

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEPHEN M. LEHMAN,

Defendant-Appellant.

Circuit Court Case No.
2008CF4994

Court of Appeals Case No.
2011AP2821

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appeal from Decisions of the Circuit Court for Milwaukee County,
the Honorable Dennis R. Cimpl Presiding, dated September 30, 2009;
March 1, 2010; December 16, 2010; February 17, 2011; and November 14,
2011.

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ISSUES PRESENTED

1. Whether Mr. Stephen M. Lehman's trial attorney was ineffective for failing to investigate witnesses who would have testified (1) Lehman had an alibi for and purchased the stolen goods related to the second burglary charge; and (2) the stolen goods related to the first burglary charge were outside of the residence.

The trial court answered, No.

2. Whether Lehman should be found eligible for the Challenge Incarceration Program ("CIP") or Earned Release Program ("ERP") given his young age, and need for intensive treatment and structure to (1) overcome his addiction and criminal thinking; and (2) prepare him for following the conditions of extended supervision.

The trial court answered, No.

3. Whether the availability of a Risk Reduction Sentence ("RRS") is a new factor requiring modification of Lehman's sentence.

The trial court answered, No.

4. Whether the sentences were grossly disproportionate to the crimes considering the facts of the cases; Lehman's character and rehabilitative needs; the minimal need to protect the public; and Lehman's criminal history, attitude, and remorse.

The trial court answered, No.

STATEMENT OF THE CASE

On June 17, 2009, Lehman pleaded guilty to two counts of Burglary of a Dwelling, Class F felonies, contrary to Section 943.10(1m)(a) of the Wisconsin Statutes. (R:16.) On or about September 28, 2009, Lehman filed a *pro se* request to reconsider his

eligibility for the CIP or ERP. (R:19.) The circuit court denied Lehman's *pro se* motion the same day it was filed. (R:20.)

On or about February 25, 2010, Lehman filed motions to withdraw his pleas based on ineffective assistance of counsel; reconsider his eligibility for the CIP and ERP; and modify his sentence based on the rule of proportionality. (R:24-26.) The court denied these motions in a written decision dated March 1, 2010. (R:27.)

On or about December 15, 2010, Lehman filed another *pro se* motion asking the court to again consider his eligibility for the CIP and ERP. (R:41.) The court denied this motion in writing the next day. (R:42.)

Lehman next filed a motion to modify his sentence based on the introduction of RRS's; this motion was filed on or about February 11, 2011. (R:43.) In a written decision dated February 17, 2011, the court denied this motion. (R:44.)

Finally, Lehman filed an amended motion to withdraw his pleas based on ineffective assistance of counsel on or about July 7, 2011. (R:52.) The court also denied this motion in writing on November 14, 2011. (R:57.)

This appeal follows.

Further details may be discussed below as necessary.

STATEMENT ON PUBLICATION

Lehman does not request publication of the Court's opinion, pursuant to Section 809.23(1)(b) of the Wisconsin Statutes. Wis. Stat. § 809.23(1)(b) (2010).

STATEMENT ON ORAL ARGUMENT

Lehman believes this appeal will be fully presented and argued in the briefs. Thus, in the interest of judicial efficiency and pursuant to Section 809.22(2)(b) of the Wisconsin Statutes, Lehman does not request oral argument. Wis. Stat. § 809.22(2)(b) (2010).

STANDARDS OF REVIEW

Ineffective Assistance of Counsel

Whether a defendant's pleas may be withdrawn based on ineffective assistance of counsel is a mixed question of law and fact. *State v. Sanchez*, 201 Wis. 2d 219, 236-37, 548 N.W.2d 69, 76 (1996). Questions of fact are reviewed under an erroneous exercise of discretion standard, while questions of law are reviewed de novo. *Id.* Hence, whether the defendant's attorney was ineffective is a question of fact that will not be overturned unless the trial court erroneously exercised its discretion. *Id.* Further, if the defendant's attorney was ineffective, whether that ineffectiveness prejudiced the defendant is reviewed de novo. *Id.*

CIP/ERP

Whether a defendant is eligible for the CIP and ERP is reviewed under an erroneous exercise of discretion standard. *State v. Lehman*, 2004 WI App 59, ¶¶ 17-18, 270 Wis. 2d 695, 703-04, 677 N.W.2d 644.

