

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2016AP000683-CR

THOMAS G. ST. PETER,

Defendant-Appellant.

DEFENDANT-APPELLANT
THOMAS G. ST. PETER'S BRIEF AND APPENDIX

APPEAL FROM THE ORDER DENYING MOTION
FOR MODIFICATION OF SENTENCE ENTERED
ON MARCH 10, 2016, AND THE JUDGMENT OF
CONVICTION AND SENTENCE ENTERED ON
DECEMBER 31, 2015, IN THE CIRCUIT COURT OF
MILWAUKEE COUNTY,
THE HONORABLE JOHN SIEFERT PRESIDING

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Course of Proceedings	2
C. Disposition Below	4
STATEMENT OF FACTS	4
-+	
STANDARD OF REVIEW.....	10
ARGUMENT	11
THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN SUMMARILY DENYING ST. PETER'S MOTION SEEKING SENTENCE MODIFICATION AND IN SENTENCING ST. PETER IN THE FIRST PLACE.....	11
A. St. Peter was Denied Due Process At Sentencing Because He Was Sentenced Based On The Court's Erroneous Understanding Of The Facts.....	12
B. Judge Siefert Erroneously Exercised His Discretion In Sentencing St. Peter.....	18

	<u>PAGE</u>
CONCLUSION	24
CERTIFICATIONS	26
APPENDIX	100

TABLE OF AUTHORITIES

Cases

	<u>PAGE</u>
<i>Bastian v. State</i> , 54 Wis. 2d 240, 194 N.W.2d 687 (1972)	20
<i>Kirk v. Credit Acceptance Corp.</i> , 2013 WI App 32, 346 Wis. 2d 635, 829 N.W.2d 522.....	16
<i>McCleary v. State</i> , 49 Wis. 2d 263, 182 N.W.2d 512 (1971)	19-21
<i>Nu-Roc Nursing Home, Inc. v. State of Wisconsin Department of Health and Social Services</i> , 200 Wis. 2d 405, 546 N.W.2d 562 (Ct. App. 1996)	18
<i>Ocanas v. State</i> , 70 Wis. 2d 179, 233 N.W.2d 457 (1975)	10
<i>Sisson v. Hansen Storage Company</i> , 2008 WI App 111, 313 Wis. 2d 411, 756 N.W.2d 667.....	16
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197	<i>passim</i>
<i>State v. Giebel</i> , 198 Wis. 2d 207, 541 N.W.2d 815 (Ct. App. 1995)	10-11
<i>State v. Harris</i> , 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409	12

	<u>PAGE</u>
<i>State v. Harris</i> , 119 Wis. 2d 612, 350 N.W.2d 633 (1984)	12, 20
<i>State v. Johnson</i> , 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990)	13
<i>State v. Lechner</i> , 217 Wis. 2d 392, 576 N.W.2d 912 (1998)	11-12
<i>State v. Noll</i> , 2002 WI App 273, 258 Wis. 2d 573, 653 N.W.2d 895	10
<i>State v. Thompson</i> , 172 Wis. 2d 257, 493 N.W.2d 729 (Ct. App. 1992)	24
<i>State v. Tiepelman</i> , 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1	11, 13
<i>State v. Cortez Wright</i> , (Milwaukee County Circuit Court Case No. 16-CF-184).....	17
<i>State v. Cortez Wright</i> , (Milwaukee County Circuit Court Case No. 15-CF-3972).....	16
<i>United States v. Tucker</i> , 404 U.S. 443 (1972).....	13
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975).....	18

Statutes and Other Sources

	<u>PAGE</u>
Sec. 302.425(2), <i>Stats.</i>	4
Sec. 303.08(1), <i>Stats.</i>	4
Sec. 809.30, <i>Stats.</i>	10

	<u>PAGE</u>
Sec. 901.01, <i>Stats.</i>	16
Sec. 902.01(4), <i>Stats.</i>	16, 17
Sec. 902.01(6), <i>Stats.</i>	16
Sec. 946.41(1), <i>Stats.</i>	2, 4

STATEMENT OF THE ISSUE

Did the circuit court err when it summarily denied defendant-appellant Thomas G. St. Peter's motion seeking sentence modification and his request for a court hearing in which to apprise the court of relevant information not previously provided and a new factor supporting relief?

