RECEIVED
09-11-2013
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

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

DISTRICT I

Case No. 2013AP832-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODNEY VINCENT MCTOY,

Defendant-Appellant.

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

---

REPLY BRIEF OF DEFENDANT-APPELLANT

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

ARGUMENT 1

I. Mr. McToy Is Entitled to Resentencing Because the Circuit Court Failed to Offer a "Rational and Explainable" Basis for Its Sentence as Related to the Facts of This Case. 1

CONCLUSION 3

CERTIFICATION AS TO FORM/LENGTH 4

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) 4

CASES CITED

State v. Gallion,
2004 WI 42,
270 Wis. 2d 535, 678 N.W.2d 197 3

State v. Harris,
2010 WI 79,
326 Wis. 2d 685, 786 N.W.2d 409 .... 1, 3

ARGUMENT

I. Mr. McToy Is Entitled to Resentencing Because the Circuit Court Failed to Offer a "Rational and Explainable" Basis for Its Sentence as Related to the Facts of This Case.

This Court should grant resentencing because the sentencing court failed to individualize its sentence to the facts and circumstances of this case. ***State v. Harris***, 2010 WI 79, ¶ 29, 326 Wis. 2d 685, 786 N.W.2d 409. Instead, the primary factor underlying the court's sentence was a set of pending charges in Waukesha County. Consequently, the court failed to give any meaningful consideration to the facts and circumstances of the case actually before it.

Mr. McToy agrees that the circuit court could give *some* weight to the pending charges in Waukesha County. The issue in this case, however, is that a pending case in a different county was overwhelmingly the most important factor to the circuit court's sentencing rationale.

In its brief, the State attempts to construct a sentencing rationale that was never announced by the circuit court. The State asserts that the court "determined that the charge of domestic violence and bail jumping were serious." (Respondent's Brief at 6). This assertion is directly contradicted by the record. The only offense that the court determined was "serious" was dissuading victims from testifying. (19:19, 22). But Mr. McToy was never charged with, nor alleged to have dissuaded victims from testifying in this case. The circuit court was considering the seriousness of the Waukesha offense, where there was a charge of witness intimidation. (2:2). The court never made any determination

as to the seriousness of bail jumping, the offense that was actually before it.

The State also asserts that the circuit court believed its sentence was "necessary to protect the community, and victim." (Respondent's Brief at 6). The court did state that protecting the victim was something it was "supposed to consider," but the court admitted that it did not know how to accomplish that goal "if she doesn't protect herself by staying away from the defendant." (19:17). The court then undercut the goal further by explaining that it would modify a no contact order if the victim wanted contact with Mr. McToy. (19:20). As to protection of the community, contrary to the State's claim, the court never said that its sentence was "necessary to protect the community;" the court said absolutely nothing about attempting to protect the public. (Respondent's Brief at 6).

A review of the record makes it clear that the circuit court was completely preoccupied with Mr. McToy's pending charges in Waukesha County. The court could not accurately recite the charges in this case, and instead, claimed that it was imposing a sentence for violating a domestic violence restraining order. (19:22). The court repeatedly noted that dissuading victims from testifying was serious, despite the fact that that charge was only in the Waukesha case, not the present case. (2:2; 19:19, 22). The court never discussed the gravity of the bail jumping charges that were actually before it. The court's primary sentencing factor—keeping Mr. McToy in custody through his trial in Waukesha—was wholly unrelated to the charges before the court and was more properly an issue of bond for Waukesha to consider. (19:17). Finally, the court's sentence was so focused on the Waukesha case that it explicitly noted it was only attempting to keep him in custody until that trial date, and would be open

to sentence modification if Mr. McToy were acquitted there. (19:18).

Mr. McToy does not seek "mathematical precision" to his sentence; nor does he request a specific explanation for the circuit court's decision to reject the parties' recommendation. Rather, he seeks what ***Gallion*** demands: an on-the-record explanation for the particular sentence imposed, *based on the facts and circumstances of the case before the court*. ***State v. Gallion***, 2004 WI 42, ¶ 39, 270 Wis. 2d 535, 678 N.W.2d 197; ***Harris***, 326 Wis. 2d 685, ¶ 29. Because the circuit court failed to explain why the facts and circumstances of the present case justified 200 days in jail and 2 years on probation, Mr. McToy is entitled to resentencing.

CONCLUSION

For the reasons stated above, and those reasons stated in his initial brief, Mr. McToy asks that this Court reverse the decision of the circuit court and remand for resentencing.

Dated September 10, 2013.

Respectfully submitted,

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov

Attorney for Defendant-Appellant

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 716 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 September 10, 2013.

Signed:

____

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov

Attorney for Defendant-Appellant