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COURT OF APPEALS OF WISCONSIN
DISTRICT I

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2013AP646-CR

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant.

**APPEAL FROM THE CIRCUIT COURT
OF MILWAUKEE COUNTY CASE NO. 2011-CF-73,
THE HONORABLE DENNIS R. CIMPL AND
ELLEN R. BROSTROM, PRESIDING**

**REPLY BRIEF OF DEFENDANT-APPELLANT
LEOPOLDO R. SALAS GAYTON**

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ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS SENTENCING DISCRETION IN FAILING TO ADEQUATELY EXPLAIN ITS REASONS FOR IMPOSING THE MAXIMUM TERM OF CONFINEMENT.

The circuit court erroneously exercised its sentencing discretion by failing to explain adequately its reasons for imposing the maximum term of initial confinement. As such, this Court should vacate the circuit court's sentence and order a new sentencing hearing.

A. Conviction of a Serious Crime Alone Does Not Support Imposition of the Maximum Term of Initial Confinement

The State contends that being convicted of a serious criminal offense alone justifies imposing the maximum term of initial confinement under *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. (*See* State's Br. at pp.9-10.) Specifically, it argues that "the egregiousness of Salas Gayton's offense . . . *by itself, without any explanation*, would have justified the imposed sentence." (*Id.* (emphasis added).) In essence, the State advocates an approach that fails to individualize the sentence and eliminates the need for a sentencing range.

This approach flies in the face of "individualized sentencing," which "has long been a cornerstone to Wisconsin's criminal justice jurisprudence." *Gallion*, 270 Wis. 2d 535, ¶ 48. If the seriousness of

the crime alone supported the maximum term of initial confinement then every single defendant convicted of these charges could receive the exact same sentence. The law does not permit this. The circuit court's failure to explain how or why Salas Gayton in particular requires a more serious sentence than any other defendant faced with the exact same serious charges is not sufficient under *Gallion*. *See id.* ¶ 50.

B. Implied Reasoning Is Not Sufficient Under *Gallion*.

The circuit court did not explain what about this crime and this defendant warrant the maximum period of initial confinement and ignored factors weighing against the maximum sentence. The court found that Salas Gayton had no intent to kill (R.45:54, App. 93), exhibited true remorse, (R.45:56, App. 95), and had no other serious convictions on his record, (R.45:40, App. 79). Failure to properly consider these mitigating factors or to justify on-the-record why the maximum term of initial confinement was necessary is an erroneous exercise of sentencing discretion. The law does not permit this type of implied reasoning.

II. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS SENTENCING DISCRETION BY ACTUALLY RELYING ON SALAS GAYTON'S ALIEN STATUS TO IMPOSE A HARSHER SENTENCE.

A. The Court Should Resolve This Issue on Its Merits.

The State argues that forfeiture prevents this Court from considering the issue of whether the circuit court improperly relied on Salas Gayton's alien status in imposing his sentence. (State's Br. at p.10.) The Court should exercise its discretion to address this argument on its merits. *See State v. Moran*, 2005 WI 115, ¶ 31, 284 Wis. 2d 24, 700 N.W.2d 884 (The court always has the discretion to address new arguments raised for the first time on appeal.). Although Salas Gayton did not raise this exact argument before the circuit court, at the core of this argument is the issue of whether the circuit court erroneously exercised its sentencing discretion, which was raised before the circuit court. (*See generally* R.29, App. 5-18.) More importantly, this issue deserves resolution on its merits because it presents an important, substantive issue affecting Salas Gayton's constitutional due process rights, which the parties have fully briefed. *Cf. State v. Ndina*, 2009 WI 21, ¶ 38, 315 Wis. 2d 653, 761 N.W.2d 612 (declining to apply forfeiture rule to case involving a criminal defendant's

constitutional right to a public trial because the parties "fully briefed the important substantive issue").

B. Alien Status Is an Improper Factor to Rely on During Sentencing.

Discretion is erroneously exercised when a sentencing court actually relies on clearly irrelevant or improper factors. *State v. Harris*, 2010 WI 79, ¶ 3, 326 Wis. 2d 685, 786 N.W.2d 409. The State argues that alien status is not an improper factor to rely on for sentencing purposes. (State's Br. at p.11.) *Harris*, a recent case decided by the Wisconsin Supreme Court, supports the notion that a circuit court cannot sentence someone based on his or her alien status. *See* 326 Wis. 2d 685, ¶ 33. *Harris* holds that criminal defendants "ha[ve] a constitutional due process right not to be sentenced on the basis of race." *Id.* ¶ 33. *Harris* cites *United States v. Munoz*, 974 F.2d 493, 495 (4th Cir. 1992), in support of this proposition. 326 Wis. 2d 685, ¶ 33 n.9. *Munoz* similarly holds: "[S]entences imposed on the basis of race or national origin violate due process." 974 F.2d at 495.

