SUPREME COURT
STATE OF WISCONSIN
Appeal No. 2022AP001390 CR
Circuit Court Case No: 2016CF002395

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MATTHEW CURTIS SILLS,
Defendant-Appellant

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Statutes

Case Law

ISSUE PRESENTED FOR REVIEW

Was Sills deprived of his right to a fair trial by objective judicial bias?

Sills filed a post-conviction motion seeking a new trial, claiming that Milwaukee Circuit Court Judge David L. Borowski exhibited objective judicial bias during his trial and sentencing hearing. Judge Borowski denied Sills' motion without a hearing and the Court of Appeals affirmed his decision.

REASON FOR GRANTING REVIEW

The judiciary is facing a crisis of public perception. Confidence in its fairness and objectivity is in serious decline. Reviewing this case will give the Court an opportunity to give real meaning to the doctrine of objective judicial bias and help restore confidence in Wisconsin courts.

STATEMENT OF THE CASE

On February 3, 2017, Sills entered a guilty plea to an amended charge of second-degree sexual assault contrary to Wis. Stat. § 948.02(2). (R. 21.) Contending he did not understand the proceedings and was rushed into pleading guilty, Sills moved to withdraw his plea prior to sentencing. (R. 22.) The Hon. Jeffrey A. Wagner denied his motion and sentenced Sills to 15 years imprisonment with nine years initial confinement and six years extended supervision. (R. 30.) On appeal, the Court of Appeals, District I, reversed. *State v. Sills*, No. 2018191053-CR, unpublished slip op. (WI App Jan. 14, 2020). (80:1-17). Applying *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the court concluded Sills did not knowingly, intelligently, and voluntarily enter his plea because Judge Wagner failed to inform him of the maximum possible fine.

Upon remittitur, the prosecutor declined to renew her offer to amend the charge, and with Hon. David L. Borowski now presiding, a jury found Sills guilty of first-degree

sexual assault contrary to section Wis. Stat. § 948.02(1)(e). (R. 114.) Judge Borowski sentenced Sills to 30 years imprisonment with 20 years of initial confinement and 10 years extended supervision—more than twice the period of initial confinement imposed by Judge Wagner. (R. 114.) During the course of the trial and at the sentencing hearing, Judge Borowski made a variety of comments disparaging the Court of Appeals' decision permitting Sills to withdraw his plea. The judge's comments are recounted below.

In January 2022, Sills filed a motion for post-conviction relief and accompanying brief in the circuit court, contending he was denied his constitutional right to a fair trial because: 1) Judge Borowski was objectively biased; and 2) Sills' trial counsel was ineffective. (R. 142:1 and 143:1-14.) Without conducting a hearing, Judge Borowski denied the motion by written decision (R. 162:1-14.) Sills appealed, asking the Court of Appeals to vacate his conviction and grant him a new trial. On February 13, 2024, the Court of Appeals, District I, denied Sills' claims and affirmed the trial court's decision.[1]

Sills now petitions this Court to review the lower court's ruling that he was not deprived of his right to a fair trial due to objective judicial bias. Sills is not seeking review of the court of appeals decision on his ineffective assistance of counsel claim.

ARGUMENT

Sills Was Deprived of his Right to a Fair Trial by Objective Judicial Bias.

While presiding over Sills' trial and sentencing hearing, Judge Borowski made several disparaging comments regarding what he referred to as the Court of Appeals'

[1] FN: On August 15, 2023, the Chief Justice issued a substitution order assigning the Honorable Gregory B. Gill, District III to handle this appeal "for the purpose of aiding in the proper disposition of business and because of the necessity of the disqualification of District I." Counsel is not aware of why District I issued the decision.

"preposterous" decision granting Sills' motion to withdraw his plea. (R. 134:28.) Borowski's comments do not merely show, as the Court of Appeals concluded, that he was dissatisfied with the Court of Appeal's ruling. (Court of App. Decision: p 5.) His comments also evince a personal animus toward Sills for bringing his appeal and for exercising his right to trial. The Court of Appeals' finding to the contrary is belied by the context in which Judge Borowski expressed his displeasure. When viewed in their entirety, his comments demonstrate that he was unable to separate his frustration with the appellate court's decision from his duty to permit Sills to exercise his constitutional right to a trial.

