RECEIVED
10-10-2017
CLERK OF COURT OF APPEALS
OF WISCONSIN

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.

---

Reply Brief of Bruce D. Johnson on Appeal from An Order Denying Post Conviction Relief, and a Judgment of Conviction Both Entered in Brown County Circuit Court, The Honorable Thomas J. Walsh, presiding.

---

GOGGIN & GOGGIN, LLC
Attorney Daniel R. Goggin II
SPD Appointed Appellate
Counsel for Bruce D. Johnson
PO Box 646
429 South Commercial Street
Neenah, WI 54957-0646
(920) 722-4265
Bar #1008910

TABLE OF CONTENTS

## AUTHORITIES CITED

A. Table of Cases: Page

## ARGUMENT

### I. THE FACT THAT MR. JOHNSON'S SENTENCE WILL BE SERVED IN PRISON RATHER THAN IN JAIL IS HIGHLY RELEVANT AND CONSTITUTES A "NEW FACTOR" UNDER WISCONSIN LAW.

The State argues whether Mr. Johnson serves his sentence in prison or in jail is not relevant for sentencing purposes. State's Brief, Page 7. Mr. Johnson flatly disagrees.

A jail term is significantly different in the level of confinement and in regard to release privileges. In many Wisconsin counties and for many misdemeanor offenses, a jail term may be served on an electronic monitoring device. A defendant serving a jail term is able to seek Huber release from confinement for work and other purposes. And a defendant serving a jail term is entitled to credit for good time.

With a prison term, a defendant is not afforded any of these privileges at all, or on a very limited basis.

As stated in his initial brief, at the original sentencing hearing, Mr. Johnson asked Judge Walsh to not order any confinement time, as Mr. Johnson was concerned about being able to support his family. With this in mind, Judge Walsh did impose some jail time as part of the original sentence (presumably to serve a punitive and deterrent purpose), but granted Huber release. Clearly, Judge Walsh's original sentence recognized the difference between prison confinement and jail confinement. As part of the original sentence, Judge Walsh imposed some confinement time (to punish Mr. Johnson and to deter future criminal conduct), but did so in a manner which allowed Mr. Johnson to support his family. Had Judge Walsh concluded punishment of Mr. Johnson and protection of the public were overriding concerns of the sentence, then one would expect a prison term would have been ordered by Judge Walsh.

In short, Judge Walsh's actions at the original sentencing hearing demonstrate the significant differences between jail time and prison time, and how these differences are relevant to sentencing. Depending how a trial court balances the usual sentencing factors – seriousness of the offense, character of the accused, and need to protect the public – either a jail term or a prison term may be warranted. For a serious crime, with a repeat offender, and a grave concern for public protection, a trial court may conclude

prison is the appropriate form of confinement to keep the defendant off the streets for an extended period of time. For a lesser crime with an offender with fewer prior convictions, a jail term may be appropriate to punish the offender, but to allow the offender to continue to work and support his/her family.

Mr. Johnson considers the nature of the confinement to be highly relevant at sentencing.

II. MR. JOHNSON DISPUTES THE STATE'S CLAIM JUDGE WALSH ERRONEOUSLY GRANTED HUBER RELEASE.

The State argues Judge Walsh mistakenly granted Huber release. State's Brief, Page 7. Mr. Johnson disagrees.

As often happens in cases in which a jail term is ordered, several collateral matters are addressed after sentence is pronounced, including Huber release, a report date, and sentence credit. (The same can be paid of a prison sentence. After the length of the sentence has been set, the trial court may be asked to consider eligibility for Earned Release or Boot Camp).

There is no stage during the sentencing process at which a defendant is obligated to raise matters such as Huber release, sentence credit or the report date must be raised. At times, these matters are raised before sentence is pronounced. Often, they are not raised until after sentence is pronounced.

In this case, as argued before, neither the attorneys nor the Trial Court ever used the term "prison" when discussing Mr. Johnson's sentence. Rather the term "jail" was used. Both the Trial Court and the attorneys were speaking of jail when discussing Mr. Johnson's confinement. Under these circumstances, Mr. Johnson sees no error in the granting of Huber release. Jail was the only form of confinement mentioned and Huber release is only available when serving a jail term. The grant of Huber privileges is fully in accord with the discussions of the Court and counsel. Moreover, for the reasons stated above, Mr. Johnson sees no significance to the request being made after sentence was pronounced. Such a request was made at a time when such matters are often addressed at sentencing.

III. THE ATTEMPT BY THE STATE TO DISTINGUISH THIS CASE FROM THE **NORTON** CASE IS MISPLACED.

The State seeks to distinguish Mr. Johnson's case from the **Norton** case because of factual differences between how Mr. Johnson and Mr. Norton were revoked. State's Brief, Page 8.

The principle espoused in **Norton** is that if there is mistaken information before the sentencing court, information highly relevant to sentencing, then the mistake constitutes a "new factor" and sentence modification may be warranted. Mr. Johnson argues this very situation occurred in his case. The Trial Court (and the parties) mistakenly believed Mr. Johnson would serve his confinement in jail, as jail is the term the Trial Court and parties used throughout the sentencing after revocation hearing (as opposed to prison, the Wisconsin Prison System, or the like). With this in mind, Huber release and good time were granted. Later on, it was learned Mr. Johnson would serve his sentence in prison. To Mr. Johnson, the principle of **Norton** indeed applies to his case.

