STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 2016AP000918-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIMITRI C. BOONE,

Defendant-Appellant.

On Appeal from Judgments of Conviction
Entered July 31, 2014 in Milwaukee County Circuit Court,
the Honorable David Borowski Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Boone Presented a New Factor to the Circuit Court.

The State turns to this Court's decision in ***State v. Sobonya***, 2015 WI App 86, 365 Wis. 2d 559, 872 N.W.2d 134, in support of its argument that Mr. Boone has not presented a new factor. In ***Sobonya***, this Court held that a sociologist's report — containing his expert opinion that granting expunction would not undermine the deterrent effect of the sentence — was not a new factor justifying sentence modification. ***Id***. This Court's reasoning was as follows:

> The postsentencing report is not a "fact or set of facts" that were not in existence or unknowingly overlooked by the parties at the time of sentencing; the postsentencing report is an expert's opinion based on previously known or knowable facts. The report simply offers an opinion that is not shared by the trial court and that the court was entitled to accept or disregard as it deemed appropriate.

Id., at ¶ 7, 365 Wis. 2d at 565, 872 N.W.2d at 136 (citations omitted).

The State recognizes that the new information Mr. Boone offered is "different" from the report presented in ***Sobonya*** in that the information presented here "does not focus on social science." (State's Brief at 8). This is an understatement. ***Sobonya*** is inapposite. In ***Sobonya***, the defendant presented an expert's spin on the known facts. Mr. Boone presented facts that were unknown at the time of sentencing. Specifically, he presented proof that factual assertions contained in the presentence report relied upon by the Court were materially false. This case is nothing like

Sobonya. Mr. Boone did not ask the circuit court to reconsider its opinion about the facts in light of an expert's opinion. Mr. Boone pointed out that the facts were materially different than the Court believed them to be at the time of sentencing.

In order to try to make use of ***Sobonya***, the State seizes upon this Court's language about the report in that case being "an expert's opinion based on *previously known or knowable facts*." ***Id.*** (emphasis added). The State reads this language to exclude as a new factor any fact that was "knowable" at the time of sentencing. Thus, the State reasons that because the contents of Mr. Boone's parole file were "knowable" at the time of sentencing, they cannot be a new factor. (State's Brief at 8). This is an unwarranted stretch of the holding in ***Sobonya***.

Furthermore, the State's reading of ***Sobonya*** is inconsistent with the Wisconsin Supreme Court's definition of a new factor. A new actor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***State v. Harbor,*** 2011 WI 28, ¶ 40; 333 Wis. 2d 53, 74, 797 N.W.2d 828 (citation omitted). By definition, a fact that was "overlooked" by the parties at the time of sentencing was also "knowable." While it was certainly possible for someone to ascertain the contents of Mr. Boone's probation file at the time of sentencing, that did not happen. The information, while potentially "knowable," was overlooked. It was unknown to the sentencing court and is a new factor under ***Harbor***. It is worth noting that the information was unknown and overlooked because the PSI affirmatively

presented untrue and misleading information to the court and the parties.

The State also claims that the information Mr. Boone has presented was known to the sentencing court because "the sentencing court was aware that Boone disagreed with the statements in the PSI report." (State's Brief at 9). However, there is a world of difference between what the sentencing court knew and the full truth. The Court knew only that Mr. Boone took issue with some of the statements in the PSI report. The full truth was that there was documented proof that the report contained multiple materially false and misleading statements.

Defense counsel did not even present his own opinion about the inaccuracy of the PSI, let alone any documentation. Defense counsel's weak protestations, prefaced as they were with "Mr. Boone says . . ." and "He denies. . ." were unlikely to carry much weight with the court. (R. 47: 5, 17). It was Mr. Boone's word versus the word of the PSI writer. What is now known is that the description of Mr. Boone's abysmal performance on supervision that was contained in the PSI was materially false and misleading. And Mr. Boone's protestations did not alert the sentencing court to the *volume* of misleading information that had been presented about Mr. Boone.

Mr. Boone submits that he has presented a new factor as a matter of law.

II The Circuit Court Erroneously Exercised Its Discretion When It Refused to Modify Mr. Boone's Sentence Based on the New Factor He Presented.