Within the first few minutes of trial, Borowski referred to the "tortured and, in my opinion, incorrect interpretation of this entire matter by the Court of Appeals." (R. 128:5.) "Yes," the court continued, "they can feel free to read that when this eventually goes back up there." (R. 128:9) These comments were not made in isolation. They were immediately preceded by his asking the prosecutor if the defendant could have been charged with an offense carrying a mandatory minimum prison sentence. (R. 128:5.) Minutes later, commenting on the state's motion to use a videotaped interview of the child victim, the judge stated: "I mean the only reason we're here four years later is because of the defendant's actions and because of the Court of Appeals …" (R. 128:7.)

Contrary to Judge Borowski's assertion, the delay was not Sills' fault. Sills waived his right to a Preliminary Examination and never asked to adjourn the trial or any other proceeding. Nor was the delay the fault of the Court of Appeals. It is widely known that both the circuit and appellate courts in this state are burdened with demanding caseloads and limited resources. In short, it was not Sills' or the Court of Appeals' actions that explained why a jury was assembled that day; it was because Sills chose to exercise his constitutional right to a trial.

These comments alone are sufficient to show objective judicial bias, but Judge

Borowski carried his frustration into the sentencing hearing: "If Judge Wagner may have glossed over the fine possibility," he offered, "who cares." (R. 134:5-6). His subsequent musing about imposing a fine because of the appellate ruling even though he could not recall having done so on a similar case in the past (R. 134: 9-13) does not inspire confidence either. Nor does his assurance that the ruling "has nothing to do *directly* with my sentence." (emphasis added) (R. 134:16-17). Finally, after surmising that an appeal after a trial "makes sense," (R. 134:1-4), implying that an appeal after a guilty plea doesn't, Borowski referred to Sills' success on appeal as getting "another kick at the cat" (R. 134:8) because of "an absolute and total technicality." (R. 134:6) [2]

Despite the obvious emotional intensity and context of Judge Borowski's comments as recounted above, the Court of Appeals' decision made much of his assurance in his post-conviction decision that he did not allow his frustration with the appellate court's ruling to affect his treatment of Sills. (R. 162: 10.) One might fairly ask what the Court of Appeals would expect—that Judge Borowski would say, "Yes, I held it against Sills." That, perhaps, is too much to expect from any judge against whom an objective bias claim is made.

Objective bias analysis, by its nature, requires more than a literal reading of court transcripts or acceptance of bland conclusory statements by the judge against whom

[2] Notwithstanding the trial judge's opinion, Sills' appeal was far from meritless. Testifying at a competency hearing approximately three months before Sills pleaded guilty, a court-appointed forensic psychologist told the court he was "just above the range of mild intellectual disability," had "borderline intellectual functioning," and was prone to "acute anxiety." (R. 35.) The record from the February 3, 2017 plea hearing (R. 21) that was the subject of Sills' initial appeal establishes the psychologist's concerns were not unfounded. While this Court's decision focused on the trial court's failure to notify Sills of the maximum possible fine, the record shows Sills was confused throughout the proceeding, telling the trial court he only understood "some things." (R. 21:4-8.) He did not initially understand that the court was not bound by the plea negotiations (R. 21:1-10) and was only "a little bit" sure about what sexual contact meant (R. 21: 7.) He requested new counsel immediately before entering his plea (R. 21: 9) and then reluctantly answered the court's inquiry about how he was pleading: "I guess guilty." (R. 21:9.)

the claim is made. In *Caperton v. A.T. Massey Coal Co. Inc.*, 556 U.S. 868, 876 (2009), the Court referenced the challenges a reviewing court faces in analyzing an objective bias claim: "[T]he question is whether under a realistic appraisal of psychological tendencies and human weakness, the interest [or bias or prejudice] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, at 883–84, quoting *Withrow v. Larkin*, 421 U.S. 35 at 47, 95 S. Ct. 1456 (1975). The Court emphasized that no mechanical definition exists to measure objective judicial bias. Objective judicial bias "cannot be defined with precision" the Court stated, because "[c]ircumstances and relationships must be considered." *Caperton* at 880.

