STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP2392-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

COURTNEY E. SOBONYA,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON OCTOBER 23, 2013, AND THE ORDER DENYING POSTCONVICTION RELIEF FILED ON SEPTEMBER 24, 2014, IN THE WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE TODD K. MARTENS, PRESIDING. WASHINGTON COUNTY CASE NO. 2013CF205

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully submitted:

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On appeal, Courtney Sobonya makes two distinct arguments for modification, asserting either as a basis for relief. She claims: (1) that the circuit court erred in denying her postconviction request for modification of her sentence based on a new factor, Sobonya's 1st Br. at 15-17, and (2) that the sentencing court erroneously exercised its discretion at sentencing when it originally denied Sobonya expungement, *id.* at 7-15. While similar, those claims are non-identical and have separate focus.

Her first claim looks at the propriety of the circuit court's postconviction denial of her modification request, which she argues was erroneous because the "empirical evidence summarized in the [Massoglia] report is a new factor entitling [her] to modification" and the circuit court misapplied the legal standard when finding otherwise. *Id.* at 7, 11-13. Much of the State's response brief is devoted to that claim. *See* St.'s Br. at 10-19.

Sobonya's second claim, however, is not focused on the postconviction court's decision. It instead attacks the propriety of the sentencing decision to deny expungement. *Id.* at 15-17. She claims that the sentencing court "erroneously exercised its discretion insofar as its stated reasons for denying expungement constitute an application of the wrong legal standard *and* an illogical interpretation of the facts." *Id.* at 15 (emphasis added). Sobonya thus alleged two separate grounds constituting an erroneous exercise of the circuit court's discretion at the time of sentencing. Sobonya's 1st Br. at 16-17. She "first challenge[d] the circuit court's application of Wis. Stat. § 973.015" on the ground that the court erroneously "denied Sobonya expungement based on [its] categorical exclusion of that benefit from heroin cases." *Id.* at 16. Her second challenge "contest[ed] the 'logical rationale' on which the court based its decision." *Id.* Both errors, she argued, constituted an erroneous exercise of discretion warranting relief. *Id.* at 17.

I. THE STATE, BY FAILING TO RESPOND, CONCEDES THAT THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION AT SENTENCING WHEN IT DENIED SOBONYA EXPUNGEMENT BECAUSE SHE WAS CONVICTED OF A HEROIN OFFENSE.

The State's brief responds to only the latter of Sobonya's two asserted errors in the sentencing decision.[1] Namely, the State disputes only whether "'the Court reached a conclusion that is contrary to current research and empirical evidence.'" St.'s Br. at 19 (quoting Sobonya's 1st Br. at 16). The State does not dispute Sobonya's additional argument that the categorical exclusion of heroin offenses from eligibility for expungement constitutes an erroneous exercise of discretion, and it makes no argument that the sentencing court did not so err in the instant case. *See id.* at 19-21.

The State's failure to contest or even respond to Sobonya's argument regarding the categorical exclusion error should render her contention on the point admitted. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (stating that "respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute"). This Court should not act as both advocate and judge, *see State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992), by independently developing the State's argument for it, *see Gardner v. Gardner*, 190 Wis. 2d 216, 239-40 n.3, 527 N.W.2d 701, 709 n.3 (Ct. App. 1994).

Instead, this Court should take the State's choice not to refute Sobonya's argument as an admission of its merit. *Charolais*, 90 Wis. 2d at 109, 279 N.W.2d at 499. Accordingly, this Court should reverse.

[1] Arguably, the State's brief fails to respond to that issue, as well, instead addressing its argument entirely to her new factor claim. *See* St.'s Br. at 19-21. However, on a liberal reading, the State's position can be interpreted as responsive to the issue of whether the sentencing court abused its discretion with regard to Sobonya's logical rationale claim. *See id.*

II. SOBONYA'S CHALLENGE TO THE SENTENCING COURT'S LOGICAL INTERPRETATION OF THE FACTS DOES NOT ASK THIS COURT TO OVERTURN PRECEDENT; INSTEAD, IT ASKS THIS COURT TO CONCLUDE THAT THE CIRCUIT COURT'S STATED RATIONALE FOR DENYING EXPUNGEMENT IN THE INSTANT CASE WAS AN ERRONEOUS EXERCISE OF DISCRETION.

It cannot be disputed that a proper exercise of discretion necessitates "a logical interpretation of the facts." *State v. Canady*, 2000 WI App 87, ¶ 6, 234 Wis. 2d 261, 610 N.W.2d 147. In light of that principle, Sobonya complains that the circuit court erroneously exercised its discretion at sentencing because its stated reasons for denying her expungement—that so doing would deter the community from future crimes—and the logic thereof is undercut by current research. To support her challenge on this ground, Sobonya references the research and empirical evidence presented in the Massoglia report. That research demonstrates that the offender being sentenced may be deterred, but it does not support the reasoning that deterrence of the community at large is an effective sentencing rationale. To the contrary, the research suggests that even harsh sentences are not an effective deterrent to others. Thus, the sentencing court's proposition that denying Sobonya expungement will deter the community is illogical.

