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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2016AP002386-CR

(Waukesha County Circuit Court Case No. 2014CM002093)

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

MARNIE L. COUTINO a/k/a MARNIE L. SPIEZER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE MICHAEL APRAHAMIAN PRESIDING

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STATEMENT OF THE ISSUE

1. Did the circuit court properly exercise its sentencing discretion as required by ***State v. Gallion*** and ***McCleary v. State***?

Trial Court Answer: Yes.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument or publication. This case can be decided on the basis of the record alone and well established principles of law enunciated in ***McCleary v. State*** and ***State v. Gallion***.

STATEMENT OF THE CASE

On November 17, 2014 a criminal complaint was filed in the Waukesha County Circuit Court charging the Defendant with two counts of misdemeanor theft, contrary to Wis. Stat. § 943.20(1)(d).[1] (R1)

Norma M. and Hector M. reported to Detective Harnish of the City of Oconomowoc Police Department that in June of 2012, the defendant approached them and said she would be willing to assist them in obtaining legal work permits or visas so they could remain in the United States to work. (R1:3) The defendant told them that in order to take advantage of a new change in the law they would need to provide her with $1,000.00 each for the immigration

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[1] **943.20 Theft.**

(1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):

……..

(d) Obtains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes a promise made with intent not to perform it if it is a part of a false and fraudulent scheme.

application fees. Norma M. stated that on June 15, 2012 she and her husband Hector met with the defendant and paid her $1,000.00 cash on that day (Count 1). Norma indicated that she also provided the defendant with her and her husband's original birth certificates which the defendant stated she needed in order to complete the application.

On July 28, 2012 Norma and Hector met with the defendant again and provided the defendant with an additional $500.00. Norma stated that the defendant was angry that they were not able to pay the full $1,000.00 filing fee. The defendant gave them a document she said was the receipt for the filing fees. The document stated "U.S. Citizenship and Immigration Services" at the top with a logo from the Department of Homeland Security. Norma stated the defendant provided them with the receipt so that they could check online using the receipt number to follow the process of the application. Norma stated that the defendant told her and her husband that she indeed had filed applications with the immigration agency.

Norma indicated that after receiving the receipt she proceeded to try to check the status of their case and in doing so she was informed that the information provided to her was false. Norma then contacted the defendant several times and asked the defendant to return the money but the defendant refused. Norma was able to provide Detective Harnish with the receipt that the defendant had provided to her.

Detective Harnish made contact with Ian House, an Immigration and Customs Enforcement Investigator from the Department of Homeland Security. Harnish provided Investigator House with the basic information he had obtained from Norma and also the printed receipt that the defendant had provided to Norma and Hector. Investigator House confirmed that the receipt was not issued by the U.S.C.I.S. (United States Customs and Immigration Service) and he believed it was created by someone who had cut and pasted U.S.C.I.S. letterhead from a government website and then filled in the transaction information themselves. Investigator House further stated

that the receipt number at the bottom appeared to be a fake number. (R1:3)

Detective Harnish then met with the Defendant at the Oconomowoc Police Department where she was read her constitutional rights to which she waived the same and agreed to give a statement voluntarily. (R1:4) When asked if she knew of any problems between herself and Norma and Hector, she stated: "Yes, it's complicated." She stated that Norma had asked her to help them apply for a deferral process and she told them that she would be willing to help them but ultimately she was unable to do so because Norma failed to enroll in school as she had recommended her to do. The Defendant stated that she started to help them with some paperwork but she was unsure of the specific forms she used. The Defendant acknowledged that Norma had given her some money and she thought it was $500.00. Detective Harnish showed the Defendant a copy of the receipt that Norma identified as the one the Defendant gave them and asked her if she recognized it, to which she stated she did not. The Defendant then asked Detective

Harnish if there was anything she could do at this point to appease everyone and make the situation go away. (R1:4)

