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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2015AP000157-CR

ERIC L. LOOMIS,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction and
from an Order Denying Post-Conviction Relief Entered
in the Circuit Court for La Crosse County,
The Honorable Scott L. Horne, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

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INTRODUCTION

The State in its response brief misses the import of the COMPAS issue and re-states the issues as presented by Defendant to gloss over its misunderstanding of the true issues. It is not that the COMPAS report contained inaccurate information about Eric Loomis. Rather, COMPAS and its risk assessments are inappropriate and should not be used at any sentencing. Doing so violated Mr. Loomis' constitutional right to due process. The trial court and the prosecution relied on the COMPAS risk assessments in formulating a sentence and therefore Mr. Loomis' sentence should be reversed.

In addition, the State glosses over the problem with the dismissed but read-in charges. The trial court erred in its statements about the legal significance of dismissed but read-in charges. The court's errors in describing the significance of those charges just further underlined its mistakes in the use of other information at sentencing. These errors compel the need for this Court to reverse the trial court and remand this for a new sentencing.

ARGUMENT

I. THE TRIAL COURT'S USE OF THE COMPAS REPORT VIOLATED MR. LOOMIS' DUE PROCESS RIGHTS.

Mr. Loomis had "a constitutional due process right to be sentenced based only upon accurate information." *State v. Harris*, 2010 WI 79, ¶32, 326 Wis. 2d 685, 786 N.W.2d 409 (citing *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1). A sentence that is based on "materially untrue information," is a violation of due process "and cannot stand." *State v. Travis*, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491. The trial court's reliance on the COMPAS

report violated Mr. Loomis' constitutional rights and therefore the sentence should not stand.

The State completely misses the point when it argues that Mr. Loomis did not point to any inaccurate information in the report. (Br. at 8.) Defendant's argument is not that there is any one piece of inaccurate information in the report, but that the use of the report itself is inappropriate. Mr. Loomis had a constitutional right to be sentenced based on individualized information. *Harris*, 2010 WI 79, ¶29. That did not happen here. As Dr. Thompson opined—the only expert who testified—COMPAS is not an individualized assessment. The COMPAS risk assessments are designed to assess group data, not individual risks, and using it in sentencing decisions detracts from what should be the court's focus on the individual. (R.31B:3; A-App. 111.) Furthermore, COMPAS was not designed to be used in sentencing decisions and using it in sentencing decisions creates a "tremendous risk of over estimating an individual's risk." (R.43:12; A-App. 225.)

After not calling any expert to testify at the post-conviction hearing, the State tried to rescue the use of COMPAS by citing to select articles. Nothing that the State cites overcomes the risk posed by COMPAS of translating group data to the individual risk as recognized by Dr. Thompson. Nor does it overcome the COMPAS report's warning itself not to use it for sentencing decisions. (R.14:14.)[1] The State cites to literature that COMPAS "is a computerized tool designed to assess offenders' needs and

[1] The State says that record item 14 does not contain the PSI (which would include the COMPAS report). (Br. at 9 n.5.) Defendant does not understand how this could be the case. The Amended List of Papers Constituting the Record that the La Crosse County Clerk of Courts filed in this case lists record 14 as "Pre-Sentence Investigation Report." To the understanding of defense counsel from the Clerk of the Court of Appeals, this item is sealed and designated as the Pre-Sentence Investigation Report.

risk of recidivism …." (Br. at 7.) This is consistent with Dr. Thompson's explanation of the development and use of COMPAS by corrections departments in allocating resources to assess offender's needs. (See App. Br. at 13; R.43:10; A-App. 223.) Neither Dr. Thompson, nor Mr. Loomis, is arguing that COMPAS reports have no place in the corrections system. Rather, it may be entirely appropriate to use them to allocate resources or assess offenders' needs, but it is inappropriate to use them in sentencing—something the report itself recognizes.

