STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2014AP2392-CR
(Washington County Cir. Ct. Case No. 2013CF205)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COURTNEY E. SOBONYA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE TODD K. MARTENS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

BRAD D. SCHIMEL
Attorney General

CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys For Plaintiff-
Respondent State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES

Page

STATUTES

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2014AP2392-CR
(Washington County Cir. Ct. Case No. 2013CF205)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COURTNEY E. SOBONYA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE TODD K. MARTENS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN[1]

QUESTIONS PRESENTED

1. Where defendant-appellant Courtney E. Sobonya presented the circuit court with a defense-commissioned report as a new factor justifying expungment of Sobonya's conviction, did the circuit court properly exercise its discretion when the court rejected the report under new-factor analysis because (among other reasons) the report, while relevant, did not qualify as

[1] To facilitate online reading, the electronically filed version of this brief includes hyperlinked bookmarks.

"highly relevant" to the original sentencing decision?

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

2. Did the circuit court (a) have an obligation (as Sobonya essentially asserted in her postconviction sentence-modification motion) to accept the report's opinions and conclusions that "harsh" sentencing does not deter others from committing crimes and therefore (b) have an obligation to reject deterrence as a basis for denying the sentence-modification motion?

- The circuit court did not explicitly address this argument.
- This court should answer "No."

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.

STATUTE INVOLVED[2]

WIS. STAT. § 973.015 SPECIAL DISPOSITION.

973.015 (1m) (a) 1. Subject to subd. 2. and except as provided in subd. 3., when a person is under the age of 25 at the time of the commission of an offense for

---

[2] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition. This subsection does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23 (2) (a).

2. The court shall order at the time of sentencing that the record be expunged upon successful completion of the sentence if the offense was a violation of s. 942.08 (2) (b), (c), or (d), and the person was under the age of 18 when he or she committed it.

3. No court may order that a record of a conviction for any of the following be expunged:

a. A Class H felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 940.32, 948.03 (2) or (3), or 948.095.

b. A Class I felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 948.23 (1) (a).

(b) A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

(2m) At any time after a person has been convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect for a violation of s. 944.30, a court may, upon the motion of the person,

vacate the conviction, adjudication, or finding, or may order that the record of the violation of s. 944.30 be expunged, if all of the following apply:

(a) The person was a victim of trafficking for the purposes of a commercial sex act, as defined in s. 940.302 (1) (a), under s. 940.302 or 948.051 or under 22 USC 7101 to 7112.

(b) The person committed the violation of s. 944.30 as a result of being a victim of trafficking for the purposes of a commercial sex act.

(c) The person submitted a motion that complies with s. 971.30, that contains a statement of facts and, if applicable, the reason the person did not previously raise an affirmative defense under s. 939.46 or allege that the violation was committed as a result of being a victim of trafficking for the purposes of a commercial sex act, and that may include any of the following:

1. Certified records of federal or state court proceedings.

2. Certified records of approval notices, law enforcement certifications, or similar documents generated from federal immigration proceedings.

3. Official documentation from a federal, state, or local government agency.

4. Other relevant and probative evidence of sufficient credibility in support of the motion.

(d) The person made the motion with due diligence subject to reasonable concern for the safety of himself or herself, family members, or other victims of trafficking for the purposes of a commercial sex act or subject to other reasons consistent with the safety of persons.

(e) A copy of the motion has been served on the office of the district attorney that prosecuted the case that resulted in the conviction, adjudication, or finding except that failure to serve a copy does not deprive the court of jurisdiction and is not grounds for dismissal of the motion.

(f) The court in which the motion was made notified the appropriate district attorney's office of the motion and has given the district attorney's office an opportunity to respond to the motion.

> (g) The court determines that the person will benefit and society will not be harmed by a disposition.
>
> **(3)** A special disposition under this section is not a basis for a claim under s. 775.05.

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. Instead, the State will present additional facts in the "Argument" portion of its brief.