On November 24, 2014 the Defendant made an initial appearance before Court Commissioner Thomas Pieper. (R41) The Defendant was given a $1,000.00 signature bond with conditions. (R41:3) On January 5, 2015 the Defendant appeared before the Honorable Michael J. Aprahamian. (R38). Judge Aprahamian advised the Defendant that she had a right to be represented by an attorney or she could represent herself and scheduled the matter for continued proceedings on February 4, 2015. (R38:2-3) On February 4, 2015 the Defendant failed to appear for her court hearing and the court revoked her bond and issued a bench warrant. (R37:2) The following day, the Defendant made a voluntary appearance before Judge Aprahamian and explained that she got the dates mixed up due to a holiday. Judge Aprahamian quashed the bench warrant and reinstated her bond. (R36:3)

On April 24, 2015 the Defendant appeared (pro se) before Judge Aprahamian and indicated that she had spoken with an assistant district attorney and offered to

resolve the matter by making $2,000.00 up front restitution and then pleading to a disorderly conduct as an ordinance violation. (R35:2). The assistant district attorney quickly corrected the defendant, noting that the offer was for her to plead to a criminal disorderly conduct, not an ordinance. (R35:2-3). The Defendant insisted that she thought it would be reduced to an ordinance. The court advised her that the State was apparently not willing to do that. (R35:3-4) The Defendant asked if she had to make up her mind "right now this second." (R35:4) The court indicated that the case had been pending for some time and that she could either have it scheduled for a plea date or a trial date. (R35:4) The defendant then said she would accept the offer as is and that she wanted to do it right now. (R35:4) The court indicated that it had other matters on the calendar and that it could be done that afternoon. The defendant indicated that she could not be there in the afternoon, so the matter was rescheduled for a plea/sentencing hearing on May 20, 2015.

On May 20, 2015 the Defendant appeared in court (pro se) and indicated that she did not have the $2,000.00

up-front restitution. (R34:2) The Defendant indicated she could make installment payments: "I was thinking like $200.00 a month for ten months." (R34:2) The court did not want to delay the matter that long. The defendant indicated that she had planned to borrow the money from her father but that he was no longer willing to loan her the money because the case had not been reduced down to an ordinance violation. (R34:2-3) The court agreed to set the matter out six months and scheduled the case for a trial, and advised the Defendant to start making payments immediately. (R34:3-9)

On October 29, 2017 the Defendant appeared (pro se) before Judge Aprahamian for a plea hearing. (R39) The State indicated that the Defendant had made the $2,000.00 up-front restitution and therefore the State would be amending the complaint down to a single count of disorderly conduct and would be recommending only a fine. (R34:2, 11) During the plea colloquy the court warned the Defendant that it was not bound by the State's sentencing recommendation and that the Defendant would be "taking [her] chances" with the court at sentencing. (R39:15) The

Defendant proceeded to enter a plea of no contest. (R39:17) Following the entry of her plea, the court questioned the Defendant about the underlying facts and her conduct and asked the Defendant to "tell the whole story." (R39:22) The Defendant replied:

> DEFENDANT: Norma, who is one of the plaintiffs in the case, came to me and asked me to help her leave her husband and asked me to help her get money from him so she could leave him. After she gave me the money I gave it to her and she decided to stay with him.
>
> THE COURT: So I thought you were – you were getting the money to assist them in obtaining legal work permits, visas?
>
> THE DEFENDANT: That's what she had said to him to get him to give her money to supposedly leave him because he was beating her up.
>
> THE COURT: Why didn't you provide the money back?
>
> THE DEFENDANT: Because I was scared. I didn't want to go to jail. I just wanted to be done with it.
>
> THE COURT: But initially when they were requesting the money back you refused to give them the money back.
>
> THE DEFENDANT: I had given it to Norma and Norma kept telling me privately I'll talk to him. I'm going to leave. Just give me more

> time. Give me more time and when they came together - -
>
> THE COURT: Doesn't sound like you did anything wrong potentially. Why don't we go to trial on Tuesday.
>
> THE DEFENDANT: Because I don't want it to – I don't want to have a count of theft.

(R39:22-23)

The discussion continued about whether to have a trial and the defendant asserted that she never "kept any one penny for myself." (R39:26) The court eventually found that there was a factual basis for her plea to disorderly conduct (R39:27) and scheduled the matter for sentencing.