Not answered by circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case because it would provide the Court and counsel an opportunity to explore why hearings on sentence modification motions should not be summarily denied.

Publication of this Court's decision may be appropriate in the Court's discretion.

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises from the sentence the circuit court imposed following St. Peter's conviction of a single misdemeanor count of obstructing an officer,

contrary to section 946.41(1), *Stats.*, and the court's summary denial of St. Peter's motion for sentence modification and request for a hearing.

B. Course of Proceedings.

The state filed a criminal complaint against St. Peter on October 11, 2015. (R.2), and St. Peter was released on a signature bond with monitoring conditions following his initial appearance on the same date. (R.3). On December 30, 2015, St. Peter entered a plea of guilty to the charge of obstructing an officer. (R.4;R.8;R.18:6).

St. Peter's case proceeded to sentencing, wherein the joint recommendation of counsel was that the court impose a sentence of a fine and four days, representing the time St. Peter had already served. (R.18:10). Circuit Judge John Siefert rejected the joint recommendation and imposed a sentence of forty-five days in jail, without Huber privileges, along with monetary surcharges and sanctions. (R.18:15). Judge Siefert also rejected St. Peter's request for electronic monitoring.

(*Id.*). Judge Siefert thereafter stayed commencement of the sentence until January 11, 2016. (R.18:20). A judgment of conviction was entered on December 31, 2015. (R.8;App.101-02).

On January 7, 2016, St. Peter filed a motion and supporting papers seeking bail pending this appeal. (R.9;R.10;R.11). The motion was heard the following day by Reserve Judge Dennis Flynn, was granted and the court set a cash bond. (R.13). St. Peter filed a timely notice of intent to pursue postconviction relief on the same date. (R.12).

On March 4, 2016, St. Peter filed a motion for sentence modification. (R.14). He sought a hearing to present relevant and important new information and an order adopting the original joint recommendation of the parties for time served. (*Id.*). Alternatively, he sought a substantially lesser amount of jail time, with Huber privileges for work, to search for work, vocational training, child care, and to attend counseling and treatment, along with eligibility for release to home

detention or electronic monitoring, pursuant to sections 303.08(1) and 302.425(2), *Stats.* (*Id.*). Judge Siefert summarily denied the motion without a hearing in a two-page written decision issued on March 8, 2016. (R.15;App.103-04). St. Peter filed a timely notice of appeal on March 30, 2016. (R.16).

C. Disposition Below.

St. Peter was convicted of one count of obstructing an officer, contrary to section 946.41(1), *Stats.* He was sentenced to forty-five days straight time in jail, without Huber privileges, along with monetary surcharges and sanctions. (R.8;App.101-02). The court denied his motion for sentence modification without a hearing. (R.15;App.103-04).

STATEMENT OF FACTS

St. Peter was convicted of the misdemeanor offense of obstructing an officer based on his false report of the circumstances surrounding his being the victim of a carjacking. (R.2;R.8).

On September 25, 2015, St. Peter reported a carjacking to the Milwaukee Police Department. (R.2:1). St. Peter told the responding officer that his 2002 Honda Accord had been taken in an armed robbery, stating that a black male had gotten into the vehicle through an unlocked passenger door. (*Id.*). He reported that the man then pointed a revolver at him and told him to start driving. (*Id.*). St. Peter said he was told to pull into the gas station at 3708 West North Avenue, where he was told to get out of the car. (*Id.*). He reported that the man then drove away in his car without St. Peter's consent. (*Id.*).

During the ensuing investigation, police officers recovered video from the gas station. (*Id.*). St. Peter's 2002 Honda Accord subsequently was recovered on or about September 27, 2015, near the 2700 block of North 48th Street in Milwaukee. (*Id.*). Investigators processed the vehicle for fingerprints and recovered latent fingerprints identified as those of Cortez Wright. (R.2:1-2).

When interviewed by police investigators, Wright stated that he did not rob St. Peter. (R.2:2). Wright said that St. Peter owed Wright money for drugs and that he took St. Peter's vehicle after a drug transaction. (*Id.*). Wright stated that he asked St. Peter to purchase a cigar for him and when St. Peter left the vehicle, Wright got into the driver's seat of the vehicle and drove off. (*Id.*). Wright acknowledged St. Peter did not give him consent to take and drive his vehicle. (*Id.*).

