STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2623-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN EDDIE FARMER,

Defendant-Appellant.

On Appeal From the Denial of a Postconviction Motion for Resentencing and the Judgment of Conviction 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

Did the circuit court adequately explain its reasoning when it imposed what it considered a "fairly severe" sentence?

The circuit court denied Mr. Farmer's motion for postconviction relief without holding a hearing. It issued a written decision, finding that its original sentencing comported with standards set forth in ***McCleary*** and ***Gallion***; and therefore, it did not erroneously exercise its discretion. (14:1-4; App. 101-104).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Farmer does not request oral argument. This is a one-judge appeal under Wis. Stat. §§ 753.31(2) and (3); therefore, Wis. Stat. § 809.23(4)(b) prohibits a request for publication.

STATEMENT OF THE CASE

On December 15, 2013, the state filed a criminal complaint charging Mr. Farmer with one count of retail theft of less than 500 dollars, contrary to Wis. Stat. § 943.50(1m)(b) and (4)(a), and three counts of misdemeanor bail jumping, contrary to Wis. Stat. § 946.49(1)(a). (2:2). Pursuant to a plea agreement, Mr. Farmer pled guilty to all four counts listed in the complaint. (6:1-2). After accepting his plea, the court sentenced Mr. Farmer as follows:

Count 1: nine months in the House of Correction.

Count 2: six months in the House of Correction, with day reporting center

Count 3: twenty-six days

Count 4: sentence withheld for two years of probation.

All of the sentences were consecutive to one another, and consecutive to a sentence that Mr. Farmer was serving in Waukesha County at the time he pled guilty in this case. (9:1; 10:1).

On August 11, 2014, Mr. Farmer filed a postconviction motion for resentencing, arguing that the court failed to provide sufficient reasoning for imposing the sentence. (13:1-16). On August 13, 2014, the circuit court issued a written decision and order denying Mr. Farmer's motion for resentencing. (14:1-4).

On November 3, 2014, Mr. Farmer filed a motion to reinstate his direct appeal deadlines under Wis. Stat. § 809.30 in order to appeal the circuit court's decision denying him postconviction relief. (15:1-3). This court granted that motion and this appeal follows.

STATEMENT OF THE FACTS

Immediately following the plea, the court heard arguments from counsel and imposed a sentence. (21:6-18; App. 110-122). Pursuant to the plea negotiation, the state recommended time in the House of Correction, with the length up to the court. (21:8; App. 112). The state informed the court about Mr. Farmer's criminal record. His record included theft in 1990, theft and two counts of retail theft in 1995, two retail thefts in 1996, theft in bail jumping in 1997, and retail theft in 1998. (21:7, App. 111). Apart from the nine-month sentence he was serving at the time for retail theft in Waukesha, his most recent convictions were in 2001 and 2002, which were for retail theft and bail jumping. (21:7; App. 111). It noted that there were referrals for prosecution between 2002 and 2004 in Illinois, but could not present any specific facts or information about whether those referrals

lead to convictions. (21:7-8; App. 111-112). Upon the court's request, the state explained that Mr. Farmer had no convictions for violent felonies in either Milwaukee or Wisconsin. (21:9; App. 113). Finally, the state told the court that the items stolen by Mr. Farmer were personal hygiene products and that when the police confronted him, he was forthcoming and admitted to his actions. (21:8; App. 112).

The defense recommended a sentence concurrent with the nine-month sentence that Mr. Farmer was serving in Waukesha County. (21:9; App. 113). Mr. Farmer was seventy-two years old and had substance abuse problems as well as physical health problems. (21:9-10; App. 113-114). Mr. Farmer had some work experience, had his GED, and had a supportive son. (21:12-13; App. 116-117). During his opportunity to address the court, Mr. Farmer explained that he struggled with substance abuse and that he has both educational and employment goals. (21:14; App. 118).

The court's sentencing comments were as follows:

> The Court: Well, Mr. Farmer, your shoplifting is totally out of control.
>
> The Defendant: Yes, [y]our Honor.
>
> The Court: And your record is very bad, and generally I don't like putting elderly people in the House of Correction; but in your case I think it's necessary. I will, however, try to fashion part of my sentence to get you treatment at the Day Reporting Center. Now, based on what I've heard, I think that the – on count one, the shoplifting, it will be the maximum nine months in the House of Correction, consecutive, no credit. On count two it will also be a consecutive sentence of six months in custody to be served at the Day Reporting Center where we ask that he be given alcohol assessment and treatment. If he had no felonies of violence, he should be eligible to do that after he's finished up all of his time.
>
> Count three will be 26 days . . . That is a time-served disposition.

> And in count four of bail jumping, it will be sentence withheld and placed on probation for a period of two years, probation to commence at the end of his sentences to Waukesha and Milwaukee.