STANDARDS OF REVIEW

A. Exercise Of Discretion.

When an appellate court reviews a circuit court's discretionary decision, the appellate court asks whether the circuit court exercised discretion, not whether another judge might have exercised discretion differently. ***State v. Prineas***, 2009 WI App 28, ¶ 34, 316 Wis. 2d 414, 766 N.W.2d 206.

> 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."). Sentencing discretion extends to the circuit court's decision whether to order, when permitted under Wis. Stat. § 973.015, expungement of a conviction. ***State v. Matasek***, 2014 WI 27, ¶ 2, 353 Wis. 2d 601, 846 N.W.2d 811 ("Wisconsin Stat. § 973.015 grants circuit courts discretion to order a record expunged.").

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. *See also* ***State v. Taylor***, 2006 WI 22, ¶17, 289 Wis. 2d 34, 710 N.W.2d 466 (sentencing court may properly draw inferences from the facts presented at sentencing and from the entire record).

The purposes underlying a sentence "include, but are not limited to, the protection of the com-

munity, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶ 40. *See also* ***id.*** n.9. 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);[3] ***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.

---

[3] "[T]he legislature has mandated that when a court makes a sentencing decision that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant, and any applicable mitigating or aggravating factors, including the aggravating factors specified in subs. (3) to (8). Wis. Stat. §§ 973.01(2)(ad), (ag), (ak), and (b)." ***State v. Gallion***, 2004 WI 42, ¶ 40 n.10, 270 Wis.2d 535, 678 N.W.2d 197.

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). 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. 2d at 276.

Gallion, 270 Wis. 2d 535, ¶ 49.

C. Review Of A Decision Granting Or Denying A Motion For Sentence Modification When A Defendant Invokes The Sentencing Court's Inherent Power To Modify A Sentence.

> The power to modify a sentence is one of the judiciary's inherent powers. This power is exercised to prevent the continuation of unjust sentences.
>
> However, a circuit court's inherent authority to modify a sentence is a discretionary power that is exercised within defined parameters. For example, . . . a court has the inherent authority to modify a

> sentence if a new factor is presented . . . . However, there must be some finality to the imposition of a sentence. Therefore, we have held that it would be an erroneous exercise of discretion to modify a sentence simply because upon reflection the court may have chosen a different one. Similarly, a court cannot set a harsh sentence to "shock" the defendant, while intending to reduce the sentence after the defendant has fully realized the loss of liberty he faces.
>
> . . . .
>
> In order to obtain sentence modification based on a new factor, an inmate must show that: (1) a new factor exists; and (2) the new factor warrants modification of his or her sentence. A new factor is not just any change in circumstances subsequent to sentencing. Rather, it is:
>
> > a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.
>
> A defendant must prove a new factor by clear and convincing evidence.

State v. Crochiere, 2004 WI 78, ¶¶ 11-14, 273 Wis. 2d 57, 681 N.W.2d 524 (footnote omitted) (citations omitted) (withdrawn language omitted), *abrogated on other grounds by State v. Harbor*, 2011 WI 28, ¶¶ 46 n.11, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (withdrawing language).

> [A] decision on whether to modify a sentence is within the circuit court's discretion. In order to succeed on a claim for sentence modification based on a new factor, an inmate must prevail in both steps of new factor analysis by proving the existence of a new factor and that it is one which should cause the circuit court to modify the original sentence.

Id. ¶ 24 (citations omitted). *See also* ***State v. Trujillo***, 2005 WI 45, ¶¶ 10-11, 279 Wis. 2d 712, 694 N.W.2d 933; ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989), *abrogated on other grounds by Harbor*, 333 Wis. 2d 53, ¶ 52.

"Whether a new factor exists is a question of law, which [an appellate court] review[s] *de novo*." ***Trujillo***, 279 Wis. 2d 712, ¶ 11. "The existence of a new factor does not, however, automatically entitle the defendant to relief. Whether the new factor warrants a modification of sentence rests within the trial court's discretion." ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). *See also* ***State v. Hauk***, 2002 WI App 226, ¶ 43, 257 Wis. 2d 579, 652 N.W.2d 393; ***Michels***, 150 Wis. 2d at 97. "In determining whether to exercise its discretion to modify a sentence on the basis of a new factor, the circuit court may, but is not required to, consider whether the new factor frustrates the purpose of the original sentence." ***State v. Ninham***, 2011 WI 33, ¶ 89, 333 Wis. 2d 335, 797 N.W.2d 451.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN THE COURT REJECTED THE UW-MADISON PROFESSOR'S REPORT AS A NEW FACTOR.