New Factor

Whether a fact is actually a new factor is a question of law reviewed *de novo*. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 71, 797 N.W.2d 828. But, whether

the new factor justifies sentence modification is reviewed for erroneous exercise of discretion. *Id.*

Rule of Proportionality

Whether Lehman's sentence is disproportionate to his crimes is reviewed for erroneous exercise of discretion. *State v. Babler*, 170 Wis. 2d 210, 214-15, 487 N.W.2d 636, 637-38 (Ct. App. 1992).

STATEMENT OF FACTS

Ineffective Assistance of Counsel

The first burglary occurred between July 18 and 19, 2008. (R:2 at 1.) At that time, Lehman allegedly entered the Sarenacs' SUV and took a GPS; an iPod; some CDs; a brand new wallet; and a flashlight. (*Id.*) Additionally, Lehman supposedly took a bicycle from the inside of the Sarenacs' garage. (*Id.*)

The second burglary occurred on August 28, 2008. (*Id.*) At that time, Lehman allegedly woke a person sleeping on the couch and took the following: a Blackberry cell phone; a medium, black Coach purse; a smaller, black Coach purse; a thin, black Coach wallet; \$300 cash; credit cards; and gift cards. (*Id.*)

Lehman advised his trial attorney, Laurence Moon, of three witnesses in his case: Russell St. Jean ("St. Jean"); Amber Bossahart ("Bossahart"); and Krista Smith ("Smith"). (R:53 at 2.) Lehman may also have advised Attorney Moon of a fourth witness, Adam Laux ("Laux"). (*Id.*) St. Jean was Lehman's roommate. (*Id.*) St. Jean and Laux observed Lehman purchase the stolen goods related to the second burglary charge. (*Id.* at 2-3, 5-6.) Hence, Lehman was guilty of receiving stolen property, not

burglary. (*See id.*) Receiving stolen property carries lesser penalties than burglary. *See* Wis. Stat. §§ 943.10(1m)(a) and 943.34 (2010).

Bossahart is Lehman's ex-girlfriend. (R:53 at 2.) Lehman was with Bossahart the evening of the second burglary charge. (*Id.*) Thus, Lehman had an alibi related to the second burglary charge. (*Id.*)

Smith is a close friend of Lehman's who lives in Texas. (*Id.*) Around the dates of the charges in this case, Smith and Lehman talked over the phone on an almost daily basis. (*Id.*) During one of these telephone conversations, Lehman advised Smith the bicycle in the first burglary charge was outside of and leaning against the garage. (*Id.*) In another telephone conversation, Lehman advised Smith that he purchased the goods related to the second burglary charge. (*Id.*) Because the bicycle was not inside the garage, Lehman never entered the Sarenac's residence in any way, shape, or form. (*Id.*) Therefore, he was not guilty of burglary with respect to the first charge, but rather some form of theft. (*Id.*) Theft carries lesser penalties than burglary, especially considering the value of the stolen goods in question. *See* Wis. Stat. §§ 943.10(1m)(a) and 943.20 (2010).

Attorney Moon does not recall Lehman mentioning the above-described witnesses, except for St. Jean; and Attorney Moon never spoke with any of the above-mentioned witnesses. (*Id.* at 4-5.) Attorney Moon does not, however, believe Lehman is lying. (*Id.* at 4.) Even if Lehman had advised Attorney Moon of the witnesses, he would have advised Lehman the witnesses were not worthwhile unless they were completely neutral and have no criminal records. (*Id.*) Attorney Moon did not hire an investigator to

locate or speak with the above-mentioned witnesses. (*Id.* at 3-5.) Attorney Moon does recall Lehman stating the bicycle was outside of the garage; and he advised Lehman this defense would go nowhere because it would be an officer's word against Lehman's. (*Id.* at 4.) If Attorney Moon had investigated Lehman's cases properly and if any of the witnesses would have been willing to testify as Lehman expected, Lehman would have demanded a jury trial. (*Id.* at 3.)

