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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
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CASE NO. 2015AP001782-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2015 CF 766**
(Rock County)

SAMBATH PAL,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN ROCK COUNTY CIRCUIT COURT, THE HONORABLE RICHARD T. WERNER PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

BY:

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

STATEMENT OF ISSUES

I. WHETHER DEFENDANT SHOULD BE GRANTED A RESENTENCING BECAUSE THE TRIAL COURT ERROUNEOUSLY EXERCISED ITS DISCRETION AT THE TIME OF SENTENCING BY IMPOSING AN UNDULY HARSH SENTENCE.

On 8/7/15, the trial court orally denied defendant's postconviction motion for a resentencing (App. at 101-106, R.37:10-15). On 8/12/15, an order denying defendant's motion for a resentencing was entered (App. at 108, R.30).

II. WHETHER DEFENDANT WAS PROPERLY CONVICTED OF TWO COUNTS OF LEAVING THE SCENE OF AN ACCIDENT, CAUSING DEATH.

On 8/7/15, the trial court orally denied defendant's postconviction motion for relief on this basis. (App. at 106-108, R.30:15-17). On 8/12/15, an order denying defendant's motion for relief was entered (App. at 108, R.30).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested.

STATEMENT OF THE CASE

On 4/25/14, defendant Sambath Pal was charged in Rock County Circuit Court Case 2014 CF 766 with the commission of the offenses of: (1) hit and run resulting in death (D.J.) and (2) hit and run resulting in death (M.V.), both Class D felonies (1). Both offenses allegedly occurred out the same incident on 4/20/14 (1). On 5/16/14, a preliminary hearing was held (33). At the conclusion of the hearing, defendant Pal was bound over for trial (33:19). An information alleging the same counts as the criminal complaint was filed (7). Defendant Pal stood mute and not guilty pleas were entered on his behalf (33:19-20).

On 7/31/14, a plea hearing was held (35). Defendant Pal entered a guilty plea to each of the two counts in the information (35:8-9). The court accepted his pleas and found him guilty (35:9).

On 10/1/14, a sentencing hearing was held (36). At the conclusion of the hearing, the trial court imposed two, consecutive 20-year prison terms, comprised of ten years initial confinement followed by ten years of extended supervision (36:58). Defendant Pal was denied participation in both the Substance Abuse Program and the Challenge Incarceration Program (36:58).

STATEMENT OF FACTS

Defendant Sambath Pal is 25 years old (1). He was sentenced to a total of 40 years in prison for his actions in leaving the scent of a traffic accident ocurring on 4/20/14 (36:58). He must serve 20 years of initial confinement without the possibility of early release based upon the completion of either the Challenge Incarceration Program or the Substance Abuse Program (36:58).

Tragically, two persons died as a result of his single action in crossing the centerline of a highway. Defendant Pal did not intentionally kill these two persons. There is no indication he killed them in a criminally reckless fashion. There is no evidence he was intoxicated or under the influence of any drug at the time he killed them.

ARGUMENT

I. AS DENDANT PAL'S SENTENCES WERE UNDULY HARSH, HIS SENTENCES SHOULD BE VACATED AND HE SHOULD BE GRANTED A RESENTENCING.

Standard of review

In State v. Grindemann, 2002 WI App 106, ¶31, 255 Wis.2d 632, 648 N.W.2d 507, the court said:

> When a defendant argues that his or her sentence is excessive or unduly harsh, a court may find an erroneous exercise of sentencing discretion "only where the sentence is so excessive and unusual and so disportionate to the offense committed as to shock public sentimentand violate the judgment of reasonable people concerning what is right and proper under the circumstances." (citation omitted).

A. Applicable law.

Way back in State v. Tuttle, 21 Wis.2d 147, 151, 124 N.W.2d 9, 11 (1963), the Wisconsin Supreme Court, in addressing the appropriate fine in a speeding case, said:

> This court, however, has statutory power to reverse and to direct the entry of a proper judgment when it appears from the record that it is probable that justice has for any reason miscarried.

Defendant concedes that normally, "a sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable." See State v. Grindemann, 2002 WI App 106, ¶31, 255 Wis.2d 632, 648 N.W.2d 507. Nevertheless, Tuttle remains to be good law.

