STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II
Case No. 2017AP0173-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT P. VESPER,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, and an Order
Denying a Postconviction Motion,
Entered in Waukesha County Circuit Court,
the Honorable Michael J. Aprahamian, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

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ISSUES PRESENTED

1. Should the $1,900 fine be vacated due to the circuit court's failure to provide an adequate explanation for its imposition?

   The postconviction court answered no.

2. Does Mr. Vesper's post-sentencing loss of sentence credit and the imposition of a lengthy reconfinement sentence warrant sentence modification in this case?

   The postconviction court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Court should not grant oral argument or publication as this is a fact-specific case requiring the application of established legal principles.

STATEMENT OF THE CASE AND FACTS

Charges

Mr. Vesper was charged with two counts: (1) operating while intoxicated (7th offense), contrary to Wis. Stat. § 346.63(1)(a); and (2) operating a motor vehicle while revoked, contrary to Wis. Stat. § 343.44(1)(b). (1:1-2). Subsequently, the State added an operating while under a prohibited alcohol concentration count, contrary to Wis. Stat. § 346.63(1)(b). (66:5). Mr. Vesper's blood alcohol content level was .139. (*See, e.g.*, 66:16).

The complaint alleged that officers were dispatched to investigate an ATM alarm at approximately 3:37 a.m. (1:2). Officer Edwards and Sergeant DeKarske observed a maroon vehicle with its engine running in an ATM drive-thru. (*Id.*). Officer Edwards made contact with the driver of the vehicle, Mr. Vesper. (*Id.*). The officers noted that there was a cardboard box for a twenty-four pack of beer inside the vehicle and that Mr. Vesper's eyes were glossy. (*Id.*). Officers asked Mr. Vesper to exit the vehicle to speak further. (*Id.*). Officer Edwards noted that there was "a strong odor of intoxicants emanating from his person." (*Id.*). Mr. Vesper stated that he was drinking beer the previous evening from 7:00 p.m. to 11:30 p.m. (*Id.*). Field sobriety tests were conducted. (1:2-3). A preliminary breath test indicated .113 grams of alcohol per 210 liters of breath. (1:3). Mr. Vesper was placed under arrest and his vehicle was searched incident to arrest. (*Id.*). Inside the twenty-four pack was a single 12 ounce beer. (*Id.*).

Plea

Mr. Vesper entered a plea to operating while intoxicated (7th offense). (66:5-7). In exchange, the State agreed to recommend "unspecified prison, consecutive to any other sentence," and took no position on a fine. (66:2-3). The State also agreed to dismiss, but read-in, the operating while revoked count. (66:2). The operating with a prohibited alcohol concentration count was dismissed as a matter of law. (66:5).

Sentencing

Pursuant to the plea agreement, the State recommended "prison" and did not take a position on the length. (66:19; App. 104).

Several letters were submitted on behalf of Mr. Vesper from a co-worker, two of Mr. Vesper's sisters, and his mother. (*See* 18). Defense counsel simply requested that the court "consider allowing having him put back into some programming that may help so he's simply not warehoused for a period of time." (66:21-22; App. 106-07). Mr. Vesper apologized and discussed the impact a family member's death had on him. (66:22-24; App. 107-09). Mr. Vesper requested grief counseling and treatment. (66:25; App. 110).

The Honorable Michael J. Aprahamian imposed a near-maximum prison sentence of 9 years (4 years 2 months of initial confinement and 5 years of extended supervision) consecutive to "whatever you're serving." (66:28; App. 113). The court imposed a $1,900 fine. (66:30; App. 115). The also granted 76 days of sentence credit. (66:31; App. 116).

Post-Sentencing Developments

Approximately six weeks after Mr. Vesper was sentenced in this case, he was ordered reconfined for 4 years, 4 days on Waukesha County Case No. 13-CF-1205. This resulted in an aggregate total of 8 years, 2 months, 4 days of initial confinement on this case and 13-CF-1205. (45:12; App. 118).

In addition, in light of a letter from the Department of Corrections (25), the 76 days of sentence credit granted at the time of sentencing was removed from Mr. Vesper's judgment of conviction in this case. (*See* 29).[1]

[1] Mr. Vesper does not contest the legality of the removal of the sentence credit.

