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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP832-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODNEY VINCENT MCTOY,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction and Order  
Denying Postconviction Relief Entered in the Milwaukee  
County Circuit Court, the Honorable John Siefert, Presiding.

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BRIEF AND APPENDIX OF  
DEFENDANT-APPELLANT

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## **ISSUE PRESENTED**

Rodney McToy pled guilty to two counts of bail jumping stemming from a domestic dispute with his girlfriend. The primary factor underlying the circuit court's sentence was ensuring that he would "remain in custody through the date of his jury trial" in an unrelated matter in Waukesha County. The circuit court also ordered Mr. McToy to serve two years of probation, while acknowledging that it did not know how to address Mr. McToy's unspecified "probationary needs." Under these circumstances, is Mr. McToy entitled to resentencing?

The circuit court ruled that Mr. McToy was not entitled to resentencing.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Mr. McToy does not request publication or oral argument because this case involves the application of well-settled precedent to a set of undisputed facts, and the issue can be adequately addressed in briefing.

## **STATEMENT OF FACTS**

On April 20, 2012, the State filed a criminal complaint, charging Rodney McToy with one count of battery and three counts of misdemeanor bail jumping, contrary to Wis. Stat. §§ 940.19(1), 946.49(1)(a). The charges stemmed from an alleged fight between Mr. McToy and a woman with whom he previously lived, Anita. (2:2). Mr. McToy allegedly punched Anita after she refused to give him money to buy

alcohol. (2:2). The bail jumping charges arose because Mr. McToy was released on bail for a number of misdemeanors in Waukesha County at the time. (2:2-3).

Mr. McToy pled guilty to two counts of misdemeanor bail jumping; the count of battery was dismissed outright; the third count of bail jumping was dismissed and read in. (18:5-6, 13-14). In exchange for his pleas, the State recommended a time-served disposition (117 days in jail) for one count of bail jumping and made no recommendation on the second count. (18:6; 19:4-5; App. 108-09).

### *Sentencing*

At sentencing, Mr. McToy acknowledged that he had made a mistake, and pointed out that he was already enduring the effects of his poor decision-making. (19:14; App. 118). He accepted his role in this case and admitted that he should not have reconnected with, or hit, the victim. (19:14; App. 118). He also explained that his conduct had already cost him his job, his friends, and his apartment. (19:14; App. 118). Through counsel, he asked that the court impose concurrent, time-served sentences because he had already served 117 days in custody. (19:13; App. 117).

At the outset of its sentencing remarks, the court stated “there are three primary factors that a Court has to consider while imposing sentence. One is the character of the defendant. Two is the need to protect the public. Three is the seriousness of the offense.” (19:20; App. 124). However, before the court could address the circumstances of the case before it, it became preoccupied with a pending trial in Waukesha County. The court began by mistakenly asserting that Mr. McToy was facing a felony charge in that case. (19:15; App. 119). Trial counsel and the defendant informed the court that there were no pending felony charges;

nevertheless, the court concluded that the dismissed felony should still form a part of the basis of its sentence because there had been a probable cause finding at one point. (19:16-17; App. 120-21).<sup>1</sup>

After clarifying that Mr. McToy was facing no felony charges, the court put forward the basis for its sentence: “I believe that he should remain in custody through the date of his jury trial, although not much beyond that, okay?” (19:17; App. 121). The court went further, noting that it needed to figure out how to ensure that “[Mr. McToy is] there for trial” in Waukesha County.” (19:17; App. 121). The court then stated that Mr. McToy had “probationary needs,” but the judge did not identify what any of those needs were. (19:17; App. 121). The judge even admitted, “I don’t know exactly how to address [those probationary needs].” (19:17; App. 121).

The court then redirected its focus to the pending Waukesha charge, saying that it would be amenable to sentence modification if Mr. McToy were acquitted in that case. (19:18-19; App. 122-23). The court then told Mr. McToy that “dissuading domestic violence victims to testify in court is a serious matter.” (19:19; App. 123). Mr. McToy was charged with one count of victim intimidation in Waukesha County case no. 11CF1278. (2:2). Mr. McToy was not charged with, or alleged to have, intimidated any victim or witness in this case.

The court ultimately concluded that the State’s recommendation was insufficient and sentenced Mr. McToy to 200 days in jail for the first count of bail jumping. (19:19; App. 123). The court pointed out that this sentence would “be

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<sup>1</sup> According to the criminal complaint, the felony charge of strangulation was dismissed at the preliminary hearing. (2:2).

over with about the time of his trial [in Waukesha].” (19:20; App. 124). The court then invited Mr. McToy again to seek sentence modification should he be acquitted in Waukesha. (19:20; App. 124).

