STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2014AP002623-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOHN EDDIE FARMER, SR.,

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the trial court's sentence of Mr. Farmer constitute an abuse of discretion?

Answer: The trial court, by denying Mr. Farmer's Postconviction Motion for Re-Sentencing, implicitly answered in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a misdemeanor case to be decided by a single judge, which is not eligible for publication. Neither is oral argument necessary to resolve the issues herein.

STANDARD OF REVIEW

The appellate court's review to determine whether a trial court has properly sentenced a defendant is limited to determining if the trial court's discretion was erroneously exercised. McCleary v.State, 49 Wis.2d 263, 278, 182 N.W.2d 512 (1971). There is an erroneous exercise of discretion when that "discretion is based on irrelevant or improper factors." Id. Furthermore, the reviewing court is to "follow[] a consistent and strong policy against interference with the discretion of the trial court in passing sentence." Id. at 281.

STATEMENT OF THE CASE

On December 14, 2013, the Milwaukee County District Attorney's Office filed a complaint against the petitioner, Mr. John Eddie Farmer, Sr. alleging four criminal counts: one count of misdemeanor retail theft and three counts of misdemeanor bail jumping. (R2). At the time the complaint was filed, Mr. Farmer had three additional open cases, 13CM5099, 13CM4594 and 13CM4573. (R2:2). Case 13CM5099 included one count of misdemeanor retail theft and one count of misdemeanor bail jumping in violation of Wisconsin Statutes §943.50(1m)(b) and §946.49(1)(a), and cases 13CM4594 and 13CM4573 each charged one count of misdemeanor retail theft in violation of Wisconsin statute §943.50(1m)(b). Id.

On February 27, 2014, at the plea and sentencing hearing, Mr. Farmer pled guilty to one count of misdemeanor retail theft, contrary to Wisconsin statute §943.50(1m)(b) and three counts of misdemeanor bail jumping, contrary to Wisconsin statute §946.49(1)(a) in case 13CM5299. (R9:1, R10:1). The three remaining cases were dismissed. (R21:3).

During the sentencing argument, Assistant District Attorney Franco Mineo spoke about Mr. Farmer's criminal history which dated back to 1990 and included offenses in Illinois. (R21:7). ADA Mineo next addressed the three open retail theft municipal warrants from the city of Milwaukee, one open municipal trespass warrant also from the city of Milwaukee and one open municipal warrant from the city of Greenfield. Id. Finally, ADA Mineo relayed the gravity of the four cases before the trial court, in which Mr. Farmer entered four different stores, concealed items in his backpack, left the stores, and then admitted the offenses once confronted by police. (R21:8).

At sentencing, the trial court imposed the following sentence:

> 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 House of Correction, time served
> Count 4: Sentence withheld for two years of probation

(R21:15)

All of the sentences were consecutive to one another and also consecutive to the sentence that Mr. Farmer was serving in Waukesha County at the time he pled guilty to the above four counts. Id.

The trial court did mention the three primary sentencing factors: gravity of the offense, character of Mr. Farmer, and need to protect the public. (R21:18). The trial court started with the gravity of the offense:

> **THE COURT**: Well, Mr. Farmer, your shoplifting is totally out of control.

(R21:14)

The trial court also considered Mr. Farmer's character:

> **THE COURT**: And your record is very bad.

Id.

Finally, the trial court considered the need to protect the public:

> **THE COURT**: And generally I don't like putting elderly people in the House of Correction; but in your case I think it is necessary.

Id.

After imposing the sentence, the trial court further discussed it's reasoning for the sentence:

> **THE COURT:** Now, that's a fairly severe sentence because it is mostly emphatically not – not concurrent. However, it does embody treatment both in the – in the probationary count and treatment in the form of the Day Reporting count.

(R21:16)

On August 13, 2014, the trial court entered a written Decision and Order Denying Motion for Resentencing. (R14). The trial court discussed in depth an additional number of reasons as to why it imposed the sentence given to Mr. Farmer. (R14). The trial court indicated that it perceived no abuse of sentencing discretion and declined to resentence Mr. Farmer. (R14:4).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED MR. FARMER.

