STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2021AP000431-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GRAHAM L. STOWE,

Defendant-Appellant.

On Appeal from an Order Denying Conditional Release and Order Denying Postdisposition Relief, Entered in the Brown County Circuit Court, the Honorable Kendall M. Kelley Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The circuit court's comments would cause an objective, reasonable observer to believe that the court prejudged Mr. Stowe's petition for conditional release.

This Court is not asked to decide whether the circuit court was subjectively biased, but rather, whether the court's remarks objectively gave the appearance of prejudgment. The appearance of prejudgment is "based on what a reasonable person would conclude[,] . . . not what a reasonable trial judge, a reasonable appellate judge, or even a reasonable legal practitioner would conclude." *State v. Gudgeon*, 2006 WI App 143, ¶26, 205 Wis. 2d 189, 720 N.W.2d 114. Here, a reasonable person observing the hearing would interpret the court's remarks to suggest prejudgment, and therefore, Mr. Stowe is entitled to a rehearing before a different judge. Although the State's brief often reads otherwise, the appeal is also not about whether the circuit court ultimately failed to apply the statutory factors in its exercise of discretion, *see* Wis. Stat. § 971.17(4)(d), or whether Mr. Stowe should ultimately be released.

From an objective standpoint, the court's comments in this case create an appearance of prejudgment. Before hearing any evidence or argument, the court made extensive statements about the merits of Mr. Stowe's petition for conditional release, repeatedly indicating that Mr. Stowe had not

made enough progress, and encouraging him to withdraw his petition to refile it at a later time. R.543:5-17; A-App.7-19.[1] The court also told Mr. Stowe that if he proceeded pro se, the court would likely find his presentation incredible and inaccurate. R.543:5; A-App.7.[2]

The State argues that Mr. Stowe misinterprets the court's comments, asserting that the court's remarks suggested postponing the hearing in order to obtain counsel, not withdrawing the petition. It was both. The court suggested postponing the hearing but also discouraged Mr. Stowe from continuing with the petition altogether, instead encouraging him to withdraw the petition and refile it in the future. R.543:9-10; A-App.11-12 ("time would definitely be on your side there") ("if you had more time . . . I could see

[1] Appendix citations marked "A-App" are to the appendix to the Appellant's Brief, and appendix citations marked "Reply-App" are to the appendix to this Reply Brief.

[2] The court specifically called into question Mr. Stowe's sincerity about his return to his Catholic faith. The court offered a "candid" thought that incarcerated people will sometimes claim to have had a spiritual awakening but "it's pretty short-lived for them." R:543:10-11; A-App.12-13. As such, the court said that Mr. Stowe would need to bring in, "a priest or some other person" to testify about "any observations" about his religious practice. R.543:12-13; A-App.14-15. The State argues the court was simply considering how to evaluate Mr. Stowe's beliefs in light of the conditional release criteria. Response Brief at 7. *See* Wis. Stat. § 971.17(4)(d). But the court went further than that. If the court was only wondering about the application of the statutory factors to Mr. Stowe's religious beliefs, that would be an inquiry for an examiner, not a priest.

that that would likely accrue to your benefit"); R.543:15; A-App.17 ("you always have an opportunity to come back for review").

The State does not appreciate the importance of the fact that this was a court trial and the challenged remarks were made before any evidence was received. For instance, the State asserts that "courts routinely inform the parties of their initial thoughts at a hearing and ask them to address specific topics before issuing oral decisions." Response Brief at 17. Putting aside the fact that these were not merely initial thoughts, this was not an oral argument. It was a court trial where the State carried the burden of proof. Mr. Stowe does not argue that the court erred by reviewing the expert report prior to the hearing. Response Brief at 17. Yet, there is a difference between reviewing a report and considering the report as evidence before receiving the report as evidence. *See Langlade County v. D.J.W.*, 2020 WI 4, ¶6 n.4. 391 Wis. 2d 231, 942 N.W.2d 277 (report is not evidence unless and until it is introduced and received).

The evidentiary nature of the proceeding makes this case like *State v. Stingle*, No. 2019AP491, unpublished slip op. (July 28, 2020). Reply-App. 3-11. *Stingle* also involved a court trial and the court's challenged remarks were made before the defense case. The State charged the defendant with discharging waste material into a wetland without a permit. While the State was questioning one of its witnesses, the judge interjected, asking defense counsel why the defendant had not removed the

material and characterizing him as stubborn for not having done so. The defense argued that the court's remarks reflected that it had already determined that the contested area was a wetland. The State responded that the parties had not given opening arguments, and in this context, the comments simply demonstrated the court's effort to clarify the issues. *Id.*, ¶40. Reply-App.8. This Court found an appearance of bias, concluding,

> even if we could construe Judge McGinnis's comments as showing that he believed Stingle may have had a basis to assert that the areas in question did not constitute wetlands, Judge McGinnis's comments clearly reflect that he thought Stingle was being unreasonable by forcing the parties to go through a trial in order to enforce his rights.

Id., ¶41. Reply-App.8.

Similarly, in Mr. Stowe's case, the court's comments suggested that it was unreasonable to proceed on the petition based on the court's view that the petition was premature. The State asserts that Mr. Stowe's case is different because the court used the terms "possible" and "possibility." Response Brief at 18. However, the weight of the judge's other comments is not overcome by the use of this term. Moreover, the court in *Stingle* did not explicitly state with certainty that it was going to find the defendant guilty—yet the inference was clear.

