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STATE OF WISCONSIN
COURT OF APPEALS

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OF WISCONSIN**

DISTRICT I

Appeal Case No. 2015AP002336-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DANNY F. ANTON,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

Whether the Circuit Court followed the requirements in *Gallion* and *McCleary* when it fashioned the sentence of Danny Anton?

Trial Court Answered: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a misdemeanor case to be decided by a single judge. Neither oral argument nor publication is necessary to resolve the issues herein.

STATEMENT OF THE CASE

On January 1, 2007, Anton was stopped by Milwaukee County Deputy Brian Conte for unsafe lane deviation and speeding on I-94 and 76th Street in Milwaukee County. (R.40:10-13) Upon making contact with Anton, Deputy Conte detected an odor of alcohol emitting from Anton. *Id.* at 14-15. Anton also admitted consuming alcohol. *Id.* at 16. Anton performed field sobriety tests and exhibited multiple clues of impairment on each test. *Id.* at 16-33. At this point, Deputy Conte believed Anton was impaired and he was taken into custody for operating a motor vehicle while under the influence of an intoxicant. *Id.* at 35. Anton provided a sample to the Intoximeter which resulted in a 0.07 reading, which was stipulated to at the jury trial. *Id.* at 41. Anton then provided a blood sample which resulted in a of 0.09 g/210L of ethanol. *Id.* at 45.

Anton was arrested and cited for operating while intoxicated as a first offense. It was later determined that Anton had filed false conviction status reports, removing prior operating while intoxicated convictions from his record. Anton was later charged in Waukesha County with forgery for altering conviction status reports. This case was then issued as an operating while under the influence third offense. (R.28:1-5)

Anton was originally charged in 2007CT5060 with the operating while under the influence third offense (R.28:1-5). Anton was found guilty of the offense at a court trial on July 21, 2008, before the Honorable Dominic Amato. *Id.* At 6. Anton successfully appealed the conviction in 07CT5060 and that case was sent back to the Milwaukee County Circuit Court. *Id.* Judge Amato granted a postconviction motion filed in the circuit court and vacated the conviction in 07CT5060 on April 26, 2010. *Id.* The charge in 07CT5060 was subsequently

dismissed by the Honorable Bonnie Gordon on November 5, 2012. *Id.* The case was reissued by the State on December 7, 2012 in Milwaukee County Circuit Court case 12CT2500. (R.2). Anton proceeded to a jury trial before the Honorable John Siefert on the operating while intoxicated third offense charge on July 7th and 8th in 2014. (R.40-41).

Anton was convicted by the jury of operating while intoxicated third offense, and sentencing went forth immediately after the trial on July 8, 2014 (R.41). The State made its sentencing argument and recommended that Anton be sentenced to five months in jail consecutive to the sentence that he was already serving. (R.41:53). The State discussed Anton's prior record that included convictions in Waukesha County Case 08CF852 for one count of first degree sexual assault and three counts of second degree sexual assault. *Id.* at 55. The State, judge and defense counsel discussed the sentence Anton was serving in the Waukesha County matter and determined that it was a total of 40 years of initial confinement. *Id.* The State also discussed Anton's history of forging conviction status reports for himself and others. (R.41:54-55). The court proposed several questions to the State regarding Anton's prior history of forging conviction status reports. *Id.*

The defense then provided its sentencing argument and recommended a sentence of 45 days in jail concurrent to the sentences Anton was currently serving. *Id.* at 60. The court asked several questions of Anton regarding his home ownership and his mandatory release date. *Id.* at 56-61.