B. Relevant facts.

Defendant Pal caused an accident by crossing the centerline of a highway. There is no indication this was anything other than inadvertent. He struck two motorcyclists. One of the victims died at the scene (1). The other died at the

hospital (1). Defendant Pal did not immediate stop, but instead, fled the scene of the accident.

Defendant was 24 at sentencing (1). He had a work history and was employed at the time of the accident (36:38). He had a high school diploma (36:54). He had a military background (36:37). He was discharged from the military because a domestic conviction disqualified him from possessing a firearm (36:37). The sentencing court noted he had a single criminal conviction prior to the convictions in this case (36:53). The circumstances leading to the fatal accident were exactly that, a tragic accident. His vehicle crossed the centerline on a curve. There is no evidence that alcohol or other drugs impaired him at the time of the collision (36:52). He was apprehended within days (36:56). He expressed remorse for his conduct, not be mere words, but by waiving his right to a trial and pleading to the charges, as alleged. The presentence report recommended a total sentence of 20-24 years in prison, with 10-14 years of initial confinement (36:36). The State joined in that recommendation (36:36).

The sentence imposed by the court was substantially longer than the one recommended by the State. In sentencing defendant Pal, the court said:

> In reviewing the sentencing factors, the factor I give the greatest amount of weight to is the seriousness of the offenses. And, obviously, it's serious with hitting and killing these two young me, but as I've indicated, in my view, the seriousness of these offenses is only an enhancer exacerbated by you fleeing without any apparent concern for them and your actions that took several days afterwards and after learning what happened (36:57).

The sentences were imposed without defendant being made eligible for CIP or ERP, meaning defendant will have to serve most of the term of initial confinement.

C. Analysis.

Notwithstanding the general rule that an appellate court should not interfere with a sentence imposed by a trial court, this court should do so in this case. The punishment simply does not fit the crime. What was the crime? It was not the intentionally killing of two young men with their life ahead of

them. It was the split-second decision by defendant Pal to keep driving after he hit the young men. The crime was completed within seconds. It was a horrible lapse in judgment in his part. While his continued unwillingness to take responsibility for his action exacerbated the offense by not turning himself in to authorities, it did so in a diminishing fashion. The whole purpose of the violated statute is to make sure persons are not left to die in the streets after an accident.[1] Once defendant Pal had absented himself from the scene, he could no longer have provided aid to the victims. While it may have made the victims' families feel better, had defendant Pal turned himself in at some point after both victims had expired, it would not have helped the victims. It would not have made his conduct in compliance with the statute.

While defendant Pal did not receive a maximum sentence, he received a sentence approaching the maximum.[2] This was so in spite of his young age, his limited criminal history, his positive work history, his military history, his demonstrated remorse, the lack of alcohol or other drug use being involved in the causation of the accident and the State's recommendation for far less than the maximum.

This was an emotional case for the families of the victims. Two young men died. However, the remarks of the trial court indicate it considered the deaths an aggravating factor justifying a harsh penalty. The focus by the trial court on the flight as an aggravating factor was misplaced. The causing of the deaths in this case was not an intentional act. The death of a person at the scene of a hit and run accident is what propelled the offense to a Class D felony punishable to up to 25 years in prison. The flight, on the other hand, is the essence of the offense. It was not an aggravating factor; it was the crime. There must be flight in order to be guilty of the hit and run causing death.

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[1] There is no indication in the record that the victims were not immediately attended to by other at the scene of the accident.

[2] Each offense was a Class D felony punishable by up to 25 years, with a maximum term of 15 years of initial confinement followed by 10 years of extended supervision, meaning the absolute maximum sentence would have been a total of 30 years of initial confinement followed by 20 years of extended supervision.

It has to be pointed out that a criminal defendant who commits the most serious offense in the State of Wisconsin, first-degree intentional homicide, even in the absence mitigating circumstances, can receive a sentence similar to defendant Pal's sentence, initial confinement of as little as 20 years! Intent to kill is absent in this case. Reckless conduct leading to the death of other is absent. Taking out the emotions of this case, what penalty is appropriate when a person makes the conscious decision to flee the scene of an accident where someone dies? How can it be a penalty similar to one that could be imposed upon a person's conviction for first-degree intentional homicide when there was no intent or recklessness on the part of the defendant to cause the deaths involved? Why shouldn't the two sentences be made to run concurrently if they arose out of the same criminal act, flight from the scene of an accident?