Furthermore, the State's reliance on Department of Correction's internal memoranda and other articles cannot overcome the constitutional problem of a court's reliance on it. Even if COMPAS' creators might have intended that it also be used for sentencing, it would still be inappropriate. Constitutional due process guarantees that a defendant be sentenced based upon individualized information. The COMPAS risk assessments are not individualized information. They are computer generated scores based on group characteristics. Therefore, the use of the risk assessments violated Mr. Loomis' right to due process to an individualized sentence.

Nor do the State's references and argument overcome the problem that Northpointe, the creator of the program, will not share information on how any of the factors are weighted. (R.43:13; A-App. 226.) Northpointe contends that it is all proprietary information and protected trade secrets. (R.43:17; A-App. 230.) Thus, neither the defendants nor the courts have any way to independently analyze how the COMPAS computer program is calculating the specific risk assessment results. In effect, the State would have the courts blindly trust the program, input data, and spit out a risk assessments to lead to sentencing because this is somehow more scientific. Scientific or not, this violates a defendant's constitutional due process right and should not be allowed.

The State also attempts to buttress the use of the COMPAS report by contending that it is an actuarial scale and that the use of such are admissible at trial and therefore should be admissible at sentencing. (Br. at 12.) The State cites two cases for its position: *State v. Smalley*, 2007 WI App 219, ¶20, 305 Wis. 2d 709, 741 N.W.2d 286; and *State v. Straszkowski*, 2008 WI 65, ¶52, 310 Wis. 2d 259, 750 N.W.2d 835. These cases are not on point.

First, *Smalley* was a Chapter 980 proceeding and, unlike here, an expert testified about the actuarial tables and their ability to predict the defendant's likelihood to re-offend. Thus, there was an evidentiary basis for the tables as information commonly relied upon by experts in the field and expert testimony linking it to the defendant in that case. 2007 WI App 219 at ¶16. The State did not offer any expert in this case to testify about COMPAS and its risk assessments. Furthermore, the question in *Smalley* was whether the actuarial tables were relevant to the determination of whether the defendant was "dangerous" as the term is used in a Chapter 980 proceeding. *Id.* at ¶20. The question here is not about relevant evidence, but whether the use of COMPAS violates a defendant's right to due process in sentencing.

Second, the Wisconsin Supreme Court's decision in *Straszkowski* seems irrelevant to the issues here. As far as Defendant can discern, the Court's opinion never mentions actuarial tables or has anything to do with such evidence. Rather, *Straszkowski* concerns the significance of dismissed but read-in charges. *See, e.g.*, 2008 WI 65 at ¶6.

The State's reliance on *State v. Samsa*, 2015 WI App 6, 359 Wis. 2d 580, 859 N.W.2d 149, also is misplaced. (Br. at 12.) The Court of Appeals in *Samsa* did not consider the issues presented in this case. The defendant there did not claim that the court's use of the COMPAS risk assessments violated his constitutional rights. Instead, in *Samsa* the defendant contended that the trial court misapplied the

information in the COMPAS report or alternatively that correct information regarding the report mandated a sentence modification. *Id.* at ¶7. Indeed, the defense joined in the PSI's sentencing recommendation. *Id.* at ¶3. The defense argued that the sentencing court should yield to the COMPAS actuarial assessment, which the Court of Appeals rejected. *Id.* at ¶11. In the portion cited by the State, all the Court stated was that a circuit court was free to rely on portions of the assessment and reject other portions. *Id.* at ¶13. There is no discussion about constitutional issues with the COMPAS report and therefore it should not control here.

II. BY RELYING ON COMPAS, THE COURT DID IMPLICITLY CONSIDER GENDER.

The State dismisses the Defendant's argument that the trial court implicitly considered gender by relying on COMPAS on the grounds that the trial court did not consider Mr. Loomis' gender in sentencing. (Br. at 9-10.) This is correct, the trial court did not explicitly consider gender—it implicitly considered it by using the COMPAS scores. The State admits that the COMPAS program uses different risk scales for men and women. (Br. at 10.) The Defense brief cited to similar references for the position that gender is one of "criminogenic factors" that COMPAS uses to predict risk. (R.28:24.)