Sobonya contends that a defense-commissioned report by UW-Madison Professor Michael Massoglia qualified as a new factor, *see* Sobonya's Brief at 9-11; that the circuit court used the wrong legal standard when denying her sentence-modification motion, *id.* at 11-13; and that her motion

satisfied both statutory criteria for expungement, *id.* at 14-15.

This court should affirm the circuit court's decision denying Sobonya's sentence-modification.

At the combined change-of-plea and sentencing hearing (5), the State did not take a position on expungement (5:4 ("We are taking no position on any request for expunction or expungement.")). Defense counsel asked the court for expungement:

> I am asking the Court, based upon all of that, to consider allowing her to come back before the Court at the completion of a successful term of probation, which I anticipate here, and request expunction, given all of those factors, given the small amount of heroin, and given how proactive she's been in addressing these issues.

(5:11.) The court noted the authority for expungement in this case: "And I also note you are statutorily of age to ask for expungement, and also that this offense is one for which expunction can be granted" (5:13). The court chose, however, not to grant expungement:

> There's been a request for special disposition under 973.015. In order to grant the special disposition of expungement or expunction, I have to determine that you would benefit and society would not be harmed by the special disposition.
>
> A number of years ago the legislature expanded the age of offender and the severity of offenses for which expunction could be granted. So I do consider those, the statutory requirement, the statutorily required factors here.
>
> You clearly would benefit by the special disposition; however, I am going to decline to exercise my discretion and grant the special disposition, because I find that society would be harmed. Heroin is such a

> dangerous, deadly drug, and it's being taken so frequently, by so many people, and so many people are being harmed by this drug, killed by this drug, that I think it's important to, as part of the sentencing, to send a message of deterrence to the community. And I think that message would be undermined by the special disposition here.
>
> So I am not going to order -- I am going to decline the invitation to order expungement of the conviction upon satisfactory completion of the sentence.

(5:14-15.)

So, although the circuit court agreed that Sobonya would benefit from expungement (thus satisfying the first statutory criterion), the court decided that expungement would harm society by undermining the important message of deterrence the sentencing should send in this case (5:14 (court declaring "I find that society would be harmed," thus determining that expungement would not satisfy second statutory criterion that "society would not be harmed by the special disposition")).

In response to Sobonya's postconviction sentence-modification motion, the State maintained its neutrality on expungement (24:2 ("The State took and currently does not take any position on the defendant's request for expungement.")). The State contended, however, "that the trial court properly exercised its discretion in denying the defendant's expungement request under Sec. 973.015, Stats." (24:2). The State continued:

> Given all the facts and circumstances surrounding this case, the trial court properly exercised its discretion and applied the factors required under the Gallion case. The defendant cannot met her burden. Merely because there is a report from a doctor re-

> garding his opinion that the[ ]defendant should be granted expungement does not mean this is an abuse of discretion. The State would argue the report is not a new factor under Rosado v. State, 70 Wi.s 2d 280, 288, 234 N.W.2d 69, 73 (1957). The defendant simply has not met her burden.

(24:2.)

In its oral ruling (33), the circuit court expressed doubt about the susceptibility of expungement to modification:

> The first concern I have here is whether expungement of a conviction on satisfactory completion of a sentence is even part of a sentence that can be modified. The McClearly and Gallion sentencing factors are not factors that are employed or considered when a Court decides whether to grant expungement. Instead, the balancing test that is laid out on the text of section 973.015 is the analysis that a Court has to employ in determining whether it's appropriate to grant expungement. So I am not sure that a motion for sentence modification is the right motion. The Defendant is, essentially, asking the Court to draft a new factor sentence modification analysis onto a decision that I am supposed to make under section 973.015 and the balancing test therein.

