STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 14-CF-1335

Appeal No. 2017AP834-CR

BRUCE D. JOHNSON,

Defendant-Appellant.

Brief of Bruce D. Johnson Concerning the Judgment of Conviction (Sentencing After Revocation) and Order Denying Post Conviction Relief Entered By Brown County Circuit Court, The Honorable Thomas J. Walsh

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STATEMENT OF ISSUES

Is Mr. Johnson entitled to sentence modification, given the sentence imposed upon revocation of probation was intended to be served in county jail (with credit for good time and Huber release) when in fact the sentence will be served in prison?

Answer: Answered by Trial Court - No.

Is Mr. Johnson entitled to resentencing given the sentence imposed upon revocation of probation was intended to be served in county jail (with credit for good time and Huber release) when in fact the sentence will be served in prison.

Answer: Answered by Trial Court - No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As the facts of the case are straight forward and well documented, and given the law applicable to the issues at hand is long-standing and unambiguous, appellant does not believe oral argument is necessary.

Moreover, appellant does not expect the Appellate Court's ruling will require explanation, modification, or rejection of existing law or policy, and therefore, appellant does not believe the Appellate Court's ruling merits publication.

STATEMENT OF CASE

This criminal case was commenced in 2014. In Brown County Case No. 2014-CF-1335, Mr. Johnson was charged with one count of Possession of Cocaine, as a second or subsequent offense. R-1.

After the usual pretrial discovery and various pre-trial proceedings were held, a settlement was negotiated. By the terms of the agreement, Mr. Johnson was to enter a plea to an amended charge of Possession of Cocaine.

The plea hearing was held on January 13, 2015. At that hearing, Mr. Johnson entered a no contest plea to the misdemeanor Possession of Cocaine charge. The Trial Court accepted the plea. R-15 and 50.

Sentencing was held on March 10, 2015. At that time, Judge Walsh withheld sentence and placed Mr. Johnson on probation. R-22 and 53.

Ultimately, Mr. Johnson's probation was revoked and he returned to Judge Walsh for sentencing after revocation. The sentencing after revocation occurred on November 1, 2016.

When imposing sentence, Judge Walsh made the following statements:

> "I'm going to impose one year jail. That will be consecutive to any other sentence that he's currently serving. I will give him 45 days credit as requested by Mr. Mannenbach; and convert all remaining fines and costs to civil judgment.

> And that will be the order of the Court.
>
> Questions or clarifications regarding my sentence, Mr. Enli.
>
> MR. ENLI: No, Your Honor. Thank you.
>
> THE COURT: Mr. Mannenbach?
>
> MR. MANNENBACH: For the record, is the Court taking the position on Huber and/or good time.
>
> THE COURT: He'll get Huber and good time." Appendix - 1.

The Judgment of Conviction refers to jail as well. Appendix - 2

In reviewing the sentence with trial counsel, Mr. Johnson understood the sentence he was ordered to serve by Judge Walsh would be completed in the Brown County Jail, he would receive credit for good time served, and he would be eligible for Huber release privileges.

Subsequent to his sentencing after revocation hearing, Mr. Johnson was advised by the Wisconsin Department of Corrections (DOC) he would serve his time for this offense in the prison system not in county jail, as required by Wis. Stats., 973.03(2).

Mr. Johnson filed a motion for post conviction relief, seeking either modification of his sentence or resentencing. Mr. Johnson argued sentence modification was warranted as the sentencing after revocation transcript indicated to Mr.

Johnson that the Trial Court and attorneys all anticipated his sentence would be served in jail (thus affording Mr. Johnson both credit for good time and Huber release privileges). In fact, Wisconsin law required the sentence be served in prison rather than in jail, so trial counsel and the Circuit Court were mistaken. This mistake about the law was a new factor as it was information not known or available at the time of sentencing, and was information highly relevant to the sentence. In the alternative, Mr. Johnson sought resentencing as he had a due process right to be sentenced based on accurate information, contending the Trial Court and attorneys mistakenly expected Mr. Johnson's sentence would be served in jail, with credit for good time and Huber release.

Mr. Johnson's post-conviction motion was denied on both grounds. R-38. This appeal ensued.

ARGUMENT

I. APPLICABLE LAW AND STANDARD OF REVIEW.

A trial court has the discretion to modify or change a sentence previously imposed. **State v. Hegwood**, 1113 Wis. 2d 544, 355 N.W. 2d 399 (1983). A defendant has a due process right to be sentenced based on accurate information. **United States v. Tucker**, 404 U.S. 443 (1972).

A defendant may be entitled to sentence modification if he/she presents a "new factor." **State v. Harbor,** 2011 WI 28, 333 Wis. 2d 53, 797 N.W. 2d 828. A mistake as to certain sentencing factors or applicable law may constitute a "new factor" **State v. Norton,** 2001 WI App 245, 248 Wis. 2d 162, 635 N.W. 2d 656.

On appeal, whether or not a fact or set of facts presented by a defendant constitutes a "new factor" is a question of law which is reviewed independently of the circuit court. **State v. Hegwood**, 113 Wis. 2d 544, 335 N.W. 2d 399 (1983). If a new factor is presented, determining whether or not the new factor justifies sentence modification is a matter of discretion for the trial court which is reversed only if there has been an improper exercise of discretion. **State v. Harbor**, 2011 WI 28, 333 Wis. 2d 53, 797 N.W. 2d 828**.**

A defendant may be entitled to resentencing when there is information before the trial court at sentencing which is inaccurate and the trial court relied upon the inaccurate information when formulating the sentence. **State v. Tiepelman**, 2006 WI 66, 291 Wis. 2d 179, 717 Wis. 2d 1. If the defendant can show his/her sentence is based on inaccurate information relied on by the trial court, then the burden shifts to the State to prove the error is harmless. **Tiepelman**, Supra.

Whether a defendant has been denied the due process right to be sentenced based on accurate information is a constitutional issue that an appellate court reviews de novo. **State v. Coolidge**, 173 Wis 2d 783, 496 N.W. 2d 701 (Ct. App. 1993).

II. MR. JOHNSON'S SENTENCE SHOULD BE MODIFIED AS THE TRIAL COURT AND COUNSEL MISTAKENLY EXPECTED MR. JOHNSON'S SENTENCE WOULD BE SERVED IN PRISON RATHER THAN IN COUNTY JAIL, A MISTAKE WHICH AMOUNTS TO A NEW FACTOR.

Mr. Johnson was convicted of a misdemeanor charge, carrying a maximum period of confinement of one year. Thus, from the outset, Mr. Johnson believes the Trial Court and the attorneys should have expected any confinement time which was imposed would be served in county jail.

This is confirmed by the statements of the Circuit Court and parties. When the State prosecuting attorney, Mr. Enli, made his sentencing recommendation, he stated: "So I do think the one year jail, consecutive, is appropriate." R-56, Page 3, Lines 18-19. In the revocation summary submitted by the Department of Corrections, the sentence recommendation is "1 year jail". R-25, Page 6, bottom. As stated above, when pronouncing sentence, Judge Walsh indicated Mr. Johnson would serve "one year jail". R-56, Page 8, Lines 16-22.

Moreover, defense counsel, Mr. Mannenbach, when making his sentence recommendation, requested credit for good time and Huber release privileges, requests typically made for a jail sentence, not a prison sentence. R-56, Page 6, Line 9. The Trial Court granted good time and Huber release. R-56, Page 7.

In Mr. Johnson's mind, there is no doubt that the Circuit Court and the attorneys all anticipated Mr. Johnson would be serving a jail sentence.

Neither Judge Walsh nor the attorneys ever referred to a prison term. At all times, Mr. Johnson's sentence was referred to as a jail term. Moreover, Judge Walsh granted Huber release, a privilege available only in jail. Mr. Johnson contends the only reasonable conclusion one can draw from the sentencing after revocation transcript is the Circuit Court

and parties expected Mr. Johnson to serve his one year of confinement in county jail.

This assumption of the Circuit Court and parties is contrary to the provisions of Wis. Stats., Sec. 973.02(2) which requires Mr. Johnson's sentence is to be served in prison.

At the sentencing after revocation hearing, there is no mention of Wis. Stats., Sec. 973.01(2), or as stated before, any discussion of Mr. Johnson's confinement time being served in prison. Mr. Johnson maintains the most reasonable explanations for this are either the Circuit Court and attorneys were unaware of this provision or they had forgotten about it. Either way, Mr. Johnson argues this amounts to a mistake as to the law.