After interviewing Wright, investigators contacted St. Peter and confronted him with Wright's statements. (*Id.*). St. Peter admitted that his story about the armed robbery portion of the auto theft was a fabrication. (*Id.*). St. Peter was charged, booked and spent four days in jail before he was released on bail. (R.18:12).

After he was formally charged, St. Peter agreed to enter a guilty plea and the state agreed to recommend a punishment of four days' time served and a fine. (R.18:3). He entered a guilty plea as agreed and the

state made the agreed-upon recommendation. (R.18:4,10).

In addressing sentence, the circuit court, Judge John Siefert, stated he was “skeptical” about a sentence of time served because St. Peter had accused an “innocent person” of a crime, stating: “whatever wrongs [Wright] may have done in his life, he did not rob [St. Peter.]” (R.18:7). Defense counsel then told Judge Siefert that the court’s statement was not accurate, and the court discussed the issue at a sidebar.¹ (*Id.*). The state then made its recommendation and laid out the facts underlying the plea, including that Wright took St. Peter’s vehicle without consent after a drug transaction. (R.18:8-9). The state argued that St. Peter’s decision to use the criminal justice system to get his car back in the way he did and to allege use of a firearm was very serious because it tied up police resources.

¹ Although the sidebar was not recorded, the subject of that sidebar likely was Wright’s acknowledgement that he did steal St. Peter’s vehicle but via his ruse and not while armed.

(*Id.*) The state also noted that St. Peter had a 2013 heroin conviction. (R.18:10).

Defense counsel reminded the court that St. Peter acknowledged his offense in failing to accurately portray why he was there and what happened. St. Peter did not tell the responding officer that he was there to buy drugs or that he was on probation. (R.18:11-12). Counsel argued that the four days St. Peter spent in jail taught him the importance of being honest and truthful. (R.18:12). Counsel also argued that St. Peter has a significant heroin addiction that must be addressed. (R.18:12-13). Indeed, St. Peter's probation officer directed him to spend sixty hours at Rogers Memorial as an alternative to revocation, which he completed. (R.18:14). Counsel further advised the court that, as a result of his arrest, St. Peter lost his position at WE Energies, a job he had held for twenty-three years and that he was in the midst of divorce proceedings. (R.18:13).

Judge Siefert began his sentence by stating that he was “not sympathetic at all” with someone who would try to frame someone, stating that while Wright was “not an upstanding citizen,” he also was not an armed robber, yet St. Peter portrayed him as one. (R.18:14). Judge Siefert then stated: “I do not think that that can be excused with a time served disposition” and then sentenced St. Peter to forty-five days in the House of Correction, straight time, remanded him into custody immediately, and denied electronic monitoring. (R.18:14-15).

Judge Siefert then added that “we don’t frame people,” “[w]e don’t like police officers that would frame someone,” and that he would not allow St. Peter to use the criminal justice system “as a method for personal vengeance for [his] own vendettas.” (R.18:16). When defense counsel pointed out that St. Peter was the victim of a crime, Judge Siefert responded, “And the police are often victims of crimes too.” (*Id.*).

Judge Siefert then elaborated that sometimes people hit police officers, adding: “And then they turn around and say because the guys hit them when they’re off duty that they should now be charged with battery to a police officer. No.” (R.18:17). The judge went on to explain that if someone hit him, not knowing he was a judge, the system does not allow police to increase the charge from simple battery to an aggravated felony. (*Id.*). Judge Siefert made no other comments and provided no other reasons for the sentence he imposed. (*See* R.18:15-20).

STANDARD OF REVIEW

The standard of review for denial of a motion for sentence modification, brought under section 809.30, is whether the sentencing court erroneously exercised its discretion in sentencing the defendant. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); *State v. Noll*, 2002 WI App 273, ¶14, 258 Wis. 2d 573, 653 N.W.2d 895. The standard of review for an unduly harsh, excessive and disproportionate sentence is whether the court

erroneously exercised its discretion. *State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

Where, however, the issue raised on appeal involves the constitutionality of the sentence imposed, a different standard applies. “A defendant has a constitutionally protected due process right to be sentenced upon accurate information,” and whether that right was violated is a constitutional question this Court reviews *de novo*. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185, 717 N.W.2d 1.