A. The trial court adequately explained its reasoning when it imposed Mr. Farmer's sentence.

The Wisconsin Supreme Court instructed that trial courts are to provide evidence of "exercise of discretion" during a sentencing hearing. State v. Gallion, 270 Wis. 2d 535,

549, 678 N.W. 2d 197, 203 (2004). Discretion is a process of reasoning, not merely decision-making. McCleary, 49 Wis.2d at 277.

> This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.

Id.

There should be evidence on the record that reflects the basis for the discretion and that discretion was truly exercised. Id. (quoting State v. Hutnik, 39 Wis.2d 754, 764, 159 N.W.2d 733, 738 (1968)).

Furthermore, the trial court must explain the reasons for the imposition of the particular sentence handed down. Gallion, 270 Wis.2d at 556-57. This includes a discussion, during the sentencing phase of the proceedings, of the gravity of the offense, the character of the defendant, and the need to protect the public. Id. Also, there is the important note that simply using the "magic words" 'seriousness [gravity] of the offense,' 'character of the offender' and 'need to protect the public' does not automatically render a sentence proper. Id. at 562, McCleary, 49 Wis.2d at 276.

In Mr. Farmer's case, the trial court did more than just state "magic words;" it actually gave explanations on the record before and after it imposed sentence. (R21:14 & 16). Instead of merely saying the words signifying that the trial court was talking about the Mr. Farmer's character, the trial court stated that Mr. Farmer's record was very bad finding that his criminal history was extensive. (R21:14). The trial court cautioned that Mr. Farmer's shoplifting was "totally out of control," which went to the gravity of the offense. Id. As to the need to protect the public, again the trial court explained that it was necessary to put Mr. Farmer in jail even though the trial court did not like doing that with elderly people. Id. Moreover, the trial court reasoned that its sentence tried to help Mr. Farmer get the treatment he requested through the Day Reporting Center and probation. (R21:16).

Here, the trial court took the facts that were in the record at the time of sentencing, and adequately relayed its reasons for sentencing to Mr. Farmer. (R21:14-16). There is no predetermined amount of time for the explanation of sentence that the court must follow, instead the necessary explanation varies from case to case. Gallion, 270 Wis.2d at 556. For Mr. Farmer, the trial court gave a sufficient explanation of sentence for his particular case by addressing Mr. Farmer's criminal history, the seriousness of the offenses, and the need to put him in jail. (R21:14-16). The factors a trial court must consider when sentencing were all taken into account and explained to Mr. Farmer at his sentencing. Id. Therefore, the trial court adequately exercised its discretion as well as explained its reasoning for the sentence of Mr. Farmer.

B. Even if the explanation of the sentence on the record is deemed inadequate, the sentence imposed was not an abuse of discretion because the totality of the record supports the trial court's decision.

When a trial court fails "to exercise discretion (discretion that is apparent from the record) when discretion is required, [this] constitutes an abuse of discretion." McCleary, 49 Wis.2d at 282. However, McCleary goes on to state that the court,

> ...will not, however, set aside a sentence for that reason; rather, we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.

Id., State v. Hall, 255 Wis.2d 662, 670, 648 N.W.2d 41,44 (2002).

It is the duty of the court to affirm the sentence on appeal if the facts of record can be sustained as an appropriate use of discretion. McCleary, 49 Wis.2d at 282. "In cases where the trial judge has failed to set forth his reasons, we examine the record ab initio to resolve the post-verdict damage questions." Id. at 277. The court "will not find an abuse of discretion if there exists a reasonable basis for the trial court's determination." Id.

Reviewing all of the information in the record at the time of sentencing, there was no abuse of discretion by the trial court in its ruling. From the beginning, the trial court had the criminal complaint which explained the nature of the current charges, as well as the fact that Mr. Farmer had three additional open misdemeanor retail theft cases at the time he was charged with the new one. (R2). The trial court was aware of the fact that at the age of 72, Mr. Farmer continued to commit retail thefts even though he had multiple open cases and was instructed as part of his bail not to commit any new offenses. Id.

