

STATE OF WISCONSIN
SUPREME COURT OF WISCONSIN
Appeal No. 2013AP646-CR

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**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEOPOLDO R. SALAS GAYTON,

Defendant-Appellant-Petitioner.

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CLERK OF SUPREME COURT
OF WISCONSIN

Appeal From the Circuit Court for Milwaukee County
The Honorable Dennis R. Cimpl Presiding
Circuit Court Case No. 2011CF73

**NON-PARTY AMICUS BRIEF OF THE IRREVOCABLE TRUST
FOR THE BENEFIT OF HAYDEN ISABELLA LAMB
IN SUPPORT OF THE RESPONDENT**

Dated: 2/16/16

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INTRODUCTION

This case is not a referendum on illegal immigration. This case involves the killing of a young woman and mother, by a man who chose to drive while drinking a twelve-pack of beer and, in his inebriated state, made a U-turn on a main arterial freeway to avoid law enforcement and drove into oncoming traffic until fatally striking the victim's car. The defendant happens to be in this country illegally, a fact that played a role not only in his choices on the day in question, but also in his qualification to drive at all, since he was unlicensed, and in his failure to comply with Wisconsin's financial responsibility law, since he was uninsured.

The amicus is the Irrevocable Trust for the Benefit of Hayden Isabella Lamb ("the Trust"). The Trust was established to provide for the young daughter of the victim, Corrie Damske ("Damske"), and has been funded by the only funds resulting from this senseless tragedy: a meager recovery under Damske's uninsured motorist policy, since Petitioner Leopoldo R. Salas Gayton ("Gayton"), among other failings, did not meet Wisconsin's requirements for adequate liability insurance. The Trust wishes to be heard on narrow issues that, while not directly at issue, have become thematic overtones to Gayton's case.

Gayton argues that reference to his illegal immigrant status produced a "stigma [that] infected the entire hearing." Gayton's Brief at 37.

Accordingly, he invites the Court to prohibit any mention, in a sentencing court, of a criminal defendant's illegal immigrant status.¹ In doing so, he asks the Court to create an exception to the general rule that a sentencing court should have "full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." *Elias v. State*, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980). Respondent's Brief in Opposition provides ample reasons for the Court to refuse such an invitation. The Trust respectfully urges the Court to additionally consider how such a ruling would impact a victim's ability to participate in the sentencing process.

Wisconsin's Legislature has elected to strongly protect victims' rights to "provide statements concerning sentencing, disposition or parole[.]" Wis. Stat. Ann. 950.04(1v)(m). In fact, Wisconsin considers a crime victim's cooperation essential to "the general effectiveness and well-being of the criminal justice system of this state[.]" and requires that "the rights extended[] to victims . . . are honored and protected by law enforcement agencies, prosecutors and judges *in a manner no less vigorous*

¹ Gayton's Brief criticizes the circuit court's sentencing proceedings for referencing his illegal immigrant status, noting that "[t]he sentencing record is saturated with references to Salas Gayton's alienage, Mexican national origin, and 'illegal alien' or 'illegal' status." Gayton's Brief at 21. He specifically criticizes the victim impact statements for "plac[ing] Salas Gayton's 'illegal alien' status and all the stereotypes that went with it front and center at his sentencing hearing. . . . The stigma infected the entire proceeding." *Id.* at 37.

than the protections afforded criminal defendants.” Wis. Stat. Ann. 950(01) (emphasis added).

In order to ensure that victims’ rights to provide impact statements are protected as vigorously as the rights of criminal defendants, this Court should be wary of a ruling that would inadvertently curtail victims’ rights to offer impact statements.

STATEMENT OF INTEREST

The Trust has an interest in this case because trustee Sharon Hvala offered a victim impact statement during Gayton’s sentencing. The Trust seeks to safeguard victim’s rights to freely offer victim impact testimony in future criminal cases, as guaranteed by Wis. Stat. Ann. 950.04(1v)(m).

ARGUMENT

An underlying, if not explicit, theme of Gayton’s brief is that *he* was a victim of sorts in this case. He suggests a lynch mob mentality during his allocution hearing that was obsessively focused on his illegal immigrant status. *See* Gayton’s Brief at 4-8 (describing victim impact letters from James Friedman, Kurt Damske, Peggy Lamb, and Jennifer Damske and victim impact testimony from Sharon Hvala and Michelle Friedman). He seeks to parlay this theme into a legal rule prohibiting any reference to illegal immigrant status during sentencing hearings, and any reliance at all on that status by the sentencing court, even where, as here, it was part of the

overall picture that led to the event in question, and was expressly deemed simply a “minor” sentencing factor going to character. The Court should reject this argument for several reasons, described below, and amplified in the remainder of this brief.