There was no error in granting Huber release and good time when throughout the hearing the Court and parties spoke exclusively of jail time, not prison time.

IV. THE TRIAL COURT DID NOT PROPERLY EXERCISE ITS DISCRETION IN DECIDING TO NOT MODIFY MR. JOHNSON'S SENTENCE.

Generally speaking, sentencing is left in the hands of the trial court, provided the trial court properly exercises its discretion. **Ocanas v. State**, 70 Wis. 2d 179, 233 N.W. 2d 457 (1975). The trial court is expected to set the sentence based upon consideration of various relevant factors and using sound reasoning. **Ocanas**, supra. When exercising its discretion, the trial court is expected to state on the record its reasoning. **State v. Bizzle**, 222 Wis. 2d 100, 585 N.W. 2d 899 (Ct. App. 1998).

In Mr. Johnson's mind, when deciding to order confinement as a sentence, to properly exercise its discretion at sentencing, the trial court must first determine the length of the sentence, stating the reasons for the term of confinement. If the sentence is more than one year, then if requested, the trial court must discuss, evaluate and decide if the offender is eligible and merits Earned Release, Boot Camp or similar program. If the sentence is less than one year, then if

requested, the trial court must discuss, evaluate and decide if the offender is eligible and merits electronic monitoring, Huber release or good time.

At the postconviction motion hearing, Judge Walsh denied sentence modification, indicating where Mr. Johnson served his sentence was not the main trust of the sentencing decision. Mr. Johnson contends this explanation does not amount to a proper exercise of discretion.

As described above, when deciding to order confinement as part of a sentence, whether the confinement is to prison or in jail, the trial court is often asked to consider various related matters such as Earned Release, Boot Camp, Huber release, good time and so on. In this regard, where the offender serves the sentence is critical as some matters are available in prison only or in jail only. As with setting the length of the sentence, when exercising its discretion as to these related matters, the trial court must discuss, evaluate and state on the record the reasons for or against granting these related matters.

In this case, Judge Walsh denied the motion to modify Mr. Johnson's sentence because where Mr. Johnson served the one year of confinement was not a primary consideration. However, given the collateral matters the Trial Court was likely required to address – ERP, Boot Camp, Huber, good time, etc. – it should have been a material consideration. If Mr. Johnson was going to prison, Judge Walsh should have been prepared to consider and exercise his discretion to approve or deny ERP, Boot Camp or similar programs. If Mr. Johnson was going to jail, Judge Walsh should have been ready to consider and exercise discretion as to Huber, electronic monitoring, or good time.

By his own admission, Judge Walsh did not give these collateral matters much thought. Mr. Johnson argues this is not a proper exercise of discretion.

## V. MR. JOHNSON IS ENTITLED TO RESENTENCING.

In objecting to Mr. Johnson's request for resentencing, the State cites to **State v. Travis**, 2013 WI 38, 347 Wis. 2d 142, 832 N.W. 2d 491, and **State v. Tiepelman**, 2006 WI 66, 291 Wis. 2d 179, 717 N.W. 2d 1, in which the trial court

explicitly refers to the erroneous information, suggesting there was no explicit reference to any error in Mr. Johnson's case.

In Mr. Johnson's case, the error was just as explicit. At no time did Judge Walsh or either of the attorneys mention prison, confinement to the Wisconsin Prison System, or some similar reference. In all instances, the Court and parties referred to jail. This was hardly by accident. To Mr. Johnson, it is evident the Court and parties all anticipated Mr. Johnson's confinement would be served in jail. Regrettably, they were all mistaken.

Moreover, Mr. Johnson rejects the State's argument Huber and good time were only mentioned in passing at the end of the hearing. As argued above, often matters such as Huber release, sentence credit and a report date are dealt with after sentence is pronounced.

If Judge Walsh had intended the confinement to be served in prison, surely he would have rejected the request knowing an offender confined to prison is not eligible for this privilege. Whatsmore, one would not expect defense counsel to make a request for Huber if prison had been ordered, as counsel would have known the offender was not eligible for the privilege of Huber release.

## CONCLUSION

Based on the errors alleged above, and set forth in his initial brief, Mr. Johnson believes he is entitled to either sentence modification or resentencing. This matter should be remanded to the circuit court with instructions for sentence modification or resentencing.

Dated this _____ day of October, 2017.

_____

Attorney Daniel R. Goggin II
SPD Appointed Appellate Counsel for
Bruce D. Johnson

## 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 2,146 words.

_____

Attorney Daniel R. Goggin II
SPD Appointed Appellate Counsel
for Bruce D. Johnson

## ELECTRONIC FILING CERTIFICATION

I, Attorney Daniel R. Goggin, II, hereby certify that (1) the electronic copy of this brief or no merit report is identical to the text of the paper copy of the brief or no merit report, and an electronic copy of the brief has been filed.

Dated this _____ day of October, 2017.

Attorney Daniel R. Goggin II
SPD Appointed Appellate Counsel
for Bruce D. Johnson