Postconviction, the circuit court rejected the research in the Massoglia report because the court's "commonsense" and "anecdotal" "experience" from "23 years of being involved in the criminal justice system . . . suggest[ed] that the sanctions that are imposed and penalties that are imposed and consequences that are suffered may deter individuals from offending." (R.33:9.) The circuit court's *ipse dixit* opinion that persons other than the one being sentenced are deterred does not render the exercise of its discretion the result of a logical interpretation of the facts. *See Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 345 (7th Cir. 1994) ("[P]ersonal observation [is] not sufficient to establish a methodology based in scientific fact."). Not even experts are allowed to offer testimonial conclusions supported by nothing more than personal observation. *See General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (explaining that "nothing in either *Daubert* or

the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."). The rule should be no different for jurists tasked with the weighty responsibility of sentencing criminal defendants. If a sentencing court wants to base its sentence on a logical rationale, the factual underpinnings of that rationale should be supportable by more than just the court's assertion of "it is so because I said it is so."

The State counters that this Court should reject Sobonya's argument because it requires "repudiat[ion] of *Gallion*.[2]" St.'s Br. at 20 (bolding omitted; footnote added). Sobonya disagrees. Her argument is limited to the facts of her case. She does not argue that deterrence of others must be abandoned in all cases, and she does not ask this Court for such a rule. There may be cases in which a logical interpretation of the facts might demonstrate deterrence as an effective sentencing rationale. For example, deterrence of a codefendant or some other person intimately connected with the case may make logical sense. However, the instant case is not one of those cases.

The sentencing court based its denial of expungement on the theory that doing so would "send a message of deterrence *to the community*." (R.5:15 (emphasis added).) Whereas the undisputed research that Sobonya presented demonstrates that deterrence of the community was not a viable justification for denying Sobonya expungement, the sentencing court erroneously exercised its discretion. She asks this Court to reverse.

III. LIKE THE CIRCUIT COURT, THE STATE ERRANTLY CONFLATES THE QUESTION OF WHETHER A NEW FACTOR EXISTS WITH WHETHER MODIFICATION IS WARRANTED.

Sobonya set forth in her first brief an explanation her position that the circuit court "misapplied the new factor analysis when it used the measured relevance of Massoglia's report to decide the justification component, rather than the existence component." Sobonya's 1st Br. at 12. That erroneous exercise of discretion, she said, demonstrates the error in the

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

court's conclusion that modification was not warranted. *Id.* at 11-13.

This Court reviews *de novo* whether the information set forth in the Massoglia report constitutes a new factor. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828. The question of whether modification is warranted is then reviewed for an erroneous exercise of discretion. *Id.*

However, in response and to defend the circuit court's postconviction decision, the State conflates the different elements of the new factor standard similarly to the circuit court. *See* St.'s Br. at 19. Specifically, the State argues that the circuit court was correct that modification was not warranted on the basis that Massoglia's report was relevant, but not highly relevant. *Id.* at 18.

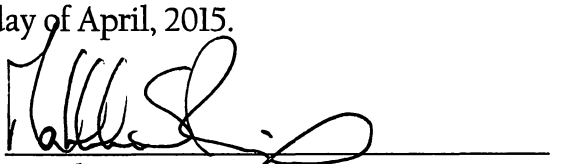
As Sobonya explained in her opening brief, the measured relevance of a purported new factor is determinative of whether a new factor exists in the first instance. Sobonya's 1st Br. at 11-12. If a thing is not highly relevant to the sentence, it cannot be called a new factor and the question of whether it warrants modification does not come up. *See Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975) (whether new factor exists depends on relevance to imposed sentence).

Whereas the circuit court misapplied the relevant legal standard, it erroneously exercised its discretion when deciding that modification was not warranted. Contrary to the circuit court's conclusion, the record demonstrates that modification is warranted in the instant case for the reasons set forth more fully in Sobonya's first brief—which will not be herein repeated. Sobonya's 1st Br. at 14-15. She asks this Court to reverse.

CONCLUSION

For those reasons, and the reasons stated with more specificity in her first brief, Sobonya asks this Court to reverse.

Dated this 21st day of April, 2015.



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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced 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 full line of body text. The length of this brief is 1,632 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 21st day of April, 2015.

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CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Reply Brief will be delivered to a FedEx, a third-party commercial carrier, on April 21, 2015, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 21st day of April, 2015.

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