STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP634-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JIMMIE G. MINETT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING RESENTENCING, ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE JAMES L. CARLSON PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in refusing to suppress the fruits of a constitutionally valid strip search which did not conform to all of the procedural requirements contained in Wis. Stat. § 968.255(2)?

Finding "substantial compliance," the trial court denied Minett's motion to suppress the fruits of the strip search.

2. Assuming the suppression motion should have been granted, does the narrow exception to the guilty-plea-waiver rule found in Wis. Stat. § 971.31(10) apply to Minett's conviction for delivery of heroin as a repeater, given that the evidence obtained in the strip search was irrelevant to this count?

This question was not presented below.

3. Assuming the suppression motion should have been granted, was the error in denying it harmless beyond a reasonable doubt with respect to Minett's conviction for possession with intent to deliver cocaine as a repeater?

This question was not presented below.

4. Did the trial court erroneously exercise its discretion in denying Minett's motion for resentencing?

The trial court found that its original sentence was not excessive.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the parties' briefs thoroughly discuss the relevant facts and legal authorities.

If this court decides that suppression is not an appropriate remedy for violations of Wis. Stat. § 968.255(2) even after *State v. Popenhagen*, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, then the State asks that the opinion be published.

SUPPLEMENTAL STATEMENT OF FACTS

Facts additional to those presented in Minett's brief will be incorporated into the Argument where necessary.

ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS THE FRUITS OF THE STRIP SEARCH OF MINETT.

A. The nature of Minett's claim.

Minett concedes that officers had probable cause to strip-search him at the Whitewater Police Department on February 22, 2010, and he does not allege any constitutional violation resulting from that search. Minett's brief at 12. Instead, Minett claims a statutory violation, i.e., that officers failed to comply with three conditions for a valid strip search under Wis. Stat. § 968.255(2).[1] According to Minett, the search violated the statute because Detective Uhl was present but not conducting the search; no written authorization for the search was given; and neither a copy of the report specified in § 968.255(2)(e) nor the written authorization was given to Minett before the search. Minett's brief at 12. As a result of these alleged violations, Minett argues that he is entitled to suppression of the evidence obtained from the strip search.

The State will show below that in fact Detective Uhl was a participant in the search; the trial court found that he was, and this finding is not clearly erroneous. The State will also show why the failure to obtain written rather than oral authorization for the search and to give Minett the strip-search report earlier than the exchange of discovery are procedural violations of the statute that do not entitle him to suppression of the fruits of the search.

[1] That statute is reproduced at 12-13 of Minett's brief.

B. The trial court found that Detective Uhl was a participant in the search rather than a mere bystander, and Minett has not shown this finding to be clearly erroneous.

This court can summarily reject Minett's contention that Detective Uhl was only a witness to the strip search and not a participant, thereby violating § 968.255(2)(b). After hearing testimony on this point, the trial court ruled that Detective Uhl "was clearly one who was conducting the search. He was clearly searching" (66:117). This factual finding is binding on this court unless the finding is clearly erroneous. *See State v. Martwick*, 231 Wis. 2d 801, 811, 604 N.W.2d 552 (2000) ("appellate court applies a deferential, clearly erroneous standard [of review] to a circuit court's findings of evidentiary or historical facts"); *State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984) (same).

In his argument, Minett does not discuss the evidence he believes proves that Detective Uhl did not participate in the strip search. In the trial court, Minett relied primarily on the Strip Search Report introduced as Exhibit 1 at the suppression hearing (26:2). Under the heading "Conducting Search," "Timothy Swartz #404" and "Michael Ciardo #426" are listed (*id.*). Right below their names, "Brian Uhl #405" appears on a line labeled "Witness" (*id.*). Sergeant Ciardo testified that he prepared the report (66:47).

Notwithstanding the report's identification of him as a witness, Detective Uhl testified that he participated in the strip search by searching articles of clothing as Minett was removing them (66:15, 17). Uhl stated that Minett was not exposed to the view of anyone other than himself, Officer Swartz and Ciardo during the entire search (*id.*:19). Uhl's report, admitted as Exhibit 2 at the suppression hearing, also indicated that Uhl "searched

[Minett's] shoes and jacket as Minett removed them" (26:3). Sergeant Ciardo confirmed that he saw Uhl searching the clothing Minett had removed (66:53).

