STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2013 AP 634-CR

JIMMIE G. MINETT,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND THE DENIAL OF A POSTCONVICTION MOTION, ENTERED AND DECIDED IN THE CIRCUIT COURT OF WALWORTH COUNTY, THE HONOROBLE JAMES L. CARLSON, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Issues Presented

1. Did the Trial Court erroneously deny Mr. Minett's Motion to Suppress Fruits of Illegal Strip Search?

   The trial court ruled that the motion should be denied.

2. Did the Trial Court erroneously deny Mr. Minett's postconviction motion for resentencing?

   The trial court ruled that the sentence was not excessive or based on irrelevant factors.

Position on Oral Argument and Publication

The appellant leaves the possibility for oral argument up to the court, unless pursuant to Rule 809.22(b), Wis. Stats, the court finds that the briefs sufficiently purse the arguments. The appellant does not think that any of the restrictions on oral argument presented in Rule 809.22(a), Wis. Stats. apply in this case.

The appellant suggests that there be publication of the decision as, per Rule 809.32(1)(a)(1) and (3), the decision will enunciate a new rule of law and resolve or identify a conflict between prior decisions. The decision may, pursuant to Rule 809.32(1)(a)(4) and (5), contribute to legal literature by reciting legislative history and be relevant to public interest, or certainly the interest of detained persons subject to strip searches. Additionally, the appellant asserts that none of the restrictions to publication under Rule 809.32(1)(b) apply.

Statement of the Case

On March 1, 2010, Jimmie Minett was charged with counts one, two and three: delivery of heroin, less than three grams, as a second or subsequent offense, contrary to Wisconsin Statutes §§ 961.41(1)(d)1 and 961.48(1)(b) ; count four: possession with intent to deliver cocaine, less than five grams, as a second or subsequent offense, contrary to Wis. Stats. §§ 961.41(1m)(cm)1r and 961.48(1)(b); and count five, possession of narcotic drugs as a second or subsequent offense, contrary to Wis. Stats. §§ 961.41(3g)(am) and 961.48(1)(b). (R2:1-2). According to the complaint, on February 17, 18 and 22, 2010, officers from the City of Whitewater Police Department conducted three separate controlled buys of heroin using a confidential informant (CI).

Id. at 3. On February 17, 2010, Officers followed the CI from 1069 W. Main Street to 477 N. Fremont Street to buy heroin. *Id.* Upon the CI's return, the CI possessed three bindles of heroin in exchange for $90 given to the CI from the officers. *Id.*

On Feb. 18, 2010, the CI conducted another controlled buy with Mr. Minett at the Five Points BP Gas Station. *Id.* On February 22, 2010, the CI was involved in another controlled buy with Mr. Minett at Hawk Bowl Apartments in Whitewater. *Id.* On that same day, officers arrested Mr. Minett at a traffic stop on W. Walworth Ave. *Id.* Upon strip searching Mr. Minett at the police department, officers extricated 15 gem bags of crack cocaine and 1.2 grams of heroin from his buttocks, along with $221. *Id.* at 3-4.

During all these incidents the suspected drugs were tested and tested positive for heroin, crack cocaine and narcotics, respectfully. *Id.* at 4.

On September 4, 2010, Mr. Minett filed a motion challenging the strip search in his case which discovered the cocaine and the narcotics on his person as unlawful. R18-20. On that same day, he also filed a motion challenging the search of his cell phone which was found in the strip search as unlawful. R21-22. These motions were argued on September 23, 2010, and the court denied both motions. R66:114-130.

