

RECEIVED

06-08-2015

**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. 2014AP002623-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN E. FARMER,

Defendant-Appellant.

On Appeal From the Denial of a Postconviction Motion for
Resentencing and Judgment of Conviction Entered in the
Milwaukee County Circuit Court, the Honorable John Siefert,
Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. Mr. Farmer Is Entitled to Resentencing Because the Trial Court Failed to Adequately Explain the Sentence It Imposed.	1
A. The circuit court’s sparse comments at sentencing were inadequate to demonstrate that the process of reasoning required in determining a sentence.	1
B. The record and the postconviction decision are insufficient to cure a sentence that lacks explanation.	2
CONCLUSION	6
CERTIFICATION AS TO FORM/LENGTH.....	7
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)	7

CASES CITED

<i>McCleary v. State</i> , 49 Wis. 2d 263, 182 N.W.2d 512 (1971).	1,2
<i>State v. Borrell</i> 167 Wis. 2d 749, 482 N.W.2d 883.	5
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 ...	3, 4

State v. Hall,

2002 WI App 108, 255 Wis. 2d 662, 648

N.W.2d13 2, 4

ARGUMENT

I. Mr. Farmer Is Entitled to Resentencing Because the Trial Court Failed to Adequately Explain the Sentence It Imposed.

A. The circuit court's sparse comments at sentencing were inadequate to demonstrate that the process of reasoning required in determining a sentence.

When the circuit court sentenced Mr. Farmer, it failed to identify the mandatory sentencing factors, identify sentencing objectives, and provide an on-the-record explanation of *why* and *how* it justified the sentence it ultimately imposed. The circuit court's few vague comments do not demonstrate a process of reasoning that an exercise of discretion requires. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

The state argues that the circuit court in this case went beyond simply stating “magic words,” and that it “actually gave explanations on the record before and after it imposed sentence. (State’s Brief, at 5). To support this claim, the state argues that characterizing Mr. Farmer’s record as “very bad,” and calling his shoplifting “totally out of control” are sufficient to show that the court adequately considered, and explained Mr. Farmer’s character and the gravity of the offense, as well as how those factors related to the ultimate sentence. (State’s Brief, at 5). Likewise, the state argues that the court’s consideration of the protections of the public can be gleaned from the court’s comment regarding its general dislike of sending elderly people to jail, but that it in this case it was necessary. (State’s Brief, at 5).

However, these limited comments fail to demonstrate a process of reasoning, which is required at sentencing. *McCleary*, 49 Wis. 2d 263, 277. First, the circuit court here failed to even identify the mandatory sentencing factors. But, it is not just the absence of these mandatory factors that renders this sentencing explanation insufficient. Rather, it is the circuit court's failure to discuss the substance of each factor related to the facts before it that renders this sentence inadequate under *Gallion*. The circuit court failed to identify any sentencing objectives, or how it weighed particular facts in relation to those objectives. The state's argument gives explanation where there was none from the court. Moreover, the state's argument fails to consider Mr. Farmer's "constitutional right to have the relevant and material factors which influence sentencing explained on the record by the trial court. See *State v. Hall*, 2002 WI App 108 ¶ 21, 255 Wis. 2d 662, 648 N.W.2d13. The circuit court's sentence is inadequate, and as such, constitutes an erroneous exercise of discretion.

B. The record and the postconviction decision are insufficient to cure a sentence that lacks explanation.

One of the primary obligations of the circuit court is to explain the reasons for its decisions. *McCleary*, 49 Wis. 2d at 280. People cannot understand and appellate courts cannot review decisions that are not fully explained. *Id.* at 281. A judge must make a statement "detailing his reasons for selecting the particular sentence imposed" in order to make a prima facie valid sentence. *Id.* at 281. Circuit court judges are in the best position to determine a defendant's sentence, and "[a]ppellate judges should not substitute their preference for a

sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence.” *Id.* at 281, 296.