And there is at least one witness who would testify as Lehman expected: Adam Laux. (*Id.* at 5-6.) Laux would testify he was with Lehman one night at Wendt's, a bar in Greenfield, WI. (*Id.*) While there, Lehman talked to a man, who Laux did not know. (*Id.* at 6.) The man was 27-28 years old, slender, slight frame, balding, and wore glasses. (*Id.*) Lehman and the man walked out of the bar; and Lehman returned a short time later with a purse and some credit cards. (*Id.*) Lehman stated he purchased the purse from the man and was going to give the purse to his girlfriend. (*Id.*) Laux and Lehman stayed at Wendt's until bar closing. (*Id.*) Given Laux's testimony, Lehman has a strong argument for a lesser charge related to the second burglary.

CIP/ERP

Following Lehman's pleas, the court pronounced sentence on Lehman as follows: 8 years on each count, 5 years initial confinement and 3 years extended supervision, consecutive. (R:34 at 17-23.) Therefore, under this sentence, the total time in for Leman is 10 years; and the total time out is 6 years. Lehman advised the court that he had a drinking problem. (*Id.* at 20.) Yet, the court found Lehman ineligible for both the CIP and ERP. (*Id.* at 17-23.)

New Factor

At sentencing, the court noted Lehman was a "high risk," (*id.* at 20); and "all [that is] left is punishment," as "rehab hasn't worked," (*id.* at 22).

On October 1, 2009, however, RRS's - a new form of rehabilitation - became available under Section 973.031 of the Wisconsin Statutes:

Whenever a court imposes a sentence for a felony under s.973.01, the court may order the person it sentences to serve a risk reduction sentence if the court determines that a risk reduction sentence is appropriate and the person agrees to cooperate in an assessment of his or her criminogenic factors and his or her risk of reoffending, and to participate in programming or treatment the department develops for the person under s. 302.042(1).

Wis. Stat. § 973.031 (2010). The RRS programs are designed to reduce the risk an individual may reoffend. Wis. Stat. § 302.042(2)(b) (2010). Upon completion of the programming or treatment, the individual is entitled to early release to extended supervision after serving at least 75% of the initial confinement. Wis. Stat. § 302.042(4) (2010). Because a RRS was not available to the court at the time of sentencing, a RRS is a new factor.

Rule of Proportionality

Attorney Moon believes Lehman's sentence is grossly disproportionate to the charges in this case. (R:53 at 5.) Attorney Moon advised Lehman to plead believing Lehman would receive a much lesser sentence for pleading. (*Id.*) Attorney Moon believes Lehman received the same sentence he would have, if Lehman had gone to trial. (*Id.*)

Moreover, the Court interrupted Lehman's right to allocution during sentencing and never gave Lehman an opportunity to finish his statement:

THE COURT: What do you want to say, Mr. Lehman.[sic.]

THE DEFENDANT: Well, this is the longest sentence I have ever received. It's giving me time to think about my actions, where my life is going, and I realize it's not going where I want it. I know pretty much if I keep going the direction I'm going, I'm afraid I'm going to spend the rest of my life in prison.

THE COURT: Why do you steal?

THE DEFENDANT: Foolishness. I mean it's no excuse what I did this time, but I mean I just got released from M.S.D.F. I did a program for domestic violence. Me and my girlfriend split while I was in there and pretty much when I got out, she cleaned me out, took everything. I had nothing. I mean, I stole the bike because—

THE COURT: Because you didn't want to walk.

THE DEFENDANT: Correct.

THE COURT: I listened to your confession.

THE DEFENDANT: I mean it was stupid. It was childish.

THE COURT: And you were going over to a friend's house . . . you saw the door open, so you decided to go there and rip them off whatever you could get. That's what happened in the other case.

THE DEFENDANT: Yes.

THE COURT: And when you stole the bike, what you did is you went into the S.U.V. because it was open . . . Right?

THE DEFENDANT: Yes.

THE COURT: And the iPod. . . . In sentencing somebody, I have to set goals . . .

(R:34. at 17-18.) After interrupting Lehman, the court never gave him an opportunity to finish his statement. (*See id.* at 17-23.)

