STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2021AP751-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUSTIN M. CHURCH,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICITION MOTION IN THE FOREST COUNTY CIRCUIT COURT, THE HONRABLE LEON D. STENZ PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Justin Church pleaded guilty to possession of methamphetamine. He now seeks resentencing before a new judge, claiming that the circuit court was objectively bias. Despite not objecting to the circuit court's comment at the time it was made, Church alleges that a reasonable person could conclude that the circuit court prejudged Church's sentence by commenting that possession "sounds like prison" during a pretrial hearing. Church is wrong.

Because Church did not object to the circuit court's comment at the time it was made, he forfeited his judicial bias claim. Even if this Court reaches the merits of Church's claim, the circuit court's comment was neither an express statement of its desired outcome nor an unequivocal promise of what would happen at sentencing. In context, a reasonable person would not conclude that the circuit court's comment, which it made in jest, was a serious prejudgment of the sentence. At most, the circuit court was expressing what *could* happen at sentencing.

Church has failed to carry his burden that the circuit court's comment revealed a great risk of actual bias. Therefore, this Court should affirm the decision of the circuit court.

ISSUES PRESENTED

1. Church did not object when the circuit court made its allegedly biased comment. Did Church forfeit his judicial bias claim?

Answered by the circuit court: The circuit court addressed forfeiture, but it decided Church's postconviction motion on the merits.

This Court should answer: Yes.

2. At a final pretrial hearing, the circuit court made an isolated comment that the offense "Sound[s] like prison, agree, [State]?" If this Court considers the merits, did that comment demonstrate that the court was objectively biased by prejudging the sentence?

Answered by the circuit court: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

Church was a passenger in a vehicle stopped for speeding. (R. 5:2.) Church initially gave the officers a false name and the officers searched Church and uncovered a syringe that contained methamphetamine. (R. 5:2.) The State charged Church with one count of obstructing an officer and one count of possession of methamphetamine, both as repeat offenses. (R. 7:1.)

Before trial, the State presented a plea offer that would dismiss the charge for obstruction if Church pleaded guilty to possession. In the offer, the State recommended a six-year, bifurcated sentence of four years' initial confinement and two years' extended supervision. (R. 24:2.) As part of the offer, the State would read in the obstruction charge at sentencing. (R. 24:2.)

Toward the end of a pretrial hearing, and while the parties were discussing scheduling the plea hearing, Church's trial counsel reminded the circuit court that "this case is

regarding a syringe that tested positive for methamphetamine." (R. 53:5.) After the circuit court asked counsel "What?", counsel again stated, "[t]he offense possession of meth was a syringe that tested positive for methamphetamine." (R. 53:5.) The special prosecutor responded, "Sounds like possession to me." (R. 53:5.) The circuit court followed the special prosecutor's statement with, "Sound[s] like prison, agree, Ms. Bednar?" (R. 53:5.) The circuit court's comment was followed by "[g]eneral laughter." (R. 53:5.)

At the plea and sentencing hearing, the circuit court accepted Church's guilty plea and convicted him. (R. 51:6, 13.) During sentencing, the State maintained its recommended bifurcated sentence. (R. 51:13.) Church's trial counsel argued for probation rather than prison, and Church exercised his right to allocution. (R. 51:15–20.) The circuit court considered the parties' arguments along with Church's criminal history and the seriousness of the offense. (R. 51:21–27.) The circuit court ultimately agreed with the State and adopted its recommended six-year, bifurcated sentence. (R. 51:24–25.)

Church filed a postconviction motion seeking resentencing before a new judge. (R. 36.) Church argued that the circuit court's comment that possession "sounds like prison" showed an appearance of bias. (R. 36:4.) The court disagreed. (R. 57:18–19.) It denied Church's motion, finding that nothing in the record demonstrated that the court prejudged the sentence. (R. 57:19–21.) The circuit court noted that based on context the remark may have been sarcastic or in jest, but it was not intended to be an unequivocal statement that the court would impose a prison sentence. (R. 57:19–20.) Church now appeals his judgment of conviction and the circuit court's order denying postconviction relief. (R. 46.)

STANDARD OF REVIEW

Whether a party forfeited a claim of judicial bias is a question of law that this Court reviews independently. *See State v. Mercado*, 2021 WI 2, ¶ 32, 395 Wis. 2d 296, 953 N.W.2d 337.

