**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 24, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP1367-CR** **Cir. Ct. No. 2008CF825**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL D. POTTS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

**Per curiam opinions 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).**

¶1 PER CURIAM. Michael Potts appeals a judgment of conviction for first-degree reckless homicide, felon in possession of a firearm, and two counts of

felony bail jumping. He also appeals an order denying him postconviction relief. Potts contends judicial bias required the circuit court judge's recusal. He also argues he is entitled to plea withdrawal because his pleas were induced by misleading advice from his counsel regarding eligibility for early release. We reject Potts' arguments and affirm.

¶2 In 2010, Potts was convicted by a jury of first-degree intentional homicide, felony bail jumping and felon in possession of a firearm, all in connection with the shooting death of Artheddius Peeler in Grand Chute. In 2012, the circuit court granted a new trial on the grounds of ineffective assistance of counsel. We affirmed on direct appeal the order for a new trial, concluding Potts' trial attorney "was ineffective for failing to introduce inculpatory statements by another person tending to exculpate Potts." *See* ***State v. Potts***, No. 2012AP764-CR, unpublished slip op. ¶1 (WI App Apr. 23, 2013).

¶3 On January 2, 2014, Potts pleaded no contest to felon in possession of a firearm and two counts of felony bail jumping. The circuit court withheld adjudication of guilt on those counts pending the outcome of the new trial on the first-degree intentional homicide charge. On March 27, 2014—the fifth and final day of the jury trial—Potts entered a no-contest plea to an amended charge of first-degree reckless homicide, in exchange for the State's agreement to recommend no more than twenty-eight years' initial confinement on all charges. The court accepted the plea to reckless homicide, and adjudicated guilt regarding the January pleas. The court imposed twenty-five years' initial confinement and twenty years' extended supervision on the reckless homicide charge; nine years' initial confinement and five years' extended supervision on the felon in possession of a firearm charge, concurrently; and seven years' initial confinement and three years' extended supervision on each bail jumping charge, concurrently.

¶4 Potts subsequently filed a postconviction motion seeking to withdraw his March 27 plea to first-degree reckless homicide, and to set aside the "subsequent adjudication of guilt" concerning the felon in possession of a firearm and bail jumping counts. In his motion, Potts asserted that his trial attorney "induced [Potts] to enter a plea on the fifth day of trial (March 27, 2014) by informing Potts that he would be eligible for a sentence adjustment after conviction that would permit him to be released after serving only 75 percent of the initial confinement imposed by the court." Potts claimed that when he "got back to prison after the plea to first-degree reckless homicide, Potts found out that he was not eligible for early release." Potts insisted he would not have entered his no-contest plea to first-degree reckless homicide absent the advice given by his attorney as it "gave him hope he would be released in 19 years."

¶5 A scheduling conference was held prior to the postconviction hearing, during which the circuit court sought to clarify the issues that would be presented at the postconviction motion to withdraw the plea. The court began the scheduling conference by stating:

> THE COURT: All Right. I'm trying to understand what the argument is as we structure time, but, and I don't want to misstate it, [postconviction counsel], but I think what I read is we're—the argument is that in the middle of this murder trial, we're days in on the trial, there's an agreement worked out. We went through a lengthy colloquy that everybody has I believe, and if I understand the argument is that something happened either during or prior to that colloquy that resulted in whatever it is you're going to argue about.

¶6 Postconviction counsel represented to the court that "prior to the colloquy, information that was given to Mr. Potts that induced the plea that was not part of the record of the colloquy." The court addressed Potts' postconviction counsel and stated, "What I'm trying to understand is what it is you're saying

happened or didn't happen or what was represented or not represented? When was that done?"

¶7 As Potts' position clarified, the circuit court expressed skepticism. The court stated it was "completely shocked, maybe surprised" that Potts would claim his plea was precipitated by a promise of early release when Potts had not mentioned anything about early release during a seemingly complete plea hearing. Nevertheless, the judge said he would set the matter for an evidentiary hearing on the postconviction motion.

¶8 After this discussion with postconviction counsel about Potts' position, the circuit court queried Potts' trial counsel. The court stated, "I know you're not under oath now, but you will be eventually." The judge asked trial counsel some questions relating exclusively to what counsel told Potts about early release.[1] After counsel answered those questions, the judge commented, "Sounds like good lawyering, but you still want to proceed with the motion …." Postconviction counsel indicated he wished to proceed because the motion presented questions of credibility and memory.