On November 30, 2015 the Defendant appeared (pro se) before Judge Aprahamian for sentencing. (R40) The transcript of that hearing is reproduced in the appendix to this brief at A7-A11. The victims were present and were given the opportunity to address the court. (R40:3) Norma indicated that she simply wanted to get her money back. (R40:3) Norma denied that she gave the Defendant money so she (Norma) could use it for a potential divorce or leaving her husband. (R40:3) Norma said she gave the Defendant the money because the Defendant offered to help

them obtain permits or visas which would allow them to travel back and forth to and from Mexico. (R40:3)

In accordance with the plea agreement, the State recommended a "fine only" disposition. (R40:4) The State justified that recommendation by noting the money had been returned and the Defendant had no prior criminal record. (R40:4)

The Defendant noted that she had known Norma and Hector for about four years and that she had helped them substantially. (R40:5) She noted that she had assisted Norma when Norma was pregnant by taking her to the doctor and "I never had her pay me money for gas or my time." (R40:5) She helped both of them when they had medical problems and she assisted Norma in getting enrolled in Early Head Start. She also took Norma out to get food and diapers when the couple was having financial difficulties. (R40:5) She also noted that Norms had called her "multiple times in the middle of the night stating her husband had hit her and the she had bruises. (R40:5)

The Defendant also made the court aware of community involvement, noting she was "active in a variety

of volunteer positions throughout the community," including Head Start, serving as a Sunday school teacher, and working through the Interfaith Council providing rides to people to the grocery store, to doctor's appointments, and volunteering at her children's school. (R40:6)

Judge Aprahamian began his sentencing remarks by noting that he "need[ed] to look at protection of the community, the gravity of the offenses and the character and rehabilitation of the defendant." (R40:6) The court described the disorderly conduct charge as a "serious offense" and although the case was reduced to a simple disorderly conduct charge, "I think it is a theft." (R40:6) In addressing the Defendant's character, the court credited the Defendant for her volunteer work and for helping the victims, "But it doesn't give you the right to take advantage of them which is what I believe you did." (R40:6)

The judge further indicated that he did not believe the Defendant's story about trying to get money out of Hector so that Norma could leave him, and that the Defendant "went to great lengths to take advantage of these people who were in a desperate situation and they

needed that money and you wouldn't provide them them the money and according to the complaint you even printed up a receipt for US customs, USCIS." (R40:6-7)

The court concluded its remarks by noting that the Defendant had not accepted responsibility for her actions "and that speaks poorly of your character and the protection of the community." The court then sentenced the Defendant to 30 days jail with Huber and imposed a $250.00 fine plus court costs. (R40:7) The court further noted: "I could have given you 90 days and I was inclined to go something higher than that. But I don't think a fine only is appropriate." (R40:7) Whereupon, the Defendant asked:

> THE DEFENDANT: Is there any way I can withdraw my plea?
>
> THE COURT: You can look into that. Let me impose the sentence first. The sentence is –
>
> THE DEFENDANT: Is there –
>
> THE COURT: Let me get the sentence out.
>
> THE DEFENDANT: But my question is if I can withdraw my plea before the sentencing.
>
> THE COURT: I don't believe you can. I've already – I'm not going to permit that. At this point you are already into the sentencing. You had the opportunity to speak, you spoke. I'm

> going to finish my sentence and if you want to bring a motion to vacate or set aside your plea, you can do that. You can talk to an attorney or you can do it on your own.
>
> THE DEFENDANT: Okay.

(R40:8)

The Defendant attempted (pro se) to appeal her case to this court but ultimately that appeal was dismissed as prematurely filed (No. 2016AP1035-CR) pursuant to an order of this court dated July 7, 2016. In that order this court summarized the procedural history of the Defendant's pro se appeal.

Thereafter, undersigned counsel was appointed by the State Public Defender. On November 10, 2016 undersigned counsel filed a motion for postconviction relief. (R43) The motion requested a new sentencing hearing alleging that the circuit court misused its sentencing discretion by not following the procedures described in ***State v. Gallion*** [2] and ***McCleary v. State***.[3] On November 14, 2016 a hearing was held before Judge Aprahamian on

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[2] ***State v. Gallion,*** 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197

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

the Defendant's postconviction motion. (R50) The transcript of that hearing is contained in the appendix to this brief at A2-A6 and the particular findings made by the circuit court will be discussed further below in connection with the Defendant's arguments.