Whether a judge was objectively bias is a question of law that this Court reviews independently. *State v. Herrmann*, 2015 WI 84, ¶ 23, 364 Wis. 2d 336, 867 N.W.2d 772.

ARGUMENT

I. Church forfeited his judicial bias claim.

A. To preserve a claim of judicial bias, a defendant has an obligation to object when he becomes aware of the grounds for the claim.

"A challenge to a judge's right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge's decision on a contested matter." *State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992) (internal citation omitted). "We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge." *Id.* (citation omitted). A defendant forfeits a judicial bias claim when he does not contemporaneously object to the allegedly biased comment. *Id.*

The forfeiture rule "is essential to the orderly administration of justice, as it promotes efficiency and justice." *State v. Klapps*, 2021 WI App 5, ¶ 25, 395 Wis. 2d 743, 954 N.W.2d 38. The forfeiture rule allows circuit courts to correct errors when they become known, gives parties and the circuit court notice of errors, and "avoids sandbagging by

failing to object and later claiming error." *Id.* (citing *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727).

B. Church forfeited his judicial bias claim by not objecting at the pretrial hearing or during sentencing.

Church did not object to the circuit court's allegedly biased comment—he did not argue that the circuit court was biased until his postconviction motion. Although the State did not argue forfeiture below, this Court generally considers a respondent's argument to affirm a circuit court's decision on grounds not raised below. *See State v. Rodriguez*, 2007 WI App 252, ¶ 12, 306 Wis. 2d 129, 743 N.W.2d 460. Further, the circuit court brought forfeiture to Church's attention during the postconviction hearing. (R. 57:8–10.) However, the court ultimately decided the motion on the merits. Nonetheless, this Court can affirm the circuit court on grounds other than those that the circuit court relied upon. *State v. Bembenek*, 2006 WI App 198, ¶ 10, 296 Wis. 2d 422, 724 N.W.2d 685. This Court should do so here.

The record is notably void of any objection to the circuit court's comment, either at the pretrial hearing when the comment occurred or during the plea and sentencing hearing. If Church truly believed that the circuit court's comment appeared biased, he should have objected when the comment occurred, as Church points out, five months before sentencing.

Instead, Church tested the mind of the circuit court and waited until after he received his sentence to decide that an isolated comment in a pretrial hearing months prior demonstrated judicial bias. This is the type of testing of the circuit court that the forfeiture rule seeks to prevent. *See Marhal*, 172 Wis. 2d at 505. Because Church never objected to the circuit court's comment, this Court should hold that Church forfeited his judicial bias claim and thereby affirm the decision of the circuit court.

II. Even if this Court reaches the merits of Church's judicial bias claim, the record does not reveal an appearance of bias sufficient to establish a great risk of actual bias.

A. Judges are presumed to act impartially, and the burden is on the defendant to overcome that presumption.

"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. Courts presume that judges act impartially; that presumption is rebuttable. *Id.* The party asserting bias has the burden to overcome the presumption of impartiality by a preponderance of the evidence. *Herrmann*, 364 Wis. 2d 336, ¶ 24.

A party asserting bias can allege that a judge was either subjectively biased or objectively biased. *Id.* ¶ 26. "Judges must disqualify themselves based on subjective bias whenever they have any personal doubts as to whether they can avoid partiality to one side." *State v. Gudgeon*, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114. On the other hand, objective bias may be actual "where 'there are objective facts demonstrating . . . the trial judge in fact treated [the defendant] unfairly.'" *Goodson*, 320 Wis. 2d 166, ¶ 9 (quoting *State v. McBride*, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994)). Alternatively, there may be the appearance of bias "when a reasonable person could question the court's impartiality based on the court's statements." *Id.* The appearance of bias is constitutionally infirm "only where the apparent bias revealed a great risk of actual bias." *Herrmann*, 364 Wis. 2d 336, ¶ 31 (citation omitted).

Church concedes that the circuit court was neither subjectively nor actually objectively biased. (Church's Br. 8.)[1] Accordingly, this Court must analyze only whether the circuit court demonstrated an appearance of bias that revealed a great risk of actual bias. As explained below, the circuit court's comment did not reveal a great risk of actual bias, and Church has failed to carry his burden.

B. The circuit court's comment did not appear so biased as to reveal a great risk of actual bias and a reasonable person would not question the court's impartiality.