Mr. Minett pleaded guilty on February 17, 2011 to counts one (delivery of heroin less than three grams as a second or subsequent) and count four (possession with intent to deliver cocaine, less than five grams, as a second or subsequent offense). R69. The defense filed a presentence investigation on May 25, 2011, and the State filed a sentencing memorandum on May 31, 2011. R37, R38. The

trial court sentenced Mr. Minett on May 31, 2011, R70, to ten years of initial confinement and five years of extended supervision on count one and a withheld sentence imposed and stayed for seven and a half years of consecutive probation on count four. R42. He was found eligible for the Earned Release Program and ineligible for the Challenge Incarceration Program. *Id.* He was granted 463 days of credit after having sat for the pendency of the case on bail. *Id.* Mr. Minett filed a notice of intent to pursue postconviction relief on June 6, 2011. R43. Mr. Minett filed a postconviction motion challenging the sentencing decision on October 29, 2012. R51. The motion was argued on December 11, 2012 and denied on December 17, 2012. R73, R52.

Mr. Minett timely filed a no merit notice of appeal on March 15, 2013[1]. R55.

Statement of Facts

On February 22, 2010, Sergeant-then-Detective Brian Uhl was part of an investigation of the Whitewater Police Department involving a confidential informant and controlled buys from Jimmie Minett. R66:13-15. Det. Uhl had information from the CI that Mr. Minett, upon arrest, was concealing drugs in his genital area. *Id.* Det. Uhl testified that he received permission for a strip search of Mr. Minett from Sergeant Ciardo. *Id.* at 15-16. Sgt. Ciardo testified later that he had authority, which was granted from the sergeant level up the hierarchy of chain of command, to grant the go ahead for strip searches. *Id.* at 55-56. He testified that this grant of authority was given orally and not in writing. *Id.* at 55 (lines 6-7). There was a strip search report form generated by the Whitewater Police Department. *Id.* at 17. Officers testified

[1] The no merit notice of appeal was later converted to a notice of appeal in the Court of Appeals' order dated April 29, 2013 based on Mr. Minett's request.

that they did not see anyone hand a copy of this strip search report to Mr. Minett. *Id.* at 57, 72.

Mr. Minett filed a suppression motion at the trial level, arguing three violations: that Whitewater Police Officers strip searched Mr. Minett in the booking room while an additional detective watched, that the officers did not get written authorization, and that a strip search report was not provided to Mr. Minett per Wis. Stat. § 968.255. R19:1-2.

In the memorandum in support of the motion to suppress, Mr. Minett asserted that suppression was an appropriate remedy for the violation of Wis. Stat. § 968.255(2) despite the fact that the statute did not expressly provide for suppression under *State v. Popenhagen*, 2008 WI 55, ¶¶65-68, 309 Wis. 2d 601, 632, 749 N.W.2d 611. Under *Popenhagen*, a Circuit court has discretion to suppress or allow evidence obtained in violation of a statute that does not specifically require suppression of evidence obtained contrary to the statute, depending on the facts and circumstances of the case and the objectives of the statute. *Id.* at ¶68. (See R20).

As mentioned *supra*, the trial court held a motion hearing on this issue September 23, 2010. R66. Sergeant Brian Uhl, Sergeant Michael Ciardo, and Officer Timothy Swartz testified, along with Detective Sergeant Tina Winger on a separate issue. *Id.* As mentioned *supra*, Sgt. Uhl testified that as part of his investigation with other officers, he learned from the CI that Mr. Minett had concealed drugs in his genital area, underneath his testicles or possibly in his buttocks area. *Id.* at 14-15. Sgt. Uhl admitted that he needed permission to start a strip search, which he orally received from Sgt. Ciardo. *Id.* at 15-16. He testified that he actively participated in the search of Mr. Minett by searching clothing as it was being removed from Mr. Minett. *Id.* at 17. Officer Timothy Swartz later testified as to Exhibit 4, a report that he drafted regarding this strip search. *Id.* at 71. He testified that he had

been trained in writing reports and that in the report, he had written that, "Sergeant Ciardo and I conducted a strip search in the booking room, interview room with Detective Uhl witnessing." *Id.*, R26. He indicated that he understood that there was a difference between conducting a search and witnessing a search. *Id.* He also testified that it was not in his report that Det. Uhl conducted a visual inspection of Mr. Minett. *Id.* at 72.