First, it is exaggerated factually. The Impact Statements primarily focused on the profound loss Ms. Damske’s death represented to her friends and family

Second, however they may be characterized, impact statements should have no bearing on appellate review of a trial court’s sentencing determination. A rule prohibiting sentencing judges from entertaining any reference to a defendant’s illegal immigrant status would severely curtail victims’ ability to offer impact statements, leading to an unacceptable (and unworkable) policy outcome. Sentencing judges have no effective means to control what information victims introduce at sentencing hearings in their impact statements. A rule seeking to impose such control would likely have a chilling effect on victim impact statements and also put at risk otherwise lawful sentences based on such statements.

Third, even if impact statements contain information irrelevant to the underlying crime, such statements do not invalidate otherwise sound sentences. Impact statements containing information irrelevant to a liability determination may be relevant in a sentencing hearing. Moreover,

sentencing courts are presumed capable of disregarding irrelevant information when considering impact statements.

Fourth, even where sentencing courts rely upon improper sentencing factors, such reliance is not necessarily fatal to the underlying sentence if it is otherwise justified by proper sentencing factors.

1. The Impact Statements in Gayton’s Sentencing Hearing Overwhelmingly Focused upon the Victims’ Profound Loss.

Gayton’s Brief characterizes the impact statements in his sentencing hearing as “plac[ing] Salas Gayton’s ‘illegal alien’ status and all the stereotypes that went with it *front and center* at his sentencing hearing.” Gayton’s Brief at 37. This argument overstates the facts. Peggy Lamb, Colette Brunki, Arlene Carter, Jennifer Damske, James and Michelle Friedman, and Hvala all provided impact statements. The overwhelming majority of these statements addressed the profound sense of loss experienced by Damske’s friends and family members.

For instance, consider the testimony offered by Sharon Hvala (“Hvala”), Damske’s mother. When Hvala began to offer the court her victim impact testimony, she noted that “[she did not] even know where to begin, to express the depths of my pain and agony in losing a child especially in a tragic manner as this one.” Sentencing Transcript (“Transcript”) at 16:23-25. She spoke about the pain of losing her daughter, noting that:

Everyday I wake up to the unbelievable, that I will never see my daughter again. . . . I was never able to say goodbye or hold her in my arms or tell her how much I loved her and how much she meant to me. She died alone in the most tragic way on that cold highway.

Id. at 17:19-18:02. Hvala further explained the profound absence caused by Damske's death:

It is tearing the very heart out of myself and my family and has left us with an absence so profound that nothing again in our lives would ever be able to replace the emptiness and unimaginable loss that we feel. It has altered our family forever.

Id. at 18:04-08. Hvala recounted events in the life of Damske's daughter, Hayden Isabella Lamb ("Lamb") that Damske will never witness, such as Lamb's birthdays, highschool and college graduations, marriage, and the birth of her children. *Id.* at 20:06-20. Finally, Hvala told the court that her family would be forever haunted by Damske's senseless death. *Id.* at 21:19-23 ("I don't even know what to do or where to go with this loss, but that is what we all[] have to face for the rest of [our] lives[.]")

Similarly, Michelle Friedman ("Friedman") explained her pain over losing her friend. *Id.* at 23:10-14 ("[E]ach day I struggle with the pain that she will never, ever be here again. I will never see her smile or feel her hug or enjoy her beautiful laughter . . . for the rest of my life.") *Id.* at 23:10-14. Friedman also mourned how Lamb will suffer because of her mother's death. *See, e.g., id.* at 23:15-19; at 24:09-19 ("Hayden no longer has a mother to guide her or to love her. . . . That . . . is the big tragedy surrounding [Damske's] death for her daughter[.]").

To be sure the pain, anger and frustration expressed during Gayton's allocution hearing was certainly heightened because Gayton committed an incredibly dangerous act, directly attributable to his illegal immigrant status and, though not intended to cause Ms. Damske's death, was not too far removed from the random firing of a gun into a crowd of people. He also, because of his immigration status, was unlicensed to drive and was uninsured. Inasmuch as Damske bore the brunt of these circumstances, the reference to the status that created them is understandable.