¶9 The court proceeded to schedule the evidentiary hearing, inquiring how much time was needed for the hearing, who was going to testify, and whether Potts would testify from prison. The court then re-affirmed there would be only one issue. The court stated, "What I'm interested in knowing is given the facts

[1] Potts suggests the circuit court showed bias by questioning his trial counsel without procuring a verbal waiver of the attorney-client privilege. However, there was no reason to solicit any such waiver, as the judge questioned counsel only about what counsel told Potts, not about what Potts might have told counsel. *See* ***State v. Boyd***, 2011 WI App 25, ¶20, 331 Wis. 2d 697, 797 N.W.2d 546.

roughly that [trial counsel] indicated, then what [postconviction counsel] has indicated that Mr. Potts is going to get up and say that this was a determining factor that contributed to my decision making ….”

¶10 Following the scheduling conference, Potts filed a motion for judicial recusal, claiming the circuit court “turned the hearing into a discovery proceeding for the State.” Potts contended the court conducted a “mini-deposition” of his attorney “in which only [the court] was asking questions plac[ing] itself in the role of a courtroom party rather than an impartial tribunal.” Potts argued the court would be unable to be fair and impartial during the proceedings on his postconviction motion.

¶11 Following the evidentiary hearing, the circuit court denied the recusal motion, concluding there was no basis to believe the court would not be fair, impartial or unbiased. The court noted in this regard that it had granted Potts a new trial several years earlier.

¶12 The circuit court also denied the postconviction motion seeking plea withdrawal. The court found incredible Potts’ testimony at the hearing that he would not have entered his plea except for the purported availability of early release. The court found it much more likely that Potts entered his plea toward the close of trial because there was overwhelming evidence virtually assuring a conviction of first-degree intentional homicide. The court noted Potts received a substantial benefit by pleading to first-degree reckless homicide avoiding a sentence of life in prison in favor of a lesser sentence that allowed for release at some point. Potts now appeals.

¶13 Potts does not claim any defect in the January 2014 plea colloquy regarding the possession of a firearm and bail jumping charges—or that he entered

his pleas on that date because of ineffective assistance of counsel. Moreover, Potts "does not fault the court for inquiring of the [postconviction] attorney as to the basis for Potts' postconviction motion or the anticipated testimony of witnesses." Rather, Potts contends the circuit court "went beyond his judicial role and demonstrated objective bias."[2] Potts argues the court noticed a scheduling conference, but then "went well beyond the scope of the noticed activity in its inquiry of [trial counsel] as to his conversations with Potts and Potts' mother. In effect, the court turned the hearing into a discovery proceeding for the State." Potts insists the court's inquiry "was not to clarify issues but to unexpectedly confront [trial counsel] with questioning so the State would know what to expect at the evidentiary hearing on the merits of the motion." Potts argues this conduct constituted structural error that "irreversibly tainted the public perception that the court could be fair and impartial in further proceedings regarding the postconviction motion."

¶14 We presume circuit court judges try to be fair and impartial, and this presumption must be overcome by proof except in extreme cases of structural error. *See* ***State v. Carprue***, 2004 WI 111, ¶46, 274 Wis. 2d 656, 683 N.W.2d 31. If a judge is actually biased because he or she has a direct, personal, substantial interest in the outcome of the proceeding, there is a structural error that would be

[2] We note numerous citations in Potts' briefs are to record documents generally, often multi-hundred page transcripts, with no pinpoint citation to page. This violates the rules of appellate procedure. *See* WIS. STAT. RULE 809.19(d) and (e) (2015-16). It should be clear to all lawyers that appellate briefs must give references to pages of the record on appeal for each statement and proposition made in the appellate brief. ***Haley v. State***, 207 Wis. 193, 198-99, 240 N.W.2d 829 (1932). A reviewing court is not required to sift through the record to support a party's contentions; the rules make it clear that a party's brief must make appropriate references to the record on appeal. ***Siva Truck Leasing, Inc. v. Kurman Distribs.***, 166 Wis. 2d 58, 70 n.32, 479 N.W.2d 542 (Ct. App. 1991). Counsel is admonished that future rules violations may result in sanctions.

subject to automatic reversal. ***Id.***, ¶59. However, most matters pertaining to judicial disqualification do not rise to that level. ***Id.***, ¶¶57-60.

¶15 Here, Potts does not allege actual bias. Potts can do no more than allege the judge harbored general bias in favor of the State, arising from the judge's questioning of Potts' trial counsel at a scheduling conference preceding an evidentiary hearing on Potts' motion to withdraw his plea. A general appearance of bias is not structural error. ***Id.***, ¶¶43-44, 46.

