STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2013AP646-CR
(Milwaukee County Cir. Ct. Case No. 2011CF73)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS R. CIMPL AND ELLEN R. BROSTROM PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN[1]

QUESTIONS PRESENTED

1. Did the circuit court properly exercise its sentencing discretion when the court imposed the maximum period of initial confinement on defendant-appellant Leopoldo R. Salas Gayton?

   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

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[1] The electronically filed version of this brief includes hyperlinked bookmarks intended to facilitate online reading.

2. Did the circuit court properly exercise its sentencing discretion when the court ordered Salas Gayton to pay a DNA surcharge?

   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion. The State does request, however, that the court issue the opinion as an authored opinion rather than as a *per curiam* opinion, memorandum opinion, or summary disposition order. Wis. Stat. § (Rule) 809.23(3)(b) (authorizing citation, for persuasive value, of unpublished authored opinions issued on or after July 1, 2009).

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[2] Instead, the State will present additional facts in the "Argument" portion of its brief.

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[2] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2011-12 edition.

STANDARDS OF REVIEW

A. Exercise Of Discretion.

> Evidentiary determinations are within the trial court's broad discretion and will be reversed only if the trial court's determination represents a prejudicial misuse of discretion. [An appellate court] will find an erroneous exercise of discretion where a trial court failed to exercise discretion, the facts fail to support the decision, or the trial court applied the wrong legal standard.

State v. Burton, 2007 WI App 237, ¶ 13, 306 Wis. 2d 403, 743 N.W.2d 152 (citations omitted).

> The term "discretion" contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards. The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.

State v. Delgado, 223 Wis. 2d 270, 280-81, 588 N.W.2d 1 (1999) (citations omitted).

> Under this standard, the circuit court's determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record. . . . While the basis for an exercise of discretion should be set forth in the record, it will be upheld if the appellate court can find facts of record which would support the circuit court's decision.

Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (citations omitted).

B. Sentencing Discretion.

Sentencing lies within the circuit court's discretion. *See, e.g.,* ***State v. Gallion***, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197 ("It is a well-

settled principle of law that a circuit court exercises discretion at sentencing"); ***McCleary v. State,*** 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) ("[S]entencing is a discretionary judicial act").

A sentencing court properly exercises its discretion when the court engages in a reasoning process that "depend[s] on facts that are of record or that are reasonably derived by inference from the record" and imposes a sentence "based on a logical rationale founded upon proper legal standards." ***McCleary,*** 49 Wis. 2d at 277.

When deciding on a sentence, a sentencing court must consider three principal factors: the gravity of the offense, the character of the defendant, and the need to protect the public. *See* Wis. Stat. § 973.017(2)(ad), (ag), (ak); ***McCleary,*** 49 Wis. 2d at 276; ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). The court must also consider mitigating and aggravating factors. Wis. Stat. § 973.017(2)(b). A sentencing court may also consider the defendant's criminal record, history of undesirable behavior patterns, personality, character, social traits, remorse, cooperativeness, and degree of culpability; the results of the PSI; the aggravated nature of the crime; the need for close rehabilitative control; and the rights of the public. ***Gallion***, 270 Wis. 2d 535, ¶ 43 n.11; ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984); ***State v. Lewandowski***, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985). The weight assigned to each factor lies within the circuit court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); ***State v. Stenzel***, 2004 WI App 181, ¶ 16, 276 Wis. 2d 224, 688 N.W.2d 20.

When reviewing a sentencing decision, an appellate court presumes that the circuit court acted reasonably. An appellate court "will not interfere with the circuit court's sentencing decision unless the circuit court erroneously exercised its discretion." ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citation omitted). On appeal, a reviewing court will search the record for reasons to sustain a circuit court's exercise of sentencing discretion. ***McCleary***, 49 Wis. 2d at 282.

> [T]he exercise of discretion does not lend itself to mathematical precision. The exercise of discretion, by its very nature, is not amenable to such a task. As a result, we do not expect circuit courts to explain, for instance, the difference between sentences of 15 and 17 years. We do expect, however, an explanation for the general range of the sentence imposed. This explanation is not intended to be a semantic trap for circuit courts. It is also not intended to be a call for more "magic words." Rather, the requirement of an on-the-record explanation will serve to fulfill the *McCleary* mandate that discretion of a sentencing judge be exercised on a "rational and explainable basis." 49 Wis. at 276.

Gallion, 270 Wis. 2d 535, ¶ 49.

