STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2015AP000130-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

STEVEN RAY GADDIS,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND A POSTCONVICTION ORDER DENYING RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE JOHN SIEFERT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did the circuit court properly exercise its sentencing discretion when it fashioned a reasonable and justifiable sentence?

   Answer: Yes

2. Did the circuit court properly rely on the States accurate portrayal of facts and the accurate belief that Gaddis could have been charged with a felony?

   Answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication. The case can be resolved by applying well-established legal principles to the facts of the case.

STATEMENT OF THE CASE

On January 21, 2014, Steven Gaddis was charged in Milwaukee County Circuit Court Case number 2014CM000303 with one count of retail theft as a repeater and one count of disorderly conduct while armed as a repeater, contrary to Wis. Stats. §§ 943.50(1m)(b), 947.01(1) and 939.62(1)(a). (R2:1). The complaint alleged that on January 15, 2014, Walmart Loss Prevention personnel observed Mr. Gaddis take several items of merchandise from the shelves and conceal them in his shirt cuff. (R2:2). Mr. Gaddis then attempted to leave the store before being confronted by loss prevention staff. (R2:2). When emptying his pockets, Mr. Gaddis pulled out a red box cutter and held it in a "threatening manner" with the blade extended towards the loss prevention staff. (R2:2).

On April 15, 2014, a plea and sentencing hearing was heard by circuit court Judge John Siefert. (R38:1). Mr. Gaddis entered a plea of guilty to one count of retail theft as a repeater, and the count of disorderly conduct while armed as a repeater was dismissed and read-in. (R38:6). The court confirmed with Mr. Gaddis that his prior conviction of Robbery with the Use of Force, 2009CF004981, was the predicate for the repeater enhancer. (R38:3).

The State recommended a prison sentence with the amount up to the court. (R38:6). In its sentencing argument, the State gave the court the facts of the particular incident including the fact that Mr. Gaddis removed a box cutter and slid the blade out in a threatening manner towards loss prevention officers. (R38:6-7). The State also told the court that Mr. Gaddis got away because the "loss prevention officer did not want to get harmed." (R38:7).

In looking at the character of Mr. Gaddis, the State informed the court that Gaddis had twenty-six prior convictions dating back to 1987. (R38:7-8). Of those twenty-six priors, the State mentioned several retail theft convictions, several drug convictions, several escape convictions and the 2009 felony robbery conviction. (R38:7-8). The State further stressed that prison was an appropriate sentence because Mr. Gaddis has "demonstrated an ability to possess weapons and to commit armed robberies," thus threatening the community. (R38:8).

The defense argued for an eighty-eight day time-served disposition. (R38:9). In its argument, the Defense stated that Mr. Gaddis and the loss prevention officials "simply parted ways" after Mr. Gaddis held the box cutter in the air in a defensive position. (R38:10).

The court found the State's recommendation appropriate and sentenced Mr. Gaddis to two years of incarceration, dividing it into fifteen months of initial confinement and nine months of extended supervision. (R38:12-13). In fashioning it's sentence, the court took into consideration the character of Mr. Gaddis, the need to protect the public and the seriousness of the offense. (R38:12). The court based its decision on the fact that Mr. Gaddis had a "horrible criminal record of past offenses that casts real doubt on [his] character." (R38:12).

The court accepted the State's recitation of facts regarding the box knife and considered that an aggravating circumstance. (R38:12). Furthermore, the court stated that this particular retail theft could have been charged as a different kind of felony. (R38:12).

Mr. Gaddis filed a post-conviction motion claiming that the circuit court failed to adequately explain its sentence and that the court relied on inaccurate information in fashioning its sentence. (R21:3). Mr. Gaddis' motion was denied and he subsequently filed this appeal. (R30:1).

STANDARD OF REVIEW

A circuit court's sentencing decision is reviewed for an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42,

¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A circuit court commits an erroneous exercise of discretion when its sentencing explanation is unreasonable or unjustifiable. *State v. Bizzle*, 222 Wis. 2d 100, 106, 585 N.W.2d 899 (Ct. App. 1998).

If the defense can show that some of the information presented at sentencing was inaccurate, and that the court actually relied on that information, the State must show that the error by the sentencing court was harmless. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis.2d 179, 185, 717 N.W.2d 1, 3 (2006). An error by a sentencing court is harmless if there is no reasonable probability that it contributed to the outcome of the sentence. *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis.2d 39, 756 N.W.2d 423.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS SENTENING DISCRETION

A. Legal Principles

It is well established Wisconsin precedent that "the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." *State v. Borrell*, 167 Wis.2d 749, 781–82, 482 N.W.2d 883 (1992). Therefore,

> . . . sentencing courts are obliged to acquire the full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence. A sentencing court may consider uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted.

