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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP834-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
BRUCE D. JOHNSON
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Brief of the State of Wisconsin 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 Presiding

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IS MR. JOHNSON ENTITLED TO A SENTENCE MODIFICATION WHEN THE COURT, AFTER IT HAD CONSIDERED RELEVANT FACTORS, MISSPOKE AND ASSUMED MR. JOHNSON WOULD SERVE HIS SENTENCE IN COUNTY JAIL RATHER THAN IN STATE PRISON AS REQUIRED BY LAW?

Trial court answer: No.

WAS MR. JOHNSON'S RIGHT TO BE SENTENCED ON ACCURATE INFORMATION VIOLATED WHEN THE COURT, AFTER ALREADY HAVING PRONOUNCED SENTENCE, ASSUMED THAT MR. JOHNSON WOULD SERVE HIS SENTENCE IN COUNTY JAIL RATHER THAN STATE PRISON AS REQUIRED BY LAW?

Trial court answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

This case originated in Brown County Circuit Court with the Case Number 2014-CF-1335. (7: 1). On October 8, 2014, Bruce Johnson was charged with one count of Possession of Cocaine as a second or subsequent offense in violation of Wis. Stat. § 961.41(3g)(c) and Wis. Stat. § 939.05. (1: 1).

At a plea hearing held on January 13, 2015, Mr. Johnson entered a no contest plea to an amended count of Possession of Cocaine without the second and subsequent modifier. (50: 12). In exchange for that plea, the State agreed to cap its sentence recommendation at 12 months of probation with 60 days conditional jail time. (50: 12).

At the sentencing hearing held on March 10, 2015, Judge Walsh withheld sentence and placed Mr. Johnson on probation for one year. (53: 2-3).

Mr. Johnson's probation was eventually revoked and he returned to Judge Walsh for a sentencing after revocation on November 1, 2016. (56). During that hearing, Mr. Johnson's counsel mentioned that Mr. Johnson had two children and that the mother of his two children was in court for the hearing. (56: 5). His attorney requested that whatever sentence passed down that day run concurrent to his other sentences so that "any programming that he can get into in the prison system, he'd be allowed to get into." (56: 5).

In crafting his sentence, Judge Walsh considered the "gravity of the offense, the character of the defendant, and the need to protect the public," in addition to other facts including rehabilitative needs and punishment. (56: 6). The court noted that Mr. Johnson's education level and age indicated that he had a desire to earn a living to support his family. (56: 7). On the other hand, Judge

Walsh noted that the conduct which led to his revocation was similar to the Possession of Cocaine charge, a rather serious charge. (56: 7). Specifically, Judge Walsh said:

> At the same time I consider the conduct that I see on the revocation summary regarding what led to the revocation, and I consider those things in the context of his character as well, and those things don't reflect favorably on character. And, in fact, they're concerning because they're similar in nature to the charge which we are here for.
>
> The charge we're here for is one that certainly is a serious offense. The public takes these types of offenses seriously because it indicates that there are illicit drugs like, in this case, cocaine in our community, and that brings with it a whole host of other problems for a community . . . And the public is concerned about that, and they look to the courts for protection from those types of things,...

(56: 7-8). Accordingly, Judge Walsh, "in light of all the factors," sentenced Mr. Johnson to "one year jail," consecutive to any other sentence he would be serving. Afterwards, defense counsel asked if the court was taking a position on Huber and/or good time. Judge Walsh replied that Mr. Johnson would "get Huber and good time." (56: 8).

The Judgement of Conviction refers to jail as well (22).

Apparently Mr. Johnson was advised after his revocation hearing that he would have to serve his time for this offense in the prison system and not jail, consistent with Wis. Stat. § 973.03(2).

In Mr. Johnson's post-conviction motion for relief, he moved the court to either modify his sentence or resentence him. (35: 1). Mr. Johnson argued that he, Judge Walsh, and the State were all under the impression that in entering his plea, he would be serving one year in county jail after the sentence he was then serving. (35: 2) He argued that Judge Walsh was not aware of the fact that he would instead have to serve his time in prison as required by Wis. Stat. § 973.03(2) and that this amounted to a mistake in the law that constituted a new factor highly relevant to sentencing. (35: 2) Mr. Johnson argued that this new factor permitted the court to resentence him. (35: 2).

Alternatively, Mr. Johnson argued that he had a constitutional right to be sentenced on accurate information, and that he was entitled to be resentenced because information before the trial court was inaccurate and Judge Walsh relied on that inaccurate information when formulating his sentence. (35: 2).

Judge Walsh concluded that for reasons stated on the record (57), he would be declining to modify Mr. Johnson's sentence or resentence him on the grounds Mr. Johnson set forth. (38: 1). Mr. Johnson subsequently appealed.