The State relies on *Dane County DHS v. C.B.*, No.2018AP38, unpublished slip op. (WI App. April 9, 2018) (*In re Z.B.*) Reply-App.12-17. Response Brief at 15. In *C.B.*, this Court reviewed a circuit court's remarks made at a dispositional hearing in a termination of parental rights case. *Id.*, ¶13. Reply-App.13.[3] After hearing the evidence and parties' arguments, the court began its remarks. During its remarks, the court indicated that it had been "weighing" the statutory factors for some time. This Court held that the statements did not suggest prejudgment. *Id.*, ¶28. Reply-App.15.

Mr. Stowe's case is distinguishable from *C.B.* for several reasons. First, the term used in *C.B.*, "weighing," is neutral. It means to contemplate, think about, or consider. In Mr. Stowe's case, the court did not express a weighing of the factors but rather, an apparent view as to their actual weight. The timing of the statements was also different. In *C.B.*, the challenged remarks were made after the evidence and

[3] A termination of parental rights case proceeds in two phases. *Steven V. v. Kelley H.*, 2004 WI 47, ¶ 24, 271 Wis. 2d 1, 678 N.W.2d 856. The first phase is the grounds phase, where the petitioner must prove by clear and convincing evidence that the parent is unfit. *Id.* The second phase is the disposition phase, where the judge considers whether, in light of the finding of unfitness, the parent's rights should be terminated. *Id.* ¶27. At the disposition hearing, the court must apply various statutory factors. *Id.*

parties' arguments.[4] Here, the remarks were made beforehand. Finally, the *C.B.* court found that "the decision of the circuit court at the conclusion of the dispositional hearing shows that the case was not prejudged in any way." *Id.* Reply-App.15. Here, the concluding remarks instead reinforced the appearance of prejudgment. The court stated that it had"[m]ade a number of remarks at the outset and the court stands by those, that's why I made them." R.544:28; A-App.92. The court said, "I still believe, based on his testimony, based on all of the records that have been here that there remains clear and convincing evidence" to deny the petition. R.544:38; A-App.102 (emphasis added). These statements convey that the court went into the hearing with a view to deny the petition and at the end was satisfied that nothing had disturbed that view.

The State also relies on *State v. Marcotte*, 2020 WI App 28, 392 Wis. 2d 183, 943 N.W.2d 911. *Marcotte* actually shares an important similarity with Mr. Stowe's case. In both cases, the court's remarks gave the appearance of personal investment. In *Marcotte*, the judge placed a defendant on probation and ordered him to participate in Drug Court as a condition of probation. The same judge then presided over Drug Court. Ultimately, the defendant was terminated from Drug Court and came before the same judge for sentencing. During the sentencing hearing,

[4] The court had also heard extensive evidence at the jury trial, which had occurred the previous month. *Id.*, ¶4. Reply-App.12.

the judge discussed Drug Court at length. This Court found an appearance of prejudgment and observed that,

> a judge who presides over drug court may become personally invested in a defendant's success in the program. Here, Judge Morrison's comments during the sentencing after revocation hearing demonstrate a high level of personal investment in Marcotte's case.
>
> …
>
> Judge Morrison also commented that he, and the other members of the drug court team, had Marcotte's "best interest at heart" more than Marcotte did.

Id., ¶29.[5]

Here, the court's comments similarly suggested investment in the case. The court framed its encouragement for Mr. Stowe to refile later as being to Mr. Stowe's "benefit." R.543:9-10; A-App.11-12. The court's statement that "we've been at this for awhile," also points to a stake in the case. R.543:9-10; App.11-

[5] The State relies heavily on the suggestion in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) that successful bias claims will be "rare," "exceptional," and based on "extreme" facts. Response Brief at 14-15, 16. However, this Court did not require extreme facts in *Marcotte*, or even use those terms. It is helpful to consider that there are many kinds of bias claims. *Caperton* did not involve a challenge based on a court's on-the-record comments that gave the appearance of prejudgment. It involved a party's campaign contribution to a presiding judge. *Id.* at 883.

12 (emphasis added). To the extent that the court was trying to assist Mr. Stowe, guide him, and consider his best interests (*see* Response Brief at 17), this does not lessen the appearance of prejudgment. Ultimately, the court itself acknowledged that given the "historical[ ]" context of the case, it might seem "personal or something like that. It's really not intended to be." R.543:16; App.18. To be clear, Mr. Stowe does not argue that the fact that the court has presided over all of the hearings in this sixteen-year old case is "in itself" evidence of bias. Response Brief at 21. However, it is relevant context.

In conclusion, a reasonable person observing the hearing would interpret the court's remarks to suggest prejudgment, and therefore, Mr. Stowe should be afforded a rehearing before a different judge.

CONCLUSION

Based on the arguments presented herein and in Mr. Stowe's Appellant's Brief, Mr. Stowe respectfully asks this Court to reverse and remand for a new conditional release hearing before a different judge.

Dated this 8th day of November, 2021.

Respectfully submitted,

Electronically signed by Colleen Marion

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 1,875 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 8th day of November, 2021.

Signed:
Electronically signed by
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