State v. Leitner, 2002 WI 77, ¶ 45, 253 Wis. 2d 449, 646 N.W.2d 341 (internal quotations omitted). The sentencing judge's role is to "assess the defendant's character using all available information, unconstrained by the rules of evidence that govern the guilt-phase of a criminal proceeding." *State v. Arredondo*, 2004 WI App 7, ¶ 53, 269 Wis. 2d 369, 674 N.W.2d 647.

In sentencing a defendant, the trial court must enumerate the objectives of its sentence on the record. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. *State v. Mosley*, 201 Wis. 2d 36, 43-44, 547 N.W.2d 806 (Ct. App. 1996). In addition to the primary factors, the trial court may consider a number of other factors, including: the defendant's criminal record; history of undesirable behavior patterns and the aggravated nature of the crime. *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). After setting forth the objectives, the court must then identify the facts it considered in arriving at its sentence and explain how those facts advance the objectives of its sentence. *Gallion*, 270 Wis. 2d. 535, ¶¶ 41, 42.

B. The Circuit Court Properly Exercised Its Sentencing Discretion

After hearing arguments from the parties, the circuit court exercised proper discretion when it fashioned a reasonable and justifiable sentence. As mandated by *Gallion*, the circuit court based its sentence decision on the character of the defendant, the need to protect the public and the seriousness of the offense. (R38:12). The court acquired the necessary knowledge of these three elements by listening to the detailed sentencing arguments given by the State, Mr. Gaddis' attorney and Mr. Gaddis himself. Also available to the court was criminal complaint that laid out the facts of the offense Mr. Gaddis plead guilty to. (R2:1-2). The court then sentenced Mr. Gaddis to two years in prison, divided into one year three months initial confinement and nine months extended supervision. (R38:12-13).

First, the court took into consideration the character of Mr. Gaddis. The court specifically stated Mr. Gaddis had "a horrible criminal record of past offenses that casts real doubt on [his] character." (R38:12).

Second, the court took into consideration the need to protect the public. The court acknowledged that Mr. Gaddis was a threat to the public when it specifically stated it accepted the State's version of what happened with the box cutter.

(R38:12). This is relevant because the State established that Mr. Gaddis's use of the box cutter showed Mr. Gaddis as a danger to the community because he held the box cutter in a threatening manner. (R38:7). The court also considered Mr. Gaddis' rehabilitative needs, in which his prior convictions of Possession of Drug Paraphernalia, Possession of a Controlled Substance without a Prescription, a drug felony, and numerous Retail Theft convictions showed signs of a substance abuse problem. (R38:7-8). With that, the court intended Mr. Gaddis to be eligible for the Earned Release Program. (R38:14-15). Thus, the court intended to protect the community by punishing and rehabilitating Mr. Gaddis.

Finally, the court considered the seriousness of the crime. The court specifically noted,

> I don't accept the defense's explanation of the knife – box cutter weapon and how it was displayed as being more accurate than the district attorney's description of it. And that's the aggravating circumstance.

(R38:12). The court also understood that the State could have charged the case as a felony offense instead of Retail Theft as a Habitual Criminal, but that it chose not to. (R38:12).

The court enumerated sufficient facts in explaining its sentencing decision. The court specifically stated it took into consideration Mr. Gaddis' horrible criminal record, the use of the box cutter as an aggravating circumstance and the fact that this could have been charged as a felony. (R38:12). The court does not have to passionately or eloquently provide a detailed analysis of how each individual factor affected the calculation of Mr. Gaddis' sentence. *See State v. Fisher*, 2005 WI App 175, ¶¶21-24, 285 Wis. 2d 433, 702 N.W.2d 56 (explaining that *Gallion* does not require a comparative analysis of the effect of any given factor on the length of the sentence).

In its Decision and Order Denying Motion for Post-conviction Relief, the court further elaborated on its sentencing decision. (R30:1). The court did admit that "its sentencing comments could have been more extensive." (R30:2). But the court also noted that it took into consideration everything the State mentioned in its sentencing argument, as well as the

potentially mitigating factors the defense argued. (R30:2-3). Just because the court did not go on "for pages and pages of transcript" does not mean that the court did not take into consideration everything that was available to it at the time of sentence. (R30:3).

Although the circuit court may not have passionately described its rational, it is clear from the sentencing record that the court paid attention throughout the hearing and gained a complete understanding of the three sentencing factors prior to imposing its sentence. The court then enumerated the objectives of its sentence on the record and established which factors weighed heaviest in its decision.