The state argues that even if the circuit court’s sparse remarks at sentencing constitute an erroneous exercise of discretion, this court should uphold the sentence because the record supports the sentence that the circuit court imposed. (State’s Brief at 6). However, doing so would require this court to substitute in its own reasoning, to identify sentencing objectives, and to determine how much weight to give to various facts. In other words, this court would be required to substitute its own exercise of discretion for that of the circuit court. However, it is the role of the circuit court to determine how to weigh the factors, how to prioritize sentencing objectives, and ultimately what sentence to impose. *See McCleary*, 49 Wis. 2d 263 (1971); *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, this court would become the sentencing court and the principles of *McCleary* and *Gallion* would be nullified.

In this case, different sentences may have been reasonable under the facts. There were aggravating factors, such as Mr. Farmer’s record, and the fact that he had been out on bail while some of the offenses were committed. There were also mitigating factors, such as his cooperation, the low value of the items taken, and his age. The circuit court stated it was relying on everything it heard, but failed to identify what facts or factors were most important, what its objectives were, and why fourteen months of jail and two years of supervision was the minimum amount of time consistent with the sentencing objectives.

Contrary to what the state asserts, the record does not support consecutive sentences totaling over three years of

corrections involvement. The nature of the offense was not serious or aggravated. There were no weapons or violence involved. The items taken were personal hygiene products. Mr. Farmer was elderly and had health issues, including issues related to a life-long struggle with addiction. Mr. Farmer was cooperative and accepted responsibility. While he had an extensive record, he had no convictions between 2002 and 2014 in Wisconsin. The state was unsure as to whether Mr. Farmer had any convictions in Illinois in that time period. Speculation about convictions in another state should not factor into the sentence. It would have been reasonable to give Mr. Farmer concurrent sentences or to stay jail time and place him on probation.

Ultimately, the reasonableness of a sentence rests in the explanation and reasoning of the circuit court. Because the circuit court here failed to adequately explain its sentence, this court would learn nothing of the circuit court's view of the factors, relevant facts, and how the circuit court weighed the information in light of the sentencing goals in determining the minimum amount of time in custody necessary. This court should not uphold a sentence where there is nothing explicit in the record regarding the court's sentencing objectives or how it weighed the factors.

Here, the sentencing court's remarks were sparse and showed no process of reasoning. Searching the record for any reason to uphold the sentence also denies Mr. Farmer his constitutional right to be present at sentencing, as well as his right to have the trial court explain and discuss all of the relevant and material factors; thereby assuring him that the result was that of a deliberate process. *Hall*, 255 Wis. 2d 662, ¶ 21; *State v. Gallion*, 2004 WI 42 ¶8, 270 Wis. 2d 535, 678 N.W.2d 197. *McCleary*, 49 Wis. 2d at 772. Moreover, searching the record to justify any sentence, even when it is

devoid of explanation, limits appellate review to those that this court considers harsh or excessive; thereby denying meaningful review to defendants. Likewise, it relieves the trial court of its obligation to sufficiently explain the sentencing rationale, thus nullifying *Gallion* and *McCleary*.

Similarly, the written decision denying postconviction relief should not be accepted as a “clarification” of the circuit court’s original sentencing remarks, as doing so also denies Mr. Farmer his right to be present and renders the principles of *Gallion* and *McCleary* meaningless. The state argues that “[t]he trial court put numerous justifications for Mr. Farmer’s sentence in the written postconviction motion, many of which were mentioned in the record during sentencing. (State’s Brief at 8).

However, the list of factors in the state’s brief were not discussed in any detail at sentencing, nor was any weight assigned, or objective identified. Mr. Farmer was entitled to have his sentence explained to him at the time of sentencing. Allowing the postconviction motion decision to replace an adequately reasoned sentencing decision at the time of sentencing denies Mr. Farmer his right to be present. *State v. Borrell* 167 Wis. 2d 749, 772, 482 N.W.2d 883.

CONCLUSION

For the reasons set forth in this brief, and his brief-in-chief, Mr. Farmer respectfully requests that this court vacate the judgment of conviction and remand this case to the circuit court for resentencing.

Dated this 4th day of June, 2015.

Respectfully submitted,

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202
(414) 227-4300
velasquezm@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 1,363 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 4th day of June, 2015.

Signed:

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355
Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) @227-4300
velasquezm@opd.wi.gov
Attorney for Defendant-Appellant