

RECEIVED

08-26-2010

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2010AP000387-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY K. NIELSEN,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and Denial of
Postconviction Relief, Entered in the Circuit Court for Racine
County, the Honorable Faye M. Flancher, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

DEVON M. LEE
Assistant State Public Defender
State Bar No. 1037605

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
leede@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ARGUMENT	1
This Court Should Vacate Nielsen’s Sentence Because the Sentencing Court Failed to Properly Exercise its Sentencing Discretion.	1
CONCLUSION	5

CASES CITED

<i>McCleary v. State</i> 49 Wis. 2d 263, 182 N.W.2d 512 (1971)	4
<i>State v. Fisher</i> , 2005 WI App 175, 285 Wis. 2d 433, 702 N.W.2d 56	3
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197	1, 3
<i>State v. Klubertanz</i> , 2006 WI App 71, 291 Wis. 2d 751, 713 N.W.2d 116	1
<i>State v. Russ</i> , 2006 WI App 9, 289 Wis. 2d 65, 709 N.W.2d 483	2
<i>State v. Steele</i> , 2001 WI App 160, 246 Wis. 2d 744, 632 N.W.2d 112	5

State v. Wickstrom,

118 Wis. 2d 339, 48 N.W.2d 183

(Ct. App. 1984)..... 1

State v. Ziegler,

2006 WI App 49, 289 Wis. 2d 594,

712 N.W.2d 76 2

ARGUMENT

This Court Should Vacate Nielsen's Sentence Because the Sentencing Court Failed to Properly Exercise its Sentencing Discretion.

Nielsen recognizes that successfully challenging the exercise of a sentencing court's discretion is nearly impossible given this court's proper deference to trial courts' decisions. See *State v. Wickstrom*, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). This deference is given when the sentencing court has provided an explanation for the general range of the sentence it has imposed, including why the parts of the sentence imposed advance the court's objectives, what factors the court considered and how the factors influenced its sentencing decision. *State v. Gallion*, 2004 WI 42, ¶¶ 41-43, 46, 270 Wis. 2d 535, 678 N.W.2d 197.

Such deference should not be given when, as here, the sentencing court merely utters the facts, invokes the sentencing factors, and pronounces a sentence. *Gallion*, ¶ 2. Because the court's sentencing remarks did not reflect the court's sentencing rationale, it erroneously exercised its discretion.

The state compares Nielsen's challenge to his sentence to other sentencing challenges that this court has rejected. (State's brief at 4-5). The state is comparing apples to oranges: each of the cases cited by the state highlights sentencing comments that did fulfill the requirements of *Gallion*.

In *State v. Klubertanz*, 2006 WI App 71, 291 Wis. 2d 751, 713 N.W.2d 116, this court noted that the circuit court discussed each of the three *Gallion* factors, drawing on

specific facts to explain how it used the facts to arrive at its sentencing decision. ¶ 8. Here, the court mentioned the facts but provided no explanation for how it used the facts to determine what Mr. Nielsen's sentence should be. Indeed, there was no "discussion" of several of the factors: the court simply mentioned that it needed to consider protection of the public and punishment. (37:41).

The state's comparison of Mr. Nielsen's challenge to that in *State v. Ziegler*, 2006 WI App 49, 289 Wis. 2d 594, 712 N.W.2d 76 is off-base. In *Ziegler*, the defendant did not actually challenge the exercise of the court's sentencing discretion, but rather argued that the court needed to give a reason for the specific sentence it ordered. This court noted the thoroughness of the circuit court's sentencing remarks, "which consume some fifteen pages of transcript." *Id.*, ¶ 5. The court went on to note that the trial court's remarks served as a "textbook example of a proper consideration of the relevant sentencing objectives and factors." *Id.*, ¶ 27. As Nielsen explained in his opening brief, he is not arguing that the sentencing court must spend hours explaining how it reaches a sentence, but he notes for comparison that the court's sentencing remarks here consumed nothing close to fifteen pages of transcript.