On redirect, Uhl testified that in addition to searching Minett's clothing, he also visually inspected Minett's body for evidence of drugs (66:40-41).

Based on the foregoing summary of evidence, the trial court's finding that Detective Uhl participated in the search is not clearly erroneous. This court should therefore reject Minett's claim that the search violated § 968.225(2)(b) by exposing him to a person who was not conducting the search.

C. Neither the failure to reduce to writing the police chief's authorization allowing Sergeant Ciardo to approve strip searches nor the officers' failure to timely supply Minett with a copy of the strip-search report warrants suppression of evidence obtained in the search.

Relying largely on *Popenhagen*, 309 Wis. 2d 601, Minett claims that the police failure to comply with all of the provisions of the strip-search statute, § 968.255(2), entitles him to suppression of the drugs obtained during the search, even though the statute does not prescribe suppression as a remedy. For the following reasons, this court should reject that argument.

Popenhagen held that evidence obtained in violation of, or noncompliance with, a statute may be subject to suppression even though the statute does not provide suppression or exclusion as a remedy. *Popenhagen* therefore overruled *State v. Wallace*, 2002 WI App 61, 251 Wis. 2d 625, 642 N.W.2d 549, to the

extent *Wallace*'s holding was based on the categorical rule that "[a]bsent a constitutional violation, a court may not suppress evidence obtained in violation of a statute except where the statute 'specifically requires suppression of wrongfully or illegally obtained evidence as a sanction.'" *See id.* ¶ 25 (citation omitted). This court relied on that rule in concluding that the alleged violation of the strip-search statute in *Wallace* did not require suppression of the evidence obtained in the search. *Id.*

Post-*Popenhagen*, the State believes it is an open question as to whether technical violations of the strip-search statute as occurred here warrant suppression of the evidence. Differences between the statute in *Popenhagen* and the strip-search statute, as well as case law from states having similar strip-search statutes, support the view that suppression is not appropriate.

The statute at issue in *Popenhagen* was Wis. Stat. § 968.135, which requires that a showing of probable cause be made before a circuit court issues a subpoena for documents. There the district attorney had obtained the defendant's bank records via a subpoena that did not comply with the probable-cause requirement of the statute. 309 Wis. 2d 601, ¶ 13. The supreme court concluded that allowing suppression as a remedy furthered the objective of the statute, i.e., "to limit strictly the conditions under which a subpoena may be obtained in order to protect persons whose records are being sought." *Id.* ¶ 84. The court reasoned that a motion to suppress is similar to motions to quash or limit a subpoena, both of which § 968.135 specifically authorizes. *Id.*, ¶¶ 76-82, ¶ 95.

In contrast to the statute in *Popenhagen*, the remedies for violation of the strip-search statute spelled out in § 968.255(4) and (5) bear no similarity to suppression motions. Under sub. (4), a person who intentionally violates the statute is subject to prosecution for a misdemeanor, while sub. (5) provides that "[t]his section does not limit the rights of any person to civil

damages or injunctive relief." None of the remedies mentioned in the statute – prosecution of the violator, civil damages or injunctive relief – is akin to a suppression motion. This marks a major difference between the strip-search statute and the statute in *Popenhagen*, which explicitly mentions "[m]otions to the court, including, but not limited to, motions to quash or limit the subpoena" (§ 968.135). The *Popenhagen* court found that the types of motions mentioned in the text of the statute are similar in nature to suppression motions. 309 Wis. 2d 601, ¶ 48.

Unlike the failure to establish probable cause for the issuance of a subpoena for documents, here the officers' noncompliance with the statute will not render the safeguards established by the legislature in § 968.255(2) meaningless if suppression is not a tool for punishing violations. With respect to the failure to obtain prior *written* authorization, Sergeant Ciardo testified that since 1995, he had been authorized by the chief of police to approve strip searches (66:54-55). Ciardo testified without contradiction that "I have the ability to authorize any and all strip searches that are conducted by any officers of my department" (*id.*:56). While that approval was given orally (*id.*:55) rather than in writing as the statute requires, Ciardo – in his dual capacity as shift commander and one of the searching officers – signed the Strip Search Report (26:2). This was therefore not a situation where the searching officers lacked authority to conduct the strip search of Minett. Rather, the violation of the statute was the failure to reduce this authority to writing. Suppression of the drugs found in the search is too drastic a remedy under these circumstances.

