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September 26, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1213-CR State of Wisconsin v. Kenneth J. Thomas (L.C. #2015CF54)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kenneth J. Thomas appeals from a judgment of conviction and the circuit court's order denying his postconviction motion. Based upon our review of the briefs and record, we conclude

at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm the judgment and order of the circuit court.

Thomas pled to one count of armed robbery, as a repeat offender, and one count of felony murder, party to a crime, and he was thereafter sentenced. Thomas moved to withdraw his pleas on the basis that he did not enter his pleas knowingly and intelligently because he has a learning disability and thus did not understand the charges against him or the penalties to which he was subject. He relatedly complains that his trial counsel, Attorney Anthony Cotton, performed ineffectively by failing to explain the charges against him and the penalties he faced and by leading him to believe he would be sentenced to no more than "20 years." An evidentiary hearing was held at which both Thomas, his mother, and his trial counsel testified. The circuit court denied Thomas' motion, and Thomas appeals.

A defendant seeking to withdraw a plea postsentencing "carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997) (citation omitted). "The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion," and "[w]e will only reverse if the circuit court has failed to properly exercise its discretion." ***Id.*** The circuit court here did not erroneously exercise its discretion in denying Thomas' motion to withdraw his pleas.

Thomas asserts his motion turned on who was the more credible witness at the postconviction hearing—Thomas or his trial counsel—and the judge who presided over the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

hearing was biased "in favor of [Cotton]" "based upon the court's past experiences and cases with [Cotton]." According to Thomas, this is his "central issue."[2]

Thomas' bias assertion is conclusory; he develops no legal argument analogizing this case to any other where judicial bias was considered and thus we conclude his appellate "argument" is insufficiently developed. While we need not consider insufficiently developed arguments, *see* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995), we nonetheless observe the following.

Thomas claims the postconviction judge was objectively biased because in denying Thomas' postconviction motion the judge referenced past in-court experience he had had with Cotton and expressed that Cotton had previously conducted himself in a knowledgeable, conscientious, and professional manner in his representation of criminal defendants. We are not convinced the court was objectively biased.

"There is a presumption that a judge acted fairly, impartially, and without prejudice." ***State v. Hermann***, 2015 WI 84, ¶3, 364 Wis. 2d 336, 867 N.W.2d 772. "[W]hen determining whether a defendant's right to an objectively impartial decisionmaker has been violated" we consider whether actual bias or the appearance of bias exists. ***Id.***, ¶46. The defendant bears the burden of showing bias or its appearance by a preponderance of the evidence. *See* ***id.***, ¶24. Whether a judge was or appeared biased is a question of law we review de novo. ***Id.***, ¶23.

[2] Thomas hints at other bases for concluding the circuit court erred in denying his postconviction motion but we do not address these hints because he fails to adequately develop an argument in support of any of them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

A defendant may rebut the presumption of impartiality "by showing that the appearance of bias reveals a great risk of actual bias. Such a showing constitutes a due process violation." ***Id.***, ¶3.

> "[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." Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements.

State v. Goodson, 2009 WI App 107, ¶9, 320 Wis. 2d 166, 771 N.W.2d 385 (citations omitted; alteration in original). Actual bias exists "where 'there are objective facts demonstrating ... the trial judge in fact treated [the defendant] unfairly." ***Id.*** (citation omitted; alteration in original).

Thomas has failed to convince us that the postconviction judge was actually biased or that there was an appearance of bias that "reveal[ed] a great risk of actual bias." *See* ***Hermann***, 364 Wis. 2d 336, ¶3. In short, there are no objective facts demonstrating the judge treated Thomas unfairly, and a reasonable person would not question the judge's impartiality based on his statements.

As Thomas points out, the judge did make reference to prior instances where he had observed Cotton conduct himself as a competent and conscientious attorney in representation of other defendants. Considering the totality of the judge's statements during his ruling denying Thomas' motion, however, we cannot conclude he was not fair, impartial, and without prejudice or that there was an appearance of bias that "reveal[ed] a great risk of actual bias." *See* ***id.***

The judge explained that he had reviewed the motion, the plea questionnaire, a transcript of the plea hearing, and the presentence investigation (PSI); had listened to the testimony at the

postconviction hearing by Thomas, trial counsel, and Thomas' mother; and had been present during and observed Thomas' testimony as a witness during the trial of his accomplice in the felony murder. We note from the record that the judge also presided over Thomas' plea hearing and sentencing hearing.

In considering whether Thomas entered his plea knowingly and intelligently, the judge reflected upon Thomas' testimony at the trial of his accomplice, including "watch[ing] [Thomas'] facial expressions" and "his reaction to questions" on direct and cross-examination. The judge noted that Thomas "responded coherently, logically, appropriately" and the judge could not recall "one instance where Mr. Thomas appeared … to be confused by any language that [trial counsel for Thomas' accomplice] used, confused about the implication of any question, or answered in a fashion that was inconsistent with the information that was being supplied or asked of him." Based upon this, the judge expressed at Thomas' postconviction hearing: "So it appeared to this Court that Mr. Thomas was completely oriented as to person, place, and time [and] had absolutely no difficulty comprehending spoken language that was directed to him in the form of questions."

