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February 7, 2019

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

2018AP565 State of Wisconsin v. Eric T. Alston (L.C. # 2009CF1694)

Before Sherman, Blanchard, and Kloppenburg, 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).

Eric Alston, pro se, appeals a circuit court order that denied Alston's motion for resentencing. Alston contends that he was denied his due process right to an impartial judge at his sentencing after revocation of his probation.[1] Based upon our review of the briefs and record,

[1] The State contends that Alston's arguments are procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Alston failed to raise them in his May 2013
(continued)

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[2] We summarily affirm.

In 2010, Alston was convicted of child abuse, as a repeater, and placed on probation for four years. In 2012, Alston was sentenced after revocation of his probation to ten years of imprisonment, with seven years of initial confinement and three years of extended supervision, the maximum allowed by statute. *See* WIS. STAT. §§ 948.03(2)(b), 939.50(3)(h), 973.01(2)(8), and 939.62(1)(b). In 2017, Alston moved for resentencing. He contended that, while he was on probation, he was selected by law enforcement as a target of a newly developed Special Investigations Unit (SIU), which focused on attempts to deter a small group of individuals from reoffending. Alston asserted that he recently discovered that his sentencing after revocation judge had attended a presentation by law enforcement on the SIU at judicial training on March 17, 2011, as well as a second presentation with an unknown date, during which the judges were informed that the objective of the SIU was to have targets of the program who reoffend sentenced to the maximum. Alston argued that the judge's attendance at the presentations was an impermissible ex parte communication with law enforcement, and that the judge should have revealed his attendance at the presentations at the time of sentencing, to disclose the ex parte contact and discuss any potential bias. Alston argued that his due process right to an impartial judge was violated because the sentencing judge had been informed during ex parte contacts with

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postconviction motion following his sentencing after revocation. Because we reject Alston's claims on their merits, we need not discuss the procedural bar.

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

law enforcement that Alston should be sentenced to the maximum following revocation. The court denied the motion.

We presume that a judge acts without bias at sentencing, but a defendant may rebut that presumption by showing that the appearance of bias reveals a great risk of actual bias. ***State v. Herrmann***, 2015 WI 84, ¶3, 364 Wis. 2d 336, 867 N.W.2d 772. "[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.***, ¶32 (quoted source omitted).

Alston contends that the sentencing judge's attendance at presentations by law enforcement about the SIU were impermissible ex parte contacts that created the appearance of bias.[3] *See* SCR 60.04(g)(1) (judges may not engage in ex parte communications concerning a pending or impending case); ***State v. Vanmanivong***, 2003 WI 41, ¶34, 261 Wis. 2d 202, 661 N.W.2d 76 (judges may not seek evidence independently and then rely on that evidence in issuing a decision). Alston contends that, at the presentations, law enforcement explained that the SIU had targeted ten individuals as the worst offenders in the community, that they expected those individuals to be treated differently by the criminal justice system, and that the judges were to sentence those individuals to the maximum allowed by law if their supervision were revoked.

[3] Alston also argues that, during his revocation proceedings, the administrative law judge (ALJ) disclosed that two law enforcement officers had given the ALJ office an informal presentation on the SIU program. Alston raises arguments of bias related to the revocation of his probation and cites material that he states is part of the record from his revocation proceedings. Those arguments and that material are outside the scope of this appeal, which is from the order denying resentencing following Alston's sentencing after revocation.

Alston points out that, at his sentencing after revocation, the judge was informed by the State that Alston was one of the ten individuals selected for the SIU program. Alston contends that the judge was required to disclose the judge's prior attendance at the SIU presentations, and failed to do so. Alston contends that his due process rights were violated by the ex parte contact and the appearance of bias it created. *See* ***Herrmann***, 364 Wis. 2d 336, ¶3. We disagree.

We conclude that Alston has not shown the appearance of bias by asserting that his sentencing judge attended presentations by law enforcement that explained that the SIU program had targeted habitual offenders and intended participants to receive maximum sentences if revoked from probation. That information was conveyed to the court at Alston's sentencing after revocation. Because Alston has not alleged that the sentencing judge received any information on the SIU topic prior to his sentencing that was not discussed on the record at the sentencing hearing, Alston has not established the appearance of judicial bias.

At Alston's sentencing after revocation, the State informed the judge that Alston had been selected for the SIU program based on his criminal record. The State recommended the maximum sentence following revocation, highlighting Alston's criminal history and the chances he had already been afforded.