C. Sentencing Based On Allegedly Improper Factors.

A sentencing court erroneously exercises its discretion when the court imposes a sentence "*based on* or in *actual reliance upon* clearly irrelevant or improper factors." ***State v. Harris***, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409 (emphasis in original). A postconviction motion claiming the circuit court relied on an improper factor at sentencing must show that the court relied on an irrelevant or improper factor in imposing sentence. ***Id.*** ¶ 33; ***Gallion***, 270 Wis. 2d 535,

¶ 72 ("The defendant has the burden of showing that the 'sentence was based on clearly irrelevant or improper factors.'"). The defendant must then prove by clear and convincing evidence that the court actually relied on the irrelevant or improper factor. ***Harris***, 326 Wis. 2d 685, ¶¶ 30-35. If the defendant does so, the State can demonstrate the harmlessness of the court's reliance by proving beyond a reasonable doubt that the court would have imposed the same sentence if the court had not considered the factor. *See* ***State v. Harrell***, 2008 WI App 37, ¶ 37, 308 Wis. 2d 166, 747 N.W.2d 770.

D. Harmless Error.

> The harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do. *See* Wis. Stat. § 805.18(2) (specifying that no judgment shall be reversed unless the court determines, after examining the entire record, that the error complained of has affected the substantial rights of a party).

State v. Harvey, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189. "Wisconsin's harmless error rule is codified in WIS. STAT. § 805.18 and is made applicable to criminal proceedings by WIS. STAT. § 972.11(1)." ***State v. Sherman***, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *Harvey*, 254 Wis. 2d 442, ¶ 39) (footnote omitted). The statutory harmless-error rule also applies to appellate procedures. ***State v. Felton***, 2012 WI App 114, ¶ 1 n.1, 344 Wis. 2d 483, 824 N.W.2d 871 (codified version of harmless-error rule made applicable to appellate procedures by Wis. Stat. § (Rule) 809.84); ***State v. Louis***, 152 Wis. 2d 200, 202 n.1, 448 N.W.2d 244 (Ct. App. 1989) (same).

"[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of *Chapman*,[3] a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Harvey***, 254 Wis. 2d 442, ¶ 48 n.14 (footnote added). *See also* ***State v. Martin***, 2012 WI 96, ¶¶ 42-46, 343 Wis. 2d 278, 816 N.W.2d 270 (reviewing harmless-error principles and factors); ***State v. Stuart***, 2005 WI 47, ¶ 40 n.10, 279 Wis. 2d 659, 695 N.W.2d 259 (various formulations of harmless-error test reflect "alternative wording"). "The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." ***Sherman***, 310 Wis. 2d 248, ¶ 8.

"The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." ***Id.***

The harmless-error test applies to a claim that a sentencing court relied on a clearly irrelevant or improper factor. ***Harris***, 326 Wis. 2d 685, ¶ 30.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS SENTENCING DISCRETION WHEN THE COURT IMPOSED ON SALAS GAYTON THE MAXIMUM TERM OF INITIAL CONFINEMENT.

Salas Gayton contends that, for two reasons, the circuit court did not properly exercise its sentencing discretion: first, the court allegedly failed

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3 ***Chapman v. California,*** 386 U.S. 18 (1967).

to explain adequately its reasons for imposing a sentence of twenty-two years of imprisonment consisting of the fifteen-year maximum term of initial confinement followed by a seven-year period of extended supervision; second, the circuit court allegedly relied on an improper factor — Salas Gayton's status as an alien illegally in the United States — to increase the harshness of the sentence.

For two reasons, this court should reject Salas Gayton's contentions and should affirm both the judgment of conviction and the circuit court's order denying Salas Gayton's motion for postconviction relief.

First, the circuit court adequately explained its reasons for the sentence. In denying Salas Gayton's postconviction motion, the court cogently explained why the sentencing judge properly exercised discretion:[4]

> The defendant also contends that Judge Cimpl erroneously exercised his discretion by failing to adequately explain his reasons for imposing a maximum sentence in this case. The defendant was driving drunk and without a valid license the wrong way on the freeway [45:51]. He hit a vehicle and killed a 34 year old woman [45:51]. The State indicated that she was hit with such force that her steering wheel and dashboard were pushed into the driver's seat. (Tr. 7/22/11, p. 12 [45:12]). The defendant was pulled over twice previously for driving without a license.

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[4] Milwaukee County Circuit Court Judge Dennis R. Cimpl imposed the sentence (45:1). Milwaukee County Circuit Court Judge Ellen R. Brostrom issued the order denying the postconviction motion (30:5).

