STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2015AP996-CR

STATE OF WISCONSIN

Plaintiff-Respondent

TRIAL COURT CASE
No. 2014-CF-526

vs.

MARKUS S. HOLCOMB,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED ON THE 4th day OF DECEMBER, 2014 IN THE
CIRCUIT COURT OF KENOSHA COUNTY, WISCONSIN,
JUDGE BRUCE E. SCHROEDER, PRESIDING.

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES CITED

WISCONSIN ACTS

ISSUES PRESENTED FOR REVIEW

1. Whether the defendant-appellant, Markus S. Holcomb, could receive less than the mandatory minimum sentence for two counts of possession of child pornography?

Answer by Trial Court: The mandatory minimum sentence applied.

2. Whether the defendant-appellant should be entitled to a re-sentencing as the defendant-appellant's pre-sentence report was biased, contained materially inaccurate information which affected the sentence proceeding in the above entitled matter, and was objected to at the time of the defendant-appellant's sentencing hearing?

Answer by Trial Court: The trial court refused to hold a new sentencing hearing and/or strike the pre-sentence report and order a new report.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant, Markus S. Holcomb, does not request oral argument. However, publication of the Court's opinion may be warranted under the circumstances as the case deals with the mandatory minimum sentence for possession of child pornography under the new revised Wisconsin Statutes. Additionally, the issue of the pre-sentence report and the inaccurate information contained therein, is a matter of statewide importance, warranting

publication as well.

STATEMENT OF FACTS

The defendant-appellant, Markus S. Holcomb, was charged with multiple counts of possession of child pornography in a Criminal Complaint filed on 05/09/14. (1:1-29). An initial appearance was held on 05/09/14. (4). Additionally, a preliminary hearing was held in the above matter on 05/15/14, wherein Mr. Holcomb waived his right to a preliminary hearing. (8:1-2). An Information was filed on that same date, on 05/015/14. (10:1-11). None of these hearings are the basis for Mr. Holcomb's appeal.

Mr. Holcomb entered into a plea agreement with the state and a Plea Questionnaire/Waiver of Rights form was filed with the court on 10/22/14. (16:1-6). In it, Mr. Holcomb agreed to enter a guilty plea to 5 counts of child pornography with the remaining counts dismissed and read-in for sentencing purposes. (16:1-6). A request for a Pre-Sentence Investigation Report was filed on 10/22/14. (17:1). Thereafter, a Pre-Sentence Investigation Report was filed with the court on 12/01/14. (18).

A letter from Mr. Holcomb's trial counsel, Attorney Christopher W. Rose, was filed with the trial court on 12/03/14, wherein Mr. Holcomb's trial counsel objected in

its entirety to the Pre-Sentence Investigation Report as it contained materially inaccurate information.(19). Additionally, Mr. Holcomb's counsel requested that a new Pre-Sentence Investigation Report be prepared, and a new sentencing date be set (19).

The defendant's sentencing hearing was held on 12/04/14. (30:1-37). What occurred at the sentencing hearing is the basis for the defendant-appellant, Markus S. Holcomb's appeal. First, Mr. Holcomb objected to the Pre-Sentence Investigation Report, and filed a letter outlining his objections to said report in that the Pre-Sentence reporter indicated throughout the entire Pre-Sentence Report that Mr. Holcomb had been engaged in, and was a producer and supplier of child pornography. (30:6). The problem with the report was that it was false and inaccurate, as it did not just contain one statement here or there regarding the issue of Mr. Holcomb producing /supplying child pornography; thus, Mr. Holcomb objected in its entirety to the Pre-Sentence Report as the entire report was not accurate, and in no way should be considered by the court. (30:6). Additionally, Mr. Holcomb requested that the report be stricken, that a new report should be prepared, and that another sentencing date should be given

as the report in its entirety was problematic as the pre-sentence reporter came to the recommended sentence based on false information.(30:7). The court, after considering Mr. Holcomb's arguments, denied Mr. Holcomb's request for a new Pre-Sentence Report and proceeded with sentencing on 12/4/14. (30:13)

Additionally, at the sentencing hearing, Mr. Holcomb requested that the court impose a lesser sentence than the mandatory minimum which the statutes allowed as a possibility. (30:24). The court, however, indicated that there was no reason for the court to interfere with what the legislature had said in terms of imposing the minimum penalty. (30:28).