Sergeant Ciardo testified that he had filled out a strip search report, which was marked as State's Exhibit 1. *Id.*, R26. The form indicated who was being searched, who was conducting the search. R66:48. He testified that as Mr. Minett's clothing was being stripped away, Mr. Minett asked Sgt. Ciardo if he could remove the drugs from his person, upon which he pulled down his underwear and retrieved a baggy of white material. *Id.* at 52. He testified that in the police department, a sergeant up through the higher channels of authority can approve of a strip search. *Id.* at 54-55. Sgt. Ciardo testified that he was authorized to authorize strip searches. *Id.* at 56-57. He also indicated that he did not observe Det. Uhl or any other officer hand a copy of the strip search report to Mr. Minett. *Id.* at 57. Officer Swartz testified that he did not hand Mr. Minett a copy of the strip search report nor did he observe any other officers do that. *Id.* at 72. Sgt. Ciardo admitted that State's Exhibit 3: the Department's strip search policy documented that "strip searches shall be conducted in strict compliance with state statute 968.255." *Id.* at 58-59.

The State argued that Mr. Minett had received a copy of the strip search report. *Id.* at 102. The court queried if it was necessary that a detainee receive a copy of the report before he was being searched. *Id.* at 102-103. The state and the defense differed on this point: the state arguing that the statute,

> …doesn't say you have to give it to him [defendant] at the time. It says you have to provide the defendant a copy. And the testimony was that they put that form in evidence or with the case file and that case file was turned over to the Das office as part of discovery. Now as part of discovery, that all gets turned over to the defendant. This defendant, his defense attorney provided Your Honor with the copy that they received.

Id. at 103.

The court evaluated this argument, commenting that the state was basically admitting that it didn't give Mr. Minett a copy of the report until the discovery was provided. *Id.* Upon hearing this, the defense posited that the plain meaning of the statute was that:

> the person conducting the search must give him [detainee] the report, not the DA six months later or not that it will be kept in the file somewhere. A person conducting the search shall provide him with the report.
>
> *Id.*

The defense continued, aptly, that, "there would be no reason for that law if it was part of Sub. (d); the legislature would have never put it in there." *Id.* at 104.

The state countered that if the legislature wanted the report to be given immediately to the detainee, "it would say, and provide a copy immediately to the defendant." *Id.*

The court summarized the state's argument as "he [ADA] thinks [the strip search] is in compliance with the statute, and he says even if it is technically not, the minor technicalities are not grounds for suppression." *Id.* at 107. The defense contended that (1) on the contrary, the statute was very clear that a strip search cannot occur until all requirements of the statute were met (thereby debunking the "hypertechnical" arguments of the state); (2) its only logical that the legislature intended "providing a copy of the report"

to the detainee as before the search; and (3) suppression was an appropriate remedy as suppression would advance the objectives of the statute to restrict police power and punish unlawful abuses of police power. *Id.* at 108-112.

The court ruled on the motion that there was,

> 'substantial compliance' with the statute, and I think the district attorney says 'hyper-technical.' You could say that they didn't give [Mr. Minett] a copy, and you could say that it, the written authorization by the chief was not attached. There was testimony he had the, I believe he said it was given to him orally; the right to do strip searches. I think there is substantial compliance with the statute. And any technical violations are clearly not a constitutional violation of his rights or a substantial violation of the statute. . . they obviously are intending to comply with it. They have a ---they have an administrative rule and, apparently, they have been using this for some time…

Id. at 114-115.

Argument

I. The Trial Court Erroneously Denied Mr. Minett's Motion to Suppress Evidence as a Result of an Illegal Strip Search

a. Standard of Review

The court of appeals reviews a motion to suppress under two prong analysis. *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 685, 811 N.W.2d 775, 782-83. First, the court of appeals will review the circuit court's findings of historical fact, and the court will uphold them unless they are clearly erroneous. *Id.* Second, the court reviews the application of constitutional principles to those facts de novo. *Id.* The court of appeals independently reviews whether the police conduct

violated the defendant's constitutional rights to be free from unreasonable searches and seizures. *Id.*

