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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP1294-CR

Waukesha County Circuit Court Case No. 14-CF-815

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID H. NINNEMANN,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and from Postconviction Orders entered by Branch 9 of the Waukesha County Circuit Court, the Honorable Michael J. Aprahamian, Presiding

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Brief of the Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Statutes

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant submits that oral argument is unnecessary because the issues can be set forth fully in the

briefs. Publication is unnecessary as the issue presented relates solely to the application of existing law to the facts of record.

STATEMENT OF THE ISSUES

1. Did the circuit court erroneously exercise its sentencing discretion when it sentenced Ninnemann to thirty six months jail after his probation was revoked?

Circuit Court answered: No.

2. Was the circuit court's discretionary decision to require Ninnemann to register as a sex offender an erroneous exercise of discretion?

Circuit Court answered: No.

STATEMENT OF THE FACTS

David H. Ninnemann was originally charged with eighty (80) counts: forty (40) counts of exposing genitals to a child under Wisconsin State Statute § 948.10(1)(a) and forty (40) counts of lewd, lascivious behavior under Wis. Stat. § 944.20(1)(b). (1). Ninnemann, through counsel, entered a plea of no contest and was convicted of five (5) counts of Lewd, Lascivious Behavior under Wis. Stat. § 944.20(1)(b). (29). The remainder of the charges were dismissed and read-in. (29).

The Court withheld imposition of sentence and placed Ninnemann on three years' probation. (20). As part of the sentence, the Court ordered Ninnemann to register as a sex offender pursuant to Wis. Stat. § 973.048. (34:18). In requiring Ninnemann to register, the Court determined that Ninnemann's actions were "sexually motivated" (34:18). In expanding upon this determination, the Court referenced that the acts "happened over 40 times" (34:18). The Court also found that reporting would be in the best interest of the public for purposes of deterrence and so that the public is made aware of the "kind of person" Ninnemann is. (34:18).

Ninnemann began probation the day he was sentenced. (42). He has no issues on probation from June 17, 2015 until February 1, 2016 when he was placed in custody. (42). He was placed in custody for failing to comply with sex offender treatment. (42). That was his only violation while on probation. Ninnemann waived his right to a revocation hearing. (42).

Ninnemann's agent recommended a maximum sentence of 45 months. (48:4). The State concurred with that recommendation despite an acknowledgment that a 45 month county jail sentence was an extraordinary and unusually long sentence. (48:4). The State asserted that the original compromise in the case contemplated three years of supervision as protection for the victim. (48:4). The State's argument for such an extraordinary length of time was to give security to the victim. (48:5).

Ninnemann argued for time served, citing the condition time he already sat, the 28 days straight time he sat and the fact that the only violation on probation was for failing to comply with sex offender counseling. (48).

The court reiterated its concern about the number of times the indecent conduct occurred. (48:15). The court outlined that it placed Ninnemann on probation because it felt that Ninnemann was targeting the victim for sexual gratification. (48:15). The court said the original sentence was fair and that Ninnemann "just didn't comply". (48:16). The court ordered 8 months straight time on Count 41 and 7 months county jail with Huber for the other four counts. (48:19).

Ninnemann challenged both the sex offender registry requirement and the sentence after revocation through postconviction motions in circuit court. (39 & 49). The circuit court denied both motions. (54). Ninnemann appeals the sentence after revocation and the orders denying his postconviction motions.

ARGUMENT

I. THE DECISION TO REQUIRE NINNEMANN TO REGISTER AS A SEX OFFENDER CONSTITUTED AN ERRONEOUS EXERCISE OF SENTENCING DISCRETION.