Alston's counsel then argued that the court should not impose the maximum sentence, contending that it was not warranted. Counsel argued that the State and the SIU program did not view Alston as an individual, but rather as "a member of this special class where the normal rules don't apply, where they treat him as just a target. He's a target of the Special Investigations Unit. He's a means to an end." Counsel argued that the State's recommendation for the maximum was not based on anything about Alston, but was based on the "scorched-earth public

relations policy that they call the Special Investigations Unit," which included a policy that, if a participant reoffended, "we pull out all the stops to get a conviction no matter what," and "[w]e pull out all the stops to get a maximum sentence no matter what." Counsel also argued that Alston was "arbitrarily, behind closed doors, selected to be in this group through a subjective selection process, and this selection was based in large part on conduct for which he was acquitted, conduct for which the charges were dismissed, or conduct for which no charges were ever even filed." Counsel reiterated that "it's because of this category, not because of his personal characteristics, that the State's making the recommendation it's making today." Counsel argued that "[w]e shouldn't spend our tax dollars to take an extra [eight-and-a-half] years of Eric Alston's life just so the police and the prosecutor can have a little story in the *Capital Times* about how this awesome new program is cleaning up the worst of the worst."

The court began its sentencing comments by stating: "Well, let me just refocus a bit on what we're doing here. It's not about the special program. All I know is what I read in the paper about it." The court then considered factors pertinent to the standard sentencing factors and objectives, including Alston's character and criminal history, the severity of the offense, and the need to protect the public, and found that the maximum sentence recommended by the State was warranted. The court explained that Alston's lengthy criminal history was significant to the court's sentencing decision: "[T]he legislature has [explained how] they feel about repeaters. They didn't need any special unit from the police department to tell them." The court disagreed with the defense characterization of the SIU, stating that "this is not the lynch mob that has been characterized by the defense here. This is a reaction to a reality. The reality is that the majority of crimes are committed by habitual offenders." The court went on to state that Alston was "a habitual criminal in terms not only of this group that's here today, but also in terms of what the

legislature, the representatives of the people, say, and that's why there's that penalty enhancer on there that increases your sentence." The court noted that Alston had "engaged in an act of violent crime after being warned, after being placed on probation."[4]

Thus, at sentencing, the judge acknowledged that he had prior knowledge of the SIU program. The parties discussed on the record the fact that Alston had been selected for the program, debated that selection process, and acknowledged that the program recommended the maximum penalty for participants who reoffended and were revoked from supervision. Defense counsel argued that the State's recommendation for the maximum sentence was not based on any specific facts but was instead based on the arbitrary selection of Alston for the SIU program and what counsel argued was the blind insistence of the SIU program to recommend maximum sentences. We discern no appearance of bias by the sentencing judge's awareness of the same basic information about the SIU program that was discussed at sentencing.

Moreover, the sentencing judge explained at the hearing on Alston's motion for resentencing that the sentence "had absolutely nothing to do with any meeting with the police or anything that [the judge] read or articles that [the judge] studied or any judicial training seminar [the judge] went to." The court stated that, following the court's statements at the original sentencing, Alston was "on high notice that if [he] violated rules of [his] probation, [he] would have some serious trouble, and that's what happened then ultimately when [he was] resentenced

[4] Alston disputes that he committed a violent crime while on probation, pointing out that he was acquitted of the battery, intimidating a victim, and disorderly conduct charges that arose during his probation, and convicted of obstruction only. However, despite the lack of criminal convictions on those charges, the alleged conduct underlying those charges was the basis for the revocation of Alston's probation. *See* ***Elias v. State***, 93 Wis. 2d 278, 284-85, 286 N.W.2d 559 (1980) (sentencing court may consider unproven criminal acts as evidence of the defendant's character).

after failing miserably on probation." The court explained further that "this presentation, which makes no reference to your case whatsoever, that [the judge] was present at demonstrates absolutely no bias whatsoever, and indeed the caution was on the record well in advance of any presentation by the police department."[5]

In sum, Alston has not shown an appearance of bias by alleging that the sentencing judge had ex parte communications with law enforcement by attending presentations on the SIU program prior to Alston's sentencing after revocation hearing. The judge revealed that he knew about the program prior to the hearing, the facts surrounding Alston's selection for the program and the objectives of the program were put on the record, and the parties had the opportunity to argue the limitations of the program and whether the recommendation for a maximum sentence was warranted in this case. The court then explained its decision to impose the maximum sentence by properly applying the standard sentencing factors and objectives. *See **State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. At the postconviction motion hearing, the judge reiterated that the sentence was not based on anything he learned about the SIU program prior to sentencing. On this record, a reasonable person would not conclude that the judge could not hold the balance true under the circumstances.

Therefore,

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[5] Alston contends that the court's comments at the original sentencing indicated that the court had predetermined the sentence to impose in the event of revocation, contrary to ***State v. Goodson***, 2009 WI App 107, ¶¶10-13, 320 Wis. 2d 166, 771 N.W.2d 385. We disagree. While the court cautioned Alston that if he violated the terms of his probation he would be going to prison, the court did not state what sentence it would impose after revocation.

IT IS ORDERED that the order is 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