Following Lehman's pleas of guilty, the court pronounced sentence as follows: 8 years on each count, 5 years initial confinement and 3 years extended supervision, consecutive. (*Id.* at 20-23.) Therefore, under this sentence, the total time in for Leman is 10 years; and the total time out is 6 years. Additionally, the court found Lehman ineligible for the CIP and ERP. (*Id.*)

Following the sentencing, a restitution hearing was held. Based on the restitution hearing, Lehman was ordered to pay the following amounts of restitution: \$70 to Kelly Koehler; \$775 to Nicole Koehler; and \$868 to Lisa Sarenac. (R:16.)

ARGUMENT

Ineffective Assistance of Counsel

I. LEHMAN'S TRIAL ATTORNEY WAS INEFFECTIVE; THAT INEFFECTIVENESS WAS SO PREJUDICIAL, A MANIFEST INJUSTICE OCCURRED; AND LEHMAN SHOULD BE ALLOWED TO WITHDRAW HIS PLEAS.

Criminal defendants are constitutionally guaranteed the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. The right to counsel includes the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 2063-64, 80 L. Ed. 2d 674 (1984). The standard for determining whether counsel's assistance is effective under the Wisconsin Constitution is the same as that under the

Federal Constitution. *See e.g., State v. Sanchez*, 201 Wis. 2d 219, 235-36, 548 N.W.2d 69, 75-76 (1996).

To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. *Strickland*, 466 U.S. at 687. In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* A defendant must establish that counsel's conduct falls below an objective standard of reasonableness. *Id.* at 687-88; *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 587-88, 665 N.W.2d 305. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 847-48 (1990).

To withdraw a guilty plea after sentencing, the defendant must show by clear and convincing evidence a manifest injustice has occurred. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50, 54 (1996). A manifest injustice has occurred if trial counsel was ineffective and, but for trial counsel's ineffectiveness, there is a reasonable probability the defendant would have demanded a jury trial. *Id.* at 311-12. In establishing a reasonable probability the defendant would have demanded a jury trial, the defendant does not need to make any claims of actual innocence. *State v. Biastock*, 42 Wis. 2d 525, 530, 167 N.W.2d 231, 233 (1969).

A. Attorney Moon's Failure to Interview or Otherwise Investigate Lehman's Witnesses was Ineffective Assistance of Counsel.

The failure to properly investigate alibi witnesses is *per se* ineffective assistance of counsel: “[F]ailure to pursue an alibi defense by investigating potential alibi witnesses . . . constitute[s] ineffective assistance of counsel.” *State v. Cooks*, 2006 WI App 262, ¶ 66, 297 Wis. 2d 633, 662, 726 N.W.2d 322. At the very least, defense counsel has a duty to investigate an alibi and his failure to fulfill that duty constitutes deficient performance. *See e.g., Washington v. Smith*, 219 F.3d 620, 631 (7th Cir. 2000).

Here, Attorney Moon failed to speak with Lehman's witnesses or hire an investigator to do so. (R:53 at 2-5.) One of the witnesses Attorney Moon ignored was an alibi witness. (*Id.* at 2.) The other witnesses could have established Lehman was guilty of crimes other than burglary and with less severe penalties. (*Id.* at 2-5.) Clearly, Attorney Moon was ineffective.

B. If Attorney Moon had Properly Investigated Lehman's Case, There is a Reasonable Probability Lehman Would have Demanded a Jury Trial.

If Attorney Moon had investigated the witnesses Lehman proffered, there is a reasonable probability Lehman would have demanded a jury trial. If any one of the witnesses would have testified the way Lehman expected, Lehman's case would have improved significantly. (*See id.*) If Bossahart had testified she was with Lehman the night of the second burglary, Lehman would have had an alibi defense. (*Id.* at 2.) If St. Jean or Laux had testified to observing Lehman purchase the stolen goods related to the second burglary, Lehman could have been found guilty of receiving stolen property, rather than burglary. (*Id.*) Receiving stolen property is a lesser offense than burglary. *See Wis. Stat. §§ 943.10(1m)(a) and 943.34 (2010).*

Smith's testimony also could have established Lehman was guilty of receiving stolen property. (R:53 at 2.) Additionally, Smith's testimony could have established Lehman never entered the residence for the first burglary. (*Id.*) If Lehman never entered the residence for the first burglary, he could have been found guilty of theft rather than burglary. (*Id.*) Considering the value of the stolen goods in the first burglary, theft would carry lesser penalties than burglary in this case. *See* Wis. Stat. §§ 943.10(1m)(a) and 943.20 (2010).