(33:4.) Instead, the court said, a claim of ineffective assistance of trial counsel probably fit the situation better:

> I think that the Defendant's arguments would fit more comfortably into an ineffective assistance of counsel claim, essentially, that the trial attorney was ineffective for failing to bring the Massoglia, . . . research to the Court's attention and argue it when the attorney was seeking expunction at the time of sentencing. And then if trial counsel was found to be ineffective, then the Defendant would get resentenc-

> ing, and the Court would need to consider the Massoglia research and the paper that was filed with the Court in support of the Defendant's motion for sentence modification here.

(33:4-5.)

Despite its reservations, the court addressed Sobonya's sentence-modification motion as raising a new-factor issue[4] and applied new-factor analysis to the motion:

> I'll accept that the Massoglia report was not in existence at the time of sentencing, and I'll also accept that the research on which the Massoglia report was based was in existence at the time but was unknowingly overlooked by the parties. So it is a new factor, but that's not the end of the analysis. Is this new factor, the Massoglia research and the opinions contained therein, is that a fact that's highly relevant to the imposition of sentence, and does it justify sentence modification, in essence expungement?

(33:5.) The court reiterated, in more detail, its reasons for denying expungement (33:6-9, 10-11). More particularly, the court said:

> I believe at sentencing, and I still believe now after having considered Counsel's arguments and the report of Professor Massoglia, that community awareness of the dangers of opiate use and opiate addiction needs to increase, that the community needs to understand and that the criminal justice system treats these offenses seriously. I think that

---

[4] When a defendant asserts that the a new factor warrants sentence modification, the defendant invokes the circuit court's inherent authority to modify a sentence: "[A] court has the inherent authority to modify a sentence if a new factor is presented." ***Crochiere***, 273 Wis. 2d 57, ¶ 12.

expungement would undermine that sentencing objective in this case. And although I was not aware of the specific studies cited by Professor Massoglia, I am aware now and I was aware at the time of sentencing that there was research to suggest that harsh penalties may not deter offenders from offending. Offenders commit violations for all sorts of reasons, and they choose not to commit offenses for all sorts of reasons. So I am aware of that social science research that suggests that harsh penalties alone may not have a deterrent effect, or at least a significant deterrent effect. However, commonsense and -- but I can also use my commonsense, and I can also consider my experience, and anecdotal though it may be, in 23 years of being involved in the criminal justice system, that suggests that the sanctions that are imposed and penalties that are imposed and consequences that are suffered may deter individuals from offending. This is an issue about which reasonable minds may differ.

(33:8-9.)

I gave careful consideration of the Defendant's request for expungement of the record on successful completion of the sentence. I certainly hope Ms. Sobonya does successfully complete probation and stays off of drugs. However, after carful consideration of Dr. Massoglia's report, I find that it is not -- the report and the contents thereof is not a fact that is highly relevant to the imposition of sentence in this case. Relevant, yes, but at the time of sentencing I was aware, as I said earlier, in general terms, of the arguments contained in the report, that harsh penalties don't necessarily have a deterrent effect, the positive effects of employment and good family on recidivism rates, and the other arguments that were advanced in the professor's paper.

I think now, having read that paper, that the facts and arguments advanced by Professor Massoglia, while interesting and thought provoking, are not sufficiently relevant to justify modification of the Defendant's sentence to authorize expungement. The

> opinions and arguments of a social scientist, and the research done by him and others in his field are just that, opinions and arguments. The Court is still entitled to its own opinion and is not required to accept in total or in part the opinion advanced by any experts. So I find that the Defendant has failed to establish the existence of a new factor relevant or probative enough to justify sentence modification in the form of expungement. So the Defendant's motion is hereby denied for the reasons that I previously stated.

(33:10-11.)