In *State v. Russ*, 2006 WI App 9, 289 Wis. 2d 65, 709 N.W.2d 483, also cited by the state, the defendant argued that the circuit court should explain why it arrived at a particular number of years for his sentence. This court rejected that challenge, and noted that the circuit court discussed each of the factors as it related to the defendant and his crimes. The circuit court in *Russ* specifically discussed Russ's characteristics and how they impacted on the court's decision to impose the sentence that it did. *Id.*, ¶ 15. Nielsen is not claiming that the circuit court abused its discretion because it

ordered fifteen years as opposed to twelve; Nielsen's concern stems from the court's near complete lack of explanation for how it arrived at his sentence.

The state also compares Mr. Nielsen's case to *State v. Fisher*, 2005 WI App 175, 285 Wis. 2d 433, 702 N.W.2d 56. As the state notes, Fisher argued on appeal that *Gallion* required the circuit court to specifically explain the weight it ascribed to each of the three factors and how these factors translated into the precise sentence it ordered. *Fisher*, ¶ 21. This court noted that the supreme court had, in *Gallion*, already determined that circuit courts need not justify the specific number of years of a sentence. *Fisher*, ¶ 22.

In each of the cases cited by the state, this court noted that the sentencing court had addressed the *Gallion* factors and related them to the respective sentences.

In *Fisher*, this court noted:

The evil *Gallion* sought to remedy was the mechanistic application of the three sentencing factors, in which a circuit court simply described the facts of the case, mentioned the three sentencing factors, and imposed a sentence.

Fisher, ¶ 22, citing *Gallion* at ¶¶ 26, 55. This “evil” is precisely what occurred here: the court briefly mentioned the facts of the case, stated the three factors, and pronounced sentence.

Indeed, the language the state quotes as demonstrating the exercise of the court's discretion does not address the requirements of *Gallion*. The court did tell the parties that it recognized that the defendant and victim's families each had reasonable requests regarding sentencing. And the court told the parties that “this is a kind of sentencing that I spend a

tremendous amount of time considering.” (37:37; State’s brief at 5).

Nielsen acknowledges that the court’s remarks regarding Nielsen’s age and the fact that he had been drinking, and that the accident had ended a young person’s life were relevant to sentencing. The problem is that the court said little else to explain why it sentenced Nielsen the way that it did.

The court indicated that protection of the community was the most important factor, but noted only that it was imperative that the community be protected from drunk drivers. Regarding punishment, the court stated: “You killed a man. Punishment is clearly an appropriate factor for this Court to consider.” The court’s remarks regarding these two factors are applicable to every single defendant facing sentencing on a homicide by intoxicated use of a vehicle; nothing in the court’s remarks shed any light on how these two factors impacted the court’s sentencing decision in Mr. Nielsen’s case.

The court also mentioned rehabilitation, noting that the court believed Mr. Nielsen needed alcohol treatment. Alcohol treatment is available both in the community and in correctional settings. Finally, the court stated that it needed to send a message to under-aged people that they will be held accountable if they drink and drive. (37:43; App. 105). These limited comments do not explain how or why the court arrived at the sentence it determined was appropriate.

Individuals, even when convicted of the same offense, should be sentenced according to their particular situation. *McCleary v. State* 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). Under these standards, Mr. Nielsen’s sentence should reflect both the circumstances of his crime and his character.

State v. Steele, 2001 WI App 160, ¶ 9, 246 Wis. 2d 744, 632 N.W.2d 112. Because it does not, this court should vacate Mr. Nielsen's sentence and remand the case for resentencing.

CONCLUSION

For the reasons stated here and in his brief-in-chief, Mr. Nielsen asks this court to vacate his sentence and remand for a new sentencing hearing.

Dated this 25th day of August, 2010.

Respectfully submitted,

DEVON M. LEE
Assistant State Public Defender
State Bar No. 1037605

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
leede@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,176 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of August, 2010.

Signed:

DEVON M. LEE
Assistant State Public Defender
State Bar No. 1037605

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
leede@opd.wi.gov

Attorney for Defendant-Appellant