¶16 When a defendant claims a judge is biased because he or she questions a witness, the defendant must object at the time the witness is questioned. A defendant's failure to promptly raise concerns or object when it is believed a judge is committing error constitutes a forfeiture. *See* ***id.***, ¶46.

In the present case, Potts made no objection when the judge at the scheduling conference asked questions of Potts' trial attorney. Accordingly, Potts forfeited any objection to the questioning, as well as the right to directly raise on appeal the issue of bias. *See* ***State v. Marhal***, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992).

¶17 Courts are not inclined to relieve defendants of their forfeiture in this situation, especially when the questioning does not occur in the presence of a jury. ***Carprue***, 274 Wis. 2d 656, ¶¶36-39. In the absence of any contemporaneous objection, a belated claim that the judge should not have questioned a witness is addressed under the test for ineffective assistance of counsel. ***Id.***, ¶47. However, Potts has not argued his postconviction counsel was ineffective for not objecting to the judge's questioning of Potts' trial counsel. We therefore decline to address

Potts' argument that the judge who decided the motion to withdraw his plea was biased.[3]

¶18 Potts also argues that he was entitled to withdraw his plea because he relied on erroneous information from his attorney regarding early release. Ordinarily, a defendant seeking to withdraw a plea after sentencing has a heavy burden to show by clear and convincing evidence that the plea must be withdrawn to correct a manifest injustice. ***State v. Sulla***, 2016 WI 46, ¶24, 369 Wis. 2d 225, 880 N.W.2d 659. If the circuit court does not believe the defendant's asserted reasons for plea withdrawal, there is no reason to allow withdrawal of the plea. ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999).

¶19 In the present case, the circuit court found incredible Potts' testimony that he would not have entered his plea except for the availability of early release.[4] The court specifically found that Potts' trial attorney never

[3] Even if we were to reach the merits of Potts' claim in this regard, we would affirm. Here, the circuit court subjectively believed it could act in an impartial manner, and the record discloses no objective basis to conclude the court was acting on behalf of the State, or against the defendant. The court questioned Potts' trial attorney regarding the attorney's version of events, making it clear the testimony was not under oath, to preview what the testimony may be and clarify the issues that would be litigated by the parties at the subsequent evidentiary hearing on Potts' motion to withdraw his plea. The court's shock and surprise that Potts would claim his plea was precipitated by a promise of early release when Potts failed to mention anything about early release during the plea colloquy was nothing more than an expression of initial bewilderment, not a reflection of any premature resolution of Potts' motion. The court did not make any finding of credibility or fact at the scheduling conference. Rather, the court proceeded to schedule the evidentiary hearing, leaving open an opportunity for Potts to explain on the record and in open court why he failed to mention anything regarding early release at the plea hearing. Under these objective circumstances, the court's evenhanded questioning at the scheduling conference to clarify a relevant subject, and to aid in the court's subsequent administration of the law and scheduling of the hearing, did not present any objective reason to believe it was biased.

[4] The circuit court also found the testimony of Potts' mother incredible as relevant to the motion to withdraw the plea.

promised Potts that he would be released from custody after serving seventy to eighty percent of his sentence. Rather, the attorney told Potts that there might be a possibility of early release if the statutes were changed to allow it. This finding was properly based upon the attorney's repeated testimony that he informed Potts that Potts should pay attention to whatever statutes would be in effect at the time he had served about three-quarters of his sentence because the law, which was in a state of flux, could change to provide the possibility of some kind of early release in the future.[5]

¶20 Significantly, the circuit court found it much more likely that Potts entered his plea on the last day of trial because there was overwhelming evidence virtually assuring a conviction of first-degree intentional homicide and a sentence of life in prison. As the court observed, Potts received a substantial benefit by pleading to an amended charge of first-degree reckless homicide—namely, a lesser sentence that allowed for release at some point. The historical facts on which Potts supposedly based his reason for pleading were contradicted, and the court's findings in that regard are not clearly erroneous. *See* ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. We conclude Potts failed to prove by clear and convincing evidence that he was entitled to plea withdrawal to correct a manifest injustice.

[5] To the extent Potts suggests that some of his trial counsel's statements excerpted from context may have suggested otherwise, the trier of fact has a right to accept some testimony of a witness while rejecting other assertions. *See* ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978).

*By the Court*.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).