But contrary to Gayton's brief, there was no "stereotyping" in the impact statements or by the sentencing court of illegal immigrants generally. Nothing in this record suggests that any party characterized illegal immigrants as bad people generally or that Gayton's actions reflected on illegal immigrants as a class of people. Rather, the statements reflected the view that Gayton's status as an unlicensed, uninsured driver seeking to avoid law enforcement—factors attributable to Gayton's unlawful presence in the United States—made his actions all the more reprehensible.

2. Excluding All Reference to a Defendant's Illegal Immigrant Status Would Curtail a Victim's Right to Provide an Impact Statement Under Wis. Stat. Ann. § 972.14(3)(a).

As noted, Wisconsin law recognizes the rights of victims to provide impact statements. Wis. Stat. Ann. 950.04(1v)(m). In fact, Wisconsin law

mandates that courts must affirmatively inquire whether victims want to offer impact statements and, if so, must allow victims the opportunity to offer such statements. Wis. Stat. Ann. § 972.14(3)(a) (West) (emphasis added).

Victim impact statements serve several purposes. They provide information about the full extent of harm caused by the defendant's crime, information that may prove crucial to sentencing courts. See Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 620 (2009). Wisconsin sentencing courts, in particular, benefit from victims' impact statements since sentences must consider the gravity and nature of an offense, including the effect on the victim. *State v. Gallion*, 2004 WI 42, ¶ 65, 270 Wis. 2d 535, 568, 678 N.W.2d 197, 212 ("A statement from the victims about how the crime affected their lives is relevant to . . . consider[ing] . . . the gravity of the crime"). Impact statements afford sentencing courts the most direct opportunities to consider victims' understandings of their loss.

Impact statements also provide benefits to the victim. "[E]ven if a victim has nothing to say that would directly alter the court's sentence, a chance to speak still serves important purposes. . . . '[Victim] allocution is both a rite and a right.'" *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1349 (D. Utah. 2005) (quoting *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994)). Other courts have observed that victim

impact statements provide therapeutic effects to their victims. *See, e.g., Kenna v. U.S.*, 435 F.3d 1011, 1017 (9th Cir. 2006).

A ruling prohibiting sentencing courts from entertaining any reference to a defendant's illegal immigrant status would have chilling effects on a victim's right to offer impact statements.

Such a ruling could prove unworkable, given the nature of victim impact statements. It is unrealistic to expect victims, in moments of profound grief, to compose impact statements that are finely tailored to concord with legal standards of relevance. To fully express the physical, psychological, or economic damage caused by a crime, a victim may choose to reference a criminal defendant's illegal immigrant status because it is relevant to the victim's understanding of the crime and of their loss. For instance, a victim such as Hvala will have difficulty avoiding the thought that, but for a criminal defendant's unlawful entry into the United States, her daughter's life would not have ended at the hands of a man who elected to drunkenly drive into oncoming traffic. For Hvala, the defendant's illegal immigrant status may be entirely relevant to her understanding of her loss.

Furthermore, sentencing courts have no practical means of ensuring that an impact statement does not mention a defendant's illegal immigrant status. Wis. Stat. Ann. 950.04 provides no methods to determine, in advance, whether impact statements are inadmissible for containing

irrelevant testimony. If this Court sanctioned a rule forbidding sentencing courts from referencing a defendant's illegal immigrant status, sentencing courts may become unwilling to admit victim impact statements. This is because under the rule suggested by Gayton, if a sentencing court allowed a victim to provide an impact statement mentioning the defendant's illegal immigrant status, its sentencing hearing becomes invalid.

3. Where Impact Statements Contain Information Irrelevant to the Underlying Crime, Such Statements Do Not Necessarily Invalidate an Otherwise Sound Sentence.

Gayton characterizes the impact statements offered by Damske's friends and relatives, containing allegedly irrelevant information on Gayton's immigration status, as tainting the validity of Judge Cimpl's sentencing hearing. However, Wisconsin's jurisprudence on the use of impact statements is clear that impact statements containing information irrelevant to the underlying crime do not necessarily taint a sentencing hearing. This is especially true because sentencing courts are presumed capable of disregarding irrelevant information in impact statements.