Denial of Request for Postconviction Relief

Mr. Vesper filed a postconviction motion seeking to reduce the length of his sentence because: (1) the length of the reconfinement sentence was unknown at the time of sentencing; and (2) it was unknown that Mr. Vesper would not be entitled to any sentence credit on this case. (45:5-7). In addition, Mr. Vesper argued that the circuit court erroneously exercised its discretion when imposing a $1,900 fine.[2] (45:8-10).

In response, the State argued that Mr. Vesper was not entitled to sentence modification because "the Court was aware of the fact that the defendant was on extended supervision at the time of this incident and remarked about it on a couple of occasions during the course of the sentencing remarks" and also ordered the sentence in this case to run consecutive. (48:1). In regards to the $1,900 fine, the State argued:

> Again, the defendant is asking for a sentence modification without a new factor. It is commonplace for Courts to order fines in OWI cases, in fact, mandatory for most offenses. The Court expressly laid out the aggravating factors in this case during its remarks, again justifying the fine that was imposed.

(48:1-2).

The Honorable Michael J. Aprahmian denied postconviction relief in a one-page order stating that "the

[2] Mr. Vesper also sought an order granting him eligibility to participate in the Wisconsin Substance Abuse Program and modifying the judgment of conviction to state that the prison may only take financial obligations from his prison earnings. (*See* 45:7-8, 10-11). He does not pursue these two issues in this appeal.

Defendant failed his burden of identifying any new factor warranting a modification of his sentence . . .” (50; App. 101).

Additional relevant facts will be referenced below.

ARGUMENT

I. The $1,900 Fine Should Be Vacated Because the Circuit Court Failed to Provide an Adequate Explanation for Imposing It.

A. Legal principles.

“It is a well-settled principle of law that a circuit court exercises discretion at sentencing,” however, “the exercise of sentencing discretion must be set forth on the record.” ***State v. Gallion***, 2004 WI 42, ¶¶ 4, 17, 270 Wis. 2d 535, 678 N.W.2d 197. Circuit courts may not dispense with discretion by citing facts, reciting “magic words,” or limiting sentences to the statutory maximum. ***Gallion***, 270 Wis. 2d 535, ¶ 37. Instead, “[c]ircuit courts are required to specify the objective of the sentence on the record.” ***Id***. ¶ 40.

“A fine is a substantially different form of sentence than incarceration.” ***State v. Ramel***, 2007 WI App 271, ¶ 13, 306 Wis. 2d 654, 743 N.W.2d 502. While a fine may be imposed it if is adequately explained, “[i]t is also necessary that a sentencing court determine at the time of sentencing whether a defendant has the ability to pay a fine if the court intends to impose one.” ***Id***. ¶ 15.

B. Standard of review.

Appellate review of a sentence is limited to determining whether there was an erroneous exercise of

discretion. ***Ramel***, 306 Wis. 2d 654, ¶ 8 (quotation omitted). A reviewing court will "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***Id***. ¶ 9 (quotation omitted). A trial court's findings of fact will not be reversed unless they are clearly erroneous. ***Id***.

C. The circuit court failed to provide an adequate explanation for the $1,900 fine.

Two cases provide guidance when examining a circuit court's imposition of a fine: ***Ramel***, 306 Wis. 2d 654, and ***State v. Kuechler***, 2003 WI App 245, 268 Wis. 2d 192, 673 N.W.2d 335. Both cases support that the circuit court here erroneously exercised its discretion.

In ***Ramel***, this Court vacated a $1,000 fine because the sentencing court did not explain the fine or consider the defendant's ability to pay. 306 Wis. 2d 654, ¶¶ 14-27. In regards to the circuit court's failure to explain the reasoning behind imposing the fine, this Court explained:

> A fine that an offender has the ability to pay may satisfy sentencing objectives the trial court has found to be material and relevant to the particular defendant. Here, however, with no explanation from the sentencing court of how the fine imposed advanced those objectives, we are left to guess as to what those objectives might be in relation to the fine. ***Gallion*** requires that we do more than guess. While we do not hold that ***Gallion*** requires a trial court to explain the reason for a specific amount of a fine (as it is likewise not required to explain a specific time of incarceration), we do conclude that under ***Gallion*** some explanation of why the court imposes a fine is required.

Id. ¶ 14 (internal citation omitted).