STANDARD OF REVIEW

Whether a fact or set of facts presented by the defendant constitutes a "new factor" is a question of law that is reviewed de novo. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis.2d 53, 71, 797 N.W.2d 828, 837. If it is determined that a "new factor" was indeed present, the reviewing court must then review whether that new factor justified modification under an "erroneous exercise of discretion" standard. *Id*. Such a discretionary decision by a circuit court may only be reversed if there has been an improper exercise of discretion. *Id*.

Whether a defendant has been denied his due process right to be sentenced on accurate information is a constitutional issue which a reviewing court analyzes de novo. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis.2d 179, 185, 717 N.W.2d 1, 3.

ARGUMENT

I. MR. JOHNSON'S SENTENCE SHOULD NOT BE MODIFIED BECAUSE THE MISTAKE IN LAW IS NOT A HIGHLY RELEVANT NEW FACTOR, NOR WAS IT AN ERRONEOUS EXERCISE OF DISCRETION FOR THE CIRCUIT COURT TO DENY MODIFICATION.

To justify a sentencing modification, a defendant must establish that 1) there is indeed a new factor and 2) the new factor justifies modification. *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609 (1989).

a. All parties' lack of mentioning Wis. Stat. § 973.03(2) did not amount to a "new factor" justifying modification of Mr. Johnson's sentence.

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. Norton, 2001 WI App 245, ¶ 9, 248 Wis.2d 162, 167, 635 N.W.2d 656, 659. A new factor is something that is "highly relevant" to the sentence so that its newly revealed existence frustrates the court's sentencing objectives. *State v. Ramuta*, 2003 WI App 80, ¶ 8, 261 Wis.2d 784, 791, 661 N.W.2d 483, 486. A defendant seeking to demonstrate that a new factor exists must do so by "clear and

convincing evidence." *State v. Franklin*, 148 Wis.2d 1, 9–10. Ordinarily, a revocation of probation does not present a new factor. *Id* at 168.

The State concedes it appears as though all parties were under the impression that the defendant would serve his time in the Brown County Jail. However, this misunderstanding was hardly relevant to the sentence the court crafted. The relevant factors the court considered were the nature of the crime, the defendant's character, and the need to protect the public. (56: 6). After considering those factors, the court found that a one year sentence, consecutive to any other sentence, was appropriate. (56: 6-8). Judge Walsh's mistaken grant of Huber and good time was an aside remark that had no bearing on his sentence. The circuit court considered all the relevant factors and sentenced the defendant. It was only after the court pronounced sentence did Mr. Johnson ask the court about Huber and good time. The court granted that request. (56: 8). Neither defense counsel nor the State was basing their arguments under the assumption that Mr. Johnson was going to jail instead of prison. (56: 5). Further, the court was not basing its judgement on that assumption (56: 6-8); (57:7). The parties were basing their arguments on the nature of conduct which led to his revocation, which ultimately led to his sentence. (56).

Norton is distinguishable from the case at bar. 248 Wis. 2d 162. In *Norton*, the defendant was misadvised that if he voluntarily consented to a revocation, he could serve his sentence after revocation for misdemeanor theft concurrently with his new sentence for felony theft. *Id* at 166. However, the trial court in Norton's felony sentence mandated that the sentence be served consecutive to any other sentence. *Id*. The mistake in law that he could serve that sentence after revocation concurrently induced his consent to revocation and this constituted a new factor. *Id*. The deciding fact that led the court to conclude that there was a new factor was that everyone understood that Norton's probation would not be revoked at the time of sentencing or subsequent to sentencing unless he consented to it. *Id*.

The difference between *Norton* and the instant case is that Norton had the option to consent to revocation. There was no such option for Mr. Johnson. He was going to be revoked without question. (25). The revocation report from the Wisconsin Department of Corrections recommended Mr. Johnson be revoked because of the nature and severity of the offense justifying revocation, his behavior while on extended supervision, his incarceration would be consistent with the goals and objectives of field supervision, and because one year of incarceration would be necessary to protect the public from Mr. Johnson's future criminal activity. (25: 11). In addition, the report noted that Mr. Johnson's prior

revocations, his prior assaultive behavior, his multiple violations of his parole and their nexus to his Possession of Cocaine charge warranted revocation. (25: 11). Because Mr. Johnson had no option to consent to revocation, the instant case significantly differs from *Norton.*

Courts have upheld that proper factors to consider during sentencing are the character of the defendant, the need to protect the public, and the gravity of the offense. *State v. Harbor*, 333 Wis.2d 53, 70; *State v. Ramuta*, 2003 WI App 80, ¶ 12, 261 Wis.2d 784, 793, 661 N.W.2d 483, 487; *State v. Echols*, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640 (1993); *State v. Ninham*, 2011 WI 33, ¶ 30, 333 Wis.2d 335, 352, 797 N.W.2d 451, 460. The Supreme Court of Wisconsin has also enumerated a plethora of other factors that it has recognized can be properly considered:

> A past record of criminal offenses, a history of undesirable behavior patterns, the defendant's personality, character and social traits, the results of a presentence investigation, the vicious or aggravated nature of the crime, the degree of the defendant's culpability, the defendant's demeanor at trial, the defendant's age, educational background and employment record, the defendant's remorse, repentance and cooperativeness, the defendant's need for close rehabilitative control, and the rights of the public.