Although neither *Harris* nor *Munoz* specifically reference "alien status" as an improper factor, alien status constitutes a reference to a person's national origin, which the cases make clear is an improper factor. Federal law defines an "alien" as "any person not a citizen or

national of the United States." 8 U.S.C. § 1101. It follows then that whether a person is an illegal alien hinges on having a national origin from a country other than the United States of America. Courts may not impose sentences based on this type of reference to a defendant's national origin.¹

C. The Circuit Court Actually Relied on Salas Gayton's Alien Status in Imposing His Sentence.

The State argues essentially that the circuit court may rely on a defendant's alien status at sentencing so long as it doesn't rely on it too much. (*See* State's Br. at p.10.) This is contrary to the law and bad policy. First, improper factors may not be relied upon by the court—at all—in the imposition of a sentence. *Harris*, 326 Wis. 2d 685, ¶ 3. Second, a test that requires appellate courts to determine what level of reliance on alien status during sentencing is permissible and what crosses the line to impermissible would be unworkable because it would be unpredictable, overly complex, and would encourage litigation on the issue.

Here, the record establishes that the circuit court actually relied on Salas Gayton's alien status as an aggravating sentencing factor.

¹ To the extent no Wisconsin case explicitly holds that criminal defendants have a constitutional due process right not to be sentenced on the basis of his nationality or race, including alien status, this Court should so hold.

This requires reversal. The circuit court made numerous references to Salas Gayton's nationality and alien status, in the context of evaluating his character as a sentencing factor:

- Salas Gayton's citizenship "goes to character." (R.45:52, App. 91.)
- Salas Gayton's alien status is "a minor character flaw." (R.45:52, App. 91.)
- "The fact that [Salas Gayton is] an illegal alien doesn't enter into the serious nature of the crime or the need to protect the community. *It goes to character.*" (R.45:52, App. 91 (emphasis added).)
- While explaining the rules of extended supervision, the court called Salas Gayton "an illegal in this country." (R.45:57, App. 96.)
- "There's plenty of places on the south side of Milwaukee that cater to Latinos that would help them with their drinking problems." (R.45:57, App. 96.)

These comments with respect to Salas Gayton's nationality and citizenship status make clear the court actually relied on this as an aggravating factor relevant to his character. This constitutes an

erroneous exercise of sentencing discretion. *See Harris*, 326 Wis. 2d 685, ¶ 3.²

III. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN IMPOSING THE DNA SURCHARGE ENTITLING SALAS GAYTON TO AN ORDER VACATING THE DNA SURCHARGE.

The record does not reflect that the circuit court considered any of the *Cherry* factors relevant to imposing the DNA surcharge, nor does it reflect consideration of *any* factors unique to this case. This is an erroneous exercise of sentencing discretion. *See State v. Cherry*, 2008 WI App 80, ¶¶ 7-11, 312 Wis. 2d 203, 752 N.W.2d 393.

A. The Circuit Court Must Articulate On the Record the Basis for the DNA Surcharge.

The State argues that, under *State v. Ziller*, the circuit court did not need to state its reasons for imposing the surcharge in explicit terms. 2011 WI App 164, ¶ 12, 338 Wis. 2d 151, 807 N.W.2d 241;

² The State asserts that the "harmless error test applies to a claim that a sentencing court relied on a clearly irrelevant or improper factor." (State's Br. at p.7 (citing *Harris*, 326 Wis. 2d 685, ¶ 30).) Contrary to the State's assertion, *Harris* left open this question. *Harris*, 326 Wis. 2d 685, ¶33 ("Because we determine that Harris has not met this burden [to prove that the circuit court actually relied on race or gender in imposing its sentence] . . . we need not determine whether the errors alleged here are subject to harmless error analysis, or whether they are structural errors not amenable to harmless error analysis.").

Even assuming the harmless error analysis applies, this erroneous exercise of sentencing discretion does not constitute a harmless error. The State included no argument on harmless error (other than in its standard of review section) and therefore failed to meet its burden of proving beyond a reasonable doubt that the circuit court would have imposed the same sentence if the court had not considered the factor. (*See State's Br.* at p.6.)

(State's Br. at p.14 (sentencing court "need not 'explicitly describe its reasons for imposing a DNA surcharge'").) This argument overextends *Ziller*.

