criminal history, and

> I just reject the notion that any defendant has the right to have a court operate under such a whitewashed record.
>
> So I – I may be wrong. It would be surprising to me to find out I'm wrong, and I would – I would hope that if I am wrong that the Court of Appeals or the Supreme Court will tell all of us, not just me, but all circuit judges in the state that that is the state of the law.

(61:11-14; A157-160).

Defense counsel renewed his objection to the Court's considering juvenile records. (61:18; A161). The Court set another hearing for further evidence and resentencing. (61:22; A162).

At the Evidentiary Hearing and Sentencing on October 11, 2019, defense counsel pointed out that the Sauk County Juvenile cases that the Court had mentioned at the earlier hearing were a petition of a juvenile in need of protection (62:23; A163); a disorderly conduct petition (62:24; A164); and a petition that was dismissed (62:24; A164).

The District Attorney again recommended that the Court withhold sentence and place Ms. Throndson on probation for three years. (62:35; A165). Defense counsel supported the joint recommendation. (62:39; A166).

At that hearing on October 11, 2019, the Court stated:

> It comes out in the PSI Ms. Throndson tries to play the race card and claims that she's being unfairly treated by family members and others because she chooses to date black men.

(62:44, 45; A167, 168).

The Court disregarded their recommendations and sentenced Ms. Throndson to a period of four years of probation on Count 4 (62:47; A170), and to nine months in the Sauk County Jail with Huber commencing after three months (62:48; 33:1; A171, 101).

STANDARD OF REVIEW

This Court reviews constitutional issues *de novo*. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Since both counts present the question of law of whether Ms. Throndson was deprived of Due Process, the standard of review is *de novo*.

ARGUMENT

I. The circuit court erred in sentencing Ms. Throndson because the court deprived Ms. Throndson of her Due Process right to be sentenced by an impartial court by conducting an independent investigation of her prior to sentencing.

Wisconsin courts hold that, "The right to an impartial judge is fundamental to our notion of due process." *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis.2d 166, 771 N.W.2d 385. A reviewing court will always presume that a judge acted fairly and without bias. *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. But that presumption is rebuttable. *Id*. "In determining whether a defendant's due process right to trial by an impartial and unbiased judge has been violated, Wisconsin courts have taken both subjective and objective approaches; "[t]he court applie[s] a subjective test based on the judge's own determination of his or her impartiality and an objective test based on whether impartiality can reasonably be questioned." *State v. Herrmann*, 2015 WI 84, ¶26, 364 Wis.2d 336, 867 N.W.2d 772, quoting *State v. Rochelt,* 165 Wis.2d 373, 378, 477 N.W.2d 659 (Ct.App.1991).

Ms. Throndson does not argue that the circuit court was subjectively biased. Ms. Throndson argues

that the test for objective bias shows that impartiality can reasonably be questioned.

> Objective bias can exist in two situations. The first is where there is the appearance of bias, *Gudgeon,* 295 Wis.2d 189, ¶¶ 23-24, 720 N.W.2d 114. "[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 (citation omitted). Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements. *Id.,* ¶ 26; *Rochelt,* 165 Wis.2d at 378, 477 N.W.2d 659. The second form of objective bias occurs where "there are objective facts demonstrating ... the trial judge in fact treated [the defendant] unfairly." *State v. McBride,* 187 Wis.2d 409, 416, 523 N.W.2d 106 (Ct.App.1994) (citation and internal quotation omitted).

State v. Goodson, 2009 WI App 107, ¶ 9, 320 Wis.2d 166, 771 N.W.2d 385.

Courts, "inquire into whether a reasonable person could conclude that the trial judge failed to give the defendant a fair trial." *Herrmann*, 2015 WI 84, ¶28.

In this case, the circuit court's actions in conducting an independent investigation into Ms. Throndson give the appearance of bias and cause a reasonable person to conclude that the trial judge failed to give the defendant a fair trial.

The circuit court independently investigated Ms. Throndson's closed juvenile records, and refused to follow the recommendations of the district attorney and defense counsel. The court listed twenty-three case numbers from Ms. Throndson's closed juvenile record, and then stated that, "[I]t may be relying on [them] for purposes of sentencing…". (61:13; A159). As defense counsel subsequently pointed out, the Sauk County Juvenile cases that the Court had mentioned at the

earlier hearing were a petition of a juvenile in need of protection (62:23; A163); a disorderly conduct petition (62:24; A164); and a petition that was dismissed (62:24; A164).

The circuit court gave the appearance of bias. A reasonable person would believe the court had determined its sentence on the basis of information the court had discovered through outside investigation in violation of SCR 60.04(1)(g).

SCR 60.04(1)(g) provides that, with exceptions: "A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding," The Commentary to this Rule states specifically that, "A judge must not independently investigate facts in a case and must consider only the evidence presented." SCR 60.04(1)(g).

In this case, the circuit court readily admitted to conducting its own investigation. This gives the appearance that Ms. Throndson was deprived of Due Process at sentencing.

The court justified its research into Ms. Throndson by stating that, "Ms. Throndson has no right, constitutional right or statutory right, to be sentenced based on a whitewashed record only upon information that the parties choose to provide to the Court." (61:12; A158). The court stated that if it did not do research it would, "create a system within our criminal justice system where a court could impose a sentence on a defendant and the next morning open up the newspaper and learn for the first time of the defendant's criminal history and find out that the newspaper knows far more than the judge knew at sentencing about the defendant's criminal history" (61:13; A159).

