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OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS DISTRICT I

Case No. 2015AP2336-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY F. ANTON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JOHN SIEFERT PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
ISSUES PRESENTED.....	1
STATEMENT ON PUBLICATION AND ORAL ARGUMENT.....	2
STATEMENT OF FACTS.....	2
STATEMENT OF THE CASE.....	2
ARGUMENT	
I. The Circuit Court Violated the Requirements of <i>Gallion and McCleary</i> When it Sentenced Anton.....	4
CONCLUSION.....	9

CASES CITED

<i>Harris v. State</i> , 75 Wis.2d 513 250 N.W.2d 7(1977).....	5,6
<i>McCleary v. State</i> 49 Wis.2d 263 182 N.W.2d 512 (1971).....	passim
<i>State v. Gallion</i> , 2004 WI 42 270 Wis.2d 535	

678 N.W.2d 197.....passim

State v. Herrmann

2015 WI 84
364 Wis.2d 336
867 N.W.2d 772.....6

State v. Travis,

2013 WI 38
347 Wis.2d 142
832 N.W.2d 491.....5

**CONSTITUTIONAL PROVISIONS
AND STATUTES CITED**

United States Statutes

8 U.S.C. 1227(a)7

8 U.S.C. 1227(a)(2)(A)(i)(ii).....7

Wisconsin Statutes

Wis. Stat. § 973.017(10m)passim

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ISSUE PRESENTED

Whether the circuit court violated the requirements in *Gallion* and *McCleary* when it failed to explain the objectives, reasons and intentions it used when it fashioned the defendant-appellant's sentence.

STATEMENT ON PUBLICATION AND ORAL ARUGMENT

Anton does not request publication or oral argument. This case involves the application of well settled principles of law and the parties briefing with adequately address all issues.

STATEMENT OF FACTS

According to trial testimony, On January 1, 2007 Anton was stopped by Milwaukee County Sherriff's Deputy Brian Conte for speeding and lane deviation on I94 Westbound near the 76th street exit in Milwaukee County. (R. 40: 10-13).

While speaking with the driver (later identified as the defendant-appellant, Mr. Anton), Deputy Conte noticed the smell of alcohol. *Id.* at 14-5. When asked if he had been drinking, Anton replied that he had. *Id.* at 16. Deputy Conte then had Anton perform various field sobriety tests. *Id.* at 16-34. According to Deputy Conte, Anton failed the field sobriety tests and was taken into custody on suspicion of operating a motor vehicle while intoxicated. *Id.* at 35. Anton submitted to an intoximeter breath test which showed his blood alcohol level ("BAC") to be .07. *Id.* at 41. Anton stipulated to this level at trial. *Id.*

Subsequent to the breath test, Deputy Conte also request Anton submit to a blood analysis. *Id.* at 54. Anton agreed to the blood draw which showed his blood alcohol level to be .09. *Id.*

STATEMENT OF THE CASE

On December 6, 2012 the Anton was charged with one count operating a motor vehicle while intoxicated contrary to Wis. Stat. §§ 346.63(1)(a), 346.65(2)(am)3. (R.2:5). Anton

was convicted of the charge after a jury trial on July 8, 2014. (R.12).

The facts surrounding the OWI are from 2007. Mr. Anton was originally charged with this crime in 2007 (Milwaukee County Case No. 2007CT5060). (R.28:1-5). After a court trial in the 07-CT-5060 case, Mr. Anton was convicted of OWI 3rd. *Id.* at 6. Mr. Anton successfully appealed the conviction in 07-CT-5060 and that case was dismissed without prejudice on November 5, 2012. *Id.* The State then reissued the case on December 6, 2012. (R.2). A jury trial commenced on July 7 and 8th of 2014. (R.40-41).

The jury ultimately convicted Anton of OWI and sentencing proceeded immediately after trial on July 8th, 2014. (R.41). The State began its sentencing argument by recommending the defendant spend 5 months in jail consecutive to the sentencing the he was already serving. (R.41:53). The State noted that Anton had a criminal history that included one count of first degree sexual assault and three counts of second degree sexual assault (Waukesha County Case No. 08-CF-852). *Id.* at 55. Anton is serving four ten year sentences (of initial confinement) on each count run consecutively to each other for a total of 40 years of initial confinement. *Id.*

The defense then provided its sentencing argument and recommended 45 days of incarceration concurrent to any sentence Anton was serving. *Id.* at 60. Anton also spoke at sentencing. During Anton's statement, the Court asked Anton about a house, presumably a house that Anton previously owned. *Id.* at 61. Anton said his house was foreclosed on and then ask the Court how the Court could have known about the foreclosure. *Id.* The Court responded by saying it was looking at Anton's history "on the computer." *Id.*

The Court ultimately sentenced Anton to one year incarceration concurrent to his other sentence. *Id.* at 63. The Court noted that sentencing him to any additional time would be “piling on.” *Id.* The only reasoning the Court gave for its sentence was because of Anton’s previous forgery conviction. *Id.* After the Court pronounced its sentence, Anton asked the Court to reconsider based on possible immigration consequences the Court’s sentence could have. *Id.* at 64. The Court then told Anton that if the Court had to power to revoke his green card it would do so. *Id.* at 67.

Anton filed a postconviction motion challenging the circuit court’s sentence on the grounds that it violated *State v. Gallion*, 2004 WI 42, ¶¶5-8, 270 Wis.2d 535, 678 N.W.2d 197 and *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971). The circuit court denied Anton’s postconviction motion in an order dated October 28, 2015. (R.23).

In its order denying Anton’s postconviction motion, the circuit court acknowledged that it did not state any mitigating or aggravating factors on the record during the sentencing.(R.23:3) Moreover, the circuit court stated it was not required to state those factors on the record. *Id.* The circuit court did state that Anton’s “poor character”, need for punishment and his already extensive sentence were factors it considered when fashioning Anton’s sentence. *Id.* at 4.

ARGUMENT

I. The Circuit Court violated the requirements of *McCleary* and *Gallion* when it sentenced Anton.

The sentencing Court did not adequately state its reasons, objectives or the factors it considered when it sentenced Anton. Thus, Anton is entitled to a resentencing.

On appellate review, a circuit court's sentence is reviewed based on the erroneously exercise of discretion standard. *State v. Travis*, 2013 WI 38, ¶16, 347 Wis.2d 142, 832 N.W.2d 491. A sentence will be upheld if it was based on the facts in the record and relies on appropriate and applicable law. *Id.*

The sentencing Court must apply a process of reasoning depending on the facts that are of record or could be reasonably derived by inference from the record. *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971). The application of the sentencing standards and the exercise of sentencing discretion outlined in *McCleary* and mandated by *Wis. Stat.* § 973.017(10m) must be placed on the record. *State v. Gallion*, 2004 WI 42, ¶¶5-8, 270 Wis.2d 535, 678 N.W.2d 197. The sentencing court must provide a detail of reasoning for selecting the particular sentence imposed. *Id.* at ¶ 24.

Moreover, Courts are supposed to explain the reasons for the particular sentence they impose and identify the sentencing objectives of greatest importance for that particular case. *Id.* at ¶ 41. Courts must also describe facts relevant to these sentencing objectives and explain, in light of the facts, why the sentence imposed advances those objectives. *Id.* at ¶ 42.

“Courts must also identify factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision.” *Id.* at ¶ 43. In *Harris v. State*, the Wisconsin Supreme Court identified some factors that courts may take into consideration including, past criminal record, history of undesirable behavior, the defendants character and personality, the aggravated nature of the crime, the defendant's degree of culpability, the defendant's demeanor at trial, the defendant's remorse and cooperativeness, the defendant's need for rehabilitation, the

defendant's employment and background and the length of any pretrial incarceration. *Harris v. State*, 75 Wis.2d 513, 519-20, 250 N.W.2d 7 (1977).

As the Supreme Court noted in *Gallion*, “merely uttering the facts, invoking sentencing factors, and pronouncing sentence” is not sufficient. *Id.* at ¶2. The sentencing court must demonstrate some evidence of decision making and the exercise of its discretion. *Id.*

The Court in Anton's case did not place its reasoning for the sentence on the record. The Court made no mention of the sentencing factors or how those factors applied to Mr. Anton's case. The Court did not mention any of the facts of the case and how those facts affected the sentence. The Court did not mention any aggravating or mitigating factors, other than Anton's prior forgery conviction. Basically, the Court did not identify what factors were considered in arriving at Anton's sentence or how those factors fit the Court's sentencing objectives and influenced the sentence.