The circuit court in *Ziller* considered several unique factors, including that the defendant stated that he wanted to make things right with his victims, that he was employable, and that he had the ability to pay the \$10,000 of restitution imposed because of his employability. *Ziller*, 338 Wis. 2d 151, ¶¶ 11, 13. Despite this reasoning, the defendant in *Ziller* argued that the court was required to state explicitly that the defendant had means to pay the surcharge. *Id.* ¶ 1. Ultimately, the court rejected the defendant's argument holding that restating the defendant's ability to pay the surcharge would have been redundant. *Id.* ¶ 13. Following *Cherry*, the court explained that although an on-the-record explanation of why the surcharge is being imposed is essential, no "magic words" are necessary to satisfy this requirement. *Id.* Therefore, in the wake of *Ziller*, the circuit court still must state its reasons for imposing the surcharge; holding otherwise will allow courts to engage in implicit reasoning, rendering *Cherry* meaningless.

Unlike *Ziller*, no rationale for imposing the surcharge is apparent on the face of the record here, nor did the circuit court make any

finding as to Salas Gayton's employability. The extent of the circuit court's on-the-record reasoning for imposing the DNA surcharge was as follows: "You will give a DNA test, be responsible for all of the costs of this action, including a DNA surcharge. That is part of the punishment, part of the rehabilitation." (R.45:58, App. 97.) This statement does not analyze any factors unique to this case and is similar to the capricious impositions of the surcharge *Cherry* prohibits.

If the aim to punish is sufficient to justify a DNA surcharge then a surcharge could be imposed in every case. The payment of a surcharge also has no rational impact on the defendant's rehabilitation. Therefore, analyzing whether Salas Gayton should pay the surcharge is irrelevant because the circuit court did not record any rationale for imposing the surcharge beyond a single sentence that does little to justify imposing the surcharge. Here, the circuit court did not sufficiently state its reasoning for imposing the DNA surcharge.

B. Applying the *Cherry* Factors, the Circuit Court Improperly Imposed the DNA Surcharge.

The State also argues that imposing the DNA surcharge was proper under *Cherry*. (State's Br. at pp.13-14). This is not so. Under *Cherry*, circuit courts must have reasons for imposing a DNA surcharge on a defendant, and the court gives four examples of factors a court

should consider. *Cherry*, 312 Wis. 2d 203, ¶ 10. These factors are: whether the defendant provides a DNA sample; if the case requires DNA analysis; whether the defendant has adequate financial resources; and "any other factors the trial court finds pertinent." *Id.* The State argues that the *Cherry* factors weigh in favor of imposing the surcharge because Salas Gayton will in fact provide this sample and the amount he will pay in restitution illustrates his ability to pay. (State's Br. at p.14). This position does not consider the strength of all factors, however.

Examining all of the factors, the Court should not have imposed the DNA surcharge. Neither side disputes Salas Gayton must provide the sample because of his conviction, but his crime did not require any DNA analysis leading to this cost. (R.29:11, App. 15; R.45:58, App. 97.) Unlike *Ziller*, which the State relies on, the circuit court here did not make any finding that Salas Gayton was employable and thus had the ability to pay the surcharge. In fact, the court could not have made such a finding because Salas Gayton is indigent and his alien status makes future legal employment impossible. And, the imposition of more than \$11,000 does not imply, as the State argues, that Salas Gayton can afford the DNA surcharge. (State's Br. at pp.13-14.) To the contrary, the fact that he owes over \$11,000 and is not legally

employable makes it much less likely he can afford the \$250 surcharge. Therefore, the *Cherry* factors do not lead to the conclusion that Salas Gayton must pay the surcharge.

CONCLUSION

For the foregoing reasons, Salas Gayton asks that this Court reverse the circuit court's postconviction order denying Salas Gayton's resentencing request and issue an order vacating the sentence and order a new sentencing hearing. Additionally, Salas Gayton requests that this Court reverse the circuit court's postconviction order denying his request to vacate the DNA surcharge and issue an order vacating the DNA surcharge.

Dated this 19th day of June, 2014.

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FORM AND LENGTH CERTIFICATION

I hereby certify this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,285 words.

Dated this 19th day of June, 2014.

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Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 June, 2014.

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Defendant-Appellant.

CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that pursuant to Wis. Stat. § 809.80(3)(b)2. on June 19, 2014, the Reply Brief of Defendant-Appellant Leopoldo R. Salas Gayton was delivered to Federal Express for delivery to the Clerk of the Wisconsin Court of Appeals within three calendar days. I further certify that the brief was correctly addressed.

Dated this 19th day of June, 2014.

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