If a court tries to learn everything on a defendant that it can, in order to not be startled by a newspaper's reports, the prohibition against outside

investigation in SCR 60.04(1)(g) would be meaningless. Defense counsels' jobs will be magnified by a large degree in having to refute everything that a court may learn about a client from an internet search. Information that would be deemed inadmissible at trial will now be a part of plea hearings.

The court functioned as a prosecutor in violation of the Wisconsin courts' holdings that:

> The court must not permit itself to become a witness or an advocate for one party. A defendant does not receive a full and fair evidentiary hearing when the role of the prosecutor is played by the judge and the assistant district attorney is reduced to a bystander.

State v. Jiles, 2003 WI 66, ¶39, 262 Wis.2d 457, 663 N.W.2d 798.

The circuit court showed its bias by stating that the Presentence Investigation report showed that Ms. Throndson was "play[ing] the race card," and "claim[ing] that she's being unfairly treated by family members. (62:44, 45; A167, 168).

The agent who wrote up the Presentence Investigation report had discussed Ms. Throndson's mother and father with her. (23:13 (omitted from Appendix)). Ms. Throndson had stated that her father abused her when she was a child. (23:13). The agent wrote, "After the defendant gave birth to her son, who is biracial, her father would make racist comments about her son. The defendant recalls her father asking her 'Why did you just have a white kid?' He would voice his disapproval of her dating black men." (23:13). But the agent wrote that Ms. Throndson, "feels close [to] and supported by her mother." (23:22).

At no point in any of the hearings did defense counsel or Ms. Throndson ask for leniency because Ms. Throndson had a biracial child. Ms. Throndson wanted to spend time with her child. She did not ask for sympathy because her father had mistreated her.

The PSI agent in routine fashion had asked her about her parents and she had answered him, but she had sought no leniency because her father never approved of her dating black men.

Furthermore, the circuit court seemed to have made up its mind that the statement that her father did not approve of her biracial child was not true. There is no evidence that her abusive father did not disapprove of her having a child by a black man. And, it is irrelevant to the plea hearing whether or not her father approved or did not approve of her child. Defense counsel and the district attorney never relied on it in their sentencing recommendations.

It is not "playing the race card" for Ms. Throndson to answer an investigating agent's question truthfully. There is nothing in the PSI or hearings to suggest that she sought sympathy or leniency because her father never accepted her son.

In this case, the district attorney was reduced to a bystander. Ms. Throndson was deprived of Due Process and is entitled to be resentenced by a different judge.

II. The circuit court erred in sentencing Ms. Throndson because the court deprived Ms. Throndson of her Due Process right to be sentenced based upon accurate information.

"A defendant has a constitutionally protected due process right to be sentenced upon accurate information." *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis.2d 179, 717 N.W.2d 179, 717 N.W.2d 1, citing *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972)). U.S. Const. Amends. 5, 14; Wis. Const. art. 1, § 8.

> In order to be entitled to resentencing, a defendant must show by clear and convincing evidence that the

> information at the original sentencing was inaccurate, and that the court actually relied on the inaccurate information at sentencing. *Id.,* ¶ 21 [*State v. Travis,* 2013 WI 38, ¶ 17, 347 Wis.2d 142, 832 N.W.2d 491]. The former is a threshold question. *Id.,* ¶ 22. Once that showing is made, the defendant "must establish by clear and convincing evidence that the circuit court actually relied on the inaccurate information." *Id.* "Once the defendant shows actual reliance on inaccurate information, the burden then shifts to the State to prove the error was harmless." *Id.,* ¶ 23. Review of this constitutional issue is de novo. *Id.,* ¶ 20.

State v. Enriquez, 2016 WI App 67, ¶23, 371 Wis.2d 565, 884 N.W.2d 535.

Here, the circuit court had inaccurate information. The court stated specifically that, "the reason I outlined all of the cases that I had found at the plea hearing was to make sure that the parties – both parties knew what the Court had seen and what it may be relying on for purposes of sentencing." (61:12, 13; A158, 159).

The court had made up its mind before defense counsel could investigate the cases and show that they were a petition of a juvenile in need of protection (62:23; A163); a disorderly conduct petition (62:24; A164); and a petition that was dismissed (62:24; A164).

In this case, the circuit court relied on the twenty-three cases he discovered during his independent investigation to discard the district attorney and defense counsel's recommendation and sentence Ms. Throndson to time in jail, away from her son.

"Where a court gives 'explicit attention to the misinformation,' the court 'demonstrates [its] reliance on that misinformation in passing sentence.' *Id.,* ¶¶ 44, 46." *State v. Enriquez*, 2016 WI App 67, ¶28, quoting *State v. Travis,* 2013 WI 38, ¶44, 46. It is irrelevant whether the sentence might have been justified by

information independent of the inaccurate information. *State v. Enriquez, 2016 WI App 67* at ¶31.

The circuit court's repeated references to these twenty-three cases show that the court relied on the inaccurate information. Therefore, Ms. Throndson is entitled to be sentenced before a different judge.

CONCLUSION

For the reasons stated above, Ms. Throndson respectfully requests that the court vacate the sentence and remand the matter to the circuit court for resentencing before a different judge.

Dated this 2nd day of September, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

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 4,136 words.

Dated this 2nd day of September, 2020.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12) Stats. 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 2nd day of September, 2020.

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CERTIFICATION AS TO APPENDIX

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.

Dated this 2nd day of September, 2020.

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