While objective bias cannot be defined with precision, nearly a century ago the US Supreme Court characterized it this way: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927). This language from *Tumey* survives as perhaps the best way to characterize objective judicial bias. The Supreme Court reiterated it in *Murchison*, and even more recently in *Caperton v. A.T. Massey Coal Co.*, 566 US 868 (2009), 129 S. Ct. 2252. Warning against the danger of judicial bias, this Court embraced the *Tumey* language just two years ago and reiterated that objective bias occurs when there is "a serious risk of actual bias ... based on objective and reasonable perceptions." *Miller v. Carroll*, 2020 WI 56, ¶44, 392 Wis. 2d 49, 944 N.W.2d 542, citing *Caperton* at 884

Crucially, the Court of Appeals failed to take into account a central feature of objective judicial bias jurisprudence when it rejected Sill's appeal. Under a correct reading of the doctrine of objective judicial bias, Sills need not prove that Judge Borowski was in fact biased against him; he need only show that it appeared that way.

Judicial bias can be either subjective or objective. Judges are subjectively biased when they have a personal interest at stake, often but not exclusively financial. Objective bias, on the other hand, arises from the *appearance* of unfairness and does not require proof of actual bias. In *Murchison*, the Supreme Court distinguished the two this way: While fairness "requires an absence of actual bias in the trial of cases," it is also "endeavored to prevent even the probability of unfairness." *Murchison* at 136, citing *Offutt v. United States*, 348 US 11 (1954), 75 S. Ct. 11. Just four years ago, this court warned of "a serious risk of actual bias ... based on objective and reasonable perceptions." *Miller v. Carroll*, 2020 WI 56, ¶44, 392 Wis. 2d 49, 944 N.W.2d 542, citing *Caperton* at 884. Like other states, Wisconsin has also codified objective bias as one of the grounds for disqualification. Wis. Stat. § 757.19 (2)(g) mandates recusal when a judge "determines that, for any reason, he or she cannot, *or it appears* he or she cannot, act in an impartial manner." (emphasis added)

Courts scrupulously guard against judicial bias in order "to ensure both the litigants' and *the public's confidence* that each case has been adjudicated by a neutral and detached arbiter." (emphasis added) *Hurles v. Ryan*, 752 F.3d 768, 788 (9th Cir. 2014). Applying this language to Sills' case, a reasonable observer of his trial and sentencing hearing would not have perceived Judge Borowski's treatment of him as either "neutral" or "detached." Significantly, the Court of Appeals wrongly attached meaning to the fact that the judge's comments were not made in front of the jury. (Court of App. Decision, FN 8 on p 15.) The Court plainly stated in *Hurles* that it is the "litigants," but also the "*public's* confidence" that must be ensured. *Hurles* at 788.

Counsel would be remiss if he did not make note of two matters before closing. First, the Court of Appeals rejected Sills' contention that he suffered actual bias because of some of the Judge Borowski's rulings. Indeed, most of the the Court's analysis involves whether Sills suffered actual bias. But this Court need not find that the Court of Appeals

erred in this respect to find in Sills' favor. Objective judicial bias does not require proof of actual bias (see *State v. Herrmann*, 2015 WI 84, 364 Wis. 2d 336, 867 N.W.2d 772 (2015); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); and *Caperton*, ibid.). It is the risk of actual bias that protection against objective bias is aimed.

Second, judicial bias claims are not subject to harmless error analysis. The risk of actual bias is a structural error, which is different than regular trial court error because they "are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards'." *State v. Pinno*, 2014 WI 74, ¶49, 356 Wis. 2d 106, 850 (2014), citing *Puckett v. United States*, 556 U.S. 129, 141, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). See also *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909, 195 L. Ed. 2d 132 (2016) ("[A]n unconstitutional failure to recuse constitutes structural error ....").

Conclusion

The Court of Appeals took pains to note that it did "not condone the trial court's repeated negative commentary on Sills's [*sic*] previous appeal that restored his trial right." (Court of App. Decision, FN 8 on p 15.) The court's admonishment is apt, but it does nothing to restore Sills' right to a fair trial presided over by an unbiased judge. Reviewing this case will not only restore Sill's constitutional right. It will give the Court an opportunity to give real meaning to the doctrine of objective judicial bias and help restore confidence in Wisconsin courts. For all the above stated reasons, Sills respectfully asks this Court to grant his petition.

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