STATE OF WISCONSIN

C O U R T OF APPEALS

DISTRICT I

Case No. 2015AP000130-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN RAY GADDIS,

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

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ARGUMENT

I. Mr. Gaddis is Entitled to Resentencing Because the Circuit Court's Explanation for Imposing the Maximum Sentence Was Inadequate.

The parties agree that when sentencing a defendant, the circuit court "must enumerate the objectives of its sentence on the record." (State's Brief at 5); citing ***State v. Gallion***, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. The parties also agree that the circuit court "must identify the facts it considered in arriving at its sentence and explain how those facts advance the objectives of the sentence." (State's Brief at 5); citing ***Gallion***, ¶¶ 41, 42.

A. The circuit court's limited statements at sentencing do not demonstrate a process of reasoning as required under ***Gallion***.

"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, as the state agrees, they "are required to specify the objective of the sentence on the record." ***Id***. at ¶ 40; Wis. Stat. § 973.017(10m).

The state notes that the circuit court had before it the information necessary to consider the mandatory sentencing factors, which are the gravity of the offense, the character of the defendant, and the protection of the public. (State's Brief at 5). However, the fact that the court had information before it as provided by the parties is inconsequential to determining whether it properly exercised its discretion. The exercise of

discretion relates to the process of reasoning by which the circuit court identifies "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.

Despite, perhaps, the circuit court having had sufficient information at the time of sentencing, it failed to provide an adequate explanation for the maximum sentence it imposed. The court noted Mr. Gaddis' record as being "horrible," and explicitly rejected his explanation of the events related to the box cutter. (38:12). After pronouncing sentence, as if an afterthought, the circuit court made Mr. Gaddis eligible for the substance abuse program. (38:14). The court did not identify any sentencing objectives, which the state agrees a circuit court must do.

The state argues that the circuit court "enumerated sufficient facts in explaining its sentencing decision." It further argues that a court need not "passionately or eloquently provide a detailed analysis of how each individual factor affected the calculation of Mr. Gaddis' sentence." (State's Brief at 6); citing ***State v. Fisher***, 2005 WI App 175, ¶¶21-24, 285 Wis. 2d 433, 702 N.W.2d 56. In that case, the circuit court discussed the defendant's record and the impact that drug sales have on the community. ***Id***. ¶ 5. This Court reasoned that the "evil ***Gallion*** sought to remedy was the mechanistic application of the three sentencing factors, in which a circuit court simply described the facts of the case, mentioned the three sentencing factors, and imposed a sentence." ***Id***. ¶ 22; citing ***Gallion***, 270 Wis. 2d 535, ¶¶ 26, 55.

Here, unlike in ***Fisher***, the circuit court did not provide any discussion. Instead, before imposing the maximum

sentence, it merely stated Mr. Gaddis had a bad record and that it believed the state's version of events. Mentioning the mandatory sentencing factors without any discussion of sentencing objectives, or indication of how facts are being weighed, is the evil ***Gallion*** sought to remedy.

Contrary to the state's argument, the circuit court's written decision on the postconviction motion does not remedy the absence of an adequate sentencing explanation. A circuit 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. However, clarifying what was said, and providing reasoning for the first time are two different things. Here, in its written decision, the circuit court provided sentencing objectives for the first time. (30:2). Moreover, it explained why probation was not an option, which was something that was entirely absent from the original sentencing remarks.

This Court should not sanction a postconviction motion decision that rather than clarify, supplements the entire sentencing explanation that was wholly absent at the original sentencing. Moreover, allowing the circuit court to remedy its deficient sentencing explanation on postconviction is contrary to Mr. Gaddis' right 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. Gaddis is entitled to re-sentencing.

B. Upholding the sentence requires this court to take the place of the circuit court and apply its own reasoning because the circuit court failed to adequately explain its sentence.

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 7). However, doing so would require this court to substitute in its own reasoning, by identifying sentencing objectives, and determining 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. It is, however, the role of the circuit court, not this 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, the record does not justify a maximum sentence of two years of imprisonment for retail theft of candy. As the state notes, a property crime is less serious than a crime of violence. (State's Brief, at 7). Moreover, as a misdemeanor, this offense is far less serious than a felony and the value of the item taken was minimal. The state argues that the planned nature of the theft makes the offense more serious, warranting the sentence. (State's Brief, at 8). However, the state is inserting its own justification, as the circuit court never discussed these facts.