While defendant Pal has no way of proving it, arguably, 20 full years in prison for making a split-second decision not to stop at the scene of an accident should shock the conscious of any fair-minded person in the community. This court, pursuant to its authority outlined in Tuttle, should vacate defendant Pal's sentence and should remand this matter for a new sentencing.

II. AS DEFENDANT'S TWO CONVICTIONS FOR LEAVING THE SCENE OF AN ACCIDENT, CAUSING DEATH ARE MULTIPLICITOUS, ONE OF HIS CONVICTIONS SHOULD BE VACATED.

Defendant Pal concedes the law set forth in State v. Hartnek, 146 Wis.2d 188, 430 N.W.2d 361 (Ct.App. 1988), resolves the issue raised. Hartnek remains good law in the State of Wisconsin. Nevertheless, defendant Pal asks this court to reverse Hartnek. If reversal is not granted, defendant Pal intends to petition for review to the Wisconsin Supreme Court to overturn Hartnek.

A. State v. Hartnek.

In Hartnek, defendant caused an accident. Two individuals were injured. Defendant fled the scene of the accident. He was convicted of two counts of leaving the scene of an accident, causing injury. He appealed.

On appeal, defendant asserted his convictions were multiplicitous and therefore in violation of the double jeopardy clause of the United States Constitution. In addressing the issue, the Hartnek court said:

> Multiplicity is the charging of a single offense in separate counts. State v. Tappa, 127 Wis.2d 155, 161, 378 N.W.2d 883, 885 (1985). The double jeopardy provision of the constitution protects against multiple punishments for the same offense. Id. at 162, 378 N.W.2d at 886. Wisconsin has utilized a two-part test for evaluating whether a charge is multiplicitous. Id. The first part inquires whether the offenses are identical in law and fact. Id. The second part examines the legislative intent as to the allowable unit of prosecution. Id. Hartnek concedes that the first part of the test is met because each charge requires proof of a different injured person. We therefore examine only the second part of the test. Four factors are relevant to determining the legislative intent: (1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct. Id. at 362, 146 Wis.2d 192-93.

The issue in Hartnek was nearly identical to the issue raised by defendant in this appeal. The court was interpreting Wis. Stat. §346.67 and its penalty section counterpart, Wis. Stat. §346.74(5). Wis. Stat. §346.67 read:

> Duty upon striking person or attended or occupied vehicle. (1) The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the following requirements: (a) He shall give his name, address and registration number of the vehicle he is driving to the person struck or to the operator or occupant or person attending any vehicle collided with;

> and (b) He shall upon request and if available, exhibit his operator's license to the person struck or to the operator or occupant of a person struck or to the operator or occupant of or person attending any vehicle collided with; and (c) He shall render to any person injured in such accident reasonable assistance, including the carrying, or making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent such treatment is necessary or if such carrying is requested by the injured person.

At that time, Wis. Stat. §346.74(5) read:

> Any person violating any provision of s. 346.67: (a) Shall be fined not less than $1,000 or imprisoned not more than 6 months or both if the accident did not involve death or injury to a person. (b) Shall be fined not less than $300 nor more than $5,000 or imprisoned not less than 10 days nor more than one year or both if the accident involved injury to a person but the person did not suffer great bodily harm. (c) May be fined not more than $10,000 or imprisoned not more than 2 years or both if the accident involved injury to a person and the person suffered great bodily harm. (d) May be fined not more than $10,000 or imprisoned not more than 5 years or both if the accident involved death to a person.

In a rather unconvincing and cursory fashion, the Hartnek court found multiple punishments were appropriate. The court conducted the four-part analysis from Tappa. As to the statutory language, the first part of the Tappa analysis, the court pointed out that "any person injured" could mean more than one person was injured in the accident and that a defendant would have a duty to attend to all persons injured as a result of an accident. Id. at 363. The court found multiple injury accidents are not rare and the legislature could have made it clear that only one penalty per accident could be imposed if it had intended to do so. Id. The court found that several of the penalty sections could be invoked in a single accident. Id. As to the legislative history and context of the statute, the second part of the Tappa analysis, no significant analysis was performed. Id. As to the nature of the proscribed conduct, the third step in the Tappa analysis, the court conducted no significant analysis. Id. Finally, as to whether multiple punishments were appropriate when more than one

person was injured, the fourth step in the Tappa analysis, the court summarily concluded they were. Id. at 364.