Likewise, the officers' apparent failure to provide Minett with a copy of the strip-search report until the exchange of discovery does not warrant suppression either. While the State submits the statute is unclear as to the precise time a copy of the report must be given to the detained person, the State disagrees with Minett's assertion that the report must be delivered to the detainee *before* the search. At the same time, the State agrees that

waiting until discovery is later than the statute contemplates because it uses the language "the person detained" rather than "the defendant." *See* § 968.255(2)(e). (Not all detained persons subjected to a strip search will later become defendants.) Despite the untimely delivery of the report, Detective Uhl substantially complied with this subsection by preparing a report "identifying the person detained, the persons conducting the search, [and] the time, date and place of the search." *See* 26:3. He also had Sergeant Ciardo sign off on the report in his capacity as shift commander (*id.*:2). The information required by the statute was provided to Minett, and he does not contend that the report is inaccurate. In light of this substantial compliance with sub. (2)(e), suppression of the drugs found during the search is too drastic a remedy for the untimely delivery of the report to Minett.

While Minett has failed to cite a single case that supports his claimed entitlement to suppression, the State has found several cases from sister states that reject suppression as a remedy for the types of violations that occurred here.

In *Jenkins v. State*, 978 So. 2d 116 (Fla. 2008), the Florida Supreme Court held that suppression was not an available remedy for two violations of that state's strip-search statute. One of the violations was similar in nature to one of the violations asserted here: the failure to obtain written authorization from the supervising officer on duty before conducting the strip search. *Id.* at 120. Although the Florida courts agree with the *Popenhagen* court that suppression can be an appropriate remedy even where it is not prescribed in a given statute, *see id.*, the *Jenkins* court found that the legislature's specification of civil and injunctive remedies for violations of the statute made suppression inappropriate. *Id.* at 130.

In a case on all fours with ours, the Ohio Court of Appeals in *State v. Freeman*, No. 1999CA00131, 2000 WL 222036 (Ohio App. Feb. 7, 2000) (R-Ap. 101-03),

rejected the defendant's contention that two violations of the strip-search statute warranted suppression of evidence obtained during the search. The two violations were the failure to obtain written authorization for the search before it was conducted and to give a copy of the strip-search report to the defendant. *Id.* at *1 (R-Ap. 101). The appellate court upheld the trial court's determination that these were technical violations that did not minimize or weaken the existence of probable cause to believe the defendant was concealing drugs in her vagina. *Id.* at *2 (R-Ap. 102).

In *State v. Harris*, 833 P.2d 402, 406 (Wash. App. 1992), the court held that suppression was not an appropriate remedy for an officer's failure to obtain prior *written* approval from his supervisor before conducting a strip search of Harris. The court provided the following rationale: "The purpose of the statutory requirement is to provide proof the officer consulted his or her supervisor and obtained permission to conduct the search. The lack of *written* approval does not invalidate other proof, in the form of oral testimony, that such permission was obtained."

Similar to the above cases, the California court in *People v. Wade*, 256 Cal. Rptr. 189 (Cal. Ct. App. 1989), found that two violations of the state statute governing visual body cavity searches did not warrant suppression of the evidence obtained in the search. One of the violations in *Wade* was the failure to obtain written authorization of the supervising officer on duty prior to conducting the search. *Id.* at 191. Like § 968.255(4), the California statute made it a misdemeanor to knowingly violate the strip-search law and provided civil remedies for any person harmed by such violation. Partly in light of these specific remedies contained in the statute, the *Wade* court found that exclusion of the evidence was unwarranted. *Id.* at 192.

Because suppression is not a remedy consistent with those remedies the legislature has prescribed for a

violation of § 968.255(2), and because courts in sister states have found suppression an unwarranted remedy for violations of their strip-search statutes that are the same or similar to the violations here, this court should hold that even post-*Popenhagen*, suppression is not an appropriate remedy for the technical violations of the statute at issue here.