The circuit court's isolated comment would not lead a reasonable person to believe that the court prejudged the sentence. At most, by commenting that possession "sounds like prison," the circuit court was expressing its opinion that possession could lead to prison—not that it would definitely lead to prison. Said differently, a reasonable person would not conclude that the circuit court was expressing a desired outcome, *see Gudgeon*, 295 Wis. 2d 189, ¶ 3, or promising a certain outcome, *see Goodson*, 320 Wis. 2d 166, ¶ 2. Church has therefore failed to carry his burden.

Church relies primarily on *Gudgeon* to support his claim that the circuit court was objectively biased. (Church's Br. 11–12.) *Gudgeon* does set forth the applicable law, as does *Goodson*. But Church fails to explain how the circuit court's isolated comment here rises to the level of the expressly desired outcome in *Gudgeon* or the unequivocal promise of a particular sentence in *Goodson*. Perhaps, that is because the circuit court's comment here simply does not rise to the same level as those in *Gudgeon*, *Goodson*, or their progeny.

[1] Citations to Church's brief are to the electronic page numbering and not the page number listed at the bottom of his brief.

Unlike this case, this Court in *Gudgeon* assessed whether a circuit court's handwritten note that it wanted the defendant's probation extended was objectively biased. *See Gudgeon*, 295 Wis. 2d 189, ¶¶ 20–26. This Court held that it was. *Id.* ¶ 26. There, unlike here, the circuit court's handwritten note expressly stated, "No—*I want* his probation extended." *Id.* ¶ 3 (emphasis added). The note did not, for example, merely say, "Seems like an extension." Rather, this Court emphasized that the circuit court used "strong language" and that "[n]eutral and disinterested tribunals do not 'want' any particular outcome." *Id.* ¶ 26. This Court noted that "nothing in the extension hearing would dispel these concerns [of partiality]." *Id.*

Goodson is similarly distinguishable. Unlike this case, the circuit court in *Goodson* specifically told the defendant that if he "deviate[d] one inch from the[] rules, . . . you will come back here, and you *will be given the maximum*." *Goodson*, 320 Wis. 2d 166, ¶ 2 (emphasis added). The circuit court in *Goodson* made clear to Goodson that it was not joking about giving him the maximum. *Id.* The circuit court also reiterated its statement mere moments after telling Goodson that he would get the maximum. *Id.* At Goodson's initial reconfinement hearing, the circuit court again emphasized that "continued violations will only be met with more severe consequences." *Id.* ¶ 4. After Goodson's supervision was revoked, the circuit court made good on its promise and "ordered Goodson reconfined for the maximum period of time available." *Id.* ¶ 5.

This Court held that the circuit court's unequivocal promise to sentence Goodson to the maximum would lead a reasonable person to conclude that the circuit court had made up its mind prior to sentencing. *Id.* ¶ 13. However, this Court was careful to note that "[a] court may certainly tell a defendant what *could* happen" in a case. "But telling a

defendant what *will* happen imperils the defendant's due process right to an impartial judge . . . ." *Id.* ¶ 17.

More recent decisions are similarly unhelpful to Church. For example, like *Goodson*, the circuit court in *State v. Marcotte*, 2020 WI App 28, 392 Wis. 2d 183, 943 N.W.2d 911, expressly told the defendant what would happen if "he was not successful in drug court." *Marcotte*, 392 Wis. 2d 183, ¶ 5. Specifically, the circuit court told Marcotte that "discharge from the program means you get sentenced and you go to Dodge." *Id.* ¶ 4. The circuit court further "warned Marcotte that if he was not successful in drug court, there would be 'no mercy' when Marcotte returned to court for sentencing." *Id.* ¶ 5. *Gudgeon* and *Goodson* guided this Court's analysis, and this Court concluded that the circuit court prejudged Marcotte's sentence and was objectively biased. *Id.* ¶¶ 20–22, 24.

This Court examined a similarly distinguishable prejudged outcome in *State v. Lamb*, No. 2017AP1430-CR, 2018 WL 4619535 (Wis. Ct. App. September 25, 2018) (unpublished). (R-App. 3–7).[2] There, despite initially wanting to withdraw his plea, Lamb agreed to plead no contest after he learned that the State would be recommending probation. *Id.* ¶ 5. (R-App 3.) While explaining why he no longer wished to withdraw his plea, Lamb noted that "there's the possibility of leaving today." *Id.* (R-App 4.) The circuit court interjected and said, "Not really . . . Just thought I'd tell you that so you don't have any false hopes. . . . [T]here's a possibility, but it's probably not going to happen." *Id.* (R-App 4.) Despite both parties recommending probation, the circuit court sentenced Lamb to prison. *Id.* ¶ 6. (R-App 4.) This Court held that the circuit court's comments showed a "'serious risk' that he had

[2] Pursuant to Wis. Stat. § (Rule) 809.23(3), an unpublished decision may be used for its persuasive value.

already made up his mind about what kind of sentence Lamb would receive." *Id.* ¶ 16. (R-App 6.)