At the conclusion of the sentencing hearing, the court, the Honorable Bruce E. Schroeder presiding, sentenced Mr. Holcomb on the second count of the Information to a period of confinement of 6 years in the Wisconsin State Prison System, with a 10 year period of extended supervision thereafter. (30:33). On count 4, the court sentenced Mr. Holcomb to an identical sentence to be served consecutively. (30:33). A Notice of Intent to Pursue Post-Conviction Relief was filed on 12/11/2014. (27). Thereafter, a Notice of Appeal was filed on May 13, 2015

from the Judgment of Conviction. (29:1-6). Thereafter, this appeal followed. The remaining relevant statement of facts will be recited in the argument section to avoid repetition herein.

ARGUMENTS

I

THE DEFENDANT-APPELLANT, MARKUS S. HOLCOMB IS ENTITLED TO A NEW SENTENCING HEARING AS THE TRIAL COURT MISTAKENLY BELIEVED THAT A MANDATORY MINIMUM PENALTY APPLIED IN MR. HOLCOMB'S CASE.

Pursuant to *§939.617, Stats. - Minimum Sentence for certain child sex offenses* - provides as follows:

> (1) Accept as provided in Subs. (2) and (3), If a person is convicted of a violation of . . . 948.12, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years for violations of s.948.05 or 948.075 and 3 years for violations of s. 948.12. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.
> (2) If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, the court may impose a sentence that is less than the sentence required under sub. (1) or may place the person on probation under any of the following circumstances:
> (a) If the person is convicted of a violation of s. 948.05, the person is no more than 48 months older than the child who is the victim of the violation.
> (b) If the person is convicted of a violation of s. 948.12, the person is no more than 48 months older than the child who engaged in the sexually explicit conduct.

> (3) This section does not apply if the offender was under 18 years of age when the violation occurred. See 939.617(1)(2), Stats.

The section at issue in this case is Wis. Stats. Sec. 939.617(2) which provides:

> "(2) If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, the court may impose a sentence that is less than the sentence required under sub. (1) **or** may place the person on probation under any of the following circumstances:". (Emphasis added at or); 939.617(2) Stats.

It is Mr. Holcomb's position, as he asserted at the sentencing hearing, that the court could impose a sentence less than the minimum of 3 years, as the language prior to the "or" in sec. (2), clearly allows the sentencing court to impose less than the 3 years of confinement as stated in sub. (1) for a violation of Stats. 948.12, "If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record". Such language is plain and unambiguous and, thus, it is clearly a presumptive minimum sentencing guideline under 939.617, Stats.

The analytical framework for statutory interpretation is well established. First, the court looks to the statutory language, and if the meaning is plain, the

inquiry typically ends there. State ex rel. Kalal v. Circuit Court, 271 Wis.2d 633, 2004 WI 58, ¶45; Seider v. O'Connell, 2000 WI 76,236 Wis.2d 211, 232. Statutory language is given it's common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning. See Kalal v. Circuit Court at ¶45; Bruno v. Milwaukee Co., 2003 WI 28 ¶8,20, 260 Wis.2d 633; See also Wis. Stats. 990.01(1).

Statutory Language is interpreted within the context in which it is used; not in isolation but as part of a whole in relation to the language of surrounding or closely related statutes. See Kalal at ¶46. Statutes are to be interpreted reasonably to avoid absurd or unreasonable results. Id. at ¶46; State v. Delaney, 2003 WI 9, ¶13, 259 Wis.2d 77. Statutory language is read whenever possible to give reasonable effect to every word, in order to avoid surplusage. Kalal at ¶46. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." Id. quoting Bruno, 260 Wis.2d 633, ¶20. Where statutory language is unambiguous, there is no need to consult extrinsic sources of

interpretation, such as legislative history. Kalal at ¶46. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." See Kalal at ¶46, quoting State v. Pratt, 36 Wis. 2d 312, 317, 153 N.W.2d 18(1967).

A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses. See Kalal at ¶47; Bruno at ¶19. It is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute "to determine whether 'well-informed persons should have become confused,' that is, whether the statutory . . . language reasonably gives rise to different meanings." See Bruno at ¶21. "Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity." Id. at ¶25. Wisconsin Courts ordinarily do not consult extrinsic source of statutory interpretation unless the language of the statute is ambiguous. See Kalal at ¶50.