A court may consider evidence that is irrelevant to determining criminal liability while evaluating the defendant's character during the sentencing phase. In *State v. Sharrard*, 2009 WI App 95, 320 Wis. 2d 484, a defendant-appellant claimed that a sentencing court improperly considered a victim's impact statement containing irrelevant information

about a previous crime. The Court of Appeals held that because discerning whether a crime is part of a “pattern of conduct” is essential to determining the defendant’s character and need for incarceration and rehabilitation, sentencing courts are “entitled to consider” evidence of prior unproven offenses in victim impact statements when considering the defendant’s character. *Id.* at ¶ 11. *See also State v. Leitner*, 2002 WI 77, ¶ 45, 253 Wis. 2d 449, 646 N.W.2d 341; *United States v. Lawrence*, 934 F.2d 868, 874 (7th Cir. 1991) (noting that sentencing courts may consider evidence for which the defendant has not been prosecuted).

Here, the impact statements presented Gayton’s illegal immigrant status as part of a pattern of illegal conduct. As explained in *Sharrard*, Gayton’s sentencing court did not err by allowing victim impact statements which noted Gayton’s illegal immigrant status in portraying a pattern of conduct of disregarding the laws of the United States. Additionally, Wisconsin jurisprudence trusts sentencing judges to ignore irrelevant information when considering impact statements and that, therefore, irrelevant portions of impact statements do not taint the entire sentencing hearing. In *State v. Lettenberger*, a defendant-appellant claimed that an impact statement contained irrelevant remarks. 2012 WL 280358, 340 Wis.2d 497. The Wisconsin Court of Appeals rejected defendant’s argument, trusting the sentencing court’s ability to “determine what was pertinent in the [impact statement]” and noting that “ “[i]f any of the[

statement could be deemed not relevant to the sentence . . . it is clear that the circuit court did not rely upon any improper information at sentencing. The circuit court had sufficient information from the State and Lettenberger to exercise its sentencing discretion.” *Id.*

Here, as in *Lettenberger*, the information about the seriousness of the crime sufficiently upholds Judge Cimpl’s sentence. Nothing in the sentencing transcript indicates Judge Cimpl relied upon victim comments on Gayton’s illegal immigrant status in determining the proper sentence; instead, the sentence is justified by Gayton’s extreme disregard for human life when he ended Damske’s life by drunkenly driving on the freeway into oncoming traffic.

4. Where Sentencing Courts Rely on Improper Factors During Sentencing, This Reliance Is Not Fatal to the Underlying Sentence if Justified By Proper Factors.

Nothing in the sentencing decision supports the notion that Judge Cimpl placed undue reliance on Gayton’s illegal immigrant status. Nor, as previously explained, does such status constitute an improper sentencing factor. Nevertheless, courts have held that a sentencing court’s reliance on improper factors, if minor, does not undermine the validity of a sentence that is otherwise based upon an appropriate consideration of the three primary sentencing factors.

In *State v. Betters*, Betters, convicted of sexually assaulting a child, claimed that the sentencing court improperly relied upon religious factors during his sentencing hearing when it stated that “every child is a gift from God” and that Better’s conduct was “an abomination in the sight of God[.]” 349 Wis.2d 428, 835 N.W. 2d 249 (Wis. App. 2013). While the Wisconsin Court of Appeals recognized the impropriety of such considerations and stressed that “the court’s invocations of a religious deity were ill-advised[.]” it affirmed the sentencing court because the sentence was otherwise based upon a proper consideration of the three primary sentencing factors. *Id.* at ¶ 20. The Seventh Circuit has similarly held that where a sentencing court relies on both proper and improper factors, the sentence should be upheld if proper factors alone sufficiently justify a sentence. *U.S. v. Franklin*, 902 F.2d 501, 508 (7th Cir. 1990).

Assuming, *arguendo*, that Judge Cimpl relied on Gayton’s illegal immigrant status, such status was only a minor factor in the sentence imposed. Taken as a whole, the sentence was based on Judge Cimpl’s consideration of the three primary sentencing factors under Wisconsin law: the gravity of Gayton’s causing the death of Damske while drunkenly driving into oncoming traffic, his character, and the need to protect the public. Where a defendant, regardless of status, engages in such conduct, a sentencing court is well within its discretion to provide the maximum penalty the law will allow for vehicular homicide.

CONCLUSION

For the foregoing reasons, the amicus urges that this Court affirm the decision of the Court of Appeals.

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**CERTIFICATE OF COMPLIANCE WITH
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I hereby certify that this brief and appendix conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, and maximum of 60 characters per line. The length of this nonparty, amicus brief is 2989 words, as determined by a word count produced by a commercial word processor available to the general public and as allowed by Wis. Stat. § 809.19(8)(d).

Dated this 16th day of February, 2016.

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CERTIFICATE OF SERVICE

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