The court sentenced Anton to a one year jail sentence concurrent to his other sentences. *Id.* at 63. The court noted that the State's request for a consecutive sentence was "piling on." *Id.* at 63. When the court asked the State for the point of a consecutive sentence, the court noted that Anton's record clearly deserved it. *Id.* at 58. The court went on to explain that Anton's use of forged conviction status reports went to the very heart of the justice system and a fairness to courts. *Id.* at 63. The court reiterated its one year sentence and noted that the sentence was symbolic, and that it would have no practical effect. *Id.* The court stated during the sentencing hearing that Anton demonstrated bad character by forging conviction status

reports. *Id.* at 59. The court also noted that Anton would be a very different person upon release from prison. *Id.* The court also imposed a \$600 fine plus costs and noted that the fine would be the real punishment, as it would come out of Anton's prison wages. *Id.* at 65. The court also ordered the maximum driver's license revocation stating that Anton should not get an inmate job that involves driving. *Id.* at 66.

After a brief discussion of immigration consequences, the court denied Anton's request to make the sentence 364 days and noted that Anton had not shown the character that deserves a green card. *Id.* at 67.

Anton filed a postconviction motion requesting a modification/resentencing as the sentence violated *State v. Gallion*, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197 and *McCleary v. State*, 49 Wis.2d, 182 N.W.2d 512 (1971). In an order dated October 28, 2015, the Court denied Anton's postconviction motion (R.23). The Court stated in its order, that the court considered Anton's poor character, the extensive sentence Anton was serving and the need for punishment as factors considered when fashioning the sentence. *Id.* at 4.

STANDARD OF REVIEW

On appellate review, a sentence from a circuit court is reviewed based on an erroneous exercise of discretion standard. *State v. Harris*, 2010 WI 79, ¶30 326 Wis.2d 685, 786 N.W.2d 409; *State v. Brown*, 2006 WI 131, ¶ 5, 298 Wis.2d 37, 725 N.W.2d 262. A circuit court sentence will be upheld if the sentence was based on the facts in the record and the Court relies on appropriate and applicable law. *Id.*

ARGUMENT

THE CIRCUIT COURT'S SENTENCE OF ANTON COMPLIED WITH THE REQUIREMENTS UNDER MCCLEARY AND GALLION

Courts must consider three primary factors during sentencing: (1) the gravity of the offense, (2) the character of the offender, and (3) the need for protection of the public. *State v. Fisher*, 2005 WI App 175, ¶ 20, 702 N.W.2d 56, 285 Wis.2d 433. Judges are to explain the reasons for the particular sentence they impose. *McCleary v. State*, 49 Wis. 2d 273, 280-81 (1971). Judges must also provide a “rational and explainable basis” for the sentence. *Id.* at 276. The amount of explanation that is necessary will vary from case to case. *State v. Gallion*, 2004 WI 42, ¶ 39. Courts should identify the general objectives of greatest importance, describe the facts relevant to those objectives, and identify what factors are considered in arriving at a sentence and how they fit with the objectives. *Id.* ¶¶ 41-43. The weight given to each factor is at the trial court’s discretion. *Id.* ¶ 41.

Trial courts are not required to state exactly how the factors it considered translate into a specific number of years of imprisonment. *Fisher*, 2005 WI App 175, ¶¶ 21-22. Nor is the trial court required to recite “magic words” to justify a sentence. *See Gallion*, 2004 WI 42, ¶ 49. Rather, trial courts are required to provide an explanation for the general range of the sentence imposed. *Id.* A sentence should ordinarily be affirmed where the relevant facts are fairly inferable from the record. *McCleary*, 49 Wis. 2d at 281.

The sentencing court is generally afforded a strong presumption of reasonability, and if our review reveals that discretion was properly exercised, we follow “ ‘a consistent and strong policy against interference with the discretion of the trial court in passing sentence.’ ” *Gallion*, 2004 WI 42, ¶ 18 (citation omitted). If the sentencing court considered

the proper factors, explained its rationale for the overall sentence it imposes, and the sentence is not unreasonable, the court does not erroneously exercise its discretion simply by failing to separately explain its rationale for each and every facet of the sentence imposed.

