STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case Nos. 2015AP001850 CRNM

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

PATRICIA A. ENRIQUEZ,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING MOTION FOR RESENTENCING IN RACINE COUNTY CIRCUIT COURT THE HONORABLE MICHAEL J. PIONTEK PRESIDNG RACINE COUNTY CIRCUIT COURT CASE NO. 13-CF-1134

REPLY BRIEF OF DEFENDANT-APPELLANT PATRICIA A. ENRIQUEZ

Kathilynne A. Grotelueschen, State Bar No. 1085045
Seymour, Kremer, Koch, Lochowicz & Duquette LLP

Attorneys for Defendant-Appellant
23, N. Wisconsin St., P.O. Box 470
Elkhorn, WI 53121-0470
(262) 723-5003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Sources **Page**

ARGUMENT

I. MS. ENRIQUEZ WAS DENIED HER DUE PROCESS RIGHT TO BE SENTENCED BY AN IMPARTIAL COURT.

A. Ms. Enriquez did not forfeit her judicial bias claim.

"[A] biased decisionmaker is 'constitutionally unacceptable,'" and denial of the right to an impartial court is a structural error that cannot be waived or forfeited. *State v. Herrman*, 2015 WI 84, ¶ 25, 364 Wis. 2d 336, 867 N.W.2d 772;*State v. Carprue*, 2004 WI 111, ¶57, 274 Wis. 2d 656,683 N.W.2d 31(noting that Carprue's claim of judicial bias could not be waived by failure to object). "Forfeiture" and "waiver" are two distinct concepts. *State v. Ndina,* 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612. "Forfeiture" involves the failure to timely assert a right, while "waiver" involves a deliberate relinquishment of a known right. *Id*. The State asserts that Ms. Enriquez forfeited her fundamental right to be sentenced by an impartial court by not objecting and requesting Judge Piontek's recusal at the sentencing hearing. The due process right to an impartial court, however, is not a right which may be forfeited.

While some rights may be forfeited by a failure to object, others "are not lost by a counsel's or litigant's mere failure to register an objection at trial." *Id*. at ¶¶30-

31. Rights which cannot be forfeited are those that "are so important to a fair trial that courts have stated that the right is not lost unless the defendant knowingly relinquishes that right." *Id.* at ¶31. In *State v. Soto*, 2012 WI 93, 343 Wis. 2d 43, 817 N.W.2d 848, the Wisconsin Supreme Court clarified which rights may be forfeited and which rights must be knowingly waived:

> Rights that are subject to forfeiture are typically those whose relinquishment will not necessarily deprive a party of a fair trial, and whose protection is best left to the immediacy of the trial, such as when a party fails to raise an evidentiary objection.
> ...
> In contrast to forfeiture, waiver typically applies to those rights so important to the administration of a fair trial that mere inaction on the part of a litigant is not sufficient to demonstrate that the party intended to forego the right.

Soto, 2012 WI 93, ¶¶36-37. In sum, "when determining whether a right is subject to forfeiture or waiver, we look to the constitutional or statutory importance of the right, balanced against the procedural efficiency in requiring immediate final determination of the right." *Id.* at ¶38.

The right to an impartial court is a minimum requirement of due process. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252(2009)("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of

due process.'"); *Guthrie v. WERC*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (Wis. 1983)("It is, of course, undisputable that a minimal rudiment of due process is a fair and impartial decisionmaker."). The right to an impartial judge is of such constitutional significance that it cannot be forfeited by a defendant's failure to act. Denial of such a right has been found to be a structural error which affects the entire case from beginning to end and is not subject to "harmless error" analysis. *See State v. Pinno*, 2014 WI 74, ¶¶49-50, 356 Wis. 2d 106, 850 N.W.2d 207. The right to an impartial court is unquestionably so important to a fair trial that it cannot be relinquished by mere inaction. *See Carprue*, 2004 WI 111, ¶57. Ms. Enriquez, therefore, could not forfeit her due process right to be sentenced by an impartial court through simple inaction in this case.