The plain and unambiguous language of Wis. Stats. sec. 939.617(2) allows for the sentencing court to impose less than the 3 years of initial confinement for a violation of sec. 948.12, Stats., if the court finds that the best interests of the community will be served, and the public

will not be harmed and if the court places its reasons on the record. Under Wis. Stats. sec. 939.617(2), before the "or" prefacing the probation exception, clearly states and preserves a lesser sentence than required in subsection (1) for a person convicted of sec. 948.12, "if the court finds that the best interests of the community will be served and places its reasons on the record" without regard to age of the offender. Thus, Wis. Stats. 939.617 provides for a presumptive minimum penalty, as opposed to a mandatory minimum penalty, including when read in context to the language of surrounding or closely related statutes. See Kalal at ¶46. Wis. Stats. 939.617, at issue in the case at hand, is entitled "**minimum sentence for certain child sex offenses**." It is proceeded by Wis. Stats. 939.616, which is entitled "**Mandatory minimum sentence for child sex offenses**." See 939.616, Stats. The very next two statutes following the statute at issue in this case are 939.618, Stats. entitled "**Mandatory minimum sentence for repeat serious sex crimes**.", and 939.619, Stats., "**Mandatory minimum sentence for repeat serious violent crimes**." See 939.618, Stats.; 939.619, Stats.

Clearly, 939.616, 939.618, and 939.619, Stats., all provide for mandatory minimum sentences of varying degrees,

and include the statement that they are, in fact, mandatory minimum sentences in each section title. The statute at issue, 939.617, Stats., does *not* contain the words "**mandatory minimum sentence**" in its title, unlike the other three referenced statutes, leading to the only reasonable conclusion that 939.617 carries a presumptive minimum sentence and not a mandatory minimum sentence. Compare 939.616, 939.618, 939.619, Stats. Additionally, 939.617(2) clearly states that the court "may" impose a sentence that is less than the sentence required under subsection (1). Again, this leads to the only reasonable conclusion that the legislature uses "may" to leave the court discretion in imposing sentence. See Kalal at ¶46; Bruno v. Milwaukee County, 260 Wis.2d 633, ¶24.

Assuming, arguendo, that 939.617 is ambiguous, extrinsic sources confirm that this statute carries a presumptive minimum category and not a mandatory minimum. After **2011 Act 272**, the relevant portion of Wisconsin Statute 939.617(2), confirms that when the legislature changed the statute, it also intended for 939.617(2), Stats., to continue to provide a presumptive minimum penalty when it kept the language, which included that a court may impose a sentence that is less than the sentence

required under subsection (1) of 939.617. **2011 Wisconsin Act 272**; 939.617(2), Stats. Thus, Mr. Holcomb was subjected to a presumptive minimum penalty, not a mandatory minimum penalty in his case.

The court, when sentencing Mr. Holcomb, rejected Mr. Holcomb's argument that he could receive less than the minimum sentence. At the sentencing hearing, Mr. Holcomb requested that the court consider imposing a lesser sentence than the minimum, as the statute at issue indicated that the court could do so if it put its reasons on the record. (30:24). The court, however, indicated that there was no reason to interfere with what the legislature had said in these cases. (30:28). It said what it said in terms of imposing the minimum penalty because "it felt that it was a crime that needed to be dealt with more aggressively." (30:28).

Additionally, at the end of the sentencing hearing when Mr. Holcomb's trial counsel asked whether or not it would allow Mr. Holcomb time to report to prison as he had been out on bond for the majority of the case without any bond violations, the court indicated that it was known that there was a minimum sentence and, thus, it was going to deny Mr. Holcomb's request for a report date. (30:35).

In cases where the circuit court explicitly relies, and refers to inaccurate penalty information, a defendant in such a situation is entitled to a resentencing. State v. Travis, 2013 WI 38, ¶32-33, ¶87, 347 Wis.2d 142, 157-158.

A defendant is entitled to resentencing if the defendant meets a two-prong test: (1) The defendant shows that the information at the original sentencing was inaccurate; and (2) The defendant shows that the court actually relied on the inaccurate information at sentencing. State v. Tiepelman, 2006 WI 66, 291 Wis.2d 179, ¶26. Once the defendant shows that the information is inaccurate, he or she must establish by clear and convincing evidence that the circuit court actually relied on inaccurate information. See Travis at ¶22; State v. Harris, 2010 WI 79, ¶4, 34. The burden then shifts to the State to prove the error was harmless. Tiepelman, 291 Wis.2d 179, ¶2,9.