Ordering a person to register with the sexual offender registry under Wis. Stat. § 973.048 for a Lewd and Lascivious conviction is subject to the Court's discretion. Statutory language and case law allow for the Court to impose the registration requirement provided that the underlying conduct for which the offender was convicted was "sexually motivated" and that registration be in the public's best interest. Sexually motivated is defined by statute and further considered by case law. The court stated an act is sexually motivated if, "one of the purposes for an act is for the act of sexual arousal or gratification or for the sexual humiliation or degradation of the victim." (34:18). The Court of Appeals reviews a trial court's discretionary decision under the erroneous exercise of discretion standard. ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). Thus, the Court of Appeals will uphold a discretionary decision if the circuit court reached a reasonable conclusion based on the proper legal standard and a logical interpretation of the facts. ***Id***. In reviewing a discretionary decision, the Court of Appeals will look for reasons to sustain the trial court. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

The Court offered two explanations for why Ninnemann's conduct was determined to be sexually motivated. The court expressly cited the 40 occurrences and that the alleged victim is a minor in finding the acts to be sexually motivated. (34:16). Ninnemann rejects this concept. There is no evidence that these acts, if they did in fact occur, were sexually motivated. Ninnemann and the alleged victim were long-term neighbors, making sporadic contact natural. Further, the quantity of the read-in counts is irrelevant as to whether Ninnemann should be subject to register in this matter as read-in offenses may not be considered in determining whether a defendant should register pursuant to

Wis. Stat. § 973.048. ***See State v. Martel***, 2003 WI 70, 262 Wis. 2d 483, 664 N.W.2d 69. Notwithstanding the irrelevance of the read-in counts in determining whether Ninnemann be required to register, the Court made multiple references to the volume of the events. The Court considered on the record, "…the fact for it to happen so many times…" (34:16) and that the alleged victim "…had to endure this for five months…" (34:16), considering the read-in counts in its determination. The Court erred in considering these counts when determining whether Ninnemann should register as a sex offender.

The discretionary determination should also take into account the public interest. The Court cites its concern for the protection of the community (34:17) though Ninnemann had displayed no conduct from the time of the charges that would indicate a likelihood to reoffend. He has remained compliant with all requirements and recommendations of the Court. Ninnemann has not exhibited any propensity to engage in conduct similar to that of the charges. There is no evidence to show Ninnemann was or is a danger to the community, nor would requiring him to register as a sex offender be in the best interests of the community. Ninnemann has no prior criminal record nor is there any indication he has engaged in similar conduct. Further, a sex offender evaluation performed by Joseph Henger resulted in a "very low risk for sexual recidivism" with a Static-99R score of -2.

The considerations made by the Court at the sentencing hearing in regards to the sexual offender registration under Wis. Stat. § 978.048 were erroneous. There was no evidence to show the behavior was sexually motivated, that there would be any benefit to the community, nor should the read-in counts have been considered. The requirement that Ninnemann register as a sexual offender is under the discretion of the court, but was ordered in error in this instance.

Because of these errors, this court should reverse the circuit court's decision to require Ninnemann to register as a sexual offender and should not require sex offender registration in this case.

II. THE COURT'S SENTENCE AFTER REVOCATION CONSTITUTED AN ERRONEOUS EXERCISE OF SENTENCING DISCRETION.

A criminal sentence should represent the minimum amount of custody consistent with the factors of the gravity of the offense, the character of the offender and the need to protect the public. ***State v. Setagord***, 211 Wis. 2d 397, 416, 556 N.W.2d 506, 514 (1997); ***State v. Borrell***, 167 Wis. 2d 749, 764, 482 N.W.2d 883, 888 (1992). Probation should be considered as the first alternative. ***Bastian v. State***, 54 Wis. 2d 240, 248-49 n.1, 194 N.W.2d 687 (1972). The record must show that the sentencing Court engaged in a logical process of reasoning based on the facts of record and proper legal standards. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The Wisconsin Supreme Court reaffirmed the sentencing standards established in ***McCleary***. ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Ninnemann has a due process right to be sentenced based on accurate information. ***State v. Anderson***, 222 Wis. 2d 403, 408, 588 N.W.2d 75, 77 (Ct. App. 1998).

It is well recognized that it is in the inherent power of the trial court to "amend, modify and correct a judgment of sentencing." ***Hayes v. State***, 46 Wis. 2d 93, 102, 175 N.W.2d 625, 629 (1970). Sentence determination issues should, therefore, be raised with the trial court. ***State v. Meyer***, 150 Wis. 2d 603, 606, 442 N.W.2d 483, 485 (Ct. App. 1989). The trial court may review its original sentence for abuse of discretion and determine that the original sentence was unduly harsh or unconscionable. ***Cresci v. State***, 89 Wis. 2d 495, 504, 278 N.W.2d 850, 854 (1979).