B. The current statutory scheme.

This case involves an analysis of statutory language essentially the same as in Hartnek. Wis. Stat. §346.67 is now gender neutral:

> Duty upon striking person or attended or occupied vehicle. (1) The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the following requirements: (a) The operator shall give his or her name, address and registration number of the vehicle he or she is driving to the person struck or to the operator or occupant or person attending any vehicle collided with; and (b) The operator shall upon request and if available, exhibit his or her operator's license to the person struck or to the operator or occupant of a person struck or to the operator or occupant of or person attending any vehicle collided with; and (c) The operator shall render to any person injured in such accident reasonable assistance, including the carrying, or making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent such treatment is necessary or if such carrying is requested by the injured person.

§346.74(5) is essentially the same, with updated penalties:

> Any person violating any provision of s. 346.67: (a) Shall be fined not less than $1,000 or imprisoned not more than 6 months or both if the accident did not involve death or injury to a person. (b) May be fined not more than $10,000 or imprisoned not more than 9 months or both if the accident involved injury to a person but the person did not suffer great bodily harm. (c) Is guilty of a Class E if the accident involved injury to a person and the person suffered great bodily harm. (d) Is guilty of a Class D felony if the accident involved death to a person.

C. Hartnek is wrongly decided.

The Hartnek court's analysis is wrong. When one applies the four-part Tappa analysis to the applicable statutory scheme, it is apparent only one offense can be charged when one leaves the scene of an accident defined in §346.67, regardless of the number of victims in the accident.

As to the language of statute, part one of the Tappa analyses, §346.67 proscribes leaving the scene of a motor vehicle accident. It does not proscribe the mere leaving of the scene of an accident. It proscribes only the leaving of the scene of an accident involving injury to another person, the death of another person or the damage to a vehicle occupied by another person. If one of these three circumstances exists, one then goes to the penalty section, §346.74, to determine the applicable penalty. If the accident only involved nothing worse than property damage, sub. (a) applies. If the accident involved personal injury, but not great bodily harm, sub. (b) applies. If the accident involved great bodily harm, sub (c). applies. If the accident involved death, sub (d) applies. The penalty section is not invoked twice simply because there are two victims. The penalties are graduated. The more substantial the injury is to any victim, the higher the potential penalty will be. The applicable penalty will presumably be based on the most seriously injured person.

This penalty scheme is no different than that for operating while intoxicated offenses. For example, Wis. Stats. §346.63(1)(a) prohibits an individual from operating while intoxicated. The penalty section, Wis. Stat. §346.63(2)(a) sets the penalty for a first offense. However, if there was a passenger in the vehicle under the age of 16, the penalty is enhanced by virtue of Wis. Stat. §346.63(2)(f). If there are two passengers under the age of 16, two counts of operating while intoxicated cannot be charged! The threshold is met when there is one passenger under the age of 16. Whether there are one or six passengers under the age of 16 in the vehicle, the penalty does not increase. Similarly, in this case, whether one or five persons are killed during the accident described in 346.67, the penalty section applies only once. As the language of the statute is not ambiguous, there is no further need to analyze the remaining Tappa factors.

Even if the statute were somehow ambiguous, the Hartnek court did not address the issue in the context of the "rule of leniency" defined in State v. Kittilstad, 231 Wis.2d 245, 603 N.W.2d 732, 741 (1999):