II. THE EXCEPTION TO THE GUILTY-PLEA-WAIVER RULE FOUND IN WIS. STAT. § 971.31(10) DOES NOT APPLY TO MINETT'S CONVICTION FOR DELIVERY OF HEROIN AS A REPEATER, GIVEN THAT THE EVIDENCE OBTAINED IN THE STRIP SEARCH WAS IRRELEVANT TO THIS COUNT.

A. The drugs found during the February 22 strip search are irrelevant to the first count to which Minett pled guilty: delivery of heroin as a repeat offender on February 17.

During the February 22, 2010 strip search being challenged on appeal, police obtained fifteen gem bags of crack cocaine and 1.2 grams of heroin that Minett removed from between his scrotum and his buttocks (2:3; 66:52).[2] Those drugs formed the basis for counts four and five of the complaint and information. *See* 2:2; 7:2-3.

In contrast, the drugs that underlay count one of the complaint and information were three bindles of heroin that a confidential informant purchased from Minett on February 17, 2010, during a controlled buy (2:3; 7:1).

[2] Contrary to Minett's representation at page 6 of his brief, the officers did not "extricate[]" the drugs from Minett's buttocks; Minett did so himself (66:52).

The drugs seized during the strip search of Minett are totally unrelated to the drugs he delivered during a controlled buy five days earlier. Accordingly, the drugs Minett claims should have been suppressed are irrelevant to the first count to which he pled guilty: delivery of less than three grams of heroin as a repeat offender on February 17, 2010 (69:16-17).

B. Because the drugs obtained during the strip search are irrelevant to count one, the exception to the guilty-plea-waiver rule in § 971.31(10) does not apply to Minett's plea to that count.

In *State v. Pozo*, 198 Wis. 2d 705, 717, 544 N.W.2d 228 (Ct. App. 1995), this court determined that prior cases did not foreclose it from "affirming a trial court's refusal to suppress a statement alleged to have been taken in violation of a defendant's *Miranda* rights under circumstances where the challenged statement can have no possible impact on the defendant's plea or conviction because it is wholly irrelevant to the charge to which the plea is entered." There Pozo had been convicted of possession of marijuana within 1,000 feet of a school and bail jumping. *Id.* at 709. On appeal, he challenged on *Miranda* grounds the admission of a statement he had made to an officer, indicating that he was not working at the time of his arrest due to a back injury. *Id.* at 709, 713-14.

This court found that the statement likely was relevant to the original charges of maintaining a vehicle and a dwelling for the manufacture and delivery of controlled substances, because the statement suggested Pozo was getting money somewhere other than through gainful employment. *Id.* at 714. This court found that once those charges were dismissed and Pozo pled guilty to simple possession, "it no longer mattered whether there

was evidence suggesting that Pozo was selling drugs." *Id.* Accordingly, the trial court's refusal to suppress Pozo's statement could not have played a role in determining the outcome of a trial on the charge to which he pled guilty. *Id.* at 715. Under these circumstances, this court found that "the exception to the guilty-plea waiver rule found in § 971.31(10), STATS., is inapplicable . . . because the statement sought to be suppressed has no possible relevance to the charge of which Pozo was convicted." *Id.* at 716.

In concluding that Pozo could not challenge his conviction under § 971.31(10) because the evidence at issue was irrelevant to the charge to which he pled guilty, the court disagreed with Pozo's assertion that it was engaging in harmless-error analysis. *See* 198 Wis. 2d at 716. At the time, this disavowal was necessary because *State v. Pounds*, 176 Wis. 2d 315, 326, 500 N.W.2d 373 (Ct. App. 1993), held that "it would be contrary to present law to follow a harmless error analysis in sec. 971.31(10), Stats., situations." More recently, however, the supreme court has acknowledged that harmless-error analysis is appropriate in cases appealed under § 971.31(10). *State v. Armstrong*, 225 Wis. 2d 121, 122, 591 N.W.2d 604 (1999) (per curiam) (on motion for reconsideration). *See also State v. Semrau*, 2000 WI App 54, ¶ 21, 233 Wis. 2d 508, 608 N.W.2d 376 (citing *Armstrong*).