Moreover, the constitutional importance of the right to an impartial court is not outweighed by any perceived procedural efficiency in requiring immediate determination of the right. A request for recusal would not have avoided an appeal in this case. It is apparent from the circuit court's comments at the post-conviction motion hearing that it did not feel that it could not act in an impartial manner and would not have recused itself if it was requested do so.

(R38:29)(A96) In fact, Ms. Enriquez does not assert that the circuit court was subjectively biased and should have recused itself. Rather, she asserts that objective bias is present in this case. Additionally, it was not until the circuit court rendered its sentence that the appearance of bias was revealed. Ms. Enriquez could not have anticipated that the circuit court had conducted its own investigation and would make the comments that it made which gave the appearance of bias in this case. Consequently, she could not have asserted her right to an impartial court at the sentencing hearing.

If the Court finds that Ms. Enriquez forfeited her judicial bias claim, the Court should ignore that forfeiture and address the merits of this case. The forfeiture rule is one of judicial administration and an appellate court may consider the alleged forfeiture on review when it raises a question of sufficient public interest and involves a question of law which has been briefed by both parties. *State v. Anderson*, 2006 WI 77, ¶26, 291 Wis. 2d 673, 717 N.W.2d 74. Whether the circuit court's actions at sentencing in this case constitute objective bias is a question of law. Moreover, this case involves a question of sufficient public interest which, with increased access to documents online, is likely to become a reoccurring issue if not addressed.

B. Ms. Enriquez has shown objective bias by a preponderance of the evidence.

Ms. Enriquez has met her burden of demonstrating by a preponderance of the evidence that the circuit court's actions and statements give the appearance of bias and reveal a great risk of actual bias. A reasonable person viewing the court's actions in this case would question the court's impartiality.

The State's argument that Ms. Enriquez has not met her burden of establishing objective bias in this case relies largely on the circuit court's comments at the post-conviction motion hearing. A judge's *post hoc* explanation, however, is not dispositive of the issue. Rather, this Court is to conduct an independent review of the matter. *Herrman*, 2015 WI 84, ¶23. The State's argument also misses the mark. The question is not whether the circuit court was actually biased against Ms. Enriquez, but rather, whether its actions would lead a reasonable person to question its impartiality. Despite its attention to proper sentencing factors, the circuit court's actions and comments in this case reveal a great risk of actual bias.

The State's argument that the circuit court did not violate SCR 60.04(1)(g) is also misguided. The State asserts

that the circuit court's actions were not contrary to the Code of Judicial Conduct because the court "did not create or gather new evidence from law enforcement." (Resp't Br. 12) The State distinguishes this situation from that in *State v. Vanmanivong*, 2003 WI 41, 261 Wis. 2d 202, 661 N.W.2d 76, by pointing out that the records in this case were available online and were not created by law enforcement. This attempt to distinguish the cases fails. In *Vanmanivong*, the Wisconsin Supreme Court found that the circuit court committed error by relying upon independently gathered information to make a decision about whether to disclose a confidential informant. *Vanmanivong*, 2003 WI 41, ¶34. In so finding, the Wisconsin Supreme Court stated:

> Judges are generally prohibited from independently gathering evidence by the rules of judicial ethics. Supreme Court Rule 60.04(1)(g) prohibits a judge from engaging in ex parte communications concerning a pending action, with several exceptions not applicable here. The Comment to the rule states, in part, "A judge must not independently investigate facts in a case and must consider only the evidence presented." A judge must not go out and gather evidence in a pending case. To do so is error.

Id. The Wisconsin Supreme Court did not limit its holding to information received from law enforcement or created at the court's request.

In this case, the circuit court conducted an independent

investigation of Ms. Enriquez. It went out searching for information on her nursing licenses and then relied upon that information, which was not presented by the parties, in making its sentencing decision. By obtaining the records and relying on them at the sentencing hearing, the circuit court did create "evidence" in this case. For these reasons, as well as those in Defendant-Appellant's Brief, the presumption of impartiality has been rebutted in this case and Ms. Enriquez is entitled to resentencing.

II. MS. ENRIQUEZ WAS DENIED HER DUE PROCESS RIGHT TO REBUT INFORMATION RELIED UPON AT SENTENCING.

The circuit court's independent investigation of Ms. Enriquez deprived her of her due process right to review and rebut information relied upon at sentencing. As argued in Defendant-Appellant's Brief, the circuit court's actions in this case deprived Ms. Enriquez of any meaningful opportunity to rebut the information that it had found regarding her nursing licenses.

Contrary to the State's argument, Ms. Enriquez was not aware of the contents of all the documents the circuit court found regarding her nursing licenses. Specifically, Ms. Enriquez was not aware that the court had run a search for her Illinois license that showed she did not have a license

there. (R13:18)(A21) Nor could she have known that the court would draw other mistaken conclusions from the documents.

The State incorrectly argues that *State v. Lynch*, 2006 WI App 231, 297 Wis. 2d 1,724 N.W.2d 656 does not support Ms. Enriquez's argument. (Resp't Br. 14) Specifically, the State mistakenly characterizes the holding in *Lynch* and Ms. Enriquez's argument. The State asserts that the court's failure to give Ms. Enriquez prior notice that it would consider her nursing records at sentencing did not deprive her of her due process rights because she was aware of the contents of those records.(Resp't Br. 13-14)Putting aside the fact that Ms. Enriquez was not aware of the contents of these records as argued above, the State's argument ignores the fact that Ms. Enriquez was not given any meaningful opportunity to refute the records that the circuit court found and relied upon.

The Wisconsin Court of Appeals decision in *Lynch* noted that Lynch did not make any attempt to object or present information in rebuttal at the sentencing hearing. *Id*. at ¶25. Here, Ms. Enriquez tried to dispute the information that the circuit court had found regarding her nursing licenses but was told to shut her mouth and not to make any more comments. (R37:10-11)(A49-50) It was the circuit court's

failure to notify the parties of its independent investigation, combined with its subsequent failure to give Ms. Enriquez any meaningful opportunity to respond to that information, which deprived her of her due process right to review and rebut information presented at sentencing.

III. MS. ENRIQUEZ HAS ESTABLISHED THAT THE COURT RELIED UPON INACCURATE INFORMATION WHEN IMPOSING ITS SENTENCE.

Judge Piontek relied upon inaccurate information when imposing the sentence in this case. Ms. Enriquez did not waive this claim; she properly notified the circuit court of her dispute with the information it had found as a result of its independent investigation. Further, despite its claim to the contrary, the circuit court did rely upon the inaccurate information and that reliance was not harmless.

The State argues that Ms. Enriquez failed to object to the alleged inaccurate information in her nursing records at the time of sentencing and, therefore, waived her right to bring this claim on appeal. (Resp't Br. 16.) This argument, however, is clearly flawed. To the extent she was able, Ms. Enriquez notified the circuit court that the information it obtained was inaccurate. (R37:9-10)(A48-A49) When presented with the documents and asked to explain herself, Ms. Enriquez told the circuit court that her nursing license in Texas was

not revoked and that she had a license in Illinois.(R37:9-10)(A48-A49) It was then that she was told to close her mouth and not make any more comments.(R37:10-11)(A49-A50) Ms. Enriquez made the court aware that she was disputing the accuracy of the information it obtained. That is all that is required of a defendant to reserve her right to be sentenced upon reliable and accurate information. *See State v. Mosley,* 201 Wis. 2d 36, 46, 547 N.W.2d 806 (Wis. App. 1996).

Unlike the defendant in *State v. Leitner,* 2001 WI App 172, 247 Wis. 2d 195, 633 N.W.2d 207, Ms. Enriquez made the court aware of her disagreement with the inaccurate facts. *See Leitner,* 2001 WI App 172, ¶41. She did not attempt to withhold information from the court and then wait until after sentencing to dispute that information. Should the Court find that Ms. Enriquez did waive this claim, however, the Court should ignore the waiver and reach the merits of this case due to the unusual circumstances involving the circuit court's independent investigation. *Id.* at ¶42.

