STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2015AP996-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

Trial Court Case
No. 2014-CF-526

v.

MARCUS 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

REPLY BRIEF OF DEFENDANT-APPELLANT

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The following is the defendant-appellant, Marcus S. Holcomb's reply to the State's Brief in the above matter wherein the State argues: 1. Wis. Stat. 939.617 provides a mandatory minimum sentence for violations of 948.12, Stat.; 2. The legislative history establishes that the Legislature intended to provide a mandatory minimum sentence, and resort to the legislative history is appropriate as the statute is ambiguous; 3. The circuit court incorrectly withheld sentence and imposed probation in counts 5 through 8; 4. The circuit court did not err in declining to strike the PSI nor rely on inaccurate information when imposing sentence.

The defendant-appellant, Marcus S. Holcomb, disagrees with all the assertions made by the state in its brief and this reply will respond to those arguments made by the state. Nothing contained herein should operate as a waiver to any of those arguments previously made in Mr. Holcomb's brief-in-chief.

First and foremost, as Mr. Holcomb argued in his brief-in-chief, the statute at issue, 939.617(2), Stat., is not ambiguous, and permits a court to impose a bifurcated sentence less than three years if the "best interests"

exception is met. See 939.617(2), Stats. State ex rel. Kalal v. Circuit Court, 2004 WI 58, 271 Wis. 2d 633, ¶44. If the meaning of the statute at issue is plain, the inquiry stops. Id. at ¶45. The general rule "prevents the use of extrinsic sources of interpretation to vary or contradict the plain meaning of a statute. . ." Id. at ¶51.

The state, in its brief, cites to the case of State v. Lalicata, 2012 WI App. 138, 345 Wis. 2d 342, in support of its argument. However, a closer look at Lalicata shows that Mr. Holcomb's interpretation is correct. The court in State v. Lalicata noted that the surrounding or closely related statute at issue in the Lalicata case was part of the context in which it was used. The court in Lalicata stated:

> The very next statute, Wis. Stat 939.617, is entitled "Minimum Sentence for Certain Child Sex Offenses." This title contrasts with the prior statute's title because the word "mandatory" is omitted and the statute is directed at "certain" child sex offenses. What's more, the statute expressly allows probation for certain crimes: "[T]he court may impose sentence that is less than the [minimum], or may place the person on probation, only if the court finds that the best interest of the community will be served and the public will not be harmed." See 939.617(2)(emphasis added). Thus, 939.617 shows that the legislature knew very well how to create exceptions allowing probation for crimes that ordinarily trigger a minimum sentence for confinement. And when it did so, the legislature helpfully omitted the word "mandatory" from the statute's title. Id. at ¶12.

The Legislature has shown that it knows how to create and restrict exceptions when it amended §939.617(2), by **2011 Wisconsin Act 272**, effective April 24, 2012. The Legislature did not eliminate "or" in the statute. Although the Legislature struck language at the beginning of that portion of section (2) of 939.617, Stats., which contained the "or" disjunctive, it re-stated it again in the re-wording of the statute which eliminated only the word "only".

> 2011 Wisconsin Act, Section 1m 939.617(2) of the statute is renumbered 939.617(2) (intro)and amended to read:
>
> 939.617(2) (intro) ~~if a person is convicted of a violation of s. 948.05, 948.075, or 940.12, the court may impose a sentence that is less than the sentence required under sub.1, or may place the person on probation, only~~ 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:

Case law indicates that the ordinary meaning of "or" is disjunctive, meaning that a category that is included in a list of categories linked by the term "or" is one alternative choice. Beaver Dam Community Hospital, Inc. v. City of Beaver Dam, 2012 WI App. 102, ¶10, 344 Wis. 2d 278. Thus, keeping the disjunctive "or" in the reworded statute

of 939.617 (2), leads to an unambiguous, plain meaning of the text; therefore, the court has two options for imposing a sentence that is less than three years imprisonment, only one of which (probation) is restricted by age. As the Kalal court interpreted, the statutory language is: "read where possible to give reasonable effect to every word, in order to avoid surplusage." See Kalal, 2004 WI 58, ¶46. In Holcomb's case, if 939.617(2) were interpreted to bar a lesser prison sentence, unless there were no more than a 4-year age differential between the person who was convicted and the child, then the phrase "the court may impose a sentence of less than the sentence required under sub.(1)" would be surplusage. The Legislature could have deleted that entire phrase; thus, the meaning of the statute is plain and unambiguous.