Similar to the situation in *Pozo*, here the evidence obtained during the strip search is irrelevant to Minett's conviction for delivering heroin on February 17, 2010. Pursuant to *Pozo*, even if this court were to find that the trial court erred in refusing to suppress the evidence obtained during the strip search of Minett, this would have no effect on the validity of his conviction on count one. Thus, the guilty-plea-waiver rule in § 971.31(10) does not apply to this count. Rather, regardless of how this court resolves the merits of Minett's suppression claim, his conviction and his fifteen-year bifurcated sentence on that count would still stand.

III. THE SIGNIFICANT REDUCTION IN EXPOSURE MINETT ACHIEVED BY PLEADING GUILTY, AND THE FACT SUPPRESSION WOULD HAVE HAD VIRTUALLY NO IMPACT ON TWO OF THE COUNTS DISMISSED PURSUANT TO THE PLEA AGREEMENT, RENDER ANY ERROR IN DENYING THE SUPPRESSION MOTION HARMLESS WITH RESPECT TO COUNT FOUR.

Where a defendant pleads guilty following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable probability that he would not have entered the plea agreement had the motion been granted. *See Semrau*, 233 Wis. 2d 508, ¶ 22. In answering this question, the court examines the following factors: 1) the relative strength and weakness of the State's case and defendant's case; 2) the persuasiveness of the challenged evidence; 3) the reasons, if any, the defendant gave for choosing to plead guilty; 4) the benefits the defendant obtained in exchange for the plea; and 5) the thoroughness of the plea colloquy. *Id.*

If the first and second factors are applied solely to Minett's conviction on count four – possession with intent to deliver five grams or less of cocaine as a repeat offender – then those factors would undercut a harmless-error finding because the cocaine found during the strip search is the only evidence supporting that count. But in the context of multiple charges, some of which are dismissed pursuant to a plea agreement, logic dictates that the first and fourth factors must be analyzed with an eye to all of the counts charged against the defendant prior to the plea agreement being struck. In other words, the question should be how strong is the State's case overall, not just with respect to the charge underlying the defendant's plea and conviction.

Here, Minett waived his right to a preliminary hearing (6), so the strength of the State's case and its persuasiveness must be evaluated based on the criminal complaint; an incident narrative prepared by Detective Uhl (26:3); and Uhl's testimony at the suppression hearing.

The complaint reveals that counts one, two and three were based on three controlled buys involving the same confidential informant (CI) on three separate days during February 2010 (2:1-3). As Detective Uhl explained at the September 23, 2010 motion hearing, a controlled buy involves giving an informant prerecorded money to buy drugs; equipping the informant with a body wire; and monitoring the informant during the drug transaction (66:13-14). Uhl testified that he observed text messages to and from Minett on the CI's cell phone, arranging the drug transactions (*id.*:22-24). This electronic information was available to corroborate the CI's testimony.

Additionally, in his incident narrative, Uhl indicated that Minett's cell phone contained over forty messages relating to possible drug sales, with some of the sent messages stating that he had forty-nine rocks and "3 gms of H" (26:3). Because the trial court denied Minett's motion to suppress the contents of his cell phone (*see* 36; 66:128-29), the State had available as evidence information obtained from Minett's phone that also would have corroborated the CI's testimony that Minett was a drug dealer who sold heroin to him on three occasions.

When all of the charges filed against Minett are considered as a whole, the first and second factors identified in *Semrau* support the view that any error in refusing to suppress the fruits of the strip search was harmless. The State had strong evidence incriminating Minett in three controlled buys, as well as evidence seized from his cell phone. Nothing in the record suggests that Minett had any plausible defense to the charges in counts one, two and three, even if the fruits of the strip search had been suppressed.

The third factor mentioned in *Semrau*, 233 Wis. 2d 508, ¶ 22 – the reasons expressed by the defendant for pleading guilty – is neutral inasmuch as Minett never stated on the record the reasons for his decision to enter guilty pleas to two of the charges.