The state also asserts that Mr. Gaddis' conduct was made more serious because of his "possession and display of

the box cutter as a weapon." (State's Brief, at 8). For reasons explained in more detail in section II of this brief, the state's characterization of Mr. Gaddis' conduct related to the box cutter is incorrect. He complied with the security officer's request to empty his pockets, twice. Mr. Gaddis did not simply take out and display the knife as the state represented at sentencing when it described that when he was confronted, he "pulled out a box cutter from his pocket and slid the blade out of that box cutter and threaten (sic) that officer." (38:7). Mr. Gaddis' *actual* conduct related to the box cutter would not support a maximum prison sentence. Finally, in relation to Mr. Gaddis's extensive record, counsel argued that since 1997 he had only had one felony conviction and that his other cases were related to substance abuse issues. (38:10; App. 115).

Because from the state's perspective it believes that this sentence is appropriate, it asks this court to uphold the sentence imposed. However, reasonable people could disagree as to what sentence would be appropriate under the facts of this case. It is inconsequential whether or not the state believes the sentence the court handed down was justifiable. Ultimately, the reasonableness of a sentence rests in the *explanation and reasoning of the circuit court*. Because 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, which were absent entirely, 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, and likewise should not substitute its own explanation or reasoning, or that of the state.

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. Gaddis his constitutional right to be present at sentencing, as well as his right to have the circuit 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 circuit court of its obligation to sufficiently explain the sentencing rationale, thus nullifying ***Gallion*** and ***McCleary***.

II. The Circuit Court Relied on Inaccurate Information at Sentencing, Thereby Violating Mr. Gaddis' Right to Due Process.

The parties agree that Mr. Gaddis had a Constitutional, Due Process right to be sentenced on the basis of true and correct information. (State's Brief, at 9); citing ***State. v. Tiepelman***, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1. Mr. Gaddis agrees that it is his burden to show that the information is inaccurate and that the circuit court actually relied on that information. ***Id***. ¶ 26. Likewise, he agrees that once he has met his burden, the burden shifts to the state to show that the error was harmless beyond a reasonable doubt. ***Id***. ¶31.

A. The details surrounding the box cutter were inaccurate and the court relied on it when imposing the sentence.

Here, the parties presented different characterizations of the underlying facts of the offense. Namely, the state told the court that security confronted Mr. Gaddis about the suspected shoplifting, and that he "*then* pulled out a box cutter from his pocket and slid the blade out of that box cutter and threaten[ed]that officer." (38:7; App. 112). (emphasis added). The defense told that court that the incident occurred in the lobby, and that the loss prevention officer who confronted Mr. Gaddis asked him to empty his pockets. (3:10; App. 115). Defense counsel told the court that the police reports did not describe any physical threats and that Mr. Gaddis neither verbally, nor physically threatened the security guards, nor in any way did he use the knife to get out of the store. (38:10; App. 115). The circuit court rejected Mr. Gaddis' version of events. (38:12; App. 117).

In his postconviction motion, Mr. Gaddis attached interviews from two security personnel present. (22). One of the officer's, M.T., who the state names in the complaint, explicitly stated that Mr. Gaddis made no verbal or physical threats. (22:4). He also verified that Mr. Gaddis was asked to empty his pockets, which was when the box cutter was removed, as opposed to Mr. Gaddis spontaneously displaying it. (22:3-4). The other stated he felt threatened, but that he did not recall Mr. Gaddis making any affirmative gestures or verbal threats to make him feel that way. (22;5-6). M.A. also stated that he "backed off" per Walmert's policy of not pursuing when there is the presence of a weapon. (22:5).

Despite these clarifications from the security guards, the state holds steadfast to its position that Mr. Gaddis

threatened them. (State's Brief at 9-10). The state's reasoning for maintaining this position is, in part, because the criminal complaint, which it wrote, states that "Mr. Gaddis pull[ed] out a box cutter and [held] it in a threatening matter." (State's Brief, at 9). Criminal complaints are not evidence. The fact that the complaint *alleges* that the box cutter was held in a threatening manner, does not make the information accurate. Likewise, the state argues that the information is accurate because it said it was so at the sentencing hearing. (State's Brief, at 9). Accordingly, the state seems to believe that the information is true because it has stated as such. This line of reasoning to support its claim that the information before the court was accurate presented is specious.