ARGUMENT

THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN SUMMARILY DENYING ST. PETER’S MOTION SEEKING SENTENCE MODIFICATION AND IN SENTENCING ST. PETER IN THE FIRST PLACE.

Sentencing is committed to the trial court’s discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence “has the burden to show an unreasonable or unjustifiable basis in the record for the sentence at

issue.” *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). In its exercise of discretion, the trial court must consider three primary factors: “the gravity of the offense, the character of the defendant, and the need to protect the public.” See *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409 (quoting *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984)). Although the weight assigned to the various factors is left to the sentencing court’s discretion, a sentence may be reversed if the court erroneously exercises its discretion. *Gallion*, at ¶17.

A. St. Peter was Denied Due Process At Sentencing Because He Was Sentenced Based On The Court’s Erroneous Understanding Of The Facts.

In exercising discretion, sentencing courts must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives. *State v. Harris*, 2010 WI 79, ¶29, (citing *Gallion*, 2004 WI 42, ¶¶39-48). A

defendant has a constitutionally protected due process right to be sentenced upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185-88, 717 N.W.2d 1 (citing *State v. Johnson*, 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990)). Accord. *United States v. Tucker*, 404 U.S. 443, 447 (1972). The *Tucker* court emphasized that the record in that case established that the sentencing judge gave specific consideration to and relied upon information that was invalid in imposing the sentence. *Id.* at 447. So, too, did Judge Siefert rely on invalid information when he imposed a lengthy straight time sentence on St. Peter for the stated reason that St. Peter had framed a totally innocent man. Judge Siefert's reliance on this invalid basis renders the sentencing proceedings lacking in due process and requires that St. Peter's sentence be set aside. *Tiepelman* at ¶4.

Virtually from the get-go, Judge Siefert told the parties that he was not going to accept the joint recommendation of time served because he erroneously

believed that Wright was an innocent man who was framed by St. Peter. This mindset continued throughout his sentencing remarks. "I am not sympathetic at all with the idea of people who essentially frame someone," the court stated, just before jumping to the joint recommendation by a factor of ten and denying Huber privileges. (R.18:14). While Wright did not take St. Peter's car at gunpoint, he did steal it. Wright was not innocent and he was not framed, but the impression in the judge's mind was that he was, which is incorrect, but is the sole basis for the long, harsh sentence he imposed on St. Peter.

Judge Siefert's misunderstanding is curious because, during her recitation of the underlying facts of the taking of St. Peter's car by Wright, the prosecutor noted that St. Peter's story to police was "somewhat correct." (R.18:8). St. Peter's car was indeed stolen by Wright, albeit not as an armed carjack, but as an unarmed felony theft during an attempt by St. Peter to buy drugs from Wright. This critical fact does not seem

to have gotten through to Judge Siefert. The prosecutor went back-and-forth interchanging the words “victim” and “defendant.” St. Peter was both. It was St. Peter’s embellishment of the circumstances surrounding the theft of his car, *not* the fact it was stolen from him, that underlay the obstructing charge. This, according to the prosecutor, used up extra police time and the arrest, four days in jail and fine imposed on St. Peter, would be sufficient to “impress upon him the seriousness of the offense, and that he would not use police resources like this again.” (R.18:10).

Perhaps additional confusion arose from the prosecutor’s use of the terms “victim” and “defendant.” St. Peter’s defense attorney stated that when the prosecutor “used the term victim and defendant I’m not sure if I fully understood during part of the presentation who is whom.” (R.18:10). Defense counsel went on to state that Wright indeed is a defendant as he is facing a criminal prosecution for stealing St. Peter’s car. (R.18:11).

