STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2017AP0173-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT P. VESPER,

Defendant-Appellant.

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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.

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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

In this case, the circuit court had the option of imposing a fine between $0 to $25,000. The court imposed a $1,900 fine. (66:30; Vesper Initial Br. App. 115).

In ***State v. Ramel***, 2007 WI App 271, ¶ 14, 306 Wis. 2d 654, 743 N.W.2d 502, this Court stated that:

> 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.*

(emphasis added).

The State does not appear to contest that the circuit court in this case failed to explain *why* it was imposing a fine at the time of sentencing or in postconviction proceedings. As a result, pursuant to ***Ramel***, this Court should find that the circuit court erroneously exercised its discretion.

The State argues that the record supports the fine. (State's Resp. at 7-8). The State's brief notes some "aggravating" facts of this case and argues that this justifies the fine. (State's Resp. at 7). Not only does the State ignore that the circuit court also found there were "mitigating" facts

in this case,[1] but, most significantly, the State ignores that this Court rejected a similar argument made by the State in ***Ramel***.

In ***Ramel***, the State also argued in part that "the trial court's general explanation of reasons for sentencing Ramel to prison satisfies the ***Gallion*** and ***McCleary*** requirements . . ." 306 Wis. 2d 654, ¶ 10. This Court rejected this argument stating that "[a] fine is a substantially different form of sentence than incarceration" and that "some explanation of why the court imposes a fine is required." ***Id.*** ¶¶ 13-14. Thus, the circuit court's reasoning for imposing incarceration in this case does not support the imposition of a fine.

In addition, the State argues that a fine will "help achieve the primary goals of sentencing"—punishment and deterrence. (State's Resp. at 7). While punishment and deterrence may be potential reasons for imposing a fine, this reasoning is the State's alone. The circuit court did not even use the terms "punishment" or "deterrence" at the time of sentencing much less state that these two objectives were the reasons for imposing a fine. (*See* 66:25-30; Vesper Initial Br. App. 110-115). Instead, the record leaves Mr. Vesper to guess at the circuit court's objectives for imposing a fine. Thus, in this case, the record does not support the decision to impose a fine.

Lastly, the State agrees that "a circuit court must determine a defendant's ability to pay a fine that it imposes," but again argues that the record supports that Mr. Vesper has

[1] The circuit court noted that Mr. Vesper was "cooperative" and he "accepted responsibility today very early on." (66:27; Vesper Initial Br. App. 112). Additionally, the court noted that "[t]here is mitigating factors because no accident, no factors that suggests unsafe driving [sic] . . ." (66:28; Vesper Initial Br. App. 113).

the ability to the pay the fine. (State's Resp. at 9-10). The State suggests that Mr. Vesper "could pay off his fine if he paid only $17.27 per month during his entire 110-month sentence. He could also pay off his fine during his 60 months of extended supervision by paying only $31.67 per month." (State's Resp. at 8).

However, this completely ignores that Mr. Vesper is also responsible for paying the criminal clerk fee ($163), the crime lab and drug law enforcement surcharge ($13), the driver improvement surcharge ($435), the ignition interlock surcharge ($50), the jail surcharge ($19), the penalty surcharge ($494), the victim witness surcharge ($92), and a B291 surcharge ($35). (32). In addition, Mr. Vesper may be responsible for paying extended supervision fees. *See* Wis. Stat. § 304.074. And, even assuming that Mr. Vesper is able to make $1,760 a month, this is still a lot of money to pay back in addition to the costs of two children and other household expenses.

Further, the State references ***State v. Milashoski***, 163 Wis. 2d 72, 471 N.W.2d 42 (1991). (State's Br. at 10). However, ***Milashoski*** is factually distinguishable. In ***Milashoski***, the circuit court ordered an indigent defendant to pay a $15,000 fine noting his employment record, debts, and his assets, a truck. ***Id.*** at 79-80. In a footnote, ***Milashoski*** stated that the defendant was earning $8.00 an hour and was residing with his parents. ***Id.*** at 80 n.7.

In a motion for post-conviction relief, the defendant in ***Milashoski*** challenged the fine and the penalty for nonpayment. ***Id.*** at 80. In response, the circuit court amended the judgment of conviction, allowing the defendant 60 days after his discharge to pay the fine. ***Id.*** If the defendant was unable to pay the fine, the judge said that he could bring an

appropriate motion before the court, and the court would exercise its discretion to determine whether the fine should be modified to reflect the defendant's "then current ability to pay." ***Id.*** The judge also vacated the penalty for nonpayment. ***Id.*** The Wisconsin Supreme Court ultimately stated that:

> We hold that neither Judge Kennedy nor Judge Race abused their discretion in imposing the $15,000 fine. First, Judge Kennedy was of the opinion that the $15,000 amount was necessary in order to send a message to the public that this type of behavior will not be tolerated. Second, when Judge Race modified the fine, it had the effect of creating an indeterminate fine. That is, the $15,000 represents the maximum Milashoski would ever have to pay, but this amount could be reduced, depending on Milashoski's financial status when he is released from prison. The modification of the fine takes into account Milashoski's indigency, but also takes into account his "excellent" employment record, and prospects of continuing his employment at his father's business when he is released from prison. That way, if he cannot pay the entire $15,000 when he is released, the court can set up an individualized payment plan which suits Milashoski's needs.
>
> We conclude therefore that the $15,000 fine imposed on Milashoski, as modified by the circuit court . . . was not an abuse of discretion.