b. Statutory Violation at Issue

Mr. Minett does not argue that the Whitewater Police Department lacked probable cause to conduct a strip search at the police station on February 22, 2010. Mr. Minett argues that while there was sufficient probable cause for a search because the officers had information from the CI that Mr. Minett had drugs hidden in his genital area, R66:13-15, the search was conducted in violation of Wis. Stats. § 968.255 and that the exclusionary rule is the proper remedy for such a statutory violation. Specifically, Mr. Minett argues that (1) Det. Uhl was present without participating in the search, (2) there was no written authorization for the search, and (3) the written authorization and the strip search report generated were not given to Mr. Minett before the search, all in violation of Wis. Stat. § 968.255.Wis. Stats. § 968.255(2) establishes that:

> (2) No person may be the subject of a strip search unless he or she is a detained person and if:
> (a) The person conducting the search is of the same sex as the person detained, unless the search is a body cavity search conducted under sub. (3);
> (b) The detained person is not exposed to the view of any person not conducting the search;
> (c) The search is not reproduced through a visual or sound recording;
> (d) A person conducting the search has obtained the prior written permission of the chief, sheriff or law enforcement administrator of the jurisdiction where the person is detained, or his or her designee, unless there is probable cause to believe that the detained person is concealing a weapon; and
> (e) A person conducting the search prepares a report identifying the person detained, all persons conducting the search, the time, date and place of the search and the written authorization required by par. (d), and provides a copy of the report to the person detained.

> (4) A person who intentionally violates this section may be fined not more than $1,000 or imprisoned not more than 90 days or both.
> (5) This section does not limit the rights of any person to civil damages or injunctive relief.
> (6) A law enforcement agency, as defined in s. 165.83(1)(b), may promulgate rules concerning strip searches which at least meet the minimum requirements of this section

c. The Trial Court Erroneously Found "Substantial Compliance" with Wis. Stat. § 968.255

Questions of statutory interpretation are reviewed de novo. *State v. Peters*, 2003 WI 88, 263 Wis. 2d 475, 481-82, 665 N.W.2d 171, 174, citing *State v. Setagord*, 211 Wis.2d 397, 406, 565 N.W.2d 506 (1997). If the language of a statute is clear on its face, the court need not look any further than the statutory text to determine the statute's meaning. *Id.*, citing *Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 18–22, 260 Wis.2d 633, 660 N.W.2d 656. "When a statute unambiguously expresses the intent of the legislature, the court apply that meaning without resorting to extrinsic sources" of legislative intent. *Id.* citing *State ex rel. Cramer v. Wis. Ct.App.*, 2000 WI 86, ¶ 18, 236 Wis.2d 473, 613 N.W.2d 591. Statutory language is given its common, ordinary and accepted meaning. *Id.* citing *Bruno*, 260 Wis.2d 633, ¶ 20, 660 N.W.2d 656. Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face. *Id.* at 406–09, 259 N.W.2d 97 (holding that canons of construction, including *ejusdem generis*, are inapplicable when the statute is clear on its face).

The intent was clear from Wis. Stat. § 968.255 that NO PERSON may be the subject of a strip search UNLESS he is a detained person AND if the person conducting the search

has obtained written permission of the chief, sheriff or law enforcement administrator AND if the person conducting the search prepares a report containing this written authorization and provides a copy of the report to the detainee. This statute had not changed regarding those terms since the onset of the statute in 1980. See Appendix at149-150, (Assembly Bill 744, Chapter 240, (1979-1980) Leg., Reg Session. (Wis. 1980)).

The State's argument that the statute does not specify when the report must be given to the detainee, and therefore, since the detainee was charged with a crime and then received the report through the discovery process weeks or months later, there is compliance with the statute *does not hold water*.

The discovery statute in criminal proceedings indicates that, upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his/her attorney a copy or give an opportunity to inspect a list of materials, including (a) any written or recorded statement made by the defendant about the crime (b) all defendant's oral statements and witnesses to oral statements (bm) evidence obtained under Wis. Stats. § 968.31(2)(b), (c) a copy of defendant's criminal record, (d) a list of all witnesses, (e) any relevant recorded or written statements by witnesses the state intends to use, (f) the criminal record of prosecution witnesses and (g) any physical evidence or (h) any exculpatory evidence. Wis. Stat. Ann. § 971.23. The strip search report is not included in this statute.