> Case law clarifies that the defendant is actually referring to two separate rules, the "rule of leniency" and the general rule subjecting penal statutes to strict construction so as to safeguard a defendant's rights. The rule of lenity was developed in federal courts and holds that where a criminal statue is ambiguous it should be interpreted in a defendant's favor. State v. Rabe, 96 Wis.2d 48, 69, 291 N.W.2d 809 (1990). The rule of lenity is "echoed in the familiar Wisconsin rule that 'penal statutes are generally construed strictly to safeguard a defendant's rights.'" Id. at 70, 291 N.W.2d 809 (citing Austin v. State, 86 Wis.2d 213, 223, 271 N.W.2d 668 (1978)). As explained above, the rule of strict construction of penal statutes does not apply unless a statue is ambiguous, and it cannot be used to circumvent the purpose of the statute. Moreover, the rule "is not violated by taking a commonsense view of the statue as a whole and giving effect to the object of the legislation, if a reasonable construction of the words permits it." Austin, 86 Wis.2d at 223, 271 N.W.2d 668 (quoting Zarnott v. Timken-Detroit Axle Co., 244 Wis. 596, 13 N.W. 53 (1944)).

Under the above law, even if there were any ambiguity as to the appropriate charging unit, the ambiguity should be construed in favor of defendant, militating a single count, rather than two counts of leaving the scene of an accident.

The remaining Tappa factors do not provide support for multiple convictions for leaving the scene of the same accident. As to the second part of the Tappa analysis, the legislative history and the context of the statue, there simply is no relevant guidance either way based on legislative history or the context of the statute.

As to the third part of the Tappa analysis, the nature of the proscribed conduct, in State v. Grayson, 172 Wis.2d 156, 165, 493 N.W.2d 23, 28 (1992), the court determined the focus should be on whether the charges are “either separated in time or are of significantly different nature in fact.” In Grayson, the focus was on whether there is an opportunity to form a new *mens rea*. Id. That is the key to the analysis. We punish criminal behavior. In this case, the *mens rea* exists in intentional decision to leave the scene of the accident, not the

killing of persons during the accident. When one focuses on what conduct the statute is trying to proscribe, the leaving of the scene of an accident, and given you can only leave the accident scene once, a single count is appropriate.

Finally, with regard to the fourth part of the Tappa analysis, the appropriateness of multiple punishments, the Grayson court notes the focus should be on deterrence and proportionality. Id. at 166, 493 N.W.2d at 28. In this case, the maximum penalty for committing the offense of leaving the scene of an accident is 25 years in prison. Whether the maximum penalty is 25 years or 50 years, there clearly is sufficient deterrence to convince people not to commit the crime. As to proportionality, again, keeping in mind the crime is the leaving of the scene of the accident, the more serious the property damage, the more persons injured or killed, the higher the appropriate penalty. Not unlike any criminal offense, the more serious it is, the more appropriate it is for the court to consider a harsher sentence. Given the substantial maximum penalty already available when one person dies in a hit and run accident, there is no compelling need to charge multiple counts for the single act in leaving the scene of an accident.

D. Since Harnek was decided, several other states have allowed only one charge for leaving the scene of a single accident, regardless of the number of victims.

Since Hartnek was decided, several other State courts have found the opposite, that a person can only be convicted of leaving the scene of the accident once, regardless of the number of persons hurt or killed in the accident.

In State v. Stone, 728 S.E.2d. 155 (2012), the West Virginia Supreme Court addressed a nearly-identical issue to the one before this court. In Stone, a defendant was in an accident that led to the deaths of five persons. He was convicted of five counts. He appealed. On appeal, the Stone court framed the issue as:

> The first issue for our review is whether, as a matter of law, the driver of a vehicle who leaves the scene of an accident resulting in injury or death of more than one person may be convicted of and sentenced for multiple violations of West Virginia Code §17C-4-1 (1999). It is Appellant's contention that West Virginia Code §17C-4-1

is ambiguous in this regard and that, under the rule of lenity, the statute must be strictly construed against the State and in favor of appellant.

West Virginia Code §17C-4-1 provides, in relevant part:

(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and shall remain at the scene of the accident [until certain requirements are met]. Id. at 362. Id. at 160.