(21:14-16; App. 118-120). The court stated that it was a "fairly severe sentence because it is mostly (sic) emphatically not – not concurrent." (21:116; App. 120). It then stated that it did however include a treatment component in both the Day Reporting Center and probation. (2/27/2014 Tr. at 16). The court clarified that count one was straight time and that it objected to electronic monitoring. (21:117; App. 121).

Mr. Farmer filed a postconviction motion seeking resentencing under ***State v. Gallion***. (13:1-16). Specifically he argued that the court failed to provide adequate reasoning for imposing the sentence. The court did not engage in any meaningful discussion of how the facts of the case affected the court's view of the mandatory sentencing factors, nor did it identify any sentencing objectives. (13:1-16).

The circuit court denied the motion without a hearing. In its written decision, the court stated that it "considered the defendant's conduct in this case, his age, his education, his prior record, his struggles with addiction, his rehabilitative needs and the need for deterrence and community protection." (14:3; App. 103). The court "concede[d] that its sentencing decision could have been more expansive[,]" and that "[t]he court could have gone on for pages and pages of transcript but did not need to do so in this case to state the obvious: that the defendant was a chronic shoplifter who was unwilling or unable to curb his behavior. (14:3; App. 103). The court found that its sentence comported with the requirements set forth in ***McCleary v. State*** and ***Gallion*** because its "decision was specifically individualized to achieve the court's sentencing goals for this defendant." (14:4:App. 104).

ARGUMENT

I. Mr. Farmer Is Entitled to Resentencing Because the Circuit Court Failed to Adequately Explain Its Reasons For Imposing a "Fairly Severe Sentence."

In this case, the circuit court failed to provide an adequate explanation for its sentence. Instead of identifying sentencing objectives and providing details to explain its reasons for selecting the sentence that it did, the court merely uttered a vague statement about the sentence being "based on what [it] heard" before pronouncing it. The Wisconsin Supreme Court has concluded that "[s]uch an approach confuses the exercise of discretion with decision-making." ***State v. Gallion***, 2004 WI 42, ¶ 2, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, the circuit court erroneously exercised its discretion at sentencing and Mr. Farmer is entitled to a new hearing.

On appeal, this Court reviews sentencing decisions to determine whether the circuit court erroneously exercised its discretion. ***Id***. ¶ 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 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 this case, the circuit court's erroneous exercise of discretion stems from its failure to exercise its discretion at sentencing, which requires the court to provide a "rational and explainable basis" for the particular sentence it imposed. ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971).

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

Mr. Farmer, like all defendants, has "a constitutional right to have the relevant and material factors which influence sentencing explained on the record by the trial court." ***State v. Hall***, 2002 WI App 108, ¶ 21, 255 Wis.2d 662, 648 N.W.2d 13. As part of that rational and explainable basis that must be put forth on the record, 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. [1]

"Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning." ***McCleary***, 49 Wis. 2d 263, 277. Circuit courts may not dispense with discretion by citing facts, "magic words," or limiting sentences to the statutory maximum. ***Gallion***, 270 Wis. 2d 535, ¶ 37. Instead, they "are required to specify the objective of the sentence on the record." ***Id***. at ¶ 40; Wis. Stat. § 937.017(10m). Accordingly, a court must tailor the sentence to the individual 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.

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[1] A court may also consider several other factors such, "(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 defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational and employment record; (9) defendant's remorse 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.

Furthermore, in each case, the court should impose the "minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶ 23, (quoting ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971).

B. The court failed to consider the mandatory sentencing factors, identify the sentencing objectives, and provide a rational and explainable basis for the sentence.

The issue at hand is the sentencing court's failure to identify the mandatory sentencing factors, identify a sentencing objective(s), and provide an on the record explanation of *why* and *how* it justified the sentence it ultimately imposed. Instead, it justified the sentence "based on what [it] heard." (21:15; App. 119). The court did not identify the mandatory sentencing factors, nor did it discuss the facts of the case and explain how those facts influenced its sentencing decision. The court did not discuss any facts about the offense itself. Likewise, the court did not mention protection of the public; therefore, nothing in the record demonstrates that it actually considered protection of the public, and what facts may have influenced the court in relation to it. The court did acknowledge Mr. Farmer's rehabilitative needs, insofar as it stated it would get him treatment at the Day Reporting Center. The court identified a need for treatment, but failed to explain how that need weighed against other sentencing goals.

In its few vague comments, the court noted that Mr. Farmer's record was "very bad," and that although it "[does not] like "putting elderly people in the House of Correction[,]"it was necessary to do so. (21:14; App. 118). Even if the court considered Mr. Farmer's age and criminal history, these are generally considered optional sentencing factors. ***Harris***, 326 Wis. 2d 685, ¶ 28. However, considering these optional factors cannot relieve the court of its duty to

consider the mandatory factors, and provide its reasoning for imposing the sentence on the record. Moreover, the simple statement about Mr. Farmer's "very bad" record does nothing to explain why the court believed its sentence was necessary. A court must do more; it must demonstrate a process of reasoning. ***McCleary***, 49 Wis. 2d 263, 277.