> (Id. at 25 [45:25]). The defendant was in this country illegally for 13-14 years. (Id. at 36, 39 [45:36, 39]).
>
> The court stated its goals as punishment, deterrence, and rehabilitation. (Id. at 50 [45:50]). It considered the extremely serious nature of the crime [45:51-53], the need for protection in the community based on the defendant's inability to follow the rules [45:53-54], and the fact that the defendant hit at least one other car on the freeway without stopping [45:51] before ultimately hitting the victim's car and killing her. The court considered the defendant's character [45:54-56], his employment [45:55], his drinking problem [45:55, 56], and his remorse [45:56]. It also considered the offense from the victim's perspective [45:54]. This was an egregious offense, and the defendant has a long-standing drinking problem. Given the totality of circumstances presented, the court cannot find that there was an erroneous exercise of sentencing discretion. The sentencing record complies fully with State v. Gallion, 270 Wis.2d 535 (2004).

(30:4-5 (record cites added)). A court need not explain its sentencing decision with mathematical precision. ***Gallion***, 270 Wis. 2d 535, ¶ 49. Here, based on the totality of the record and on the totality of the court's sentencing remarks (45:49-57), the court's sentencing decision satisfied the standards set out in ***McCleary***, 49 Wis. 2d 263, and ***Gallion***, 270 Wis. 2d 535. Salas Gayton obviously does not like the sentence imposed and also obviously thinks (for some reason) that he would have received a less-severe sentence if the court had spent more time explaining its rationale. But neither ***McCleary*** nor ***Gallion*** required the court to offer more of an explanation than it provided. If anything, the egregiousness of Salas Gayton's offense — intentionally driving drunk for a mile on the wrong side of a high-speed highway and not stopping after sideswiping at least one vehicle before causing the violent collision that all-but-

instantly killed the victim — by itself, without any explanation, would have justified the imposed sentence. The court's additional remarks served to buttress the self-evident need for the severe sentence and fully satisfied the court's obligation to explain the rationale for the sentence.

Second, the court's references to Salas Gayton's status as a person illegally in the United States did not amount to reliance on an improper sentencing factor. At the outset, the State notes that in his postconviction motion to withdraw his plea, Salas Gayton did not assert this claim as a basis for asserting an erroneous exercise of sentencing discretion (29:6-9). *See, e.g.*, ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (appellate court will not consider for the first time on appeal any issues not presented in the circuit court; "The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court."); ***State v. Keith***, 216 Wis. 2d 61, 80, 573 N.W.2d 888 (Ct. App. 1997) ("Arguments which are not raised at the trial level are deemed waived.").

But even assuming Salas Gayton did not waive or forfeit this ground for his erroneous-exercise-of-sentencing-discretion claim, the record does not indicate that Salas Gayton's immigration status affected the circuit court's sentencing decision. The court noted that Salas Gayton's immigration status served as, at most, "a minor character flaw" (45:52) and "minor factor" (45:55). Moreover, Salas Gayton's lawyer agreed with the court that Salas Gayton's status as a person illegally in the United States "goes to character" (45:39), further waiving any basis for Salas Gayton to assert the court's

remarks as indicating an erroneous exercise of sentencing discretion.

In any event, a defendant's immigration status does not operate as an improper or irrelevant factor for sentencing purposes. *Cf., e.g.*, ***United States v. Flores-Olague***, 717 F.3d 526, 535 (7th Cir. 2013) ("A sentencing court is well within its prerogatives and responsibilities in discussing a defendant's status as a deportable alien."). In addition, the court's reference to Salas Gayton's immigration status did not fit within the category of comments characterized as "unreasonably inflammatory, provocative, or disparaging." ***United States v. Tovar-Pina***, 713 F.3d 1143, 1148 (7th Cir. 2013).

The cases on which Salas Gayton relies do not lead to a different result.[5] *See* Salas Gayton's Brief at 14. While the State agrees with Salas Gayton that a person "has a constitutional due process right not to be sentenced on the basis of his nationality or race," *see id.*, the State disagrees with his *ipse dixit*[6] adding "alien status" as one of those due-process-protected classifications, *id.* None of the cases he cited place immigration status in the protected categories of race, nationality, and gender. Even in ***United States v. Velasquez Velasquez***, 524 F.3d 1248 (11th Cir. 2008), the court

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[5] ***United States v. Velasquez Velasquez***, 524 F.3d 1248 (11th Cir. 2008); ***United States v. Leung***, 40 F.3d 577 (2d Cir. 1994); ***State v. Harris***, 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409.

[6] BLACK'S LAW DICTIONARY 905 (9th ed. 2009) ("[s]omething asserted but not proved").

did not hold that a person's immigration status could not affect a sentence. Rather, the court declared "that a judge may not impose a more severe sentence than he would have otherwise based on *unfounded assumptions regarding an individual's immigration status* or on his personal views of immigration policy." ***Id.*** at 1253 (emphasis added). In Salas Gayton's case, the circuit court did not rely on unfounded assumptions about Salas Gayton's immigration status or on personal views of immigration policy.