Additionally, the strip search statute relates to "detainees" and not "defendants." An individual who is a detainee may never become a defendant. Therefore, when the statute directs that the *person detained* receive a copy of the strip search report, it is clear that it intends that the report be provided *before or during the strip search*, while the person is *detained,* and unrelated to the charging process which will in turn spark the discovery statute once the detainee is charged

with a crime. Getting the report is a precondition to being searched. It flies in the face of logic to think that as long as the detainee receives the report eventually through the discovery process that the strip search statute is being complied with, as the prosecutor argued during the motion hearing. It also obviously means that the police department must give a copy of the report and written authorization to the person detained *before the search* because this is the only time that the detainee will be certainly a detainee. The statute explicitly writes, "a person conducting the search prepares a report…and provides a copy of the report to the person detained." Wis. Stats. § 986.255(2)(e). This person may not presumably be detained for another 48 hours, for another two weeks, for another four months: the only certain timing of their detention is before the strip search.

Additionally, the trial court seemed to imply that "substantial compliance" with the strip search statute was enough in this case. R66:114-115. In fact, the statute is written in the absolute that "NO PERSON may be the subject of a strip search UNLESS he or she is a detained person" AND if…(d) the person conducting the search has obtained prior written authorization… and (e) a report is prepared including the written authorization and is provided to the detainee. Additionally, the statute provides that a law enforcement agency may promulgate rules concerning strip searches which at least meet the minimum requirements of the statute. Wis. Stat. § 968.255(6). Therefore, the legislature made clear its seriousness about the requirements of the statute.

d. Suppression Should Be The Remedy for a Violation of Wis. Stat. § 968.255

The exclusionary rule is the primary means by which Fourth Amendment rights are protected. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961). Its primary purpose is to deter future unlawful police conduct. *Id*. Probable cause that either weapons or contraband will be found is required to execute a strip search. *State v. Simmons*, 166 Wis. 2d 1050, 481 N.W.2d 707 (Ct. App. 1992). Therefore, there would be a constitutional violation if police lacked probable cause and the strip search was conducted, and suppression would be the clear remedy. *Id.* The case here, however, is that a strip search was conducted in violation of the statute governing strip search procedure. It is Mr. Minett's position that this is also a violation which should trigger the exclusionary rule. Strip searches are very instrusive. *Id.* If the Wisconsin legislature thought it was enough to enforce one's constitutional right to privacy and lack of intrusion into one's body, that police have probable cause to conduct the search, the legislature would not have enacted Wis. Stat. § 986.255. The purpose of Wis. Stat. § 968.255 is to place restrictions on intrusive police practices and to limit strip searches to felonies, certain misdemeanors, and occasions where a detainee is suspected to be armed. The legislature thought that it was necessary to enact other protections during the search procedure as it is so invasive.

In *State v. Wallace,* 2002 WI App 61, 251 Wis. 2d 625, 642 N.W.2d 549, Wallace contended that the evidence in his case should be suppressed because he was strip searched in violation of Wis. Stat. § 968.255. Specifically, the circuit court concluded that violations of §968.255 occurred because

Wallace was not a "detained person" as the statute defined and because the searched was not authorized by the chief of police as the statute required. *Id.* at ¶24. Wallace claimed that despite the fact that the trial court concluded that he had consented to the strip search, §968.255 suggested universal applicability and did not have an exception for consensual searches. *Id.*

The court of appeals in *Wallace* concluded that: "absent 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.'" *Id.* at ¶25, citing, *State ex. rel. Peckham v. Krenke,* 229 Wis. 2d 778, 787, 601 N.W.2cd 287 (Wis. App. 1999).