Attorney Moon's failure to investigate Lehman's witnesses undermines confidence in the outcome of this case. If Attorney Moon had investigated the witnesses, Lehman may have had an alibi for one charge. Further, Lehman would have been able to argue he was guilty of crimes other than burglary that carried lesser penalties. Any one of these witnesses could have led to a defensible or triable case. If nothing else, any one of these witnesses could have put Attorney Moon in a better position to negotiate a better pretrial offer in Lehman's case. If any one of these witnesses would have testified as expected (i.e. Laux), Lehman would have demanded a jury trial. (*Id.* at 3.) Hence, a manifest injustice has occurred, and Lehman should be allowed to withdraw his guilty pleas.

CIP/ERP

II. LEHMAN IS ELIGIBLE FOR THE CIP AND THE ERP; AND THE COURT ERRONEOUSLY EXERCISED ITS DISRECTION BY FINDING LEHMAN INELIGIBLE FOR BOTH PROGRAMS.

The court found Lehman ineligible for both the CIP and ERP, despite the fact he meets the criteria for and would benefit greatly from both programs.

A. Lehman is Eligible for the CIP.

The CIP is similar to boot camp, and includes military bearing; group activities; education; alcohol and other drug abuse (“AODA”) treatment; work; evaluations; and release planning. (R:26 Attach A at 3-5.) The inmate must spend at least 6 months in the CIP. (*Id.* at 2.) The military bearing portion of the CIP includes drilling and physical exercise. (*Id.* at 3.) For group activities, inmates spend at least 9.5 hours per week in group activities promoting rational behavior and responsible thinking. (*Id.* at 4.) Every day, the inmate must complete a journal entry related to group activities. (*Id.*) With respect to education, the inmate spends at least 9.5 hours per week in classes, completing an individualized course of study. (*Id.*) For AODA, treatment is abstinence-oriented, and the inmate must dedicate at least 9.5 hours per week of time to group and individual treatment sessions. (*Id.*) Further, the inmate must be involved in meaningful work (i.e., unskilled labor for non-profit organizations) on a daily basis and for at least 10 hours per week. (*Id.*) This work gives inmates an opportunity to give back to the community. (*Id.*) Inmates are closely supervised and evaluated on a daily basis, (*id.* at 4-5); and all inmates are involved in planning for their release, (*id.* at 5). An inmate who successfully completes the CIP is immediately released on extended supervision, but the length of his sentence remains the same. (*Id.* at 3.) Upon release, the inmate participates in aftercare and high risk supervision. (*Id.* at 3, 6.) Hence, inmates leaving the CIP are better equipped to become productive and contributing members of the community. An inmate who fails to complete the CIP is returned to the general population to serve the remainder of his sentence.

For the CIP, inmates must be less than 40 years old (R:26 Attach A at 1); and at the time of sentencing, Lehman was under 40, (*see* R:1.) Inmates must have an identifiable substance abuse problem, (R:26 Attach A at 2); Lehman admits he is an alcoholic, (R:34 at 20). Inmates must not have any physical limitations, (R:26 Attach A at 1); and Lehman has none, (*see* R:34). Inmates cannot be convicted of crimes against life and bodily security, (R:26 Attach A at 1); and Lehman has never been so convicted, (R:34 at 14). Finally, inmates cannot have any psychological issues or be on any psychotropic medications. (R:26 Attach A at 1.) Lehman has no psychological issues and is not on any psychotropic medications. (*See* R:34.) Hence, Lehman is eligible for the CIP.