As to Thomas' assertion that he believed that if he pled he would not be sentenced to more than "20 years," the judge noted that during his postconviction testimony, Thomas acknowledged that the district attorney met with him in jail "and told him that the DA's office was going to recommend 40 years in prison." The judge also recalled Thomas' testimony at his accomplice's trial, noting that when the prosecutor

> brought up that phrase about the *40*-year recommendation from the State, Mr. Thomas's reaction, I'm paraphrasing here, was that's no bargain. So he was acutely aware of the fact that even though he was cooperating in the testimony against [the accomplice] that he

> was subject to a recommendation from the prosecution, despite that testimony, of a 40-year sentence in this case.
>
> So when Mr. Thomas testifies here today he thought he was going to get 20 years and no more, that's just simply incredible. There's no reasonable basis to accept that as fact.

(Emphasis added.) The judge found Thomas' testimony "frankly, unbelievable. I think it is nothing more than a self-serving attempt at this time by Mr. Thomas, based on dissatisfaction with the sentence … to try [to] back up the train, so to speak, to try to put himself in a better position."

The judge also discussed its observation of Cotton's conduct related to his representation of Thomas in this case, which included attaching to the plea questionnaire jury instructions and a letter from the district attorney's office explaining the plea negotiations. The judge did not accept

> that [Cotton] simply just bulldozed this plea questionnaire through with Mr. Thomas to work out the resolution. This Court remembers [Cotton] sitting in the Malone trial listening to Mr. Thomas's testimony. So [Cotton] was here during the course of that. [Cotton] was intimately involved with Mr. Thomas's representation, and this Court rejects, patently rejects, any assertion that [Cotton] just blew through this plea questionnaire and just worked this plea through with his client's lack of understanding to not only the nature of the charges, the penalties that he could be exposed to, and the deal that was worked out. It simply does not even pass the straight face test to come into court today and try to represent that, well, all this happened and Mr. Thomas has absolutely no idea what's going on around him.

The judge further observed that at the plea hearing—which, as previously noted, the judge also presided over, along with the sentencing hearing—Thomas had indicated he had completed eleven years of schooling, which information was consistent with information supplied by Thomas for the PSI. The judge also noted that the PSI identified that Thomas "enjoyed … writing lyrics to music that included country songs." The court then stated:

> And so to come to court today and say, you know … I just don't get it, I just don't comprehend, well, Mr. Thomas—And I don't dispute Mr. Thomas may have a learning disability and some other disabilities. To … rise to the level of what's been represented here today is … not supported by any credible evidence in the record.

The judge expressed that when he takes a plea from a defendant he "watch[es] their face" and

> look[s] at him in the eye when I ask him about the things I'm asking questions about. And if I see any indication, a facial expression, that indicates to me a lack of understanding, a lack of comprehension, or that somehow the Court is not getting through with the question I'm asking, if I get any kind of body position feedback, or facial expression, or utterance in any fashion whatsoever that an individual that's waiving constitutional rights does not understand what I'm talking about and we're not on the same page—and I've taken lots of pleas in the last several years—I stop, I back up, I rephrase, or I stop completely and ask the attorney I don't think that your client understands…. I've done that when it seemed appropriate.
>
> I didn't get any of that information from Mr. Thomas. Mr. Thomas appears to me to be an intelligent, articulate individual. He may have learning disabilities, but in my experience with Mr. Thomas, both in my interactions with him and in taking a plea, my interactions watching him testify as a witness, I believe he has comprehension. He certainly appeared to comprehend everything that occurred in court when I was present and watched him, which was every time he came to court. He didn't have any difficulties communicating that I ever saw with respect to courtroom activities.
>
> And so I … reject the propositions that are presented to this Court today to ask this Court to withdraw a plea based upon a lack of comprehension or lack of understanding of the activities that went on with him where he interacted in those—when the plea was entered and also including his interactions with [Cotton] while preparing to enter a plea.

Regarding Thomas' testimony suggesting Cotton had indicated to Thomas that Thomas would only get "20 years," the judge expressed, "I can't believe [Cotton] would ever allow that sort of communication to occur. That just is absolutely contrary to this Court's experience with [Cotton] and the way he practices law."

The judge unquestionably considered its knowledge regarding how Cotton had previously conducted himself in the defense of Thomas as well as other criminal clients. Based upon the totality of the judge's hearing comments, however, it seems clear to us—and we believe it would be clear to the reasonable observer—that the judge found Thomas' assertions that his plea was unknowing and unintelligent and that he believed he would be sentenced to no more than "20 years" incredible and unbelievable because of the judge's prior knowledge of *Thomas* and *Thomas*' conduct, not that of Cotton. We do not believe a reasonable observer would conclude Thomas did not receive a fair hearing. The judge's determination that Thomas knowingly and intelligently entered his plea and did not do so with the belief he would be sentenced to no more than "20 years" was based upon the judge's own observations of Thomas during the plea and postconviction hearings, as well as other hearings throughout Thomas' case, and during Thomas' testimony at the trial of his accomplice. Considering the entirety of the judge's comments, we are unconvinced the judge would have believed Thomas' claim that he entered his plea unknowingly or unintelligently or did so with the belief he would be sentenced to no more than twenty years if Cotton had never been part of the mix. The judge clearly did not believe Thomas because of Thomas. The record does not lead to the conclusion that the judge was actually biased against Thomas or that there was an appearance of bias that "reveal[ed] a great risk of actual bias."

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals