STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2015AP002154-CR
Circuit Court Case No. 2013CF002723

Appeal No. 2015AP002155-CR
Circuit Court Case No. 2013CM002488

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

EARNEST LEE NICHOLSON,
DEFENDANT-APPELLANT.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE MARY TRIGGIANO AND MEL FLANAGAN PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

J. DENNIS THORNTON
Attorney at Law
State Bar No. 1016122

230 West Wells Street
Suite 405
Milwaukee, Wisconsin 53203-1866
Telephone: (414) 257-3380
Facsimile: (414) 257-3390
Email: jdennisthornton@gmail.com

Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Wisconsin Statutes

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2015AP002154-CR
Circuit Court Case No. 2013CF002723

Appeal No. 2015AP002155-CR
Circuit Court Case No. 2013CM002488

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

EARNEST LEE NICHOLSON,
DEFENDANT-APPELLANT.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE MARY TRIGGIANO AND MEL FLANAGAN PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

REPLY ARGUMENT

I. THE STATE CONCEDES THAT THE OFFENSE UPON WHICH THE CIRCUIT COURT IMPOSED THE NO CONTACT ORDER UNDER § 973.049 IN CASE NUMBER 2011CF005715 AND UPON WHICH THE PROSECUTION IN CASE NUMBER 2013CM002488 WAS PREDICATED WAS NOT BASED ON A "CRIME CONSIDERED AT SENTENCING", BUT CONTRARY TO THE STATE'S BRIEF, THE VALIDITY OF THAT ORDER IS NOT SAVED AS A VALID EXERCISE OF JUDICIAL DISCRETION.

A. The State Correctly Concedes that the No Contact Order on Which Case Number 2013CM002488 Was Predicated Was Not Based on a "Crime Considered At Sentencing".

The term "crime considered at sentencing" is clearly and unambiguously defined as "...any crime for which the defendant was convicted or any read-in crime, as defined in s. 973.20 (1g) (b)."

As noted by the State,

> Nicholson seems to assert that the issue is whether his battery of MDF was a "crime considered at sentencing" under § 973.049. He argues that since the battery charge was dismissed, it was not a "crime considered at sentencing." (Nicholson's Br. 18.)
>
> The State agrees.

(State Brief, p. 7)

That concession would seem to be issue determinative, but the State continues.

B. The Imposition of a No Contact Order Under § 973.049 in Case Number 2013CM002488 Cannot Be Justified As an Exercise of Judicial Discretion.

The State further acknowledges that the aggravated battery charge in case number 2011CF005715 was dismissed (State Brief, p. 4), but nonetheless, the State argues that imposition of a no contact order under §973.049(2) is valid as an exercise of judicial discretion.

The scope of judicial discretion is undoubtedly broad, including inherent powers that are necessary "to enable the judiciary to

accomplish its constitutionally or legislatively mandated functions." *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995).

However, that exercise of discretion "...is not the equivalent of unfettered decision-making. *McCleary v. State,* 49 Wis.2d 263, 182 N.W.2d 512 (1971). A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 NW 2d 16, (1981).

The difficulty with the Circuit Court's reasoning and the State's argument is that the statutory definition of "crime considered at sentencing" creates a condition precedent, i.e., defendant must have been convicted of the offense or the offense must have been read in,

before the Court is authorized to exercise discretion. The statutory construction proposed by the Circuit Court and the State vitiates large portions of the statutes in question. This violates the "...basic rule of statutory construction that in construing statutes, effect is to be given, if possible, to each and every word, clause and sentence in a statute, and a construction that would result in any portion of a statute being superfluous should be avoided wherever possible." *County of Columbia v. Bylewski*, 94 Wis.2d 153, 164, 288 NW 2d 129 (1980).

Failing that condition precedent, the Court is without authority to exercise discretion regarding §973.049(2).

On the record presented, one could not rationally find that Mr. Nicholson had been convicted of the battery offense in case number 2011CF005715 or that offense had been read in.

Collateral attacks on prior judicial orders or judgments are generally prohibited but there are notable exceptions:

> "Where a valid order or judgment is a necessary condition for one of the elements of a crime, a collateral attack upon the order or judgment can negate an element of the crime if the order or judgment is void." *State v. Campbell*, 2006 WI 99, ¶ 42, 294 Wis.2d 100, 718 N.W.2d 649

These circumstances go directly to the jurisdiction of the court over the alleged offense and the proceedings are void *ab initio.* The no contact order under §973.049(2) had no basis in fact or law and was void upon issuance.

C. The Decision on This Issue Remains a Question of Law, Not a Question of Discretion.

Were this issue to be reviewed as a matter of judicial discretion, it would be reviewed for erroneous exercise of that discretion. The court's determinations would not be disturbed as long as the court considered appropriate factors and gave an explanation of its sentence that shows it has exercised its discretion on a "rational and explainable basis." *State v. Gallion,* 2004 WI 42, ¶49, 270 Wis. 2d 535, 678 N.W.2d 197

It is undisputed that under § 973.01(5) a sentencing Court "...may impose conditions upon the term of extended supervision" "...as long as the conditions are reasonable and appropriate." *State v. Koenig,* 2003 WI App 12, ¶7, 259 Wis. 2d 833, 837, 656 N.W.2d 499, 501.

As previously conceded (Brief in chief, p. 17), the imposition of conditions of extended supervision is indeed an exercise of judicial discretion and should be reviewed for erroneous exercise of that discretion.

However, Mr. Nicholson raises no issue concerning the imposition of conditions of extended supervision.

Rather, he questions the Court's authority to impose a no contact order under §973.049(2), which a question of law, not of discretion.

CONCLUSION

For the reasons offered in this reply brief and in Mr. Nicholson's principal brief, Mr. Nicholson respectfully requests that this Court vacate the judgment of conviction in case number 2013CM002488 and remand with directions to dismiss that case.

Mr. Nicholson further requests that the judgment in case number 2013CF002723 be vacated and remanded with directions to grant Mr. Nicholson a new trial.

Alternatively, Mr. Nicholson requests that these cases should be remanded with directions to conduct an evidentiary hearing on Mr. Nicholson's claims.

Dated: June 21, 2016.

J. DENNIS THORNTON
State Bar No. 1016122
230 West Wells Street Suite 405
Milwaukee, WI 53203-1866
Telephone: (414) 257-3380
Facsimile: (414) 257-3390
Email: jdennisthornton@gmail.com
Attorney for Defendant-Appellant

CERTIFICATIONS

I certify that this brief meets the form and length requirements of Rule 809.19 (8)(b) and (c) on that it is: proportional serif font, minimum printing resolution of 300 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. The text is 13 point type and the length of the brief is 1338 words and 8 pages.

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.

J. DENNIS THORNTON
State Bar No. 1016122
230 West Wells Street Suite 405
Milwaukee, WI 53203-1866
Telephone: (414) 257-3380
Facsimile: (414) 257-3390
Email: jdennisthornton@gmail.com

Attorney for Defendant-Appellant

ELECTRONIC CERTIFICATION

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief pursuant to § 809.19(12).

A copy of this certificate has been served with the paper copies of this brief and served on all parties.

_____

J. DENNIS THORNTON
Attorney at Law
State Bar No. 1016122

230 West Wells Street
Suite 405
Milwaukee, Wisconsin 53203-1866
Telephone: (414) 257-3380
Facsimile: (414) 257-3390
Email: jdennisthornton@gmail.com

Attorney for Defendant-Appellant