B. Lehman is Eligible for the ERP.

The ERP is similar to the CIP. After the Court determines an inmate's eligibility, the inmate is incarcerated initially, as he is with the CIP. (R:26 Attach B at 4.) Ultimate participation in the ERP, however, is reserved for inmates who demonstrate good behavior in prison. (*Id.*) Once in the ERP, inmates are held to high standards, including "high intensity, evidence-based residential alcohol and drug treatment." (*Id.*) The ERP is approximately 6 months in length and includes 35 hours of structured activity per week. (*Id.* at 6-7.) A minimum of 30 of the 35 hours is spent in intensive AODA treatment. (*Id.* at 7.) Like the CIP, the ERP includes rational behavior training and criminal thinking prevention, as well as release planning. (*Id.*) As with the CIP, an inmate who successfully completes the ERP is immediately placed on extended supervision, but the length of his sentence does not change. (*Id.* at 5.) If the inmate fails to meet the high

standards for the ERP, he is returned to general population to serve out the remainder of his sentence. (*Id.*)

With respect to the ERP, the inmate must demonstrate good behavior in prison, (R:26 Attach B at 4); and Lehman has. Also, the inmate must demonstrate an AODA need. (*Id.*) Again, Lehman is on the record as having a drinking problem. (R:34 at 20.) Further, the inmate must be non-assaultive and non-violent, (R:26 Attach B at 4); Lehman is neither assaultive, nor violent, (R:34 at 14). The ERP has no age limitation. (R:26 Attach B at 5.) Finally, inmates participating in the ERP cannot be facing conviction for an offense involving a weapon. (*Id.* at 6.) Lehman is not currently facing charges for any such offenses.

C. The Trial Court Erred When It Refused to Make Lehman Eligible for the CIP and ERP.

The court's decision to make Lehman ineligible for the CIP and ERP was focused on Lehman's criminal history. (R:34 at 21.) Lehman's criminal history is mostly related to retail theft and burglary charges. (*Id.* at 14.) He could certainly benefit from the rational behavior and responsible thinking components of either program. Additionally, Lehman could benefit from the AODA treatment component in either program, as he admits he has a drinking problem. (*Id.* at 20.)

Lehman's young age makes him uniquely qualified to rehabilitate himself through the CIP or ERP. As Attorney Laurence Moon pointed out at sentencing, Lehman is at "the turning point in his life. . . . He's either going to turn it around at this point or he's not." (*Id.* at 14-15.) Participating in the CIP or the ERP would make Lehman substantially more likely to change his life for the better and become a productive, contributing member of the community.

Moreover, these programs are designed to rehabilitate alcoholics and criminal thinkers, like Lehman; and completing these programs is no small feat. Additionally, given Lehman's young age, he has a real shot at rehabilitation. Thus, the public would be adequately protected in the event Lehman was found eligible for the CIP and/or ERP, and released upon completion of either program. In fact, the public would benefit from Lehman's rehabilitation, as he would presumably become a productive and contributing member of society following completion of the CIP or the ERP.

Finally, Lehman needs intensive treatment and structure in order to overcome his addiction and criminal thinking, and be able to comply with the court-ordered conditions of extended supervision. The highly-regimented structures of the CIP and ERP are ways Lehman can begin to address his problems. Both of these programs are more intense and more challenging than any out-patient program in which he could participate upon release. Giving Lehman an opportunity to earn the privilege of supervision would not unduly depreciate the seriousness of the offenses in this case and would help provide him with the necessary tools for successfully completing supervision upon release. A failure to use those tools will result in his return to prison with no further opportunities to earn his early release.

New Factor

III. THE AVAILABILITY OF A RRS IS A NEW FACTOR THAT FRUSTRATES THE ORIGINAL PURPOSE OF LEHMAN'S SENTENCE AND REQUIRES LEHMAN'S SENTENCE TO BE MODIFIED.

A trial court may modify a previous sentence. *State v. Kluck*, 210 Wis. 2d 1, 6-7, 563 N.W.2d 468, 470 (1997). Modification cannot, however, be based on reflection or second thoughts alone. *Id.* A sentence may be modified based upon a new factor, which is

shown through a two-step process. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609, 611 (1989). “First, the defendant must demonstrate [by clear and convincing evidence] that there is a new factor justifying a motion to modify a sentence.” *Id.* A new factor is a “fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing.” *Rosado v. State*, 70 Wis. 2d 280, 288-89, 234 N.W.2d 69, 73 (1975). A new factor “frustrates the purpose of the original sentencing.” *State v. Harris*, 174 Wis. 2d 367, 379, 497 N.W.2d 742, 747 (Ct. App. 1993) (Citations omitted.). Once a new factor is shown, a defendant must demonstrate that “the new factor justifies modification of the sentence.” *Franklin*, 148 Wis. 2d at 8.