C. Gaddis is Not Entitled to Re-Sentencing Because the Facts of Record Allow the Imposed Sentence to be Sustained

Even if this court finds that the circuit court did not adequately set forth the reasons for the sentence imposed, this court may still affirm the sentence "if from the facts of record [the sentence] is sustainable as a proper discretionary act." *State v. Hall*, 2002 WI App 108, ¶¶ 5-6, 255 Wis. 2d 662, 669-70, 648 N.W.2d 41, 44. The reviewing court is "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *State v. McCleary*, 49 Wis. 2d 263, 282, 182 N.W.2d 512, 522. Accordingly, as long as the circuit court sets forth its objectives and explains its reasoning on the record, the trial court exercised proper discretion and did not commit error. *Id*. at 281. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." *Gallion*, 270 Wis. 2d 535, ¶17.

The sentence of two years in prison is justified the facts of record. Although a property crime, and thus less serious than a crime of violence, retail theft is nonetheless a serious offense. As a Class A misdemeanor, it is classified as one of the most serious of misdemeanor crimes. The complaint established that this was a more sophisticated retail theft than some: Mr. Gaddis did not simply grab something and leave the store without paying for it: he selected multiple items of merchandise and concealed them in his cuffs; he then staged

items in other areas of the store, returning to those items later and concealing them. Not a spur of the moment offense, the facts establish that this was a planned, more thought out crime.

The conduct at issue was made more serious by Mr. Gaddis's possession and display of the box cutter as a weapon. Those facts were appropriately considered as part of the offense as a whole: read-in charges are expected to be considered in sentencing, with the understanding that the read-in charges could increase the sentence up to the maximum that the defendant could otherwise receive . *State v. Frey*, 2012 WI 99, ¶ 68, 343 Wis.2d 358, 383, 817 N.W.2d 436, 448. Here, the court found that Mr. Gaddis produced the box cutter in a manner that made the Loss Prevention officers feel threatened. (R38:12). The court found that an aggravating factor regarding the offense (Id.); it also displayed a negative aspect of Mr. Gaddis's character.

Further evidence of Mr. Gaddis's poor character and the need for close rehabilitative control of his is his criminal history. Mr. Gaddis's criminal record spans four decades: he has twenty-six prior convictions dating back to 1987. (R38:7-8). Seven of those convictions were for Retail Theft, and four of the convictions were enhanced with Habitual Criminality penalties. (R38:7-8).

Clearly the record established that Mr. Gaddis was a threat to the community time and time again.

In its sentencing argument, the defense simply did not provide enough mitigating circumstances that could outweigh the aggravated nature of this particular offense and Mr. Gaddis' character. Despite the fact that Mr. Gaddis is a caretaker to his family members, it is clear that he is a lifetime criminal with punitive and rehabilitative needs. (R38:9). The imposed sentence of one year and three months initial confinement and nine months extended supervision adequately addresses those needs.

The circuit court did not commit an erroneous exercise of discretion because the sentence it imposed was not unreasonable or unjustifiable. Thus, this Court should find that Mr. Gaddis is not entitled to resentencing.

II. THE CIRCUIT COURT DID NOT RELY ON INACCURATE INFORMATION IN IMPOSING ITS SENTENCE

A defendant in a criminal case has a constitutional due process right to be sentenced on true and correct information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis.2d 179, 185, 717 N.W.2d 1, 3 (2006). In *Tiepelman*, the Wisconsin Supreme Court held when a defendant requests a resentencing before the sentencing court, it is the defendant's burden to show: 1) that some of the information presented at sentencing was inaccurate, and 2) that the court actually relied on that misinformation. *Id*. at ¶ 26. Once the defense has met its burden, then it is the State's burden to show that the error by the sentencing court was harmless. *Id*.

A. The State's Representation of How the Box Cutter Was Used Was Accurate

Mr. Gaddis asserts that the some of the information the State presented at sentencing was inaccurate and that the court subsequently relied on inaccurate information. An examination of the criminal complaint, the sentencing transcript and the investigation report shows that Mr. Gaddis does not meet the first prong burden under *Tiepelman*.

First, the criminal complaint states that Walmart Loss Prevention Officers observed Mr. Gaddis pull out a box cutter and hold it in a threatening manner. (R2:2). It further goes on to say the Officer saw Gaddis slide out the blade and hold it outward. (R2:2).

In its sentencing argument, the State informed the court that Mr. Gaddis had pulled the box cutter from his pocket and slid the blade out of that box cutter and threatened the officer. (R38:7). The State then said that Mr. Gaddis got away because the officer did not want to get harmed. (R38:7).

Mr. Gaddis argues that the State's representation at sentencing of how the box cutter was used was inaccurate. In support of this assertion, Mr. Gaddis cites to the investigation report that trial counsel prepared as part of its post-conviction motion. The investigator first interviewed Walmart Loss

Prevention Officer M.T. (R22:2). M.T. stated that when he asked Mr. Gaddis to empty is pockets for the second time, Mr. Gaddis removed the box cutter and extended the blade. (R22:4). After Mr. Gaddis extended the blade, M.T. stated "oh, huh, you're going to cut me" and then moved out of the way. (R22:4)

The investigator then interviewed Security Supervisor, M.A., who was also present during the incident. (R22:5). M.A. stated that Mr. Gaddis extended the blade three to four inches and then retracted it. (R22:5). M.A. then stated that he backed off according to Walmart policy. (R22:5). M.A. further stated that he felt threated by Gaddis producing the knife. (R22:6).

The statements made by M.T. and M.A. to the investigator are nearly identical to the recitation of facts the State gave at sentencing. Mr. GAddis is hung up on the fact that the State did not mention that Mr. Gaddis was asked to empty his pockets. Mr. Gaddis also takes issue with the State for telling the court that he threatened the officer even though both officers reported that no verbal threats were made. First, even if Mr. Gaddis was asked to empty his pockets by the officers, he did not have to extend the blade of the box cutter. When asked to empty his pockets, Mr. Gaddis simply had to remove the box cutter without extending the blade. Second, one does not need to make verbal threats or lunging movements to make another feel threatened. The investigator's report specifically says that M.A. "made it clear that he felt threatened by Mr. Gaddis producing the knife." (R22:6).

Mr. Gaddis argues that State's portrayal of events were incomplete because it did not mention that he was asked to remove the box cutter from his pockets. This is irrelevant because Gaddis was never asked to extend the blade once it was out of his pocket. Furthermore, the Defense simply told the court that Mr. Gaddis removed the box cutter from his pocket, without any mention of the blade being extended. (R38:10). The court found the State's version more accurate because the recitation of facts were the same as alleged in the complaint and because Mr. Gaddis has a prior record of robbery by use of force. (R38:12).

The State's recitation of facts in its sentencing argument are confirmed by the very report Mr. Gaddis cites in an attempt to support its position. Because the State did not provide inaccurate information, this Court should thus find that the circuit court did not rely on inaccurate information.

B. It Is Accurate to Believe That Gaddis Could Have Been Charged With a Felony

The fact that Mr. Gaddis could have been charged with a felony is an accurate belief. At sentencing, the court stated that Mr. Gaddis could have been charged with a different kind of felony instead of retail theft as a habitual criminal. (R38:12). It is true that given the facts alleged in the criminal complaint and supported by the statements made by the loss prevention officers to the investigator, Mr. Gaddis could have been charged with felony Robbery pursuant to Wis. Stat. § 943.32(1)(b).

A person is of guilty Robbery, a class E felony, when they threaten another person by threat of force with the intent to take property. Wis. Stat. § 943.32(1)(b). Mr. Gaddis believes that he could not have been charged with this offense because he did not make any verbal or physical threats towards the officers. This argument falls flat because it does not matter that Mr. Gaddis did not make any verbal threats, the fact still remains that officers felt threatened by Mr. Gaddis' actions. (R22:6). M.A. also told the investigator that Gaddis "made it clear that he was not going into the [detention] room." (R22:5).

Mr. Gaddis had merchandise he intended to take without purchasing and a box cutter with the blade extended in manner that made officers feel threatened. (R2:2). The court was accurate in stating that Mr. Gaddis could have been *charged* with a felony. (R38:12). Whether the State could have prevailed at trial by proving the felony beyond a reasonable doubt to a jury is a different issue. But the State could have absolutely charged Mr. Gaddis with a felony Robbery.

The investigation report is the only evidence that Mr. Gaddis has provided in an attempt to show that the circuit court relied on inaccurate information. The investigation report actually further supports the facts the State recited at

sentencing. Because Mr. Gaddis has provided no evidence that the circuit court was provided with and relied on inaccurate information at sentencing, Mr. Gaddis has thus failed to meet its burden.

CONCLUSION

For the foregoing reasons, the State respectfully asks this Court uphold the decision of the circuit court denying Gaddis post-conviction relief and uphold the judgment of conviction.

Dated this _____ day of May, 2015.

Respectfully submitted,

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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 3,520.

_____ _____
Date Brittany Skye Kachingwe
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CERTIFICATE OF COMPLIANCE
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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.

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