On the second count of bail jumping, the court withheld sentence and placed Mr. McToy on probation for two years. (19:20; App. 124). The only probation conditions articulated by the court were no contact with the victim and anger management training. (19:20-21; App. 124-25). The court then clarified that it would be willing to modify the no contact order to a no violent contact order if a request was made by the victim. (19:20; App. 124).

#### *Postconviction*

Mr. McToy filed a postconviction motion for resentencing, arguing that the circuit court failed to articulate any rational basis for its sentence. (12). The motion asserted that rather than discussing the facts and circumstances of the case before it, the circuit court became completely preoccupied with the unrelated matter in Waukesha County. (12:2-4). The motion argued that the court’s jail sentence was essentially an imposition of bail for a pending charge in another county that already made its own decision on the conditions of Mr. McToy’s release. (12:2-4). Further, the motion asserted that the court failed to explain what any of the probationary needs were before imposing a two year term of probation. (12:2-4).

At a postconviction hearing, Mr. McToy argued that imposing a six month probationary period would be appropriate because he had not been in contact with the victim, and the pending Waukesha case had been resolved. (20:3-6; App. 132-35). The court denied the postconviction request, finding that because Mr. McToy had not been

acquitted in Waukesha, there was no basis for sentence modification or resentencing. (13:1; 20:7-8; App. 136-37).

Mr. McToy appeals.

## ARGUMENT

- I. Mr. McToy Is Entitled to Resentencing Because the Circuit Court Failed to Offer a “Rational and Explainable Basis” for Its Sentence.

Mr. McToy is entitled to resentencing because rather than addressing the facts and circumstances of the case before it, the circuit court improperly based its sentence on ensuring Mr. McToy’s appearance in an unrelated matter in Waukesha County. There was no evidence in the record to suggest that Mr. McToy had missed other appearances in that case, or was at risk to not appear in the future. Further, the circuit court failed to consider the mandatory sentencing factors under *State v. Gallion*,<sup>2</sup> and did not provide any “rational and explainable” basis for its sentence as related to the facts and circumstances of the case at hand.

- A. The circuit court is required to explain the reasons for its sentence, and the objectives of that sentence on the record.

On appeal, this Court reviews sentencing decisions to determine whether the circuit court erroneously exercised its discretion. *Gallion*, 270 Wis. 2d 535, ¶ 17. This Court “will find an erroneous exercise of discretion if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court’s decision, or this court finds that

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<sup>2</sup> 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.



the trial court applied the wrong legal standard.” *State v. Black*, 2001 WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363.

In the present case, the circuit court’s erroneous exercise of discretion stems from its failure to explain how the facts and circumstances of Mr. McToy’s case required the imposed sentence. When imposing a sentence, the court must provide a “rational and explainable basis” for the particular sentence imposed. *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). As part of that rational and explainable basis, the court must consider the gravity of the offense, the rehabilitative needs of the defendant, and the need to protect the public. Wis. Stat. § 973.017(2); *State v. Taylor*, 2006 WI 22, ¶ 20, 289 Wis. 2d 34, 710 N.W.2d 466.<sup>3</sup> Although the circuit court recited those factors when beginning its sentencing remarks, Mr. McToy seeks resentencing because the circuit court failed to consider those factors at sentencing. Instead the court based its sentence on the need to keep Mr. McToy incarcerated until a pending trial in another county, and to address “probationary needs,” none of which were identified on the record.

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<sup>3</sup> Aside from those mandatory sentencing factors, the court may consider the following factors: “(1) Past record of criminal offenses; (2) history of undesirable behavioral pattern; (3) the defendant’s personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant’s culpability; (7) defendant’s demeanor at trial; (8) defendant’s age, educational background and employment record; (9) defendant’s remorse, repentance and cooperativeness; (10) defendant’s need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.” *State v. Harris*, 2010 WI 79, ¶ 28, 326 Wis. 2d 685, 786 N.W.2d 409.

- B. The circuit court erroneously exercised its discretion at sentencing because the court failed to consider the facts and circumstances of the case before it. Instead, the circuit court at sentencing was entirely preoccupied with an unrelated matter in a different county.

Here, Mr. McToy is entitled to resentencing because the circuit court failed to “individualize the sentence to [Mr. McToy] *based on the facts of the case* by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives.” *State v. Harris*, 2010 WI 79, ¶ 29, 326 Wis. 2d 685, 786 N.W.2d 409 (emphasis added).

At the outset of its sentencing remarks, the circuit court accurately recited the mandatory sentencing factors in *Gallion*: “there are three primary factors that a Court has to consider while imposing sentence. One is the character of the defendant. Two is the need to protect the public. Three is the seriousness of the offense.” (19:15; App. 119). However, the court’s consideration of those factors effectively ended there. (19:15; App. 119). Rather than imposing a sentence based on the facts of Mr. McToy’s case, his character, or the need to protect the public, the court explicitly and implicitly based its sentence on ensuring Mr. McToy’s appearance at a pending trial in Waukesha County.