***Id.*** at 89 (citation omitted).

Here, unlike in ***Milashoski***, the circuit court did not provide any option to revisit the fine. Additionally, unlike the defendant in ***Milashoski*** who lived at home with his parents, Mr. Vesper has a mortgage payment of $1500, household expenses, and two children to support. (*See* 3; 62:2, 4).

Therefore, Mr. Vesper requests that this Court vacate the fine and remand with directions that the judgment of conviction be correctly accordingly.

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

As set forth in Mr. Vesper's initial brief (at 11-12), there are two new factors in this case warranting sentence modification: (1) the loss of sentence credit; and (2) the imposition of a lengthy reconfinement sentence on 13-CF-1205. These two factors are highly relevant to the imposition of Mr. Vesper's sentence. 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.2d512 (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 a lengthy period of confinement on 13-CF-1205 before the beginning of 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.

The State argues that the "reconfinement order" is not highly relevant in this case because "the circuit court mentioned three times that Mr. Vesper was on extended supervision . . ." which "show[s] that the court was aware of the possibility that Mr. Vesper's extended supervision might get revoked." (State's Resp. at 11-12).

First, the statement that "the court was aware of the possibility that Mr. Vesper's extended supervision might get

revoked" is speculation. The circuit court never made any such statement at sentencing or in the order denying postconviction relief.

Second, even if "the court was aware of the possibility that Mr. Vesper's extended supervision might get revoked," a "possibility" of reconfinement is not the same as knowing that Mr. Vesper was in fact ordered to be reconfined for a lengthy period of time.

Third, in this case, not only was Mr. Vesper ordered to be reconfined, but he was ordered reconfined for a lengthy period of time. While the length of reconfinement time might not be important in some cases, it is in this case. For example, if Mr. Vesper was ordered reconfined for a week, and this case was ordered concurrent, the reconfinement case would probably not be highly relevant. However, here, the fact that the circuit court ordered the sentence in this case to run consecutive to "whatever you're serving" and the fact Mr. Vesper was subsequently ordered to be reconfined for 4 years, 4 days, is significant. (*See* 66:28; 45:12; Vesper Initial Br. App. 113, 118). As stated above, a 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. How could the court properly determine that a 9-year, 2 month consecutive prison sentence in this case was the minimum amount of custody necessary without knowing that Mr. Vesper was also going to be serving a 4 year, 4 day reconfinement sentence?

The State cites ***State v. Norton***, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656, and argues that Mr. Vesper's case falls into the "general rule that 'revocation of probation in another case does not ordinarily present a new factor.'"

(State's Resp. at 11-13). However, the applicability of ***Norton*** is questionable given that it analyzes whether "a new factor is 'an event or development which frustrates the purpose of the original sentence.'" *See* ***Norton,*** 248 Wis. 2d162, ¶¶ 8, 13. In ***State v. Harbor***, 2011 WI 28, ¶ 52, 333 Wis. 2d 53, 797 N.W.2d 828, the Wisconsin Supreme Court specifically withdrew any language that requires an alleged new factor to "frustrate the purpose of the original sentence."

Moreover, ***Norton*** seems to support Mr. Vesper's argument that the lengthy reconfinement sentence in this case *is* a new factor. Like in ***Norton***, the fact that Mr. Vesper was ordered to be reconfined for 4 years, 4 months was not presented at the time of sentencing. *See* ***Norton***, 248 Wis. 2d 162, ¶ 10. Additionally, like in ***Norton***, the sentence in this case was imposed consecutively. *See* ***id.*** ¶ 12.

The State argues that Mr. Vesper's case is "very different" from ***Norton*** because "nobody here told the circuit court that Vesper's extended supervision would not be revoked. And, the circuit court here, unlike in [***Norton***], did not impose a specific sentence in reliance on an incorrect assumption that Vesper's extended supervision would not be revoked." (State's Resp. at 13). While it is true that in ***Norton*** the circuit court was given inaccurate information, there is no requirement that a defendant establish the circuit court was given or relied on inaccurate information in order to obtain sentence modification. As set forth in Mr. Vesper's initial brief (at 10), 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 the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowningly overlooked by all of the parties." ***Harbor***, 333 Wis. 2d 53, ¶¶ 40, 52. Thus,

Mr. Vesper does not need to prove that the circuit court was given or relied on inaccurate information.

Lastly, the State argues that the removal of sentence credit is not highly relevant. (State's Resp. at 13-15). As Mr. Vesper acknowledged in his initial brief (11-12), the circuit court did not specifically rely on the amount of sentence credit when imposing the sentence. *Compare with* ***State v. Armstrong***, 2014 WI App 59, ¶¶ 16-17, 354 Wis. 2d 111, 847 N.W.2d 860. However, 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 is highly relevant because it bears on directly on the amount of time necessary to satisfy the requisite sentencing objectives, such as the need to protect the public.

Therefore, this Court should reverse the circuit court's order denying Mr. Vesper's 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 29th day of August, 2017.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,202 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 29th of August, 2017.

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