Popenhagen later expressly abrogated this, ruling that suppression can be a remedy even if the legislature does not expressly draft it as a remedy in the statute. 2008 WI 55, ¶68. The court ruled that, "… the circuit court has discretion to suppress or allow evidence obtained in violation of a statute that does not specifically require suppression of evidence obtained contrary to the statute, depending on the facts and circumstances of the case and the objectives of the statute." *Id.*

Additionally, the court was quite definitive on this point, writing that any other interpretation is mistaken, and does not amount to binding precedent. *Id.* at ¶70. The court wrote:

> The proposition of law that wrongfully or illegally obtained evidence may not be suppressed except when the evidence was obtained in violation of an individual's constitutional rights or in violation of a statute that *expressly* requires suppression of evidence as a sanction has been carried expressly or impliedly from case to case without any support or reasoning. This proposition is an unsupported mistaken statement of the law. Mistaken

> statements of the law should not constitute precedent that binds this court. We do more damage to the rule of law by refusing to admit error than by correcting an erroneous proposition of law. The instant case presents an opportunity to correct an error of law that has been repeated in numerous cases, and we do so.

Popenhagen, at ¶70.

Therefore, the court of appeals' decision in *Wallace* should not bind the court's decision on the instant case. The facts and circumstances of the case and the objectives of §968.255 provide that suppression is the remedy for the drugs found during the strip search of Mr. Minett. The objectives of §968.255 are clearly to enforce the rights of individuals subjected to strip searches. The persons must be detained, and must be arrested for a felony, certain misdemeanors or have reasonable grounds to believe that the person is concealing a weapon, and the police department must follow the proper procedure before subjecting the person to a strip search. Wis. Stat. § 968.255. The procedure was deemed so important by the legislature that it provided that no person could be strip searched without these conditions being met, and that police departments could only increase the protections allowed for in this statute and not detract from those protections in any way.

In this case, Mr. Minett was searched with an individual, Detective Brian Uhl, witnessing the search but arguably not participating. R66:17. Det (Sergeant) Uhl testified that he was searching clothing as it was being removed from Mr. Minett. *Id.* Yet this was not detailed in the strip search report, which described Det. Uhl as being a witness. *Id.* at 69-73, R26:2. The trial court later ruled that was participation in the search. *Id.* at 117. More importantly, the trial court found that there was "substantial compliance" with the statute despite the fact that it had no evidence that

the Whitewater Police Department had provided a written copy of authorization from police authority for the strip search, along with the strip search report to Mr. Minett. *Id.* at 114-117.

The legislature created a strict construction statute in which no person should be subject to a strip search unless each and every one of the preconditions were met. Wis. Stat. § 968.255. Also, the statute provided for remedies as drastic as prosecution and incarceration of the offending officers. Wis. Stat. § 968.255(4). Also, the statute does not limit the remedies of civil damages or injunctive relief. Wis. Stas. § 968.255(5). Given the fact that the legislature wanted conduct outside the statute deterred at such a measure, suppression is a reasonable outcome to the police violation of the edict of Wis. Stat. § 968.255.

II. Mr. Minett is Entitled to Resentencing Because the Trial Court's Decision was Excessive and Based on an Irrelevant Factor

a. Appellate Review of Sentencing Decision

Sentencing is a matter of discretion for the trial court. *State v. Macemon*, 113 Wis. 2d 662, 667-668, 335 N.W.2d 402 (1983). Appellate review of sentencing is limited to a two-step inquiry. The first question is whether the trial court properly exercised its discretion in imposing the sentence and the second question is, if it did, whether the trial court abused that discretion by imposing an excessive sentence. *State v. Glotz*, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). The trial court must consider probation as the first alternative and explain why probation is or is not sufficient and whether probation would further the goals of the

sentence. *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 551, 678 N.W.2d 197, 204

The law of this state requires the trial court to take into consideration "the gravity of the offense, the character of the offender, and the need for protection of the public." *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The weight to be given each factor lies within the discretion of the trial court, *State v. Lynch*, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981), but the court must state its reasons for imposing a particular sentence on the record. *McCleary v. State*, 49 Wis. 2d 263, 277-282, 182 N.W.2d 512 (1971).

b. The Trial Court did not Properly Exercise its Discretion in Imposing Sentence

At postconviction motion for resentencing, the court indicated that it considered Mr. Minett's remorse and his "lengthy and eloquent statement" to the court at sentencing. R73:41. Also, the court contended that it had considered the submissions from family members in the case and that there was a large group of family members there in Mr. Minett's support. *Id.* at 43. However, the court did not mention these mitigating factors at sentencing. R70:61-70.