Thus, it appears without doubt that the COMPAS risk assessments are based in part on gender. Whatever score or assessment is produced by COMPAS (and again we do not know how the individual factors are weighted because Northpointe will not produce that information), that product factors gender into the equation. If a trial court then relies on that risk assessment in sentencing a defendant, the trial court is at least partially sentencing the defendant based on gender. This is an erroneous exercise of discretion. *Harris*, 2010 WI 79, ¶33.

The constitutional problem with COMPAS and gender can be seen from the following example. A male defendant and a female defendant charged with the same crimes, with the same backgrounds, equal in all but gender, are before the same court. With gender as the only difference, the difference in risk assessments is based then on gender alone. If the court then relies on the COMPAS risk assessments, it will be relying on two different assessments that are based solely on gender. Therefore, the trial court implicitly relied on gender in sentencing Mr. Loomis, because it was a factor in the risk assessment. Therefore, for this reason too, the trial court's reliance on the COMPAS risk assessments here was an error.

III. THE TRIAL COURT RELIED ON THE COMPAS RISK ASSESSMENTS.

The State seems to have abandoned its argument from the circuit court that the trial court did not rely on the COMPAS assessment, instead arguing that it did not rely on any inaccurate information (Br. at 8-9) or that it relied on COMPAS only as one of the many relevant factors (Br. at 11-14). As shown above and in his initial brief, any reliance by the trial court on the COMPAS risk assessment was improper and a violation of Mr. Loomis' constitutional rights. Nor, as the State argued, did the trial court only considered relevant information contained in the report. (Br. at 12-13.)

The trial court and the District Attorney explicitly relied on the risk assessment scores in deciding that Mr. Loomis should be incarcerated. The trial court stated that in part it was relying on the "risk assessment tools" in deciding against probation. (R.41:35; A-App. 167.) The only risk assessment tools were the COMPAS risk scores. The court also said that Mr. Loomis was "identified, through COMPAS assessment, as an individual who is at high risk to the community." (Id.) The District Attorney also argued in sentencing that the COMPAS report showed Mr. Loomis to be a high risk. (R.41:14; A-App. 146.) Thus, the sentencing

was more than just the trial court referencing factual background information from the PSI and COMPAS. It explicitly and inappropriately relied on the risk scores from the COMPAS report.

In addition, the trial court stated that the courts were being trained to use COMPAS in their sentencing decisions.

> And we have been trained in the fact that COMPAS is to be a tool that's utilized at sentencing in determining the need for community supervision…. We utilize the COMPAS and we consistently get training to make decisions about prison incarceration versus community supervision …."

(R.42:27; A-App. 202.) The use of COMPAS in this manner is inappropriate and should be halted.

IV. THE TRIAL COURT ERRED IN ITS STATEMENTS ABOUT THE LEGAL EFFECT OF DISMISSED BUT READ-IN CHARGES.

The State also misses the main point about the trial court's errors in discussing dismissed but read-in charges. The State claims that the Defendant's position is that the trial court erred in concluding that Mr. Loomis drove the car involved in the shooting. (Br. at 4.) That is not the Defendant's position. Mr. Loomis' argument all along, from the plea to sentencing to post-conviction to appeal, is that the trial court's error was in automatically concluding that it must believe as true that Mr. Loomis was the driver because the charges were dismissed but read-in instead of being dismissed outright. (See R.40:10-11; A-App. 122-123 and App. Br. at 6-7.)

The State would like to dismiss this argument by claiming that the trial court simply "wanted to ensure that Loomis understood that it could disagree and then consider

the crime" (Br. at 14), but the trial court went far beyond this. Mr. Loomis understood that the court could consider the dismissed charges and told the court so. (See, e.g., R.40:5, 15; A-App. 117, 127) The trial court stated that it had to consider the dismissed charges as true, because they were not dismissed outright. (R.40:15; A-App. 127.) This was an outright error in the statement of the law as set forth by the Wisconsin Supreme Court in *State v. Frey*, 2012 WI 99, ¶43, 343 Wis. 2d 358, 817 N.W.2d 436.