This Court further found that the circuit court made "no finding at the time of sentencing that Ramel had any ability to pay a fine, regardless of amount." ***Id***. ¶ 26. This Court then searched the record, and ultimately concluded that the record did not support a finding that at the time of sentencing the defendant had the ability to pay a fine. ***Id***. ¶¶ 26-27.

As in ***Ramel***, here, the circuit court also erroneously exercised its discretion. First, the circuit court offered no explanation at all as to why a fine would be an appropriate component of the punishment here. At sentencing, the circuit court simply stated "$1,900 fine." (66:30; App. 115). [3] Likewise, the circuit court provided no explanation in its order denying the postconviction motion. Second, the circuit court made no findings at sentencing or in its order denying the postconviction motion with regard to Mr. Vesper's ability to pay.

Kuechler also supports that the circuit court in this case erroneously exercised its discretion. In ***Kuechler***, the defendant, like Mr. Vesper, was convicted of a seventh offense OWI. 268 Wis. 2d 192, ¶ 2. At sentencing, the circuit court in ***Kuechler*** explained that imposing anything but what the local OWI sentencing guidelines called for would depreciate the seriousness of the offense. ***Id***. ¶ 3. The circuit court then concluded that the defendant should "pay a fine, according to the guidelines, which is $8,852." ***Id***. ¶ 5. This Court held that the circuit court exercised appropriate discretion when it chose to impose a fine based on the guidelines. *See* ***id***. ¶¶ 10-12. However, this Court remanded

[3] The maximum fine is $25,000. There is no minimum fine for a seventh operating while intoxicated count. *See* Wis. Stat. §§ 346.65(2)(am)6 & 939.50(3)(f).

the case to determine whether the defendant had the ability to pay as no such determination had been made. ***Id.*** ¶¶ 13-16.

Like in ***Kuechler***, here, the circuit court did not make any findings regarding Mr. Vesper's ability to pay. Moreover, in contrast to ***Kuechler***, in which the circuit court indicated that it was imposing the fine according to the guidelines, the circuit court here simply stated "$1,900 fine."

Therefore, based on ***Ramel*** and ***Kuechler***, in this case, the circuit court erroneously exercised its discretion in imposing the fine.

D. This Court should vacate the $1,900 fine.

Where a circuit court fails to make findings of fact, three options exist: (1) affirm the judgment if the trial court reached a result which the evidence would sustain had a specific finding supporting that result been made; (2) reverse if not so sustained; or (3) remand for additional findings and conclusions. ***Ramel***, 306 Wis. 2d 654, ¶ 9 (quotation omitted).

In ***Ramel***, this Court explained that "***Kuechler*** was remanded to the trial court because the defendant's ability to pay the fine imposed had not been determined, although he raised the issue in his postconviction motion, and the court characterized as 'unsatisfactory' the evidence in the record of inability to pay." ***Id.*** ¶ 25.

This Court in ***Ramel***, however, vacated the fine and remanded with directions that the judgment be corrected accordingly. ***Id.*** ¶ 27. ***Ramel*** explained:

> Here, there was no finding at the time of sentencing that Ramel had any ability to pay a fine, regardless of the

> amount. We therefore search the record to determine whether it supports such a finding.
>
> We know from this record that Ramel was thirty-five years old, lived with his mother, never completed high school, used alcohol excessively, had a long record of both juvenile and adult convictions (many of which involved violence and mistreatment of women), and had been unsuccessful on extended supervision. The record discloses nothing about Ramel's financial circumstances except that his "employment is kind of hard to verify and a little sketchy, but [he has] had some employment." There is no evidence that he had any assets. Neither Ramel's attorney nor the State mentioned Ramel's financial circumstances in the entire record of the arguments at the sentencing hearing. The postconviction court noted Ramel's "indigency status." For all the foregoing reasons, we conclude that the record does not support a finding that at the time of sentencing Ramel had the ability to pay a fine.

Id. ¶ 27.

As in ***Ramel***, this Court should vacate the fine and remand with directions that the judgment of conviction be corrected accordingly. There is no evidence in the record that Mr. Vesper has the ability to pay the $1,900 fine. Mr. Vesper was initially found ineligible for State Public Defender representation due to his wife's income in the circuit court. (61:1-2; 62:1). However, the circuit court agreed to appoint counsel at the county's expense because "he's in custody and really doesn't have the ability to make payments." (62:2-4, 6). In addition, as alleged in the postconviction motion, Mr. Vesper presently qualifies as indigent pursuant to Public Defender standards. (45:10).