If sentence modification can embrace a request to grant an expungement denied at the time of sentencing (the point at which the special-disposition statute requires the sentencing court make the decision),[5] the circuit court properly exercised its discretion. The court acknowledged the Massoglia report did not exist at the time of sen-

---

[5] The State shares the circuit court's concern that expungement does not fit easily within the scope of a sentence-modification motion that invokes the court's inherent authority (33:4, 5). But for purposes of this appeal — and for this appeal only — the State assumes that Sobonya's motion properly used new-factor sentence modification as the basis for seeking reconsideration of the circuit court's original decision to deny expungement.

If this court determines that it requires a more detailed treatment of this issue, the State recommends that the court order supplemental briefing by the parties. The State notes that in ***State v. Matasek***, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811, the supreme court specifically stated that it did not address "whether a circuit court has inherent power to order expunction of a record when the circuit court cannot expunge the record under Wis. Stat. § 973.015," ***id.*** ¶ 6 n.4.

tencing and "that the research on which the Massoglia report was based was in existence at the time but was unknowingly overlooked by the parties" (33:5). But new-factor analysis also requires that the circuit judge not know, "at the time of original sentencing," the "'fact or set of facts highly relevant to the imposition of sentence.'" ***Crochiere***, 273 Wis. 2d 57, ¶ 14 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Here, although the court did not know — could not know — about the Massoglia report itself and "was not aware of the specific studies cited by Professor Massoglia" (33:8), the court "was aware at the time of sentencing that there was research to suggest that harsh penalties may not deter offenders from offending" (33:8). Consequently, the court knew "at the time of original sentencing," even if the parties did not, that a debate existed about the deterrent effect of harsh sentences. The court's timely knowledge that a harsh sentence might not deter (the principal point for which Sobonya highlights the Massoglia report) precludes the report or the underlying studies from qualifying as a new factor.

In addition, the court disagreed with Professor Massoglia's implicit assumption that withholding a sentence and placing Sobonya on two years of probation (5:13; 10) amounts to a "harsh" sentence (33:7 ("I dispute the characterization made by . . . Massoglia page 12, that long periods of probation qualify as a harsh sentence."); *see also* 22:Ex. A, at 3, 4, 5, 12 (Massoglia report referring to "harsh" penalties, sentences, or sentencing policies)). In effect, the court rejected Professor Massoglia's report to the extent it equated Sobonya's probation with "harsh" sentencing. As the court noted, "I

could have sent the Defendant to prison for three and a half years and fine[d] the Defendant up to $10,000. The Defendant, as part of a plea agreement, had another felony and three other misdemeanors dismissed and read-in at sentencing" (33:6-7). Put another way, Professor Massoglia's report addressed a set of "harsh" sentencing policies that did not, in fact, come into play in this case: the court could have actually incarcerated Sobonya but instead accorded her a term of probation that allowed her to continue working and to participate in rehabilitation efforts.[6]

The circuit court did not have any obligation to accord Professor Massoglia's report the same significance Sobonya attaches to it. *Cf.* ***In re Commitment of Brown***, 2005 WI 29, ¶¶ 88–89, 279 Wis. 2d 102, 693 N.W.2d 715 ("[C]ourts are not rubber stamps for expert testimony. Neither a circuit court nor a reviewing court is required to accept an expert's ultimate conclusion. The circuit court may accept or reject expert testimony . . . ."); ***First Nat'l Bank v. Wernhart***, 204 Wis. 2d 361, 369, 555 N.W.2d 819, 822 (Ct. App. 1996) (fact-finder not bound by the opinion — even uncontradicted opinion — of any expert witness). As the circuit court's remarks in the oral decision show, the court regarded Professor Massoglia's report as "[r]elevant, yes," but not "highly relevant to the imposition of sentence in this case" (33:11).

---

[6] Essentially, Sobonya received a sentencing gift from the circuit court and now complains, via her sentence-modification motion and accompanying Massoglia report (22), that the court erroneously exercised its discretion by not giving her a larger gift.