Before imposing a jail sentence almost twice as long as the prosecutor requested, the court explained that its intent was to impose a sentence that would be “over with about the time of his trial [in Waukesha].” (19:20; App. 124). The court had also previously stated that “I believe he should remain in custody through the date of his jury trial.” (19:17; App. 121). Thus, the court, rather than properly basing its sentence on

the circumstances of the present case, essentially turned its sentence into bond for Waukesha.

If the Waukesha County Circuit Court was concerned about Mr. McToy's appearance at his upcoming trial, it could have imposed a higher bond. The Milwaukee County judge effectively used its sentence to accomplish what Waukesha already concluded was unnecessary. The court used a jail sentence, an inherently punitive measure, as a substitute for bail, an explicitly non-punitive measure. *In re Reginald v. State*, 193 Wis. 2d 299, 310, 533 N.W.2d 191 (1995) (the purpose of bail in the adult system . . . is not to punish but rather to ensure the accused's appearance at the court proceedings.”).

The court's invitation to Mr. McToy to seek sentence modification if he were acquitted in Waukesha is further evidence that the court's sentence was disproportionately based on the pending trial. After stating its intent to impose a sentence long enough that Mr. McToy would “remain in custody through the date of his jury trial,” the court told Mr. McToy that if this sentence resulted in his remaining in custody beyond the trial date in Waukesha, and he were acquitted in that case, it would be a new factor for sentence modification purposes. (19:18-20; App. 122-24).

Not only did the circuit court improperly base its sentence on Mr. McToy's appearance in Waukesha, the circuit court also failed to consider the mandatory sentencing factors or the facts and circumstances of the case that was actually before it. On two occasions, the circuit court appeared to consider the gravity of the offense; the court stated that it was sentencing Mr. McToy for “violating a domestic violence restraining order,” and that dissuading victims from testifying was “serious.” (19:18, 22; App. 122,

126). However, Mr. McToy was not accused of, charged with, or convicted of violating a domestic abuse restraining order in this case. Further, there were no charges, or even allegations, that he did anything to dissuade the victim from testifying.

Mr. McToy was facing one count of victim intimidation, but that was in the pending Waukesha County case to which the court kept referring. The circuit court's sentencing was so preoccupied with the Waukesha case that it overlooked the actual charges Mr. McToy pled to in this case, and sentenced him for the alleged conduct in that case.

The court also failed to meaningfully consider Mr. McToy's rehabilitative needs. During trial counsel's sentencing remarks, the court interrupted to point out that Mr. McToy seemed to have an alcohol problem that should be addressed. (19:12; App. 116). The court did not revisit that concern during its sentencing remarks. Later the court noted that Mr. McToy had "probationary needs." (19:17; App. 121). However, the court did not identify a single probationary need. In fact, the court flatly acknowledged that it did not know how to address any of Mr. McToy's unstated probationary needs. Nevertheless, the court ordered two years of probation and the only conditions of probation stated on the record were no contact with the victim (unless she sought modification of that order) and anger management. (19:20-21; App. 124-25).

The only sentencing goal that was actually identified on the record, which was also connected to the facts of this case, was a general desire to protect the victim. (19:17, 23; App. 121, 127). However, even the court admitted that this goal could be ineffectual because the victim might go back to the defendant. (19:17; App. 121). Moreover, the court

undercut its own stated desire to keep Mr. McToy and the victim apart by saying that it would allow them to reunite if the victim came to court in search of an order prohibiting only violent conduct. (19:20; App. 124).

Mr. McToy is entitled to resentencing because the circuit court failed to consider the mandatory sentencing factors and failed to individualize its sentence to the specific facts of his case. *Harris*, 326 Wis. 2d 685, ¶ 29. Instead, the primary factor underlying the court's sentence was an improper desire to keep Mr. McToy confined until he could appear in a separate matter in a different county, and to address "probationary needs," none of which were identified on the record. Because the circuit court erroneously exercised its discretion at sentencing, Mr. McToy is entitled to a new sentencing hearing.

## **CONCLUSION**

For the reasons stated above, Mr. McToy asks that this Court issue an order reversing the decision of the circuit court and remanding for a new sentencing hearing.

Dated July 29, 2013.

Respectfully submitted,

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### **CERTIFICATION AS TO FORM/LENGTH**

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 2,362 words.

### **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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 July 29, 2013.

Signed:

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## **CERTIFICATION AS TO 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 § 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 § 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.

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# **A P P E N D I X**

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