The creation of the RRS is a new factor in this case. Because RRS's went into effect on October 1, 2009, a RRS was not known or available to the Court at sentencing on June 17, 2009. Further, the potential for a RRS is highly relevant to Lehman's case because the Court (1) was concerned about Lehman as a risk to the community; and (2) believed punishment was the only option/no other form of rehabilitation was available. If Lehman's sentence is modified to a RRS, the court's intent to make sure the community is safe through a long period of incarceration may be achieved with lesser confinement. In other words, a RRS frustrates the original purpose of Lehman's sentence.

Moreover, this new factor justifies modification because Lehman would benefit from a RRS, and the community would be safer with a RRS. A RRS sentence would be highly relevant to help Lehman assess his criminogenic factors and curtail his risk of reoffending by participating in programming and/or treatment. Thus, the creation of the RRS statute is a new factor that frustrates the purpose of Lehman's original sentence; and his sentence should be modified to include RRS.

Rule of Proportionality

IV. LEHMAN’S SENTENCE IS GROSSLY DISPROPORTIONATE TO HIS OFFENSES; THEREFORE, HIS SENTENCE SHOULD BE MODIFIED.

The Eighth Amendment to the United States Constitution “forbids . . . extreme sentences that are grossly disproportionate to the crime.” *State v. Babler*, 170 Wis. 2d 210, 211, 487 N.W.2d 636 (Ct. App. 1992). Courts should consider the following factors when determining whether a sentence is grossly disproportionate to the crime: (1) the seriousness of the offense; (2) the character and rehabilitative needs of the defendant; (3) the need to protect the public; (4) the defendant’s criminal record; (5) the defendant’s attitude; and (6) whether the defendant expresses remorse. *See id.* at 216.

A. Considering the Seriousness of the Offenses, the Sentences are Grossly Disproportionate to the Crimes.

The total 10 years initial confinement and 6 years extended supervision, without the possibility of relief under the CIP or ERP, is grossly disproportionate to the seriousness of these offenses. Lehman was ordered to pay the total of \$1,713 in restitution. (R:16.) So, the property involved in these crimes was of minimal value. Further, Lehman did not intentionally wake the person sleeping on the couch. (R:2 at 2.) Finally, with respect to the Sarenacs, Lehman did not even enter the home. (*Id.* at 3.) Considering the facts of these incidents, the sentences are grossly disproportionate to their seriousness, especially given Lehman’s ineligibility for the CIP and ERP.

B. Considering Lehman’s Character and Rehabilitative Needs, the Sentences are Grossly Disproportionate to the Crimes.

The sentences are completely out of line with Lehman’s character and rehabilitative needs. Lehman is young; and if given the opportunity, he may be able to rehabilitate himself through the CIP or ERP. Again, as Attorney Laurence Moon pointed

out at sentencing, Lehman is at “the turning point in his life. . . . He’s either going to turn it around at this point or he’s not.” (R:34 at 14-15.) Additionally, Lehman has been seriously considering where his life is going; and he knows he does not want to spend the rest of his life in prison. (*Id.* at 17.) Further, Lehman appeared to be sincerely remorseful at sentencing. (*Id.* at 17-18.) Lehman took responsibility for these charges by confessing, (R:2 at 2-3); and pleading guilty, (R:34 at 5-7.). Perhaps, the reason Lehman did not directly express his remorse at sentencing is the court cut him off during his right to allocution. (*Id.* at 17-18.) Given Lehman’s character and rehabilitative needs, 10 years of initial confinement, plus 6 years extended supervision, without eligibility for the CIP and ERP, is grossly disproportionate.