An abuse of discretion, for example, occurs if the sentencing court fails to state, on the record, the factors influencing its decision. ***State v. Larsen***, 141 Wis. 2d 412, 428, 415 N.W.2d 535, 542 (Ct. App. 1987).

The Court of Appeals will review a sentencing after probation revocation "on a global basis treating the latter sentencing as a continuum of the" original sentencing

hearing. ***See State v. Wegner***, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 101, 619 N.W.2d 289, 291. Thus, at sentencing after probation revocation, a circuit court should consider many of the same objectives and factors that it is expected to consider at the original sentencing hearing. ***See Id***.; ***see also State v. Brown***, 2006 WI 131, ¶¶20–21, 298 Wis. 2d 37, 49–50, 725 N.W.2d 262, 268.

Ninnemann contends that the sentences after revocation ordered by the circuit court do not reflect the proper exercise of sentencing discretion.

Most importantly, there was limited to no mention of the mitigating factors present in the case. The court had next to nothing positive to say about Ninnemann which is wrong. This shows that the court's sentence did not reflect the required exercise of sentencing discretion. These are the mitigating factors that the court did not address at the sentencing after revocation hearing:

(1)The fact that Ninnemann maintained stable employment while on probation.
(2)The fact that Ninnemann did not commit any law violations while on probation.
(3)The fact that Ninnemann did not miss appointments with his agent while on probation.
(4)The fact that the non-compliance with sex offender treatment was the sole violation while on probation.
(5)The fact that Ninnemann had no WCS violations while on pre-trial supervision.
(6)The fact that there had not been one incident of lewd and lascivious behavior since 2013.

This list of factors prove that the court was incorrect when it concluded that Ninnemann "just didn't comply" with probation. That was not accurate information. Ninnemann substantially complied with probation. He did show he could comply with the law. He has complied with the law ever since he was charged with these crimes.

Furthermore, the State grossly overstated the need for an extraordinary length of jail time as a way to protect the victim. She did not need protection. There have been no

alleged incidents since 2013. The court even allowed Ninnemann to move back into his residence in September 2015, against the victim's wishes, and Ninnemann repaid the court's loyalty by not committing any violations or causing issues for the victim or the victim's family. Also, nothing would stop the victim or the victim's family from seeking a restraining order against Ninnemann and receiving the protections that a restraining order provides. And Ninnemann is subject to sex offender registry which is an additional protection for the victim and the general public that will last long after Ninnemann completes his sentences.

The court was concerned at the original sentencing hearing and concerned at the sentencing after revocation hearing about Ninnemann's denials. Counsel understands those concerns in light of Ninnemann's comments to the court at the sentencing hearing and sentencing after revocation hearing. The denials sound like sour grapes and that Ninnemann has "buyer's remorse" for entering into the plea agreement in 2015. That is likely the case. But that does not, in reviewing the entire record here, prove that he is a higher risk to the community and that he deserves three years of county jail time for one probation violation. The record, since the charges were filed against him, prove that Ninnemann is *not* a risk to the public. His denials, therefore, are not as aggravating as portrayed by the court. The court, at the original sentencing hearing, concluded that its belief was that Ninnemann was targeting the victim for sexual gratification. Even if that is correct, *that is not happening anymore*. And since that is the case, the fact that Ninnemann was charged, convicted, served condition jail time and was on probation has obviously sent a message and deterred him from committing this conduct.

The court basically transferred the three years of probation it originally ordered to three years of county jail time. Based on the record and established laws related to sentencing and sentencing after revocation, the jail sentences, as fashioned, constituted an erroneous exercise of judicial discretion. As such, they must be modified.

CONCLUSION

For the above-mentioned reasons, Ninnemann respectfully requests the following:

Reversal of the circuit court's order requiring Ninnemann to register as a sex offender; and

Reversal of the circuit court's sentences after revocation and a directive to the circuit court to modify the sentences to a time served disposition.

Dated this ___ day of September, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,195 words. I hereby further certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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. I hereby further certify that an electronic copy of this Brief was submitted pursuant to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the Brief is identical to the text of the paper copy of the Brief.

Basil M. Loeb

APPENDIX TABLE OF CONTENTS