ARGUMENT

I. THE DEFENDANT IS ENTITLED TO A NEW SENTENCING HEARING BECAUSE THE COURT DID NOT PROPERLY EXERCISE ITS DISCRETION AS REQUIRED BY STATE V. GALLION AND MCCLEARY V. STATE

A. Standard of Review

It is a well-settled principle of law that a circuit court exercises discretion at sentencing. ***State v. Gallion,*** 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 549, 678 N.W.2d 197 (citing ***McCleary v. State,*** 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). On appeal, review is limited to determining if discretion was erroneously exercised. ***Id.*** When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion. ***Id.***

On review, "[i]n any instance where the exercise of discretion has been demonstrated, [the appellate court]

follows a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***Id.*** *See also In re Felony Sentencing Guidelines,* 120 Wis. 2d 198, 203, 353 N.W.2d 793 (1984). "[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***Id.***, (citing ***State v. Borrell,*** 167 Wis. 2d 749, 781, 482 N.W.2d 883 (1992), and ***State v. Harris,*** 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984)). "Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence." ***Id.*** (quoting ***McCleary,*** 49 Wis. 2d at 281).

The ***McCleary*** court summarized the reasoning process necessary to facilitate appellate review:

> [T]he term [discretion] contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.

Id. at 249-50 (quoting ***McCleary***, 49 Wis. 2d at 277).

B. The Circuit Court Misused its Sentencing Discretion

The discretion of a sentencing judge "must be exercised on a rationale and explainable basis." ***State v. Gallion,*** 2004 WI 42, ¶ 22, 270 Wis. 2d 535, 550, 678 N.W.2d 197 (citing ***McCleary v. State,*** 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)). In order to have a valid sentence there must be "a statement by the trial judge detailing his reasons for selecting the particular sentence imposed." ***Id.*** McCleary further recognized that "[t]he 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." ***Id.*** at ¶¶ 22-23, 44.

"The justification for the length of the sentence should always be set forth in the record, as well as the reasons for not imposing a sentence of lesser duration." ***Id.*** at ¶ 24. Probation should be considered as the first alternative. ***Id.*** at ¶ 25. Probation should be the sentence unless the sentencing court finds that: (1) confinement is necessary to protect the public from further criminal activity by the offender; or (2) the offender is in need of correctional treatment which can most effectively be provided id [s]he is confined; or (3) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed. ***Id.*** (*citing* ***Bastian v. State,*** 54 Wis. 2d 240, 248-49, n.1, 194 N.W.2d 687 (1972) *and*

Standard 1.3 of the ABA Standards relating to Probation). *See also* ***Id.*** at ¶ 44.

Circuit courts are also required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others. ***Id.*** at ¶ 40. Courts are to identify the objectives of greatest importance and then explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specific objectives. ***Id.*** at ¶¶ 41-42. Courts must also identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision. ***Id.*** at ¶ 43.

If a circuit court imposes a jail or prison sentence, "it shall explain why the duration of incarceration should be expected to advance the objectives it has specified." ***Id.*** at ¶¶ 45, 49. As the ***Gallion*** court summarized it:

> In short, we require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion.

Id. at ¶ 46.

In this case, the court uttered the "magic words" (*See* ***Gallion*** at ¶¶ 27, 49) at the outset of the sentencing

hearing: "When I impose my sentence I need to look at the protection of the community, the gravity of the offense and the character and rehabilitation needs of the defendant." (R40:6) However, there was no further discussion as to how the 30-day jail sentence advanced these objectives. There was no discussion as to which of these goals was of greatest importance. There was no discussion as to why the duration of the sentence (30 days) was necessary to achieve the court's goals and why a sentence of lesser duration would not have sufficed. The only comment the court made concerning the length of the sentence was "I could have given you ninety days." (R40:7) Further, the court did not even mention the possibility of placing the defendant on probation, even though ***Gallion*** and ***McCleary*** explicitly require this.

The court indicated it was considering "the character and rehabilitative needs of the defendant." (R40:6) However, there was no discussion about the defendant's personal history, her level of education, her employment history, her prior record, her contacts with the community, her family situation, etc. There was also no discussion as to how the 30-day sentence would rehabilitate the defendant and what sort of treatment the defendant might receive while incarcerated in the county jail. There was no discussion as to why the 30-day sentence was necessary to protect the public. There was no discussion as to how the

$250.00 fine advanced the court's sentencing goals and why the upfront restitution the defendant paid was insufficient.