State v. Matke, 2005 WI App 4, ¶ 19, 692 N.W.2d 265, 278 Wis. 2d 403. Additionally, the trial court has an opportunity to explain its sentence when it is challenged by postconviction motion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

The Court's sentence on July 8th of Anton appropriately comports with the sentencing requirements laid out in *McCleary* and *Gallion*.

The court rejected the State's recommendation of five months consecutive to Anton's current sentence. (R.41:63). The court stated that, "I think granting the State's request is piling on, and I'm not going to do it." *Id.* at 63. When explaining its rejection, the court stated that it will make it a one-year sentence, the maximum, because Anton's prior forgery convictions "strikes at the very heart of the justice system". *Id.* at 63. The court stated this sentence was "symbolic" though because the one year sentence will run concurrent. *Id.* at 63.

Defense counsel argued for the court to make the sentence 364 days because of immigration purposes. *Id.* at 63-64. Anton explained to the court that a sentence that is 365 days or greater will cause him to face the possibility of being sent back to his original country. *Id.* at 64. The court rejected Anton's argument. *Id.* at 65. In doing so, the court explained that the "maximum is appropriate". *Id.* at 65. After a second plea from Anton to lower the sentence to 364 days, the court stated that:

if I had the ability as part of the sentence to revoke your green card I would. I do not believe you have shown the character that deserves a green card so I'm not going to do anything in my power to make it possible for you to keep one, okay?

Id. at 67.

Furthering the its explanation, the court explained that the real punishment is the fine of \$600 plus court costs because "[i]t's likely that it will have some effect." *Id.* at 65. The court noted that 25 percent of the prison wages can be attached to pay towards the fine. *Id.* The court gave Anton 20 years to pay the fine and if unpaid the fine would result in a civil judgment. *Id.* at 66. Additionally, the court gave Anton the maximum three year driver's license revocation, which starts when he becomes eligible for a license. *Id.* at 66-67. The court explained that it did not think Anton should get an inmate job which involves driving. *Id.* at 66.

The trial court presided over a two-day trial and heard all the relevant facts and testimony with the sentencing directly following the jury's verdict. The court specifically rejected the State's sentencing recommendation as it felt that a consecutive sentence was "piling on." The court explored Anton's character and background finding that his prior forgery convictions "strike at the very heart of the justice system". The standards under *McCleary* and *Gallion* do not require a court to use specific language or "magic words" during a sentencing. Rather, a court is required to provide a rational basis for its sentencing decision. Additionally, the court has the discretion to weigh factors differently. The court appropriately did this. The court considered a consecutive sentence and rejected it based on the sentence Anton was then serving. The court examined Anton's prior record and questioned the parties regarding Anton's prior convictions for forging conviction status reports. The court used these factors to determine that a concurrent sentence of one year was appropriate.

The court further explained its sentencing when it denied Anton's motion for postconviction relief,

While the court did not parrot some of the typical buzzwords commonly seen in some sentencing transcripts, the court identified the factors that weighed most heavily upon its sentencing decision, to wit, the defendant's character for fraud, his disturbing prior record and rehabilitative needs, the extensive amount of confinement time he was already serving in the state prison system and the interest in punishment.

(R.23 at 4).

Furthermore, the court believed that "anything less than a maximum sentence would be inconsistent with the sentencing goals in this case." *Id.* at 4. While Anton would have you believe that he had no knowledge as to why the court imposed the sentence it did, (See Defendant-Appellant Brief at 7), the court in both its sentencing and order denying postconviction relief explained its rationale for the overall sentence it imposed. In addition, the sentence was not unreasonable and the court did not erroneously exercise its discretion simply by failing to separately explain its rationale for each and every facet of the sentence imposed.

CONCLUSION

The court did not erroneously exercise its discretion in sentencing Anton to a one year concurrent sentence as it relied on several factors in reaching its decision.

Dated this _____ day of May, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,163.

_____	_____
Date	Francesco Mineo Assistant District Attorney State Bar No. 1038329

**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 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.

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