State v. Macemon, 113 Wis.2d 662, 668, 335 N.W.2d 402, 406 (1983).

The circuit court considered some of these factors and the record reflects the court's well-reasoned exercise in discretion. (56: 6-8). Nowhere did the circuit

court indicate that Mr. Johnson's potential for Huber or good time factored into its decision for crafting the sentence the way it did. (56). Judge Walsh's primary factors in sentencing were the character of the defendant, the need to protect the public, the gravity of the offense, and the underlying offense's nexus to the conduct which led to Mr. Johnson's revocation. (56: 6-8). As Judge Walsh noted, had the attorney at the end of that hearing not asked for Huber and good time, he would not have ordered it. (57: 7). Where Mr. Johnson would serve his time had no bearing on the court's sentence. (57: 7).

Accordingly, this inaccurate information present at sentencing was not used nor was it highly relevant to Mr. Johnson's sentence. Mr. Johnson has not shown that it was highly relevant by clear and convincing evidence. Thus, the court's unawareness of Wis. Stat. § 973.03(2) does not constitute a new factor warranting resentencing.

b. Even if the court's failure to consider Wis. Stat. § 973.03(2) constituted a new factor, the court properly exercised its discretion in denying modification.

There was no new factor that warranted resentencing in this case. Even if there were, the court had discretion to consider whether to modify Mr. Johnson's sentence. The court was well within its authority to decide not to modify Mr. Johnson's sentence.

In order to prevent the continuation of unjust sentences, the circuit court has inherent authority to modify a sentence within defined parameters. *State v. Trujillo*, 2005 WI 45, ¶ 10, 279 Wis.2d 712, 694 N.W.2d 933. "Included within those defined parameters is the circuit court's inherent authority to modify a sentence based upon the showing of a new factor." *Ninham*, 333 Wis.2d 335, 383–84. "The issue of whether new factors warrant a modification of the defendant's sentence is within the circuit court's discretion." *State v. McDermott*, 2012 WI App 14, ¶ 9, 339 Wis.2d 316, 323, 810 N.W.2d 237, 240. "In determining whether to exercise its discretion to modify a sentence on the basis of a new factor, the circuit court may, but is not required to, consider whether the new factor frustrates the purpose of the original sentence." *Id* at 384. There is a policy in this state that favors finality in sentencing. *State v. Dowdy*, 2010 WI App 158, ¶ 32, 330 Wis.2d 444, 459, 792 N.W.2d 230, 237.

Generally, appellate courts have been reluctant to question the judgment of circuit courts when they refuse to modify sentences. In *State v. Crochiere*, a defendant pleaded no contest to reckless endangerment, operating a motor vehicle while intoxicated, and battery to a prisoner. *State v. Crochiere* 2004 WI 78, ¶ 3, 273 Wis.2d 57, 61, 681 N.W.2d 524, 526. While Crochiere was in prison, Wisconsin changed from an indeterminate sentencing model to a "Truth-in-Sentencing" model, thus subjecting him to more time in initial confinement. *Id* at 62. Crochiere moved the court to modify his sentence, arguing that the extended time on his initial confinement prolonged his inability to make child support payments constituted a new factor. *Id*. The circuit court held a hearing to determine whether this fact was a new factor and determined that the prolonged inability to make child support payments would not have changed the court's sentence and thus did not constitute a new factor. *Id* at 74. The Supreme Court of Wisconsin upheld that exercise of discretion. *Id* at 75.

Likewise, Mr. Johnson contends that he has a family to support and the trial court's refusal to modify his sentence, based upon the fact he would not get Huber and good time to support his family, constitutes an abuse of discretion. (Appellant's Brief, page 8). After hearing evidence and arguments, and after considering other materials submitted by Mr. Johnson where he alleged this "new

factor," Judge Walsh upheld Mr. Johnson's sentence. (38: 1). At the post-conviction motion hearing, Judge Walsh stated that the Huber and good time request by Mr. Johnson's attorney was "not the main thrust of his sentence." (57: 7). In fact, it was not part of the analysis that the circuit court conducted when it was imposing the sentence "in any respect." (57: 7). The court's subsequent decision to not grant Mr. Johnson's motion for modification was well within its discretion. *McDermott*, 339 Wis.2d 316, 323.

Accordingly, the court properly exercised its discretion in denying Mr. Johnson's motion to find a new factor warranting a sentence modification.

II. THE COURT'S FAILURE TO CONSIDER THAT MR. JOHNSON COULD NOT BE SENTENCED TO JAIL DID NOT AMOUNT TO A VIOLATION OF MR. JOHNSON'S DUE PROCESS RIGHT TO BE SENTENCED ON ACCURATE INFORMATION.

Inaccurate information was not the basis for Mr. Johnson's sentence, and he therefore did not suffer a violation of his constitutional right to be sentenced on accurate information. Judge Walsh's grant of Huber and good time or mention of jail had no bearing on the sentence he imposed.

A defendant has a constitutionally protected right to be sentenced on accurate information. *State v. Loomis*, 2016 WI 68, ¶ 47, 371 Wis.2d 235, 257, 881 N.W.2d 749, 760. A defendant has a constitutional right to a fair sentencing

process "in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information." *State v. Travis*, 2013 WI 38, ¶ 17, 347 Wis.2d 142, 153, 832 N.W.2d 491, 496. Only criminal sentences based upon *materially* untrue information are inconsistent with due process of law and therefore cannot stand. *Id*. (*emphasis added*). A defendant is entitled to resentencing if (1) the defendant shows that information at sentencing was inaccurate and (2) the defendant shows the court *actually relied* on the inaccurate information. *State v. Tiepelman*, 2006 WI 66, 291 Wis.2d 179, 717 N.W.2d 1. (*emphasis added*). A circuit court's "explicit attention" to the misinformation demonstrates a reliance on that misinformation in passing sentence." *Travis*, 347 Wis.2d 142, 164.

In *State v. Travis*, Travis was sentenced under the erroneous belief that he was subject to a five-year minimum term of initial confinement. *Id* at 178-179. On eight occasions during sentencing, the circuit court explained to Travis that it was bound to sentence him to at least five years in prison. *Id* at 157-158, 163. This constituted "explicit attention" that formed part of the basis for the eight year initial confinement sentence that the court eventually imposed. *Id* at 157. In *Tiepelman*, at the time of sentencing, the circuit court explicitly misstated that the defendant had over twenty prior convictions, when he had actually been convicted

of five. During its analysis, the court mentioned "I counted something over twenty prior convictions at the time of the commission of this offense." 291 Wis.2d 179, 183. This indicated to the Wisconsin Supreme Court that the circuit court actually relied on inaccurate information in reaching its decision on sentencing. *Id* at 194.

The facts of the instant case are not remotely close to those cases. The State concedes that information after the sentencing analysis was performed suggested Mr. Johnson could be sentenced to jail was inaccurate. Nonetheless, the circuit court did not rely on where Mr. Johnson would serve his sentence as a basis for his sentence. Much less, the court did not even consider where Mr. Johnson would be serving his sentence when it considered factors relevant to sentencing.

As mentioned supra, the transcript of the sentencing after revocation hearing on November 1, 2016 shows that the circuit court considered the gravity of the offense, the character of the defendant, and the need to protect the public when it sentenced Mr. Johnson. (56: 6). After considering those factors, Judge Walsh concluded that "the appropriate sentence is what's being recommended to me by the revocation summary," and that he would impose "one year jail." (56: 8). The only inaccuracy in Judge Walsh's analysis was that he could impose jail, and he mentioned it *after* he had reached his decision. (56: 6-8). Judge Walsh did not rely on that when imposing sentence. At the post-conviction motion hearing,

Judge Walsh said that "it was not the main thrust" of his sentence. (57:7). At no point in his analysis did the court mention that the location where Mr. Johnson would serve his sentence mattered. (56: 6-8); (56: 7).

The State contends that where Mr. Johnson would serve his sentence and whether he received Huber and good time were inconsequential to the sentence the court imposed. Further, the court did not rely on that when deciding Mr. Johnson's sentence. Therefore, Mr. Johnsons due process right to be sentenced on accurate information was not violated.

CONCLUSION

There was no new factor warranting a modification in Mr. Johnson's sentence. Even if there had been a new factor, it was within the circuit court's discretion not to modify the sentence. Judge Walsh did not sentence Mr. Johnson with any consideration as to where he would serve his sentence and consequently Mr. Johnson was not sentenced on inaccurate information. Accordingly, the State respectfully requests that Mr. Johnson's sentence stand.

Respectfully submitted this _____ day of September, 2017.

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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: Times New Roman proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 12 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3344 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.

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Dated this ____ day of September, 2017.

Signed:

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CERTIFICATE OF CONTENTS OF 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 s. 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 s. 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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CERTIFICATION AS TO ELECTRONIC FILING OF APPENDIX

An electronic copy of this appendix which complies with s. 809.19(13) has not been submitted.

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An electronic appendix, if filed, will be identical in content and format to the printed form of the appendix filed as of this date.

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