Ms. Enriquez has established that the circuit court relied upon inaccurate information when imposing the sentence in her case. The State appears to argue that Ms. Enriquez has not demonstrated that any of the alleged inaccurate information was actually inaccurate; asserting that it is

just a matter of semantics. (Resp't Br. 17) However, there is a material difference between a finding that Ms. Enriquez's license had been revoked because the allegations by the Board of Nursing were substantiated, and a finding that she surrendered her license. Additionally, the circuit court's erroneous conclusion that Ms. Enriquez never had a nursing license in Illinois was meaningful as Ms. Enriquez wanted to show the court that she was licensed as a nurse after the surrender of her license in Texas. (R37:10)(A49)

Ms. Enriquez has also established by clear and convincing evidence that the circuit court actually relied upon that inaccurate information. Contrary to the State's arguments, Ms. Enriquez does not have to establish that the inaccurate information formed *the* basis for the sentence, only that it formed *part* of the basis for the sentence imposed by the court. *State v. Travis*, 2013 WI 38, ¶28, 347 Wis. 2d 142, 832 N.W.2d 491. Moreover, whether the sentence might have been justified by information independent of the inaccurate information is irrelevant. *Id.* at ¶47. The court's explicit attention to the incorrect information demonstrates that it formed part of the basis for the sentence imposed. Finally, the circuit court's assertion of non-reliance at the post-conviction motion hearing is also not dispositive of the

issue. *Id.* at ¶48. Accordingly, Ms. Enriquez's case should be remanded for resentencing.

IV. MS. ENRIQUEZ HAS ESTABLISHED THAT THE COURT ERRONEOUSLY EXERCISED ITS SENTENCING DISCRETION.

Ms. Enriquez is entitled to a new sentencing hearing as the circuit court erroneously exercised its discretion while imposing the sentence in this case. The State argues that an appellate court cannot interfere with a circuit court's sentencing decision so long as the circuit court, using a logical rationale, applies the proper legal standards to the facts in the record and addresses the three relevant sentencing factors. (Resp't Br. 21-22). In doing so, the State misconstrues Ms. Enriquez's argument.

The circuit court erroneously exercised its sentencing discretion in this case, not by failing to address the three primary sentencing factors, but by imposing a sentence which was unduly harsh and so excessive as to shock the public conscience. While the State is correct that the circuit court has discretion to impose a sentence of a length within the permissible range, this Court may find that such discretion was erroneously exercised "where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of

reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457(Wis. 1975); *See also State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (Wis. 1984).

The circuit court's sentence of eleven years of imprisonment, just one year short of the maximum sentence, under the circumstances, is unduly harsh and so excessive as to shock public sentiment. This argument was fully developed in Defendant-Appellant's Brief and will not be readdressed here.

CONCLUSION

For the reasons stated herein, as well as those in Defendant-Appellant's Brief, the circuit court's denial of Ms. Enriquez's motion for resentencing should be reversed and the case should be remanded for resentencing.

Dated this 11th day of February, 2016.

SEYMOUR, KREMER, KOCH,
LOCHOWICZ & DUQUETTE LLP

By: _____
Kathilynne A. Grotelueschen
Attorney for Defendant-Appellant
State Bar No. 1085045

23 North Wisconsin Street
P.O. Box 470
Elkhorn, WI 53121-0470
Telephone: (262) 723-5003

CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 13 pages.

Dated this 11th day of February, 2016.

SEYMOUR, KREMER, KOCH,
LOCHOWICZ & DUQUETTE LLP

By: _____
Kathilynne A. Grotelueschen
Attorney for Defendant-Appellant
State Bar No. 1085045

CERTIFICATION 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 s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the 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 11th day of February, 2016.

SEYMOUR, KREMER, KOCH,
LOCHOWICZ & DUQUETTE LLP

By: _____
Kathilynne A. Groteluesch
Attorney for Defendant-Appellant
State Bar No. 1085045