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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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Reply Brief of the Defendant-Appellant

Basil M. Loeb
Attorney for Defendant-Appellant
State Bar No. 1037772

949 Glenview Avenue
Wauwatosa, WI 53213
(414) 259-9300 (Telephone)
(414) 259-9303 (Facsimile)
loeb@lawintosa.com

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REPLY ARGUMENT

Ninnemann incorporates herein by reference all of the arguments made in his initial brief. Ninnemann further responds to the arguments made by the State to the extent such arguments were not covered in his initial brief.

At the outset, Ninnemann notes that the State's primary argument is that Ninnemann has not shown that the trial court relied on an unreasonable or unjustifiable basis to make its sentencing decision. (State Br. at 2). Ninnemann disagrees. The court's finding that Ninnemann's conduct was sexually motivated was unreasonable. Further, sentencing Ninnemann to thirty-six months in jail for one violation of probation was unreasonable especially in light of the court inaccurately stating that Ninnemann just didn't comply. Ninnemann's replies are further developed below.

I. THE FINDING THAT NINNEMANN'S CONDUCT WAS SEXUALLY MOTIVATED CONSTITUTED AN ERRONEOUS

EXERCISE OF SENTENCING DISCRETION.

Contrary to the State's argument, the sentencing court did exclusively focus on the number of read-ins and the fact that the victim was a minor. The fact is, there was no real reason behind Ninnemann's conduct. He did not explain his conduct to the police and he did not make a statement at sentencing before the court pronounced its sentence. The court simply made assumptions about the conduct, based again on the number of read-ins and the age of the victim, and concluded that the conduct was sexually motivated.

Additionally, the State did not request the court to order Ninnemann to register as a sex offender. The State, who advocates for victims of crimes, did not feel that sex offender registry was appropriate. The State, who was in constant communication with the victim and her family, did not feel that sex offender registry was appropriate. The court did not take the State's position into account which was unreasonable.

The victim, who read a statement at the sentencing hearing through her attorney, did not discuss whether the conduct was sexually motivated or whether she felt that Ninnemann was a sexual predator. The victim, who, unlike the State, was not bound by the plea agreement, did not request that the court order Ninnemann to be required to register.

Moreover, prior to this case Ninnemann had no prior criminal record whatsoever. Ninnemann was fifty-eight years old at the time of sentencing. (State App. 11). His age and lack of prior record weigh heavily against the court's concern for the protection of the community. Also, Ninnemann's conduct since his arrest, which was to basically stop this type of behavior, also weighed against the court's concern for the public. Quite simply the arrest and ultimate criminal conviction for a fifty-eight year old man was substantial and sufficient deterrent for him to stop the behavior and the additional protection provided by the registry was unnecessary.

Ninnemann obviously also took the position that he should not have to register. Despite all this, the court required him to register and this decision was unreasonable.

Therefore, the Court of Appeals 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. A THIRTY-SIX MONTH JAIL SENTENCE FOR ONE VIOLATION OF PROBATION CONSTITUTES AN ERRONEOUS EXERCISE OF SENTENCING DISCRETION.

Ninnemann committed one singular violation of his probation during his approximately eight months on probation. Ninnemann then waived his revocation hearing and was sentenced to thirty-six months in jail for committing one violation of his probation. Based on the record, that was unreasonable and unjustified.

As with respect to Ninnemann's first argument, the State contends that there was no unreasonable or unjustifiable basis in the thirty-six month jail sentence. (State Br. at 9). And as in the first section, the State is wrong.

The primary proof of the unreasonableness of the thirty-six months is the court's evaluation of Ninnemann's conduct on probation. But for the sex offender treatment failure, Ninnemann's conduct was spotless. Most importantly to everyone concerned from the court, the victim and the public, was the fact that Ninnemann was no longer engaging in this type of conduct, whether towards the victim or any other individual. The purpose of the criminal justice system, which includes stopping people from offending, worked. Ninnemann stopped offending. The State acknowledges this in their brief when they concede that "Ninnemann's lewd and lascivious conduct did not continue throughout probation" (State Br. at 14). The sentencing court unreasonably ignored this fact which is concerning to Ninnemann since it shows that Ninnemann was complying with probation and that probation was working.

To phrase it differently, the court's concern that Ninnemann was an increased risk to the community because he did not comply with sex offender treatment was unfounded and not supported by the record. The fact is that Ninnemann's performance on bail and on probation, which included him refraining from committing lewd and lascivious acts, prove that the court's concerns were unfounded and unreasonable. As such, the thirty-six month jail sentence for not complying with sex offender treatment was also unfounded and unreasonable.

Finally, the State argues that the court has no obligation to repeat all the positive and negative circumstances of the case. (State Br. at 15). The court's sentence, however, does have to show that the court appropriately exercised its discretion. The court did not appropriately exercise its discretion as it relied on an unreasonable interpretation of Ninnemann's conduct while on probation and conveniently ignored the fact that Ninnemann had stopped committing lewd and lascivious acts. The criminal justice system has worked – Ninnemann was no longer committing crimes. He did not deserve to receive thirty-six months of jail for not complying with sex offender treatment.

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, the thirty-six month jail sentence for one violation of probation was unreasonable.

CONCLUSION

For the above-mentioned reasons and for the reasons articulated in his initial brief, 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 November, 2016.

Basil M. Loeb
Attorney for Defendant-Appellant
State Bar No. 1037772

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 1,048 words.

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