The state characterizes the statements made by the security personnel as being "nearly identical" to how it presented the facts at sentencing. (State's Brief, at 10). And claims that Mr. Gaddis is "hung up" on its failure to describe the context in which the box cutter was removed from his pocket. (State's Brief, at 10). This misses the point. How the box cutter came out is an important detail that would have provided context for the circuit court to assess the severity of an offense. The state's recitation of the facts at sentencing implies that Mr. Gaddis displayed the knife upon being confronted. However, the details about Mr. Gaddis being asked twice to remove items from his pocket and then retracting the knife after initially extending it, paints a different picture and renders the state's recitation inaccurate.

While the state acknowledges that no verbal threats were made (neither officer alleges physical threats either), it argues that it is inconsequential that it told the court that Mr. Gaddis threatened the officer because one of the officers reports feeling threatened. (State's Brief, at 10). Moreover, it adds that one need not make affirmative physical or verbal

threats to make another feel threatened. (State's Brief, at 10). Despite noting that Mr. Gaddis did not actually threaten the guards, the state nonetheless asks this to find that the information presented was accurate because one guard felt threatened, even absent any verbal or physical threat.

The investigation reports do not confirm, as the state purports, that Mr. Gaddis displayed a knife upon being confronted, as the state's presentation implied; nor do the investigation reports confirm the state's allegation that Mr. Gaddis threatened the officers. The statements from the officers corroborate the defense's presentation of the events, which the circuit court explicitly rejected. The officers allowed Mr. Gaddis to leave per store policy, and not because of any threat made by Mr. Gaddis. The circuit court's finding that the information was accurate was erroneous.

B. The court's assertion that Mr. Gaddis could have been charged with a felony constituted inaccurate information.

The state argues that Mr. Gaddis could have been charged with Robbery, contrary to Wis. Stat. § 943.32(1)(b), a class E felony, and therefore the circuit court's assertion was accurate. (State's Brief, at 11). Wis. Stat. § 943.32(1)(b), provides, "[b]y threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property." M.T. denied that Mr. Gaddis made any threats in taking the item or in carrying the item out of the store. (22:3-4). M.A. *felt* threatened, but did not allege any threatening acts on the part of Mr. Gaddis. There were no allegations that force was used to take or to remove the item from the store. The officers allowed Mr. Gaddis to leave the store as is required by the store's policy,

not because he used threat of force in order to exit. (22:5). Moreover, M.A. stated that Mr. Gaddis retracted the knife. (22:5). Mr. Gaddis could not have been charged with felony robbery under these facts.

The state claims that the circuit court's assertion was accurate because it could have *charged* Mr. Gaddis with a felony, but that it is a "different story" as to whether it could meet its burden and prove it beyond a reasonable doubt. (State's Brief, at 11) (emphasis in original). However, the state has an obligation to charge crimes for which there is sufficient evidence to support probable cause. SCR 20:3.8(a). It would be contrary to ethical standards to simply charge conduct for which there was no basis.

Because the state did not address the issue or reliance or harmlessness, Mr. Gaddis will not repeat the arguments that were made in his brief-in-chief in relation to each of those components of the ***Tiepleman*** test. Mr. Gaddis does maintain his position that the circuit court relied on inaccurate information and that the reliance was not harmless.

The state argues that the information was accurate and therefore Mr. Gaddis has not met his burden. If this Court finds that the information before the circuit court was inaccurate, the state, by failing to respond to Mr. Gaddis' argument that the circuit court relied on the information and that such reliance was not harmless, has conceded. *See* ***State v. Baldwin***, 2010 WI App 162, ¶42, 330 Wis. 2d 500, 794 N.W.2d 769. (citing ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979))(arguments that are not refuted are deemed conceded).

CONCLUSION

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

Dated this 17th day of June, 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 2,943 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 17th day of June, 2015.

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