In Mr. Holcomb's case, it is clear that the court believed it had an obligation to impose the minimum sentence of three years in Mr. Holcomb's case to counts 2, and 4 of the criminal Information. (30:28). The trial court stated this explicitly at the sentencing hearing when the court indicated that Mr. Holcomb was aware there was a

minimum sentence, and, additionally, that the legislature said what it did in terms of imposing a minimum penalty as it felt that [this] was a crime that needed to be dealt with more aggressively, and there was no reason for the court to interfere. (30:28,35). Thus, Mr. Holcomb is entitled to a resentencing as the trial court was incorrect. Mr. Holcomb was subject to a presumptive and **not** a mandatory minimum; thus, the trial court relied on inaccurate information when it sentenced him, and the error was not harmless. See Tiepelman at ¶2, 9.

II

THE DEFENDANT-APPELLANT'S PRESENTENCE REPORT CONTAINED MATERIALLY INACCURATE INFORMATION WHICH AFFECTED THE SENTENCING PROCEEDING, AND SHOULD HAVE BEEN STRICKEN FROM THE RECORD BUT WAS NOT; MR. HOLCOMB THEREFORE SHOULD BE ENTITLED TO A RESENTENCING.

A defendant has a constitutionally protected due process right to be sentenced based upon accurate information. State v. Travis, 2013 WI 38, 347 Wis. 2d 142, 153, ¶17. A defendant is entitled to a resentencing if a defendant shows that the information at the original sentencing hearing was inaccurate; and (2)shows that the court actually relied upon inaccurate information at sentencing. State v. Tiepelman, 2006 WI 66, 291 Wis. 2d

179, ¶26. Once a defendant shows the information to be inaccurate, he or she must establish by clear and convincing evidence that the circuit court actually relied on inaccurate information. See Travis at ¶22. Once a defendant shows actual reliance, the burden then shifts to the state to prove the error was harmless. Id. at ¶23. Whether a defendant has been denied due process is a constitutional issue which an appellate court decides independently of the circuit court. See Travis at ¶20.

A defendant has a right to challenge a PSI that he or she believes is "inaccurate or incomplete". State v. Greve, 2004 WI 69, ¶11, 272 Wis. 2d 444, citing State v. Watson, 227 Wis. 2d 167, 194 (1999). A defendant is entitled to a hearing in the event the defendant wishes to contest any of the factual matters set forth in the PSI. State v. Suchocki, 208 Wis. 2d 509, 515, 561 N.W 2d 332 (1997). The defendant should file a motion with the court identifying the specific problems with the PSI, and requesting specific remedies to deal with those problems. State v. Melton, 2013 WI 65, 349 Wis. 2d 48, ¶66. Problems include inaccurate or objectively false information, incomplete information or unfairly prejudicial information. Id. Some objections may be addressed by striking portions of the PSI

before or during the sentencing hearing. Id. at ¶69; State v. Bush, 185 Wis. 2d 716, 724, n.1 (1994). Some problems, however, may require the preparation of a new PSI. See Melton at ¶74. A new PSI may be ordered if problems so permeate the first PSI that striking is impractical or because substantial additional information should be added to the PSI for completeness. Id.

In Mr. Holcomb's case, it was Mr. Holcomb's position that the entire PSI should have been stricken and that a new PSI should be ordered by the court. (30:7). The basis for Mr. Holcomb's request was that throughout the entire report, the PSI writer indicated to the court that Mr. Holcomb was engaged in both the production and distribution of child pornography (30:6). This information was completely inaccurate. Mr. Holcomb, prior to the sentencing hearing, forwarded his objections to the court, one day prior to the sentencing hearing, which was two days prior to receiving the PSI report (30:2). At the sentencing hearing, Mr. Holcomb indicated to the court that there was absolutely no evidence that he produced nor supplied child pornography to others. (30:1-7). Although Mr. Holcomb had taken photographs of children in his neighborhood, these neighbor children were all clothed, and

the photos were in no way child pornography, nor were the photos a basis for Mr. Holcomb's conviction (30:15). Although the trial court did note that Mr. Holcomb was not convicted of a crime for taking these photos, the court also noted that it would not order a new presentence report, even though it was clear that Mr. Holcomb had in no way supplied nor produced any child pornography of neighborhood children.

