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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III  
Case No. 2015AP000170 -CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAROD D. WEAVER,

Defendant-Appellant.

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On Appeal from the Judgment of Conviction and  
Denial of Postconviction Motion  
Entered in the Eau Claire County Circuit Court, the  
Honorable William M. Gabler, Presiding.

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REPLY BRIEF OF  
DEFENDANT-APPELLANT

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## ARGUMENT

The Court Misused Its Discretion When It Disregarded OWI Sentencing Guidelines on the Mistaken Assumption That They Did Not Take Into Account Public Protection, the Seriousness of the Offense, and the Character and Rehabilitative Needs of the Defendant.

Mr. Weaver agrees with the state that sentencing is a discretionary decision, and the circuit court is not required to follow the sentencing guidelines for misdemeanor operating while intoxicated cases. *State v. Smart*, 2002 WI App 240, 257 Wis. 2d 713, ¶15, 652 N.W. 2d 429. A court could reasonably exercise its discretion to disregard sentencing guidelines in a particular case.

However, all discretionary decisions, including sentencing, require the court to examine the relevant facts, apply a proper standard of law, and using a demonstrated rational process, reach a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 320 N.W. 2d 175 (1982). This court's decision to disregard the guidelines was not based on application of the proper standard of law to the relevant facts. Rather, it mistakenly assumed that the guidelines did not take into account the primary sentencing factors of seriousness of the offense, protection of the public, and the character and rehabilitation of the defendant. (31:4; App. 105). Therefore, it misused its discretion at sentencing.

The state's brief concedes that the OWI sentencing guidelines take into account the seriousness of the offense. It does not concede that they take into account the character of the offender or the protection of the public, but it does not argue otherwise. Similarly, the state questions the deterrent effect of the guidelines, but does not argue otherwise. Mr. Weaver's brief in chief explains the reasons supporting those arguments, and he will not repeat them here.

The state makes no mention whatsoever of the primary goal of the sentencing guidelines: to "reduce sentencing disparity among persons who commit similar offenses." *Smart, supra*, 257 Wis. 2d 713, ¶ 6. Sentencing disparity is recognized as an "evil." *State v. Jorgensen*, 2003 WI 105, 264 Wis. 2d 157 ¶ 40, 667 N.W.2d 318. In Wisconsin, where African-Americans like Mr. Weaver are incarcerated at a rate almost ten times greater than that of whites, sentencing disparity cannot be thoughtlessly disregarded. See <http://www.prisonpolicy.org/profiles/WI.html> (last visited April 1, 2015).

Finally, the state's brief argues that the court properly exercised its sentencing discretion in his case.

The Wisconsin Supreme Court has long recognized that the "legislature intended that maximum sentences were to be reserved for a more aggravated breach of the statutes." *McCleary v. State*, 49 Wis. 2d 263, 275, 184 N.W. 2d 512 (1971). Here, Mr. Weaver was sentenced to the maximum sentence of one year in jail, even though he was stopped for minimal traffic violations, he did not have a bad driving record, his BAC level was .24, and he did not have a child in the car. (1, 13). Although he had a lengthy criminal history, it was dated. He had only three misdemeanor convictions and one felony conviction during the last ten years. (30:18-19).

One of those misdemeanor conviction “isn’t of any significance,” the court concluded. (31:10). Mr. Weaver’s first OWI conviction was in 1995, and his second in 2009. (30:10).

The court’s perception that the guidelines did not take into account the seriousness of the offense shifted the focus of the court’s analysis from the OWI offense itself to Mr. Weaver’s drunken, disorderly post-arrest conduct. (31:11-12; App. 112-13). If Mr. Weaver had been convicted of the disorderly conduct charge that resulted from that conduct, the maximum penalty would have been 90 days in jail. (1). If that sentence had been imposed consecutive to a guidelines sentence of 110 days, Mr. Weaver’s sentence would have been 200 days in jail, not 365.

The imposition of the maximum sentence in this case was founded on the circuit court’s fundamental misunderstanding of the misdemeanor OWI sentencing guidelines and their relationship to general sentencing factors. As a result of that misunderstanding, the court disregarded the legislative goal of reducing disparity in sentencing, and lost sight of the seriousness of Mr. Weaver’s offense. It failed to apply the proper standard of law to relevant facts, and therefore misused its discretion.

## **CONCLUSION**

For the reasons set forth in this brief and the brief-in-chief, Mr. Weaver respectfully requests that the court order a resentencing hearing.

Dated this 10<sup>th</sup> 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 719 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 10<sup>th</sup> day of June, 2015.

Signed:

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