Further, the trial court explored Mr. Farmer's lengthy criminal history during the sentencing. (R21:7). This is a criminal history that spanned over three decades with numerous retail theft and bail jumping convictions. Id. The most recent case ADA Mineo referenced was another misdemeanor retail theft case in Waukesha County in which Mr. Farmer was sentenced three days prior to his sentencing in Milwaukee County to nine months straight time. Id. It was mentioned that during the years of 2002-2014, Mr. Farmer did not have any criminal convictions in Wisconsin. Id. However, the State pointed out that during that time, Mr. Farmer may have been in custody or dealing with issues in the state of Illinois. Id. The trial court was aware of Mr. Farmer's extensive criminal history for similar behavior as the cases at hand when he sentenced Mr. Farmer. Id.

The trial court was aware of the nature of the offenses by Mr. Farmer from the complaints and statements from the State. (R2, R21:8). ADA Mineo explained how all four of the cases were similarly committed. (R21:8). Mr. Farmer went into four different stores, put merchandise into his backpack or coat, and left the store without paying. (R21:8). The total amount of items taken in the case Mr. Farmer was sentenced on was $195.72. (R2). Additionally, the trial court was aware that the total for the other retail thefts was about $150 each. (R21:8). These were added facts of the offense that the trial court had knowledge of during Mr. Farmer's sentencing.

The trial court was also aware of several mitigating factors regarding Mr. Farmer's character. (R21:9). Defense counsel discussed Mr. Farmer's age, his addiction issues, that

he tried to get treatment, his health issues, his supportive family, the fact that Mr. Farmer has lived in Milwaukee his whole life and that he had schooling beyond his GED. (R21:9-12). The trial court incorporated these points during Mr. Farmer's sentencing and mentioned that the sentence embodied treatment in both the probationary count and the Day Reporting Center giving Mr. Farmer an opportunity to get the help he wanted. (R21:16).

In addition, when the Court of Appeals reviews a sentence, it is able to look at the entire record, including any postconviction proceedings. State v. Santana, 220 Wis.2d 674, 683, 584 N.W.2d 151 (Ct. App. 1998) ("The transcripts of the sentencing hearing as well as several postconviction hearings make an extensive record of the trial court's comments at sentencing and its explanation for what was considered.") Part of the postconviction proceedings are the written motions like those that were filed in Mr. Farmer's case. (R:13,14). The trial court put numerous justifications for Mr. Farmer's sentence in the written postconviction motion, many of which were mentioned on the record during sentencing. (R14). Those factors included Mr. Farmer's age, education, prior criminal record, struggles with addiction, rehabilitative needs, need for deterrence and community protection. (R14:3). These are exactly the types of factors a trial court is supposed to consider and convey when sentencing someone according to Gallion, 270 Wis.2d at 556-57.

All of the information discussed above was known to the trial court at the time of Mr. Farmer's sentencing. Between the four open cases, extensive criminal history including possible out of state offenses, and the nature of the four cases, the trial court was well within reason to sentence Mr. Farmer in the manner that it did. Both Gallion and McCleary recognize the wide discretion afforded to the trial court at sentencing. 270 Wis. 2d at 549, 49 Wis.2d at 278. When searching the entire record, the sentence of Mr. Farmer was entirely rational. Because there existed countless reasons why the trial court imposed a reasonable sentence on Mr. Farmer, the State believes there was no abuse of discretion on the part of the trial court.

CONCLUSION

The records from the sentencing hearing and subsequent filings do not show an abuse of discretion by the trial court, but instead support that Mr. Farmer was properly sentenced. The State therefore respectfully requests that the petitioner's motion for resentencing be denied.

Dated this _____ day of May, 2015.

Respectfully submitted,

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_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,229.

_____ _____
Date Alyssa M. Schaller
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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 s. 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.

_____ _____

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