In addressing the issue, the court said:

Indeed, interpretation of West Virginia Code §17C-4-1's reference to the requirements of West Virginia Code §17C-4-3 "turns upon the use of the word 'any' in conjunction with the use of the singular, rather than plural tense of the statute." Williams v. W.Va. Dept. of Motor Vehicles, 187 W.Va. 496, 409, 419 S.E.2d 474 (1992). In Williams, we recognized the various meanings of the word "any" and with regard to the statute at issue in that case, settled on the meaning "one" or "either." 187 W.Va. at 409, 419 S.E.2d at 477. We explained that [i]t is clear from the authorities [on the meaning of the word "any"] cited herein that "any" may be used in either a singular or plural form. In this instance, the legislature has used "any" in a singular context. All references to when the statute is applicable are in the singular. Furthermore, the legislature could easily have chosen the word "all," which much more clearly stresses a plural form than "any" when worded in the statute. 187 W.Va. at 409-10, 419 S.E.2d at 477-78. Thus, we held that "'[t]he word 'any,' when used in the statute, should be construed to mean' any.'" Syl. pt. 2. Thomas v. Firestone Tire & Rubber Co., 164 W.Va. 763, 266 S.E.2d 905 (1980). Williams, at syl. pt. 4, 187 W.Va. at 407, 419 S.E.2d at 475. With regard to West Virginia Code §171-C-4-1 and its reference to West Virginia Cod §17C-4-3, we interpret "any" in a similar manner. West Virginia Code §17C-4-1, refers to "[t]he driver of any vehicle involved in an accident resulting in injury or death of any person," requiring the driver to stop at the scene of the accident and remain until he complied with the requirements of West Virginia Code §17C-4-3. West Virginia Code §17C-4-3 in turn, requires the driver to give certain information "to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured... reasonable assistance." West Virginia Code §17C-4-1 and its reference to West Virginia Code §17C-4-3, employ "'any'

> in a singular context" and "[a]ll references to when the statute is applicable are in the singular". (citation omitted). Moreover, the "legislature could have easily chose the word 'all' which much more clearly stresses a plural form than 'any' when wording" id., that portion of West Virginia Code §17C-4-3 requiring the driver to "render to any person injured ... reasonable assistance." Accordingly, applying the rule of leniency, we interpret West Virginia Code §17C-4-1 to mean that a driver of a vehicle involved in an accident resulting in injury or death may be punished only once for leaving the accident scene regardless of the number of injuries or death resulting therefrom. **Our interpretation of West Virginia Code §17C-4-1 is in accordance with a majority of other jurisdictions which have construed statutes similar to West Virginia's.** (emphasis added).

The Stone court went on to cite cases with similar holdings from other States, including State v. Ustimenko, 137 Wn.App. 109, 151 P.3d 256 (2007) (State of Washington), People v. Newton, 155 Cal.App.4th 1000, 66 Cal Rptr.3d 422 (2007), Tooke v. Commonwealth, 47 Va.App. 759, 627 S.E.2d 533 (2006) and People v. Sleboda, 166 Ill.App.3d 42, 116 Ill.Dec. 620, 519 N.E.2d 512 (1988), obviously decided before Hartnek.

The statute in Stone was exactly the same as Wisconsin's in relevant part. The Stone court reached the opposite conclusion the court in Harknek reached. The decision in Stone is persuasive and should be adopted by the State of Wisconsin.

E. In the alternative, this court should grant relief in the interest of justice pursuant to Wis. Stat. §752.31.

Finally, defendant recognizes this issue was not raised by trial counsel. Insofar as this is was a meritorious issue, and the issue was deemed waived by trial counsel's failure to raise the issue prior to sentencing, defendant asserts trial counsel was ineffective. The trial court declined defendant's request for a Machner hearing on this issue (28, App. at 110). Defendant Pal requests that he be allowed to raise the statutory analysis on appeal notwithstanding the fact trial counsel did not raise the issue.

CONCLUSION

For the reasons set forth above, defendant should be granted the relief sought.

Dated: 11/15/2015

_____
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CERTIFICATION AS TO FORM AND 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 this brief is 5539 words.

Dated: 11/15/2015

_____
Philip J. Brehm
Attorney for Defendant

APPENDIX CERTIFICATION

I certify that filed with this brief, as part of this brief, an appendix complying with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court entries; (3) the findings or opinions of the trial court; and (4) 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 related to those issues.

I further certify 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: 11/15/2015

_____
Philip J. Brehm
Attorney for Defendant

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 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 and that 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: 11/15/2015

_____
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INDEX TO APPENDIX