The state's position, is that the statute can be read the way Holcomb has asserted. (State Brief at 7). However, even if ambiguous, the Legislative history, which the state makes reference to in its appendix does not support the state's interpretation. In the appendix, the state references a Legislative Council Act memo for 2011 Wisconsin Act 272, apparently authored by a staff attorney, not a member of the Legislature or the Legislative

Reference Bureau, which further adds language to the statute itself with the words "unless" and "and" to the statute, where no such language appears in 939.617, Stats. Thus, the Memo reads:

> The Act provides that a court may not impose a sentence below the mandatory minimum *unless*: . . . (b)the offender is convicted of possession of child pornography, **and** is not more than 48 months older than the child. (See state appendix R-Ap 109).

In fact, the law itself includes neither the word "unless" nor the word "and", as in the Memo's interpretation. This staff attorney's memo does not take the place of the statutory language. It is the statutory language that controls, not the staff attorney's attempt to re-state the language.

Holcomb submits that the legislative history of the amendment to 939.617,Stats., should clarify that it was not the Legislature's intent to apply age restrictions to the alternative option of a prison sentence less than three years if the "best interests" exception applied. Rather, the intent of the legislation was to limit the court's use of probation to those youthful offenders no more than 48 months older than the child depicted.

Additionally, the history, as pointed out in the state's brief, shows actually a contrary intent than the

state argues. The history shows that the initial bill submitted to amend 939.617 was not accepted. The language proposed 2011 assembly bill 209 would have completely repealed Section 2 of 939.617, and removed any discretion except as provided "if the offender were under 18 years of age when the violation occurred" (See state appendix R-Ap. 102). That proposal, however, was rejected in favor of retaining and re-writing subsection (2), creating new subsections which limited the court's discretion to impose probation except under certain circumstances. The redline version of the final law shows the disjunctive "or" language in subsection 2 was stricken from the beginning of the sentence, but then written back at the end of the sentence. (See 939.617(2)(intro.), 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 the reasons on the record, the court may impose a sentence that is less than the sentence required under sub.(1) or . . .")

The fact the Legislature balked at the attempt to remove all discretion and instead retained the "best interests" language shows an intent to reserve discretion for a sentencing court. Had the Legislature intended to apply the more restrictive interpretation proposed by the

state, it had ample opportunity to do so by eliminating the disjunctive "or" and using the "and" conjunctive, but did not do so. Thus, the only effect of the amendment to Section 939.617 which was ultimately accepted by the Legislature, was to preclude probation unless the defendant was within 48 months of the age of the child depicted in the conduct as set forth in subsection 2(a) and 2(b). The alternative language for a prison sentence less than three years was retained therefore. See 939.617 (2)(a), (2)(b), Stats.

Finally, if the legislative history does not clarify intent, the rule of lenity should be applied; thus, "penal statutes should be construed strictly against the party seeking to exact statutory penalties and in favor of the person on whom statutory penalties are sought to be imposed." State v. Morris, 108 Wis. 2d 282, 289, 322 N.W. 2d 264 (1982). Applying lenity in Holcomb permits a lesser sentence than 3 years under 939.617(2).

The state's second argument is the court incorrectly withheld sentence and imposed probation on counts 5 through 8. Mr. Holcomb did not raise this issue in his brief-in-chief, and the state only raises it in reply. The state did not appeal the circuit court's order in this case and

thus has waived any argument that the court improperly imposed probation in this case. See 974.05(1)(2)(3), Stats.; Sec. 809.10(2)(b), Stats. The state in this instance did not file a notice of appeal within 45 days, serve it upon the defendant-appellant, nor file a notice of cross-appeal within the time period specified and thus has waived its right to appeal that issue. State v. Newman, 162 Wis. 2d 41, 469 N.W. 2d 394 (1991).

However, if this court rules that the state has not waived its right to appeal the sentence, double jeopardy would prohibit the sentencing court from resentencing on counts 5, 7 and 8. State v. Jones, 2002 WI App 208, 257 Wis. 163,¶10. If a defendant has a legitimate expectation of finality in his or her sentence, an increase in that sentence would violate the defendant's double jeopardy protection. See Jones at ¶9. Probation is "punishment" for purposes of double jeopardy. State v. Pierce, 117 Wis. 2d 83, 89 (1983). Wisconsin courts have long recognized the expectation of finality in a sentence as a key consideration in determining whether there has been a violation of double jeopardy Id at ¶10. The analytical touchstone for double jeopardy is a defendant's legitimate expectation of finality in a sentence which may be

influenced by many factors, such as completion of the sentence, passage of time, pendency of appeal, or a defendant's misconduct when obtaining sentence. Id. Additionally, in Willett, 238 Wis. 621, ¶6, the court noted that the defendant had heard the circuit court reject the state's suggestion that the sentences run consecutively. Id. Moreover, the sentencing error resulted due to the circuit court's incorrect understanding of the law, as in Holcomb, not because of a slip of the tongue. Id. Thus, the defendant had an expectation of finality in such sentence. Id.