At the postconviction motion for resentencing, the court explained that the problem for Mr. Minett was his "long history" of criminal offenses. R73:41. It is true that Mr. Minett has a prior criminal history to this case, as documented in the defense and the prosecution sentencing memorandums. R37:8, R38:5-6. However, Mr. Minett's record was dated, from 1991-1997 respectively, and then involving a later drug case in Illinois in 2005. *Id.* From Mr. Minett's later record, it is clear that he fought a serious drug addiction. The court

noted at sentencing that "his love affair was with dope, really." R70:63. And this was an accurate statement. But Mr. Minett's criminal history was not laden with violence, and guns and gangs, like some defendants. He had case involving a dangerous weapon 22 years ago, but nothing involving violence since then. R38:5-6. In this case, Mr. Minett admitted to his conduct and accepted responsibility. No one died as a result of Mr. Minett's conduct. There are heroin delivery cases in which individuals have died, and the defendants received less incarceration than Mr. Minett. R51.

Therefore, the court did not consider strongly enough Mr. Minett's mitigating factors, his acceptance of responsibility, and Mr. Minett's potential for rehabilitation.

c. Mr. Minett Received an Excessive Sentence

The sentence in this case was so excessive as to be an abuse of discretion. A sentence is harsh and excessive when it is "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 v. State*, 70 Wis.2d 179, 183-184, 233 N.W.2d 457 (1975).

Mr. Minett could have received a maximum sentence of 11.5 years initial confinement and five years of extended supervision on the charge of delivery of heroin, less than three grams as a second or subsequent offense. *See* Wis. Stats. §§ 961.41(1)(d)1 and 961.48(1)(b). He could have received 11.5 years of initial confinement and five years of extended supervision on count four, possession with intent to deliver cocaine, second of subsequent. *See* Wis. Stats. §§ 961.41(1m)(cm)1r and 961.48(1)(b). He received 10 years initial confinement and five years of extended supervision on

count one and a withheld sentence for 7.5 years of probation on count four. He essentially received a maximum sentence on count one and the potential for a maximum sentence on count four.

At postconviction motion, the trial court admitted that Mr. Minett got a sentence that was greater than most. R73:41. By giving Mr. Minett ten years of initial confinement, and12.5 years of supervision, Mr. Minett will be on supervision until at least 2031 with the possibility of serving an additional up to 16.5 years of incarceration if Mr. Minett were to be revoked on his extended supervision and/or probation. In light of the facts of this case, given simple drug crimes without violence, gang activity, injury, overdose, or death, the trial court's decision is unreasonable.

Conclusion

This Court therefore should reverse the decision of the trial court denying Mr. Minett's motion to suppress evidence from the strip search and the denial of the postconviction motion for resentencing and should remand the case to the trial court for further proceedings.

Dated at Milwaukee, Wisconsin this 17th day of July, 2013.

Respectfully submitted,

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APPENDIX

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

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JIMMIE G. MINETT,

Defendant-Appellant.

Certification of Form & Length

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,328 words.

Respectfully submitted,

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. 2013 AP 634-CR

JIMMIE G. MINETT,

Defendant-Appellant.

Certification of Appendix

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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.

Signed:_____,
MAAYAN SILVER
Attorney for Defendant-Appellant

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Certification of Electronic Brief

Pursuant to Rule 809.19(12)(f), I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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.

Signed:_____,
MAAYAN SILVER
Attorney for Defendant-Appellant

CERTIFICATION OFMAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by express mail on _____. I further certify that the brief was correctly addressed and postage was pre-paid.
Date: _____
Signature: _____