The fourth *Semrau* factor – the benefits Minett obtained in exchange for his pleas – provides significant support for a harmless-error finding. Prior to entering the plea agreement, Minett faced a maximum exposure of 93.5 years on the five charged counts (*see* 7). In addition, he was subject to being charged with several felonies and a misdemeanor in two other drug cases referred to the district attorney's office. In referral number 08-01862, the Walworth County Sheriff's Department referred three cocaine delivery charges for prosecution, one committed on December 3, 2007; another on January 18, 2008; and the third on February 13, 2008 (69:13). In referral number 09-2580, the Whitewater Police Department referred charges of manufacture or delivery of heroin and possession of drug paraphernalia occurring October 11, 2009 (*id.*:14).

By pleading guilty to two counts in the information, Minett reduced his exposure on the charged crimes to thirty-three years, a sixty-year reduction from the original charges. He also escaped prosecution for four uncharged felonies and a misdemeanor,[3] a significant benefit in its own right.

In addition to the above charging concessions, Minett received sentencing concessions as part of the plea agreement. Specifically, the State agreed to recommend a prison sentence without arguing for a specific term length (69:2) and to recommend that Minett be found eligible for earned release (*id.*:3). The trial court followed the latter recommendation (72:69).

[3] Under Wis. Stat. § 961.573(1), possession of drug paraphernalia is a misdemeanor, while the other uncharged offenses are felonies.

The plea agreement Minett struck was even more favorable than the one in *Semrau*, which reduced the defendant's potential exposure by more than fifty percent. 233 Wis. 2d 508, ¶ 25. Like Semrau, Minett at the plea hearing expressed no reservations about his willingness to plead guilty and has never claimed that the denial of his suppression motion prompted his pleas. In fact, at the plea hearing Minett confirmed that he had no doubt the State could prove him guilty of the two crimes to which he was entering pleas (69:7, 8). Under these circumstances, the fourth *Semrau* factor weighs heavily in favor of a harmless-error determination.

The thoroughness of the plea colloquy – the final factor identified in *Semrau* – also supports a harmless-error finding (*see* 69:3-15, 18-21).

Based on the factors found relevant in *Semrau*, any error in denying the motion to suppress the fruits of the strip search was harmless because there is no reasonable probability Minett would have insisted on going to trial had the suppression motion been granted. Even without the evidence discovered during the strip search, which formed the basis for counts four and five of the information, Minett faced a maximum potential sentence of 49.5 years on the three heroin delivery charges (counts one, two and three) and dozens of additional years on the uncharged crimes referred to the district attorney for prosecution.[4] By pleading guilty, Minett also received the prosecutor's agreement to forego a specific recommendation regarding sentence length and the prosecutor's recommendation that the trial court find Minett eligible for earned release.

[4] Because the record does not reveal the weight of the controlled substances involved in the uncharged offenses, it is impossible to calculate Minett's exposure on the uncharged crimes that the prosecutor agreed to dismiss.

In short, even if this court finds that the trial court erred in refusing to suppress the fruits of the strip search, such error was harmless and should not result in a reversal of Minett's conviction on count four.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING MINETT'S MOTION FOR RESENTENCING.

Minett advances two reasons for why he believes the trial court erroneously exercised its sentencing discretion. First, he claims the court failed to give sufficient weight to the mitigating factors of his acceptance of responsibility and his potential for rehabilitation. Minett's brief at 21. Second, he argues that his sentence was excessive because he "essentially received a maximum sentence on count one and the potential for a maximum sentence on count four." *Id.* at 22.

For the following reasons, neither argument is meritorious.

Minett's complaint that the trial court failed to give sufficient weight to mitigating factors ignores the well-settled principle that the weight to be given each sentencing factor is "a determination particularly within the wide discretion of the sentencing judge." *State v. Stenzel*, 2004 WI App 181, ¶ 9, 276 Wis. 2d 224, 688 N.W.2d 20 (citing *Anderson v. State*, 76 Wis. 2d 361, 364, 251 N.W.2d 768 (1977)). *See also State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984) ("weight to be given to each of the relevant [sentencing] factors is particularly within the wide discretion of the trial court").