In short, the circuit court properly exercised its sentencing discretion by considering and sufficiently explaining the relevant sentencing considerations and did not rely on any irrelevant or improper factor.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS SENTENCING DISCRETION WHEN THE COURT ORDERED SALAS GAYTON TO PAY A DNA SURCHARGE.

At sentencing, the circuit court ordered Salas Gayton to provide a DNA sample and to "be responsible for all of the costs of this action, including a DNA surcharge.[7] That is part of the punishment, part of the rehabilitation" (45:58 (footnote added)). Salas Gayton does not object to providing the DNA sample, but he does object to paying the DNA surcharge. He contends that the court erroneously exercised its discretion by imposing the surcharge without providing an ade-

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7 *See* Wis. Stat. § 973.046(1g) (authorizing imposition of DNA surcharge).

quate explanation. *See* Salas Gayton's Brief at 18. *See also* 29:9-11 (postconviction motion).

Salas Gayton objects that the DNA surcharge in his case violates ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. ***Cherry*** prohibits a court from "imposing the DNA surcharge simply because it can." ***Id.*** ¶ 10. ***Cherry*** also set out a nonexclusive list of factors for a sentencing court to consider when deciding whether to impose the surcharge:

> [W]e conclude that some factors to be considered could include: (1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

Id. *See also* ***State v. Ziller***, 2011 WI App 164, ¶ 10, 338 Wis. 2d 151, 807 N.W.2d 241 (characterizing *Cherry* factors as "nonexclusive").

This court should affirm the circuit court's discretionary decision to impose the DNA surcharge.[8] The court had an obligation to require Salas Gayton to provide a DNA sample. Wis. Stat. § 973.047(1f). Consequently, Salas Gayton "has provided a DNA sample in connection with the case so as to have caused DNA cost," thus satisfying the first ***Cherry*** factor. Salas Gayton agreed to

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[8] "A circuit court's decision whether to impose a surcharge under Wis. Stat. § 973.046(1g) involves the exercise of the court's discretion." ***State v. Simonis***, 2012 WI App 84, ¶ 8, 343 Wis. 2d 663, 819 N.W.2d 328.

restitution in the amount of $11,075 (45:7), thus indicating he had the resources (per the third ***Cherry*** factor) to pay the DNA surcharge of $250. *Cf.* **Ziller**, 338 Wis. 2d 151, ¶ 13 ("Given that the court found that Ziller had the ability to pay $10,000 in restitution based on his employability, there was no reason for the court to restate that Ziller had the ability to pay the $250 DNA surcharge. What is obvious need not be repeated."). Moreover, the court did not impose the surcharge merely because the court thought it could. Rather, the court imposed the surcharge both as part of the punishment and as a matter of rehabilitation, a rationale consistent with the fourth ***Cherry*** factor.

In short, a sentencing court cannot impose the surcharge as a matter of will, caprice, or immoveable court policy. ***Cherry***, 312 Wis. 2d 203, ¶ 6 (rejecting trial court's policy of "impos[ing] the surcharge whenever possible"). But a sentencing court also need not "explicitly describe its reasons for imposing a DNA surcharge." ***Ziller***, 338 Wis. 2d 151, ¶ 12 ("If Ziller is asking this court to adopt a rule whereby a circuit court must explicitly describe its reasons for imposing a DNA surcharge, we decline to adopt such a rule. The circuit court is in the best position to examine the relevant sentencing factors in each case. The burden is therefore on the defendant to show that the sentence is unreasonable . . . ." (citation omitted)). Here, in accord with ***Cherry*** and ***Ziller***, the sentencing court provided a sufficient explanation for imposing the DNA surcharge.

CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's order denying Salas Gayton's postconviction motion and should affirm the judgment of conviction.

Date: May 22, 2014.

Respectfully submitted,

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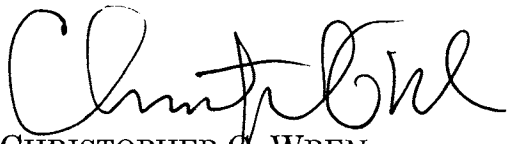

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8): FORM AND LENGTH REQUIREMENTS

In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 3,246 words.

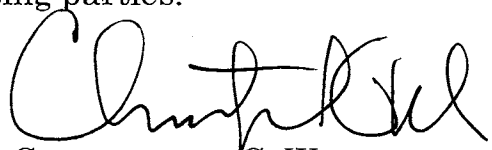
CHRISTOPHER G. WREN

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12): ELECTRONIC BRIEF

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that the text of the electronic copy of this brief is identical 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.



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