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COURT OF APPEALS **CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2015AP2176 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK P. HAYNES,

Defendant-Appellant.

**Appeal from an Order Sentencing Defendant After Revocation Entered in
Dunn County Circuit Court, the Honorable J.M. Bitney presiding**

REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

I. The Sentencing Court Abused Its Discretion by Failing to Give Proper Consideration to the OWI Sentencing Guidelines.

Patrick P. Haynes, Defendant-Appellant, (hereinafter Haynes) agrees with the State that the law is well settled as to sentencing, insofar as the sentencing court is to generally apply the McCleary factors to all cases. *See Generally, McCleary v. State*, 49 Wis. 2d 263 (1971). However, as to the effect and purpose of the OWI guidelines promulgated under §346.65(2m)(a) (2014), Haynes disagrees with the conclusion reached by both the sentencing court and the State. The sentencing court and the State both mention the OWI guidelines, but only pay lip service to the meaning of those guidelines. The question presented in the case at bar is what deference, if any, is the sentencing court to pay to the guidelines created for OWI cases?

At the Sentencing After Revocation, the sentencing court precedes the its declaration of the sentence imposed by saying, “I’m fully aware of what the guidelines are for drunk driving third offense under the Tenth Judicial District guidelines. Those are not mandatory or binding on the Court. They’re guidelines. They’re recommendations.” (Sentencing Hr’g After Rev. 11:1-6). The sentencing court concludes that this is not a normal case and then proceeds to sentence Haynes to the maximum under the law. The State follows the same foundation when it cites to State v. Smart, 2002 WI App 240, ¶ 15 for the proposition that the

guidelines are not mandatory. *See* State's Brief at 4. Beyond citing Smart and a litany of cases supporting the proposition that the sentencing court may rely on allegations that have not yet become convictions, the State provides no justification for the enhanced sentence; well beyond what the guidelines would have recommended. The State rests with a near blanket statement that the sentencing court did not abuse its discretion because the sentence was allowed by law.

Two cases sit at the top of the discussion on the use of OWI guideline sentencing, State v. Smart and State v. Jorgensen. In State v. Smart, the defendant was actually sentenced to the guideline sentence in place at the time defendant committed the offense. *See* State v. Smart, 2002 WI App 240, ¶ 15. The defendant in Smart was actually arguing that they were entitled to a different guideline sentence than the one in place at the time of the offense. *See* id. at ¶ 1. Similarly, the Court in Jorgensen approved the use of the guidelines, even in cases where the guidelines did not specifically apply. *See* State v. Jorgensen, 2003 WI 105, ¶¶ 1, 2, 8. (holding that the court did not abuse its discretion by applying the guidelines to violation of §363.43(1)(a) when the guidelines by their plain language only apply to violations of §363.43(1)(b)). Both cases support the use of the OWI guidelines, even going so far as to support the use of the guidelines when they are not specifically applicable. From these cases, it is apparent that there is at least some support for the application of the OWI guidelines. However, the State did not rely on these cases, instead pointing to a single unpublished case, State v. Weaver,

where the guidelines were not followed to support the sentencing court's decision in this case.

What the State failed to do was to provide a justification for the sentencing court's failure to give any deference or credence to the guidelines crafted for OWI cases and to explain why it was appropriate to not follow the guidelines in the present case. The State relies on State v. Weaver for the proposition that it is allowable to deviate from the guidelines in OWI cases, a general premise with which Haynes does not disagree. There are cases where deviations are appropriate, both increasing and decreasing sentences. Where Haynes disagrees with the State and the sentencing court is whether the guidelines are entitled to deference and consideration during sentencing; a premise with which it appears that the Weaver sentencing court agreed.

The sentencing court in Weaver begins its imposition of sentencing by reviewing the guidelines, "but proceeded to note that the courts had started to slavishly impose those guidelines; that OWIs are usually a 'rote endeavor.'" State v. Weaver, 2015 WI App 75, ¶ 12 (unpublished). The judge in Weaver "acknowledged the guidelines but determined they were not appropriate in this case." Id. at ¶ 11.

The sentencing court in Weaver began sentencing by highlighting the guideline sentence of 110 days and specifically noting that it was to be considered, but that the accompanying behavior had to be considered as well. *See id.* at ¶ 13. Weaver's conduct during the traffic stop was "remarkable in an alarming way"

according to the sentencing court. Id. That behavior included being physically and verbally uncooperative, using foul language, spitting at law enforcement and wanting to fight officers. *See id.* The Weaver court also highlighted Weaver's extensive criminal record which included felony convictions for escape, delivery of cocaine, failure to support, false imprisonment and substantial battery. *See id.* at ¶ 14. The sentencing court noted Weaver's history of "violent and dangerous behavior." Id. The court in Weaver addressed the applicable guideline and then based on specific criminal history and aggravating circumstances found that the sentence was insufficient. The court in the present case failed to make the type of record necessary to support its failure to properly consider the guidelines and ultimately its decision to deviate from those guidelines.

The sentencing court in the case at bar only paid lip service to the guidelines. It acknowledged that it was aware of the guidelines and then proceeded as if those guidelines did not exist. It said the guidelines were "recommendations" but gave no credence to those "recommendations." The sentencing court referred to Haynes as a "career criminal" but makes no mention of Haynes criminal record during sentencing. Presumably, this is because Haynes had little to no criminal record at the time of sentencing. The sentencing court also spent a great deal of time discussing Haynes conduct during the time of the offense; that Haynes was involved in a car accident and using his cell phone at the time of the accident. While it is true that this conduct may warrant an increased sentence beyond a "normal" case which receives a guideline, the guidelines for the Tenth District has

a separate set of guidelines for cases involving aggravated driving. The court fails entirely in explaining why this aggravated guideline is not appropriate in the present case.

With all that, Haynes acknowledges that the guidelines are not binding on the sentencing courts. *See Smart* at ¶ 15. But at the same time, asserts that the guidelines must have some meaning and value during sentencing. First, the legislature chose the term guideline when referring to the considerations that the chief judge of each district was to promulgate. *See* §346.65(2m)(a). Guideline means a rule or instruction that shows or tells how something should be done. Merriam-Webster <http://www.merriam-webster.com/dictionary/guideline>. The language used by the legislature indicates that it intended that the OWI guidelines should be followed. Also, when construing statutes, the statute “should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect.” Mueller v. McMillan Warner Ins. Co., 2006 WI 54, ¶ 27. The legislature chose precise language when ordering the creation of guidelines for OWI cases and they intended those guidelines to play an active role in sentencing. Even the language of §346.65(2m)(a) demonstrates this desire:

In imposing a sentence under sub. (2) for a violation of s. 346.65(1)(am) or (b) or (5) or a local ordinance in conformity therewith, the court shall review the record and consider the aggravating and mitigating factors in the matter. If the amount of alcohol is the person’s blood or urine or the amount of a restricted controlled substance in the person’s blood is known, the court shall consider that amount as a factor in sentencing. The chief judge of each administrative district shall adopt guidelines, under the chief judge’s authority to adopt local rules under SCR 70.34, for the consideration of aggravating and mitigating factors.

The chief judge promulgated sentencing guidelines taking into consideration the exact things discussed in §346.65(2m)(a); alcohol concentrations and aggravating factors, such as accidents and property damage. If there was no desire on the part of the legislature for the guidelines to be used in all but the most unusual of circumstances, it would not have ordered the creation of guidelines. It may well be possible to have cases that call for deviation from the guidelines, such as the circumstances in Weaver where the defendant has a significant felony record and threatens officers, but the guidelines should not be so cavalierly discarded. A significant record should be made specifically addressing what the guideline called for and the circumstances that warrant deviating from that; the type of record present in Weaver but absent here.

Conclusion

For these reasons the trial court abused its discretion at the sentencing after revocation on June 26, 2015 and the sentence should be reversed and the case remanded for a new sentencing.

Dated this _____ day of _____, 2016.

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Certification as to Form/Length

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1,560 words.

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Dated this _____ day of _____, 2016.

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Dated this _____ day of _____, 2016.

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