Mr. Johnson believes his case is similar to the circumstances in **State v. Norton**, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W. 2d 656. In **Norton**, the defendant, Steve Norton, was convicted of misdemeanor theft, a nine month sentence was imposed and stayed, and Mr. Norton was placed on probation. Later, Mr. Norton was convicted of felony theft and a prison sentence was imposed (to run consecutive to any other sentence). After being convicted and sentenced on the felony theft charge, Mr. Norton's probation agent suggested he consent to revocation of his probation on the misdemeanor theft charge, as the nine month sentence which had been imposed and stayed would be served concurrent to the felony theft sentence. Mr. Norton consented to the revocation. In fact, because the felony theft sentence had been ordered to be run consecutive to any other sentence,

the misdemeanor theft sentence could not run concurrent to the felony theft sentence.

On appeal, the Court of Appeals concluded this error or mistake in the law was a new factor. At Mr. Norton's sentencing hearing, the Circuit Court and the parties were all lead to believe (by Mr. Norton's probation agent) that Norton's probation would not be revoked and that the nine month imposed and stayed sentence would not come into play. Because the mistaken information was relied on by the trial court, the Court of Appeals ordered Mr. Norton be resentenced.

Similarly, the Circuit Court and attorneys in Mr. Johnson's case were laboring under a mistake – Mr. Johnson's sentence would be served in jail not in prison. Clearly, Judge Walsh relied on this mistaken information as he granted good time and Huber release, conditions associated with a jail sentence, not a prison sentence.

And this matter was highly relevant to the sentence.

At the original sentencing hearing, Mr. Johnson asked Judge Walsh to not impose any jail time as he had a family to support R-53, Page 4. Judge Walsh did impose jail time, but granted good time and Huber release, no doubt so Mr. Johnson could continue to help and/or support his family. To Mr. Johnson, this indicates the Trial Court wanted to impose some punishment, but in such a way that Mr. Johnson could still financially support his family. At the sentencing after revocation, for the same reasons, Mr. Johnson requested good time and Huber release R-56, Pages 5-6. Judge Walsh granted good time and Huber release, one would think for the

same reasons. One can only assume Judge Walsh approved good time and Huber as he considered it a fair and reasonable component of Mr. Johnson's sentence structure.

III. THE ERROR REGARDING MR. JOHNSON'S SENTENCE AMOUNTS TO A VIOLATION OF HIS DUE PROCESS RIGHT TO BE SENTENCED ON ACCURATE INFORMATION, THUS WARRANTING RESENTENCING.

To establish a claim for resentencing, the defendant must show: (1) inaccurate information was presented at the sentencing hearing, and (2) the sentencing court relied on the inaccurate information.

For the reasons described above, Mr. Johnson believes he has demonstrated beyond question that the Circuit Court and the attorneys mistakenly expected Mr. Johnson's confinement would be served in county jail, not in prison. This mistake as to his sentence, Mr. Johnson believes, satisfies the first proof requirement for resentencing.

Similarly, Mr. Johnson believes he has demonstrated above that Judge Walsh relied on this inaccurate information. When Mr. Johnson was first sentenced, Judge Walsh imposed the punishment of some jail time. However, Judge Walsh granted good time and Huber release, presumably in response to Mr. Johnson's stated concern of supporting his family. R-53, Pages 9-10. Therefore, while Judge Walsh concluded some punishment was warranted, he did so in a way to allow Mr. Johnson to finish his sentence early if he behaved in jail, and to leave the jail for work so he could financially support his family. At the sentencing after revocation hearing, Judge

Walsh crafted the same type of punishment – jail time (albeit for a longer period) with good time and Huber release.

To Mr. Johnson, it is evident at both the sentencing and sentencing after revocation hearings, Judge Walsh intended to craft a sentence which imposed a punishment, but at the same time, gave Mr. Johnson the opportunity to obtain early release (for good behavior) and to work while confined, all to allow Mr. Johnson to continue to support his family. The mistake about where Mr. Johnson is to serve this sentence (in prison rather than in jail) undermines this sentence.

Mr. Johnson argues this error relating to where his sentence would be served, one which is clear and undeniable, and one which Judge Walsh obviously relied on as he granted both good time and Huber release, ought to be corrected to assure Mr. Johnson has been afforded his due process rights.

CONCLUSION

Based on the errors alleged above, Mr. Johnson believes he should be granted a new sentencing hearing for the purpose of sentence modification, resentencing, or both.

Dated this _____ day of August, 2017.

_____
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APPENDIX

APPENDIX CERTIFICATION

I hereby certify that with this brief, either as a separate document or as part of this brief, is an Appendix that complies with Section 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court 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 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.

Dated this ____ day of August, 2017.

_____

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum 60 characters per full line of body text. The length of this brief is 2,973 words.

Dated this _____ day of August, 2017.

_____

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

Dated this _____ day of August, 2017.

_____
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