Thus, because the sentencing court failed to explain why the imposition of a fine was necessary and also failed to

determine that Mr. Vesper had the ability to pay such a large fine, particularly given the length of confinement imposed, this Court should vacate the fine and remand with directions that the judgment of conviction be corrected accordingly.

II. The Post-sentencing Loss of Sentence Credit and the Imposition of a Lengthy Reconfinement Sentence Warrants Sentence Modification.

A. Legal principles.

Wisconsin circuit courts have inherent authority to modify criminal sentences. ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). This authority is not unlimited. A court cannot modify a sentence based on reflection and second thoughts alone. ***State v. Wuensch***, 69 Wis. 2d 467, 475, 230 N.W.2d 665 (1975). However, a court may base a sentence modification upon the defendant's showing of a "new factor." ***Hegwood***, 113 Wis. 2d at 546.

Deciding a motion for sentence modification is a two-step process. First, the defendant must demonstrate the existence of a new factor. A new factor 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, 52, 333 Wis. 2d 53, 797 N.W.2d 828.

Whether a particular fact constitutes a new factor is a question of law which is reviewed *de novo*. ***Hegwood***, 113 Wis. 2d at 547. Accordingly, on review, this Court need not give deference to the trial court's determination. ***Id.*** Once a defendant has established a new factor, whether it warrants

modification of the sentence is left to the discretion of the circuit court. ***Id.*** at 546.

B. Mr. Vesper's loss of sentence credit and the imposition of a lengthy reconfinement sentence warrant sentence modification.

In this case, the circuit court issued a bare-bones one-page postconviction decision stating that "the Defendant failed his burden of identifying any new factor warranting a modification of his sentence . . ." (50; App. 101).

Contrary to the circuit court's finding, there are two "new factors" in this case warranting sentence modification. First, the amount of sentence credit to which Mr. Vesper was entitled was unknowingly overlooked by all of the parties in this case. At sentencing, the defense requested and the circuit court granted 76 days of sentence credit. (66:31; App. 116). However, in light of a letter subsequently sent by the Department of Corrections (25), the 76 days of sentence credit was removed from Mr. Vesper's judgment of conviction (29).

Second, the length of Mr. Vesper's reconfinement sentence was unknown at the time of sentencing in this case. At sentencing in this case, the circuit court imposed 9 years (4 years 2 months of initial confinement and 5 years of extended supervision) consecutive to "whatever you're serving." (66:28; App. 113). Approximately six weeks later, a 4 year, 4 day re-confinement sentence was ordered on 13-CF-1205. (45:12; App. 118). This resulted in an aggregate total of 8 years, 2 months, 4 days of initial confinement in prison on this case and 13-CF-1205.

While the circuit court did not specifically rely on the amount of sentence credit when imposing the sentence, *see*

State v. Armstrong, 2014 WI App 59, ¶¶ 16-17, 354 Wis. 2d 111, 847 N.W.2d 860, the fact that Mr. Vesper is not entitled to any sentence credit coupled with the fact that he received a lengthy amount of reconfinement time that the sentence in this case is running consecutive to "is highly relevant to the imposition of sentence." ***Harbor***, 333 Wis. 2d 53, ¶ 40. A circuit court has an overriding obligation to impose "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 v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971); ***State v. Gallion***, 2004 WI 42, ¶ 44, 270 Wis. 2d 535, 678 N.W.2d 197. The fact that Mr. Vesper is not entitled to any sentence credit on this case, and also has to serve 4 years, 4 days in confinement on 13-CF-1025 before starting the sentence in this case, bears directly on the amount of time necessary to satisfy the requisite sentencing objectives, including the need to protect the public.

Therefore, Mr. Vesper has presented two new factors as a matter of law and this Court should reverse the circuit court's order denying his motion to modify sentence.

CONCLUSION

For the reasons state above, this Court should: (1) vacate the fine and remand with directions that the judgment of conviction be corrected accordingly; and (2) reverse the circuit court's order denying his motion to modify sentence.

Dated this 1st day of June, 2017.

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 2,978 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 1st day of June, 2017.

Signed:

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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.

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Dated this 1st day of June, 2017.

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