In addition to identifying the facts considered when fashioning a sentence, a circuit court must also identify the objectives of its particular sentence including, but not limited to, the protection of the public, rehabilitative needs and punishment of the defendant, and deterrence. *See State v. Herrmann*, 2015 WI 84, 364 Wis. 2d 336, 867 N.W.2d 772 (citing *Gallion*, 2004 at ¶ 42).

The circuit court did not identify any objectives with the sentence other than the punishment aspect of the fine imposed. The circuit court did not even mention the protection of the public, the rehabilitative needs of Anton or whether this sentence is meant to deter Anton or others from similar conduct.

The only objective that the Court even hinted at was punishment. Curiously, the Court seems to have imposed this “punishment” because of Anton's prior forgery conviction.

The Court did mention that conviction when it pronounced sentence. However, that is the only factor it mentioned during the sentence. The Court did not mention any other aspects of Anton's prior criminal record and how that record affected the sentence. The implication is that the Court sentenced Anton to the current sentence because of the forgery conviction.

Anton is left to guess at the Court's reasoning because the Court did not identify what reasoning it used in fashioning his sentence.

According to *Gallion*, the Court must identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision. *Gallion*, 2004 WI 42 at ¶ 43. This requirement provides that the sentencing court must state its objective for a sentence and why that particular sentence achieves that objective. The Court in Mr. Anton's case did not state what objective it had when sentencing Mr. Anton nor did it state why the sentence would achieve that objective.

Thus, Anton was left without knowing why the Court sentenced him to the time it did.

As the Court noted during the sentencing, Anton is serving a lengthy sentence on a different matter, and because this sentence was concurrent it had no practical effect as far as incarceration time was concerned. The Court also noted that the sentence may have immigration consequences. The Court was correct about the immigration consequences. As noted in the sentencing transcript, Anton is a resident alien of the United States. He could face severe immigration consequences for being convicted of a crime in which he served a sentence of one year or longer. *See* 8 U.S.C. 1227(a); 8 U.S.C. 1227(a)(2)(A)(i)(ii).

In its order denying Anton's motion for postconviction relief, the circuit court did outline the necessary sentencing

factors and indicated that it fashioned Anton's sentence based on his "extraordinary bad character" and that the maximum possible penalty is mostly symbolic because of Anton's sexual assault sentence. In its order, the Court also indicated it considered the immigration consequences *after* the sentence was imposed but did not change the sentence for the reasons stated on the record. (R.23:3).

The Court only stated that Anton did not have the character required for a green card. It stated nothing else about its reasoning for the sentence. The only factor the Court stated on the record was Anton's poor character. Even in its order denying Anton's postconviction motion the only factor that the Court indicates it used in fashioning Anton's sentence was his poor character because of his prior criminal record.

Additionally, the in its order denying Anton's postconviction motion the Court states that anything less than the symbolic maximum sentence would not further its sentencing goals. (R.23:4). However, neither the order nor the sentencing transcript identify what the Court's sentencing goals were. It begs the question: What was the sentencing goal(s) of the Court? Anton is still asking that question today.

Wisconsin sentencing law requires the sentencing court to answer the above questions. *Gallion* and Wis. Stat. § 973.017(10m) require the sentencing court to detail its reasons for the sentence. Moreover, *Gallion* specifically stated that the sentencing standards of *McCleary* are still required and that the sentencing court must state the application of those standards on the record. None of the sentencing standards specifically mentioned in *McCleary* and *Gallion*, were discussed by the Court in Anton's case. Thus, Anton is entitled to a resentencing.

CONCLUSION

This Court should reverse the ruling of the circuit court and remand the case back to circuit court for resentencing.

Dated this 14th day of March, 2016.

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CERTIFICATION AS TO FORM/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 the brief is 2018 words.

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**CERTIFICATE 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 § 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.

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.

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A P P E N D I X

**I N D E X
T O
A P P E N D I X**

	Page
Portion of Sentencing Transcript (R.49: 3-35.).....	A1-A16
Criminal Complaint (R.2.).....	A17-A21
Circuit Court’s Ruling on Postconviction Motion (R.47:34-5).....	A22-A25

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court and Court of Appeals; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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.

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