Minett's contention that the trial court accorded insufficient weight to his acceptance of responsibility and potential for rehabilitation is no more than a request for this court to reweigh the relevant sentencing factors, something an appellate court is not authorized to do. Insofar as Minett claims his crimes were not that serious because "[n]o one died as a result of [his] conduct" (Minett's brief at 21), the State does not believe Minett should be rewarded for this fortuity.[5] This court should therefore summarily reject Minett's first argument for why the trial court erroneously exercised its sentencing discretion.

Minett's second attack on his sentence fares no better. Minett faced a maximum sentence of sixteen-and-one-half years on each of the two counts to which he pled guilty, for an aggregate sentence of thirty-three years, assuming consecutive sentences were imposed. *See* 2:2; 70:58. On count one, the trial court sentenced Minett to fifteen years, consisting of ten years' confinement and five years' extended supervision (70:67-68). On count four, the trial court withheld sentence and placed Minett on probation (*id.*:68). The court indicated that his probation would be "concurrent with his extended supervision on the felony"[6] but did not specify the length of the probationary period (at least the sentencing transcript does

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[5] According to the State's sentencing memorandum, on October 11, 2009, a young woman overdosed on heroin Minett had sold (38:1-2).

[6] Because both crimes to which Minett pled guilty are felonies, the State does not know why the trial court would refer to count one as "the felony." In any event, if the trial court intended to have Minett's probation on count four run concurrent with the extended supervision portion of his sentence on count one, that sentence would have been illegal under *Grobarchik v. State*, 102 Wis. 2d 461, 468-69, 307 N.W.2d 170 (1981), and *State v. Givens*, 102 Wis. 2d 476, 478-80, 307 N.W.2d 178 (1981).

But because the judgment of conviction indicates that Minett's probation is consecutive to his sentence as a whole, and Minett apparently concurs in this interpretation, any issue created by the trial court's remarks appears to have been rectified.

not contain any statement by the trial court to this effect). Nevertheless, the judgment of conviction on count four indicates that sentence was withheld in favor of seven years and six months of probation and provides that the probation is "[c]onsecutive to prison sentence on Count #1" (42:5).

Contrary to Minett's contention, the trial court's imposition of a nearly maximum sentence on count one is not excessive. In choosing this sentence, the court was allowed to consider the three felonies that had been dismissed and read in as part of the plea agreement: two additional heroin deliveries and possession with intent to deliver cocaine (70:58). In choosing this sentence, the court placed primary emphasis on the need to protect the public from Minett's drug dealing and the havoc it wreaks on a community (*id.*:66-67). The trial court acted well within its discretion in doing so. *See State v. Lynch*, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) (placing greatest weight on protection of the public was "entirely permissible").

While Minett notes that he acquired his criminal record from 1991-1997 and again in 2005 (Minett's brief at 20), he ignores the criminal conduct in which he engaged continuously from December 2007 through 2009 but for which he was not prosecuted. The prosecutor detailed some of this conduct at the sentencing hearing (70:8-16), as well as in the State's sentencing memorandum (38). Just because this drug dealing did not result in any criminal charges does not mean the trial court had to turn a blind eye to it. On the contrary, this conduct was highly relevant to Minett's character and to the need to protect the public from Minett. A nearly maximum sentence on count one is not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

As for Minett's consecutive probation on count four, Minett exaggerates its severity by characterizing it as "the potential for a maximum sentence on count four." Minett's brief at 22. In reality, the sentence is for a seven-and-one-half-year probationary term. The potential for imposition of a maximum sentence exists, of course, but that possibility is contingent on the revocation of Minett's probation on some future date. That this possibility exists does not mean this court should treat Minett's probation on count four as a maximum term for the purpose of determining if his sentence is excessive. Certainly Minett has not cited any authority that would allow this court to do so. Rather, to evaluate whether the trial court's sentence is excessive, this court should treat the sentence on count four for what it is: a withheld sentence and imposition of a consecutive probationary term. So viewed, Minett's sentence on count four is not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas*, 70 Wis. 2d at 185.

This court should therefore reject Minett's contention that the trial court erroneously exercised its discretion by imposing an excessive sentence.

CONCLUSION

This court should affirm the judgment of conviction and the order denying Minett's motion for resentencing.

Dated this 19th day of September, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5356 words.

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Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

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.

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 19th day of September, 2013.

_____
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