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DISTRICT II

July 20, 2022

To:

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Circuit Court Judge
Electronic Notice

John W. Kellis
Electronic Notice

Hon. Brad Schimel
Circuit Court Judge
Electronic Notice

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Electronic Notice

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Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

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

2021AP97-CR

State of Wisconsin v. Paul L. Antross (L.C. #2017CF669)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Paul L. Antross appeals a judgment of conviction for two counts of possession of child pornography and an order denying his postconviction motion for resentencing before a different judge. Antross argues his due process rights were violated because the sentencing judge was

objectively biased. 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 (2019-20).¹

Antross was facing amended charges consisting of ten counts of possession of child pornography and five counts of sexual gratification with an animal. After twice replacing his attorney and several adjournments occasioned by the need for additional defense investigation and plea negotiations with the State, Antross ultimately entered pleas to two counts of possession of child pornography, with the remaining counts dismissed and read in.² The plea hearing was held before the Hon. Michael J. Aprahamian, who allowed Antross to remain free on bail and set the matter for sentencing.

In the interim, Antross fired his attorney. At the beginning of the scheduled sentencing hearing, Judge Aprahamian first addressed the motion to withdraw filed by Antross's counsel. When Antross stated that he had not yet obtained successor counsel, the following exchange occurred:

THE COURT: Okay. I'm revoking bail. You're going in today. You're not postponing this any more.

THE DEFENDANT: Okay.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² Antross's brief contains extensive facts regarding events that preceded the plea hearing. We do not regard these facts as material to this appeal, as Antross is not claiming that the circuit court pressured him to enter his guilty pleas. However, we note the circuit court did mention the possibility of "a little bit of gamesmanship" in the multiple requests for adjournment prior to the plea hearing.

THE COURT: So today is your judgment day in the sense that you're going in. So you can get your new attorney when you're in there.

THE DEFENDANT: Okay.

THE COURT: Do you understand? So you can work with your mom, you can work with getting your attorney; but today you're going in *and you're not getting out for a long time*.

(Emphasis added). The circuit court subsequently explained:

The reason you're going into custody is because you've been found guilty and I didn't revoke bail last time. I should have revoked bail on the day ... you pled. I typically would have. I didn't. I cut you some slack. But as I mentioned before, it seems like you're stalling, delaying, delaying, delaying. It doesn't matter though. You're guilty. You were already found guilty.

The circuit court allowed Antross's counsel to withdraw and set the matter for a status hearing to allow Antross time to find successor counsel.

The presentence investigation report recommended that Antross be sentenced to consecutive terms of three years' initial confinement and three years' extended supervision. At the sentencing hearing, the State described "four different levels of disturbance" to Antross's behavior and recommended a total of ten years' initial confinement and ten years' extended supervision for both crimes. The defense urged the circuit court to impose concurrent terms each consisting of three years' initial confinement and three years' extended supervision. The court ultimately imposed concurrent sentences each consisting of twelve years' initial confinement followed by ten years' extended supervision.

Antross filed a postconviction motion requesting resentencing before a different judge on the basis that the sentencing court was not impartial. Specifically, Antross asserted that Judge Aprahamian had demonstrated objective bias when he stated prior to sentencing that Antross was

“not getting out for a long time.” The circuit court³ rejected this argument, concluding Judge Aprahamian’s statement was legally correct due to the applicable mandatory minimum sentences. The court also noted Antross had not been given the maximum sentences on each count, and Judge Aprahamian’s decision to exceed the mandatory minimum sentences could be justified by appropriate sentencing considerations, including “the past history with the variety of immoral activities going on that are cited in this complaint.” Antross now appeals.

“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. On appeal, we presume that a judge has acted “fairly, impartially, and without bias; however, this presumption is rebuttable.” *Id.* We apply two tests to determine whether the defendant has rebutted the presumption, one subjective and one objective; if the defendant satisfies either test, he or she is entitled to resentencing. *Id.*, ¶¶8, 18. Consistent with Antross’s arguments, we review objective bias only in this case, which presents a question of law this court reviews independently. *See State v. Herrmann*, 2015 WI 84, ¶23, 364 Wis. 2d 336, 867 N.W.2d 772.⁴

Objective bias can exist in two situations: when the facts give rise to an appearance of bias or when the record objectively demonstrates that the circuit court in fact treated a litigant unfairly. *Id.*, ¶9. The 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,

³ The Hon. Brad D. Schimel presided over the postconviction proceedings.

⁴ We elect to reach the merits of Antross’s arguments and therefore do not consider the forfeiture argument advanced by the State, nor Antross’s assertion that judicial bias constitutes structural error that cannot be forfeited.

clear and true’ under all the circumstances.” *State v. Gudgeon*, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114. In short, “actual bias—either its presence, or the great risk of it—is the underlying concern of objective bias analysis.” *Goodson*, 320 Wis. 2d 166, ¶14.

Antross relies on *Goodson* and *Gudgeon* for the proposition that the circuit court prejudged his case and decided to sentence him to a lengthy prison term before hearing argument. However, unlike the circuit court’s statements in those cases suggesting it had prejudged the defendant’s sentence, the circuit court’s statement here was factually correct as a legal matter—Antross was going to prison for what can be reasonably regarded as “a long time” no matter what sentencing arguments were presented. As the postconviction court recognized, there is a mandatory minimum sentence of three years’ initial confinement for possession of child pornography. *See* WIS. STAT. § 939.617(1).

Antross argues that Judge Aprahamian’s statement is no less indicative of bias given the mandatory minimum sentence because “a reasonable lay observer would not know that possession of child pornography convictions come with a mandatory minimum penalty.” While Antross is correct that we do not evaluate objective bias from the standpoint of a legal technician, we also need not evaluate the comments in a vacuum. As the plea hearing transcript demonstrates, the parties and Judge Aprahamian were well aware that Antross was required to serve a three-year minimum term of initial confinement in prison.

To be sure, Judge Aprahamian’s words could have been more carefully chosen. The State concedes that “the analysis would be different if Judge Aprahamian had made the same comments to Antross for convictions that carried no mandatory minimum prison sentence and allowed for probation or even a monetary fine,” or if Judge Aprahamian had specified a term of

initial confinement longer than three years.⁵ Nonetheless, those circumstances are not present, and we do not lightly cast aside the presumption that a judge has acted impartially. Under the circumstances here, Antross has failed to satisfy his burden of rebutting that presumption.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

See WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals

⁵ We note that a circuit court can disregard the statutory mandatory minimum sentence if it finds that the best interests of the community will be served and the public will not be harmed, but only if the defendant is no more than forty-eight months older than the child engaged in the sexually explicit conduct that forms the basis for the child pornography charge. WIS. STAT. § 939.617(2)(b). The appellate record shows Antross was thirty-eight years old at the time of his pleas, and he makes no argument this provision could potentially apply to him.