Because Sobonya's sentence-modification motion depended on the circuit court accepting Professor Massoglia's report as a new factor (*i.e.*, as "highly relevant" to the sentencing decision), and because the circuit court, after reviewing the sentencing transcript and Professor Massoglia's report (33:3, 5), exercised its authority to weigh the significance of the report and, having done so, found the report wanting for purposes of new-factor analysis, the court properly exercised its discretion and held that Sobonya had not presented a new factor warranting sentence modification. Because the circuit court properly exercised its discretion when denying Sobonya's sentence-modification motion, this court should affirm that decision.

II. THE CIRCUIT COURT DID NOT HAVE AN OBLIGATION TO ACCEPT THE OPINIONS AND CONCLUSIONS OF THE UW-MADISON PROFESSOR'S REPORT AND THEREFORE DID NOT HAVE AN OBLIGATION TO REJECT DETERRENCE AS A PROPER PURPOSE FOR SENTENCING.

Sobonya argues that if this court disagrees with her contention that the Massoglia report qualifies as a new factor, the court should hold that the circuit court erroneously exercised its discretion because "the Court reached a conclusion that is contrary to current research and empirical evidence." Sobonya's Brief at 16. *See generally id.* at 15-17.

For two reasons, the court should reject Sobonya's argument. First, Sobonya's argument rests, essentially, on the premise that the circuit court had an obligation to accept the Massoglia report's assertions that "harsh" sentences do not deter oth-

ers and, therefore, that the court could not properly rely on a deterrence rationale to deny the sentence-modification motion. This proposition, however, repudiates judicial precedent explicitly holding that deterrence remains a purpose of sentencing. ***Gallion***, 270 Wis. 2d 535, ¶ 40 (purposes underlying a sentence "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and *deterrence to others*" (emphasis added)); *see also* ***id.*** n.9. To require a circuit court to accept a report denying the validity of deterrence as an acceptable purpose of sentencing would require a circuit court to repudiate ***Gallion***, at least in part. Neither this court nor the circuit court can properly do so. ***Schwittay v. Sheboygan Falls Mut. Ins.***, 2001 WI App 140, ¶ 10, 246 Wis. 2d 385, 630 N.W.2d 772 (Wisconsin Court of Appeals "duty bound to follow existing precedent from our supreme court"); ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985) ("[A] court of appeals decision which effectively overrules a controlling decision of the Wisconsin Supreme Court is patently erroneous and usurpative.").

Second, a circuit court also does not have any obligation to accept an expert's evidence. *Cf.* ***Brown***, 279 Wis. 2d 102, ¶¶ 88–89 ("[C]ourts are not rubber stamps for expert testimony. Neither a circuit court nor a reviewing court is required to accept an expert's ultimate conclusion. The circuit court may accept or reject expert testimony . . . ."); ***Wernhart***, 204 Wis. 2d at 369 (fact-finder not bound by the opinion — even uncontradicted opinion — of any expert witness). Again, accepting Sobonya's argument would require repudiation of this well-established doctrine. As before, this court

cannot do so. ***Schwittay***, 246 Wis. 2d 385, ¶ 10; ***Grawien***, 123 Wis. 2d at 432.

In short, Sobonya's argument rests on an untenable proposition: that the circuit court and this court can ignore judicial precedent concerning the circuit court's authority to assess the significance of expert evidence and concerning a circuit court's authority to accept or reject that evidence. This court should reject that argument and should affirm the circuit court's decision denying Sobonya's sentence-modification motion.

CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's decision denying Sobonya's sentence-modification motion and should affirm the judgment of conviction. The Massoglia report did not qualify as a new factor. In addition, imposing an obligation on the circuit court to accept the opinions and conclusions of the Massoglia report would require this court to violate the prohibition on repudiating published judicial precedent from this court and the Wisconsin Supreme Court.

Date: April 6, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

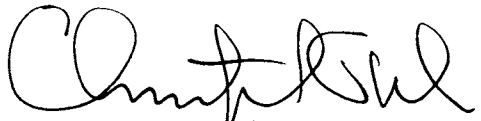
CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys For Plaintiff-
Respondent State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
wrencg@doj.state.wi.us

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 4,463 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.

CHRISTOPHER G. WREN