This was a possession case (1:1-29). Mr. Holcomb was convicted of five counts of possession of child pornography (16:1-6). He was in no way charged with, nor convicted of, nor was there any evidence that he produced or supplied or sent to others child pornography. (30:1-8). This was the problem with the presentence investigation report in its entirety. Pursuant to State v. Suchocki, 208 Wis. 2d 509, 521, a sentencing process is not fair if the court relied upon a PSI on the grounds that the PSI author was from a biased writer. See Suchocki at 521. The same is true here in Mr. Holcomb's case, as the entire presentence investigation report was biased and the sentencing was unfairly influenced by the report. Id. at 521. Throughout the report, the PSI writer was under the mistaken impression that Mr. Holcomb was both a supplier and

producer of child pornography. (30:1-16). This was completely inaccurate information. Additionally, this led the PSI writer to the conclusion that Mr. Holcomb should receive a 15-year sentence. (18; 30:6). This sentence recommendation, although the court was not bound by it, was very close to the sentence which Mr. Holcomb received as he received two consecutive sentences of six years of initial confinement on each count of the criminal Information. (30:33). Thus, although the trial court noted Mr. Holcomb's objections in the PSI, it also rendered a lengthy sentence, similar to which the PSI writer had requested in the sentencing recommendations. (30:6,18).

Additionally, immediately prior to the PSI's sentence recommendation in the report, the PSI writer noted that Mr. Holcomb should receive such a severe sentence because of the fact he was both a producer and supplier of child pornography, which was completely inaccurate and untrue as stated above. (18). Here, as in the Melton case, there were problems which required the preparation of a new PSI. See Melton at ¶74. In Holcomb, the problem with the PSI was that it was based upon a false premise; namely, that Mr. Holcomb was engaged in the production and sale of child pornography. Mr. Holcomb was not sentenced nor convicted

of the production and sale of child pornography. He was only being sentenced for possession. As the problems with the Holcomb PSI permeated throughout the PSI, it was simply impractical to ignore this information, or strike the information as it was completely and utterly inaccurate and based upon a false premise. As such, a new PSI should have been ordered in the Holcomb case, and a new sentencing hearing should have been held, but was not. See Melton at ¶74.

Mr. Holcomb also noted at sentencing, another objection to the PSI, the video of "C"[1] which was mentioned in the PSI report. The trial court indicated that it was very concerned about this video which was noted in the presentence investigation report (30:29-33). However, Mr. Holcomb reported that there, in fact, was not a video that he had produced. (30:29). The trial court, however, kept coming back to this issue in its sentencing remarks. (30:29-31). The reference to the video of "C" was also a problem in the PSI, as the PSI incorrectly noted that Mr. Holcomb was somehow a producer of this video which he had downloaded to a website (30:18;29-31). There was no evidence that Mr. Holcomb either downloaded or produced

[1] See Court of Appeals Order of 09/10/15

this video, yet the trial court continued to reference that it had occurred. (30:31). This is another problem with the PSI, which was noted at Mr. Holcomb's sentencing hearing as the video of "C" was only a web-cam which Mr. Holcomb had seen, and had not downloaded. (30:14). Thus, the trial court clearly relied on the PSI and all the inaccurate information contained therein, wherein it sentenced Mr. Holcomb to 12 years of initial confinement in the Wisconsin state prison system. See Travis at ¶20. A new PSI should therefore have been ordered by the trial court. See Melton at ¶74.

CONCLUSION

For the reasons cited herein, the defendant-appellant, Marcus S. Holcomb, hereby requests that the court reverse and remand the trial court for a new sentencing hearing for the reasons stated herein.

Dated this 22nd day of September, 2015.

Respectfully submitted,

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CERTIFICATION

I certify that this brief of appellant meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

> Typewritten (pica, 10 spaces per inch, mono font, double-spaced, 1-1/2 inch margins on left and 1 inch on other three sides).
>
> The length of the Brief is 19 pages.

Dated this 22nd day of September, 2015.

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CERTIFICATE OF COMPLIANCE WITH WIS. STATS. §(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 Wis. States. §(RULE) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of this brief filed as of 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 22nd day of September, 2015.

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CERTIFICATION RE APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains as a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of September, 2015.

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APPELLANT'S APPENDIX