At the postconviction hearing, the circuit court responded to the arguments contained in the postconviction motion. (R50) The court indicated that one factor that significantly influenced its decision "was the statements from the victim . . . and the misrepresentation from Ms. Coutino relating to her involvement in the matter." (R50:3) The court did not believe the Defendant's assertion that she obtained the money to assist Norma in getting away from her husband. (R50:3) The court indicated that the Defendant was minimizing her conduct and not taking responsibility for her actions. (R50:3). The court further noted that the Defendant "went to great lengths to take advantage of these people who were in a desperate situation . . . and that she [the Defendant] even printed a receipt for the USCIS to further the fraud on them, which again is something I considered." (R50:3-4) The court did indicate that it considered the Defendant's community involvement and activities and gave her credit for that. (R50:4). The circuit court concluded its remarks by noting:

> And so I do believe I considered all the factors that I'm obligated to consider under the law and I gave her the sentence I did because of the misstatements to the court, the significance of the harm to the victims who were here and present and identified their situation and refuted what Ms. Coutino's statements were as to what she was intending to do and that was the basis for the sentence.

(R50:4).

Undersigned counsel asked the court if had considered probation at the time of the sentencing hearing:

> MR. KOESSER: How about probation, that wasn't considered at the sentencing hearing.
>
> THE COURT: It wasn't but because the recommendation was a fine only, I think a probationary sentence would have put her, made it potentially more cumbersome for her given her situation and I think I would have given her jail time with probation if I would have considered probation. So, in lieu of probation I didn't see probationary needs. I just thought the jail time was sufficient and it wasn't an extended period of jail time. It was enough not to depreciate the seriousness of the offense which is what I did, the 30 days.

(R50:5).

Judge Aprahamian's comments at the postconviction hearing did clarify, and perhaps rehabilitate to some extent some of the deficiencies in the original sentencing hearing. The court clarified that it did take into consideration positive aspects of the defendant's character such as her community involvement "and gave her credit for that." Although not specifically using the term "goal" as that term is used in *Gallion*, the court's comments suggest that one of

the court's goals was to punish the Defendant for defrauding the victims and then lying (the court used the more sanitized term "misstatements") about it in court. Further, the court explaned that it selected 30 days as that was just enough so as not to depreciate the seriousness of the Defendant's conduct.

Nevertheless, the Defendant is entitled to a new sentencing hearing because the court admitted that it did not consider probation at the time of the original sentencing hearing. The law is clear that a circuit court *must* consider probation as the first alternative, but may reject probation if it finds that it would unduly depreciate the seriousness of the offense. ***State v. Kleser***, 2010 WI 88, ¶ 157, 328 Wis. 2d 42, __, 786 N.W.2d 144, 176 (J. Bradley concurring in part, dissenting in part); ***State v. Klubertanz***, 2006 WI App 71, ¶ 19, 291 Wis. 2d 751, ___, 713 N.W.2d 116, 123; ***State v. Gallion***, 2004 WI 42, ¶ 44, 270 Wis. 2d 535, 560, 678 N.W.2d 197; ***Bastian v. State***, 54 Wis. 2d 240, 248-49, n.1, 194 N.W.2d 687 (1972). Although the circuit court gave a *post hoc* explanation at the postconviction hearing for not considering probation, the fact remains that

probation was not even considered as an alternative at the original sentencing hearing. Consequently, this court should remand the matter back to the circuit court for a new sentencing hearing.

CONCLUSION

For all of the foregoing reasons the Defendant asks that her judgment of conviction be reversed and that the matter be remanded to the circuit court for a new sentencing hearing.

Dated this 19th day of April, 2017.

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CERTIFICATE ON FORM & LENGTH OF BRIEF

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b)(c) and (d) for a brief produced with a proportional serif font. The brief is 22 pages and contains 4,207 words.

_____

Hans P. Koesser, Bar No.1010219

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of sec. 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.

_____

Hans P. Koesser, Bar No. 1010219

APPENDIX CERTIFICATION

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 s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions 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 produced to preserve confidentiality and with appropriate references to the record.

_____

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