Appellate counsel respectfully requests that this Court take judicial notice of Wright's pending criminal matters. *State v. Cortez Wright*, (Milwaukee County Circuit Court Case No. 15-CF-3972), charges Wright with a felony for his theft of St. Peter's car. This Court may take judicial notice of CCAP records in other matters, CCAP being "an acronym for Wisconsin's Consolidated Court Automation Programs. The online website reflects information entered by court staff." *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32 ¶5, n.1, 346 Wis. 2d 635, 641, 829 N.W.2d 522 (citing section 901.01, *Stats.*) Judicial notice may be taken at any stage of the proceedings in a case, including on appeal. Section 902.01(6), *Stats.*; *Sisson v. Hansen Storage Company*, 2008 WI App 111, 313 Wis. 2d 411, 756 N.W.2d 667. A copy of the CCAP record on this felony case and the criminal complaint are being supplied to this court under section 902.01(4), *Stats.*, so that judicial notice can be taken. (App.105).

In March 2016, around when Judge Siefert summarily denied St. Peter's motion for a hearing to reconsider and modify the long, straight time sentence, St. Peter's current counsel became aware of startling new evidence that Wright indeed stole prospective drug purchasers' vehicles, at the point of a gun. In *State v. Cortez Wright*, (Milwaukee County Circuit Court Case No. 16-CF-184), Wright is charged with the armed robbery of Mr. T.Z. by taking his car at gunpoint when Mr. Z was trying to buy drugs from Wright. A copy of the CCAP record on this felony case and the criminal complaint are being supplied to this court under section 902.01(4), so that judicial notice can be taken. (App.109).

Judge Siefert's understanding was factually incorrect, as confirmed by both the prosecutor and defense counsel. Yet, once this first impression was created in the court's mind, Judge Siefert became "psychologically wedded to a predetermined disposition of the case," (a big straight time jail

sentence) regardless of the facts, the *McCleary* factors and the good reasons set forth by both counsel as to why the joint recommendation was appropriate. *Nu-Roc Nursing Home, Inc. v. State of Wisconsin Department of Health and Social Services*, 200 Wis. 2d 405, 420, 546 N.W.2d 562, 568 (Ct. App. 1996) (quoting *Withrow v. Larkin*, 421 U.S. 35, 57 (1975)). Judge Siefert's failure to recognize and sentence St. Peter based on accurate facts, and not on his erroneous belief that Wright was an innocent person who was framed for a theft he did not commit, denied St. Peter his constitutional right to due process. Therefore, that sentence should be reversed and a new sentencing hearing ordered.

B. Judge Siefert Erroneously Exercised His Discretion In Sentencing St. Peter.

In addition, Judge Siefert utterly failed to explain his sentence. He did not explain why he rejected the state's recommendation of time already served in jail, plus a fine. More importantly, he did not address any of the relevant sentencing factors established in *Gallion*

and *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

In *McCleary*, the Wisconsin Supreme Court recognized the three primary factors upon which a sentencing decision should be based referenced above. *McCleary* also enunciated the presumption that the “sentence imposed in each case should call for the *minimum amount of custody* or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.” *McCleary*, 49 Wis. 2d at 276 (emphasis added).

The Supreme Court reiterated in *Gallion* that “*McCleary* was and still is one of the best statements addressing how a circuit court should exercise its discretion.” *Gallion*, 2004 WI 42, ¶26. Under *McCleary* and *Gallion*, a sentencing court must state the factors being applied, not just lash out to punish based on an incorrect understanding of the underlying facts.

Reasons, not just pique or strong emotion, are the basis of a fair and just sentence.

Gallion also reconfirmed the holding in *Bastian v. State*, 54 Wis. 2d 240, 194 N.W.2d 687 (1972), in which our Supreme Court adopted the ABA Criminal Justice Standards Relating to Probation, which standards state that probation should be considered as the first alternative in sentencing. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The *McCleary* and *Gallion* standards call for the imposition of the minimum amount of confinement in any sentencing decision.

Probation should be the sentence unless the court finds that:

- (i) confinement is necessary to protect the public from further criminal activity by the offender; or
- (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
- (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.

Gallion, 2004 WI 42, ¶25, 270 Wis.2d at 551-552.

Judge Siefert did not consider probation at all, nor did he address these three factors. He also did not specify why he rejected time served, other than to say that St. Peter's conduct should not be "excused" by a time served disposition. He did not explain what he meant by that statement and St. Peter is at a loss as to how any sentence following a guilty plea to the charged offense constitutes an "excuse" for misconduct.