The court failed to identify any sentencing objective(s) as required. ***Gallion***, 270 Wis. 2d 535, ¶ 40; Wis. Stat. § 937.017(10m). A sentence "based on what [it] heard" makes it impossible to identify a sentencing objective(s) and for Mr. Farmer to know why the sentence imposed was necessary for the furtherance of the court's sentencing goals. Because there is no fact-factor analysis, there is no way of knowing from the record which of the many facts the parties discussed was important to the court, why the court imposed the sentence it did, or why it rejected Mr. Farmer's recommendation for concurrent time. An appellate court would learn nothing of the court's view of the factors, relevant facts, and how those furthered the sentencing objective because it failed to adequately explain its reasoning. ***McCleary*** 49 Wis. 2d 263, 280-281, (1971).

There is no evidence that the court considered the mandatory factors. It merely recited a couple of facts and identified a rehabilitative need. The court's broad statement about considering everything it had heard does not show an exercise of discretion. The exercise of discretion demands that the court provide an explanation of the court's reasoning and how the sentence furthers the sentencing objectives. ***Harris***, 326 Wis. 2d 685, ¶ 29.

C. The court pronounced its reasoning for imposing the sentence for the first time in its decision on the postconviction motion.

When a defendant brings a postconviction motion challenging a court's sentence, the court has an opportunity to clarify its sentencing decision and rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (emphasis added); ***State v. Stenzel***, 2004 WI App 181, ¶ 9, 276 Wis. 2d 224, 688 N.W.2d 20. Here, however, because the court provided minimal reasoning and explanation at the original sentencing, it was not merely clarifying its decision, but providing its rationale for the first time.

In its written decision, the court stated that it "considered the conduct, his age, his education, his prior record, his struggles with addiction, his rehabilitative needs and the need for deterrence and community protection." (14:3; App. 103). It went on to explain that despite the relatively minor offense, a sentence to the House of Correction was necessary to punish and deter Mr. Farmer. (14:3; App. 103). The court explained that it weighed Mr. Farmer's bad record and risk to re-offend against the need for treatment. (14:3; App. 103). Finally, the court "concluded then, as it does now, that the sentence imposed is necessary to achieve the sentencing goals of punishment, deterrence, rehabilitation, and community protection." (14:3; App. 103).

The postconviction decision is the first time the court provided any explanation as to how it weighed the facts of the case, the sentencing factors, or identified goals. Contrary to its statement, the court did not "conclude then" that the sentence imposed furthered its goals to punish, deter, rehabilitate and protect the community. At the time of sentencing, the court did not identify any goals, other than that it would provide treatment in the form of the Day Reporting Center; likewise, and did not address any facts, other than Mr. Farmer's record. These after-the-fact remarks

should not cure a totally deficient sentencing. Cf. ***State v. Travis***, 2013 WI 38, ¶ 48, 347 Wis. 2d 142, 832 N.W.2d 491 (sentencing court's "after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance").

In its written decision denying postconviction relief, the court "concede[d] that its sentencing decision could have been more expansive." (14:3; App. 103). However, it stated that it

> did not need to do so in this case to state the obvious: that the defendant was a chronic shoplifter who was unwilling or unable to curb his behavior[,] [and that] [s]ome House of Correction time was clearly necessary to punish and deter the defendant and to protect the community (particularly the business community.)

(14:3; App. 103). However, explaining what it thought was "obvious" is precisely what the court needed to do. ***Gallion***, 270 Wis. 2d 535, ¶¶ 41-43. Permitting the court to provide no explanation at the time of sentencing, and then on postconviction, provide all of its rationale and call it a "clarification" renders the principles of ***Gallion*** and ***McCleary*** meaningless. Furthermore, permitting an exercise of discretion on postconviction to substitute for a proper exercise of discretion at the time of sentencing denies Mr. Farmer his right to be present at sentencing. ***State v. Borrell***, 167 Wis. 2d 749, 772, 482 N.W.2d 883.

Mr. Farmer was entitled to have the trial court explain and discuss all of the relevant and material factors the court considered *at the time of sentencing*; thereby assuring him that the result was that of a deliberate process. ***State v. Hall***, 255 Wis. 2d 662, ¶ 21; ***Gallion***, 270 Wis. 2d 535, ¶ 8; ***McCleary***, 49 Wis. 2d at 278. Because the circuit court failed to do that, Mr. Farmer is entitled to resentencing.

CONCLUSION

Mr. Farmer respectfully requests that for the reasons stated above that the court reverse the decision of the circuit court denying him postconviction relief, vacate the judgment of conviction and order a re-sentencing hearing.

Dated this 18th day of March, 2015.

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 2,948 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 this 18th day of March, 2015.

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; and (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.

Dated this 18th day of March, 2015.

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