The State faults defense counsel for failing to object to the misleading information in the PSI and cites the unpublished decision in ***State v. Schultz***, No. 2007AP356-CR, for the proposition that "[w]here the information stated in the PSI is not challenged or disputed by the defendant at the time of sentencing, the sentencing judge may appropriately consider that information." (State's Brief at 11). However, Mr. Boone is not arguing that it was improper for the sentencing judge to consider the PSI at the time of sentencing. He is asserting that when he showed that the information in the PSI was materially false, he presented a new factor that warrants a modification of the sentence.

Schultz has no bearing on this case. For one thing, Schultz had moved for plea withdrawal, not sentence modification. And the Court in ***Schultz*** found that the information complained of was not inaccurate at all. ***Id***. at ¶ 13. The State seems to be arguing that failure by counsel to object to inaccurate information at the time of sentencing precludes a motion for sentence modification when the inaccuracy is later discovered. The State offers no authority that supports this conclusion. The notion is inconsistent with the definition of a new factor, which includes a fact that was "unknowingly overlooked by all of the parties." ***Harbor,*** 2011 WI 28 at ¶ 40; 333 Wis. 2d at 74, 797 N.W.2d 828.

The State points out that the circuit court offered reasons for the lengthy sentence it imposed other than Mr. Boone's performance on supervision. In its decision denying Mr. Boone's motion, the court explains that at sentencing it relied on Mr. Boone's record of prior sex offenses, his lack of

remorse, and his "tendency to make up preposterous excuses" for his crimes. (R. 40: 3). To be sure, Mr. Boone cannot show that his performance on supervision was the *only* basis for the sentence or even the *principal* basis. He does not need to. Mr. Boone asserts that it is impossible to read the sentencing transcript and not conclude that the court's belief that Mr. Boone's performance on probation was "atrocious" — a belief that turned out to be false — was highly relevant to the sentencing decision. (R. 37: 38).

This Court must review the judge's sentencing decision "in light of the strong policy against interference with the discretion of the trial court in passing sentence." ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975), citing ***State v. Tuttle,*** 21 Wis.2d 147, 124 N.W.2d 9 (1963); ***Voigt v. State,*** 61 Wis.2d 17, 211 N.W.2d 445 (1973). Mr. Boone is mindful that the standard of review is real impediment to him in this case. However, he asserts that this Court is not required to uncritically accept the circuit court's subjective after-the-fact assertion that the new factor would not have changed the sentence. Such a requirement would insulate the circuit court's decision from any meaningful review.

Mr. Boone asserts that in this case, the court's after-the-fact statement that the sentence would have been the same even if the court had known about the misleading statements in the PSI should not be uncritically accepted because it is not reasonable in light of the facts in this record. The court expressly relied on the PSI and its characterization of Mr. Boone's performance on supervision as one of the bases for its sentence. (R. 47: 37-38; App. 118-119). Further, the judge rejected the reasoning of both parties and expressly aligned himself with the PSI writer to impose a period of initial confinement five times greater than requested by the State.

(R. 47: 33; App. 114). Yet, in its decision denying Mr. Boone's motion, the sentencing court never even examines the effect of the revelations about the PSI. In fact, the court refuses to even fully acknowledge that untruthful information was presented in the PSI. The court insists on referring to the inaccuracies as "the *purportedly* inaccurate information." (R. 40: 3)(emphasis added).

The court could not rationally assess the effect of the inaccurate information on the sentencing decision without first admitting that inaccurate information was presented and acknowledging the full extent of it. Given the court's refusal to even acknowledge that the PSI writer with whom the court had aligned itself grossly mischaracterized Mr. Boone's performance on probation supervision , the court's insistence that the false information did not make a difference looks more like a reflexive response to the motion than the reasoning process that an exercise of discretion requires.

CONCLUSION

For these reasons, Mr. Boone requests that the Court reverse the circuit court's order denying his motion to modify his sentence.

Dated this 4th day of November, 2016.

Respectfully submitted,

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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 1,599 words.

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.

Dated this 4th day of November, 2016.

Signed:

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