C. Considering the Need to Protect the Public, the Sentences are Grossly Disproportionate to the Crimes.

Taking into account Lehman’s young age, rehabilitative potential, and apparent remorse, as described in Section IV. B. above, the need to protect the public is minimal. Thus, 10 years initial confinement and 6 years extended supervision, plus ineligibility for the CIP and ERP, is grossly disproportionate to the need to protect the public.

D. Considering Lehman’s Criminal History, the Sentences are Grossly Disproportionate to the Crimes.

Although Lehman’s criminal history is extensive, the sentences in this case are still grossly disproportionate to the crimes. Lehman’s criminal history is mainly related to retail theft and burglary. (R:34 at 14.) These are not violent crimes. In fact, Lehman does not appear to have been convicted of any violent crimes ever. And he has certainly not been convicted of crimes related to bodily harm or security. Granted, Lehman once violated a domestic abuse restraining order. The standard for a domestic abuse

restraining order, however, is relatively low. *See* Wis. Stat. § 813.12(4) (2010). Also, with restraining orders, the petitioner does not have to prove the respondent was actually abusive. *See id.* The petitioner simply has to state there was physical contact that caused the petitioner pain. *See id.* Such testimony can easily be self-serving for the petitioner. In any event, the nature of Lehman's criminal history does not warrant a sentence of 10 years in and 6 years out, without the chance of participating in either the CIP, or ERP.

E. Considering Lehman's Attitude, the Sentences are Grossly Disproportionate to the Crimes.

The arguments related to this Section are made in Sections IV. B. and IV. C. above and need not be repeated here.

F. Considering Lehman's Remorse, the Sentences are Grossly Disproportionate to the Crimes.

Again, the arguments related to this Section are made in Sections IV. B. and IV. C. above and need not be repeated here.

CONCLUSION

Ineffective Assistance of Counsel

Defense counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. Cooks*, 2006 WI App 262, 297 Wis. 2d 633, 726 N.W.2d 322. Defense counsel failed to properly investigate the defendant's alibi witness, as well as witnesses whose testimony may have led to reductions in the burglary charges. Defense counsel's performance was so deficient a manifest injustice has occurred, and there is a reasonable probability Lehman would have demanded a jury trial, if defense counsel had investigated any of the witnesses.

Lehman was deprived of his constitutional right to effective assistance of counsel by his trial attorney's failure to properly investigate his alibi and other defenses. Therefore, Lehman respectfully requests an order vacating his guilty pleas and returning him to the position he was in before he pleaded in this case, as well as any other relief this Court deems appropriate.

CIP/ERP

The trial court erroneously exercised its discretion by finding Lehman ineligible for the CIP and ERP; and Lehman respectfully asks this Court to issue an order making him eligible for the CIP and/or ERP, as well as for any other relief this Court deems appropriate.

New Factor

The availability of a RRS is a new factor that frustrates the sentence's original purpose; and Lehman respectfully asks this Court to issue an order amending the judgment of conviction to make him eligible for a RRS, as well as for any other relief this Court deems appropriate.

Rule of Proportionality

Lehman's sentence was clearly disproportionate to his crimes. Thus, Lehman respectfully asks this Court to modify his sentence, as well as for any other relief this Court deems appropriate.

Dated at Beloit, Wisconsin this _____ day of March, 2012.

Respectfully submitted,

Karyn T. Missimer, Esq.
State Bar No. 1061255

CERTIFICATION OF BRIEF

I certify that this brief conforms to the rules contained in Sections 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief and appendix produced with a proportional serif font. The length of this brief is 5,599 words.

Dated at Beloit, Wisconsin this ____ day of March, 2012.

Respectfully submitted,

Karyn T. Missimer, Esq.
State Bar No. 1061255

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) of the Wisconsin Statutes and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that, if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Beloit, Wisconsin this ____ day of March, 2012.

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APPENDIX

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III. TRANSCRIPTS

- A. Change of Plea and Sentencing Hearing on June 17, 2009

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 Section 809.19(12) of the Wisconsin Statutes.

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date, except for the page numbering, which has been removed due to technical difficulties.

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 at Beloit, Wisconsin this ____ day of March, 2012.

Respectfully submitted,

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