When looking at the relevant inquiries, findings and secondary factors that a sentencing court should make at a sentencing hearing, which arise from *McCleary* and its progeny, they do not square with the lengthy straight-time jail sentence imposed on St. Peter. *See Gallion*, 270 Wis.2d 535, ¶43, n.11.

These factors include --

1. Defendant's prior criminal record: St. Peter had a prior drug conviction.
2. History of previous undesirable behavior patterns: None other than the prior conviction.
3. Defendant's personality, character and social traits: Judge Siefert did not address any of these traits, including St. Peter's admitted drug addiction, the

treatment alternative to revocation (ATR) that arose from his arrest in this case and the ongoing need for treatment. How was St. Peter to go to required counseling and comply with his probation rules if he was doing forty-five days straight time?

4. Results of presentence report: No PSI ordered by court., but St. Peter being given an ATR, rather than revocation, dictates that probation was viable.
5. Vicious or aggravated nature of crime: There was no vicious or malicious intent on St. Peter's part. He embellished the circumstances of the car theft to cover up his reason for meeting Wright; to obtain drugs.
6. Defendant's culpability: St. Peter accepted full responsibility and resolved the case by a plea rather than trial.
7. Defendant's demeanor: No comments made regarding St. Peter's demeanor.
8. Defendant's age: St. Peter was forty-six at the time of the offense.
9. Defendant's education and employment background: St. Peter's education was not discussed. Defense counsel advised that St. Peter had lost his job of twenty-three years as a result of the obstructing charge and being held in jail.
10. Defendant's remorse and cooperativeness: When confronted by police as to embellishing and fabricating the armed robbery part of his stolen car report to them, St. Peter immediately admitted there was no gun and was

remorseful. Thereafter, he cooperated with authorities, his counsel and the court throughout the proceedings and apologized at his sentencing hearing.

11. Need for close rehabilitative control: None identified. St. Peter remains on probation after completing his treatment ATR to obtain needed help with his addiction issues. The court did not address this or why concurrent probation should not be considered.
12. Need to protect the public from future illegal conduct by the defendant: Not addressed, but not an issue.
13. Length of pretrial detention: Four days in jail. Judge Siefert gave credit for that time against the forty-five (45) day straight time jail sentence.
14. Gravity of offense: The offense was serious in that police time was needlessly incurred; however, contrary to Judge Siefert's comments, St. Peter did not accuse and "frame" a "totally innocent person." Wright did steal St. Peter's vehicle, but did not use a firearm.
15. Defendant's character: Judge Siefert did not address St. Peter's character.

A trial court erroneously exercises its sentencing discretion "when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one

sentencing factor in the face of other contravening circumstances.” *State v. Thompson*, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). *Gallion* also requires that the trial court explain the “linkage” between the sentence imposed and the sentencing objectives. *Gallion*, at ¶46, 270 Wis. 2d at 560.

Judge Siefert provided no explanation as to why he believed that forty-five days straight time was the minimum amount of confinement necessary and appropriate for this particular defendant in this case. His comments provided no “linkage” between the offense and the sentence. Instead, the court relied on unrelated hypotheticals that did not address or acknowledge that St. Peter’s sin was to embellish *how* the robbery occurred.

CONCLUSION

For all of these reasons, defendant-appellant Thomas G. St. Peter respectfully urges this Court to reverse the circuit court’s denial of his postconviction motion and remand the case for resentencing.

Dated this 17th day of October, 2016.

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**CERTIFICATION PURSUANT TO
SECTION 809.19(8)(d), *STATS.***

Pursuant to section 809.19(8)(d), *Stats.*, I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this brief is 3,937 words.

KATHRYN A. KEPPEL

**CERTIFICATION PURSUANT TO
SECTION 809.19(2)(b), *STATS.***

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 section 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
- (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.

KATHRYN A. KEPPEL

**CERTIFICATION PURSUANT TO
SECTION 809.19(12)(f), *STATS*.**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), *Stats*.

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.

KATHRYN A. KEPPEL

**CERTIFICATION PURSUANT TO
SECTION 809.19(13), *STATS*.**

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of section 809.19(13), *Stats*.

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

KATHRYN A. KEPPEL