Dismissed but read-in charges, like any dismissed charges, are simply to be considered at sentencing with the understanding that they could increase the sentence up to the maximum for the charges to which the defendant is pleading. *Id.* at ¶68. Contrary to the trial court's statements, there is no special significance to "dismissed outright" charges. *Id.* at ¶62. Indeed, the Wisconsin Supreme Court in *Frey* stated that the term should be discontinued and that it leads to misunderstandings. *Id.* at ¶88. Despite saying that it read *Frey* during a break, the trial court never corrected its statements about the law and gave no indication that it changed its opinion about the significance of read-in versus outright dismissed charges. The trial court still erroneously operated as if the significance of the dismissed but read-in charges was that it must consider that Mr. Loomis committed the acts as charged. This then led it to reject Mr. Loomis' position.

V. RESENTENCING IS THE APPROPRIATE REMEDY.

Citing *State v. Stenzel*, 2004 WI App 181, 276 Wis. 2d 224, ¶5 n.2, 688 N.W.2d 20, the State claims that the correct remedy is a modification of sentence, not resentencing. (Br. at 11.) The State is wrong.

First, the court in *Stenzel*, as noted by the State, relied on *State v. Carter*, 208 Wis. 2d 142, 146-47, 560 N.W.2d 256 (1997). The Wisconsin Supreme Court, however, abrogated

Carter in *State v. Harbor*, 2011 WI 28, ¶52, 333 Wis. 2d 53, 797 N.W.2d 828.

Second, the courts often have considered resentencing where the circuit court relied on inaccurate information. *See, e.g., State v. Tiepelman*, 2006 WI 66, at ¶¶2, 26. Indeed, the Supreme Court specifically referenced resentencing where the trial court's sentence was based on inaccurate information when it considered the proper standard for review:

> We hold that the correct standard was set forth by this court in *Lechner*, in which the court held: "A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on *193 the inaccurate information in the sentencing.' " [citations omitted]

Id. at ¶26. *See also Travis*, 2013 WI 38 at ¶10 (holding that remand for resentencing was necessary where court relied upon erroneous belief regarding the mandatory minimum).

Third, this sentence should be void because it violated Mr. Loomis' constitutional rights. The sentence cannot be modified, it must completely be re-done without any influence of the improper factors considered by the trial court here when it sentenced Mr. Loomis. Modification will not cure the errors, only a new sentencing will do so. Therefore, this Court should remand this case to the circuit court to vacate the sentence and set it for resentencing.

The entire sentencing of Mr. Loomis is fraught with problems, mistakes, and constitutional violations. When the trial court sentenced Mr. Loomis in this case, at the same hearing it incorrectly considered him to be a murderer for the supply of prescription pills in Case No. 12CF75. (R.26:1.) On post-conviction motion, the parties stipulated to this error

and the court then modified the sentence in that case. (R.42:3; A-App. 178.) If that were all, it would be the end of the problem. However, the trial court on top of that error, made clear errors in its statement of the law regarding the effect of dismissed but read-in charges. It then improperly considered the COMPAS risk assessments.

These intertwined and multiple errors and constitutional violations led the court to sentence Mr. Loomis to a prison sentence of eleven years (four on one count and seven on the other, consecutive to each other) for fleeing an officer and operating a motor vehicle without owner's consent, both as repeaters. (R.16:1; A-App. 101.) The length of the sentence for those two charges is indicative of how the improper factors caused the trial court to increase the sentence. The only way to cure these errors is remand for a new sentencing to reconsider only proper information.

CONCLUSION

For the above reasons and those set forth in his initial brief, Defendant Eric Loomis respectfully requests that this Court reverse the trial court and remand this matter to the Circuit Court for a new sentencing.

Dated this 26th day of May, 2015.

Respectfully submitted,

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

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 2894 words.

Dated this 26th day of May, 2015.

Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org

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 26th day of May, 2015.

Signed:

_____

Community Justice, Inc.
Attorney Michael D. Rosenberg
State Bar #1001450
Attorney for Appellant

214 N. Hamilton St. #101
Madison, WI 53703
(608) 442-3009
(608) 204-9645 (fax)
michael@communityjusticeinc.org