In Holcomb's case, Mr. Holcomb has an expectation of finality in his sentence. The court clearly wanted Mr. Holcomb on an extended period of supervision, and the fact that he sentenced him to probation, does not necessarily follow therefore that because the court was mistaken about the law, Mr. Holcomb should then be subjected to an increased punishment because he appealed his decision regarding the mandatory minimum sentence imposed on counts 2 and 4. See Willett, 238 Wis. 2d 621, ¶6. The court clearly rejected an extended period of imprisonment on all counts, as was requested by both the state and the PSI in this case. There was no misconduct of the defendant in

obtaining his sentence as in Jones. See Jones, 257 Wis. 2d 163 at ¶2,4. Although Mr. Holcomb appealed his conviction on counts 2 and 4, he clearly did not appeal the other counts, and the state failed to abide by the rules of appellate procedure when it failed to either file a notice of appeal or cross-appeal within the time specified as argued previously. Thus, looking at the factors in the Holcomb case, it is clear that jeopardy would prohibit an increased sentence on the remaining counts.

However, the Court of Appeals can fashion a remedy to this situation in line with due process and without violating double jeopardy; namely, requiring the court to resentence Mr. Holcomb on all counts in this case given the record in this matter. See State v. Church, 2003 WI 74, 262 Wis. 2d 678; State v. Martin, 121 Wis. 2d 670, 682 (1985). As argued previously, Mr. Holcomb's position is that a mandatory minimum does not apply in this matter; thus, a re-sentencing on all counts under these circumstances is appropriate as the court can start with a clean slate, without disturbing the overall sentence structure, as opposed to a re-sentencing only on counts 5, 7 and 8. See Martin at 687. In addition, the numerous errors that are outlined in the presentence investigation report, also

should lead this court to the conclusion that a resentencing would be a more appropriate remedy in this matter, on all counts as opposed to simply an attempt by the state to increase the sentence on counts 5, 7 and 8. As Mr. Holcomb argued previously in his brief-in-chief, the court should have stricken the PSI due to the numerous errors outlined therein, regarding the allegations that Mr. Holcomb was involved in the production of pornography, which is completely untrue, and clearly affected his sentencing proceeding. Thus, for example, a new PSI could be ordered by the court, and the sentencing start with a clean slate.

A defendant has a constitutionally protected due process right to be sentenced upon accurate information. State v. Travis, 2013 WI 38, 347 Wis. 2d 142, 153, ¶2. Here, the Court of Appeals should order a re-sentencing on all counts as the trial court was sentencing Mr. Holcomb based on inaccurate information found throughout the entire sentencing hearing, that a mandatory minimum applied to his sentence; additionally, if Mr. Holcomb was not entitled to probation on counts 5, 7 and 8 due to trial court error, it is also clear that the court could fashion an overall sentence on all counts, equivalent to 10 years of probation

by imposing a minimum sentence, with enough extended supervision to cover the equivalent to a ten year period of probation, without violating double jeopardy and the overall sentence structure. See Church at ¶26; Martin at 682. Finally, the information provided in the presentence investigation report was in fact inaccurate as Mr. Holcomb was never a producer of child pornography. Thus, this court should order a new sentencing hearing.

Finally, this Court should order a resentencing on all counts even if it agrees with the state that the trial court erred only when it imposed probation on counts 5, 7 and 8, when looking at the sentencing transcript as a whole, it is clear that the court was not sentencing Mr. Holcomb in a vacuum, and considered all of the factors, including the PSI, the mandatory minimum, and probation when sentencing Mr. Holcomb on all counts. The overall sentence structure is implicated here as the court clearly rejected a period of imprisonment on all counts. See Church at ¶26. Thus, a re-sentencing on all counts is appropriate. Id.

CONCLUSION

For the reasons cited herein and for the reasons cited in Mr. Holcomb's brief-in-chief, Mr. Holcomb requests that

this Court reverse and remand the trial court for a new sentencing hearing for the reasons stated herein.

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 13 pages.

Dated this 1st day of February, 2016.

Signed,

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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 1st day of February, 2016.

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