The common thread tying *Gudgeon*, *Goodson*, and their progeny together is a circuit court's express statement of what *will* happen in a case. In *Gudgeon*, it was the circuit court's predetermined and desired outcome. In *Goodson*, *Marcotte*, and *Lamb*, it was explicit and unequivocal statements about the ultimate outcome. As this Court explained, "our conclusion in *Goodson* that the court was objectively biased did not turn on the specificity of its promise. Instead, our decision was based on the fact that the court told the defendant what *would* happen . . . rather than merely explaining what *could* happen." *Marcotte*, 392 Wis. 2d 183, ¶ 24. That common thread is absent here.

Here, unlike *Gudgeon*, there is not any "strong language" that indicated the circuit court "wanted" any particular outcome. Further, unlike *Goodson, Marcotte*, or *Lamb* there was no unequivocal promise of a particular sentence. The court did not say that it *wanted* Church to go to prison or that it wanted to accept the State's recommended sentence. Nor did the court expressly say that Church *is* or even *probably* going to prison.

Rather, in a moment of levity between the attorneys and the judge, the circuit court made a passing comment that possession "sounds like prison" and asked the special prosecutor if she agreed. A reasonable person would not view a statement that spurred laughter in the courtroom to be one that the circuit court meant as a genuine prejudgment of the outcome. The circuit court's statement, other than being merely in jest, was more akin to the court expressing what *could* happen rather than what *would* happen. Simply put, this case does not have the "extreme" or "rare" facts that demonstrate a great risk of actual bias, and Church does not explain how it does. *See Herrmann*, 364 Wis. 2d 336, ¶ 37

(citing *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 887 (2009)); *see also id.* ¶ 112 (Ziegler, J., concurring).

Church's additional argument that if the circuit court's comment was actually sarcastic, the circuit court would not have adopted the State's recommended sentence is unpersuasive. (Church's Br. 10.) A judicial bias claim goes to the circuit court's ability to adjudicate a given case, not its discretion to impose a certain sentence. *See Marhal*, 172 Wis. 2d at 505. Said differently, in the context of a judicial bias claim, it is the comment or statement that matters, not the ultimate sentence. *See Marcotte*, 392 Wis. 2d 183, ¶¶ 24–26; *see also Goodson*, 320 Wis. 2d 166, ¶ 13 (focusing not on the sentence, but the indication that the circuit court had made up its mind *before* giving the sentence). This conclusion is further supported by the fact that a party can forfeit a judicial bias claim by not contemporaneously objecting to the purportedly biased comment—the objection is based on the comment, not the sentence. *See Marhal*, 172 Wis. 2d at 505. So, that the circuit court ultimately agreed with the State's recommendation is of no moment, and as explained above, the circuit court's comments did not give the appearance of bias.

Finally, the context of the sentencing hearing further belies Church's arguments. *See Gudgeon*, 295 Wis. 2d 189, ¶ 26 (noting that the transcript from the extension hearing did not dispel the Court's concerns). Unlike *Lamb*, the circuit court did not mention anything about probability of either probation or prison before hearing argument from the parties. *Lamb*, 2018 WL 4619535, ¶ 5. (R-App 4.) Unlike *Goodson*, the circuit court did not reference the earlier hearing during sentencing. *Goodson*, 320 Wis. 2d 166, ¶ 5.

Rather, the circuit court heard argument from the State about Church's criminal record. The circuit court likewise heard argument from the defense supporting probation. The circuit court also heard from Church, who exercised his right to allocution, thereby providing the circuit court with more

information to consider. The record demonstrates that, rather than having prejudged the outcome, the circuit court duly considered the parties' arguments when making its sentencing decision.

In sum, the record in this case, whether it be the pretrial hearing or the sentencing hearing, is devoid of an appearance of bias that reveals a great risk of actual bias, and this Court should therefore affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision and order of the circuit court denying postconviction relief.

Dated this 27th day of September 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3159 words.

Dated this 27th day of September 2021.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 27th day of September 2021.

Electronically signed by:

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