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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1600-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARQUIS D. WALLS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief Entered in
the Milwaukee County Circuit Court,
the Honorable Dennis R. Cimpl, Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did the circuit court violate Mr. Walls' Fifth Amendment right against self-incrimination by pressuring him into admitting guilt during sentencing, and then relying on his failure to do so as a basis to impose the maximum prison sentence?

The postconviction court said no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Walls welcomes oral argument if it would be helpful to the court. As this case involves settled law applied to the facts, publication is likely not warranted.

STATEMENT OF FACTS

The State charged Mr. Walls with one count of armed robbery as a party to a crime, in violation of WIS. STAT. §§ 943.32(2), 939.50(3)(c), and with one count of attempting to flee or elude a traffic officer, in violation of WIS. STAT. §§ 946.04(3), 939.50(3)(i). (1). The State alleged Mr. Walls participated in an armed robbery that occurred on March 19, 2015, and that he fled from a traffic stop on March 24, 2015. (1).

Mr. Walls exercised his right to a jury trial, during which he elected not to testify. (48:117-18). The State's case consisted of the testimony of the armed robbery victim, W.P., and three City of Milwaukee police officers, Nathan Butz, Daniel Urban, and Ronald Ziarnik. (48). In addition, portions

of two squad videos depicting the traffic stop were shown to the jury and entered into evidence. (48:114).

The jury acquitted Mr. Walls of the armed robbery, but convicted him of fleeing. (49:43). As to the fleeing offense, Detective Butz testified that he was involved in the armed robbery investigation and that he stopped Mr. Walls in the early morning hours of March 24, 2015. (48:66-69). Officers Urban and Ziarnik were each called to the scene of the traffic stop as backup. (48:66,101). Officer Urban testified he responded as backup to Detective Butz's call, and spoke to the driver of the stopped vehicle. (48:88-89). Urban identified that he was given a Wisconsin driver's license with the name of Marquis Walls on it, and he identified Mr. Walls as the driver of the stopped vehicle. (48:90). Urban testified that he asked Mr. Walls to step out of the vehicle, but that Mr. Walls drove away. (48:91-2). Urban and his partner returned to their squad car to chase Mr. Walls' vehicle. (48:92). Urban and Ziarnik each testified to the fleeing and to the accuracy of their respective squad videos. (48:92, 94-99, 103-113).

Sentencing on the fleeing conviction occurred on June 8, 2016, before the Honorable Dennis R. Cimpl. (50; App.101). The State asked the court to impose the maximum penalty of three-and-a-half years in prison, bifurcated as one-and-a-half years of initial confinement and two years of extended supervision. (50:2-3; App.102-3). In addition, the State asked the court to run the sentence consecutive to Mr. Walls' revocation term in Racine County Case No. 2008-CF-833, on which Mr. Walls was revoked based on the charges in this case. (50:2-3, 5; App.102-3, 105). Mr. Walls' trial attorney requested that the court impose a sentence concurrent to his nine-year revocation term. (50:7-8; App.107-8). During Mr. Walls' allocution, the following exchange took place:

The Court: What do you want to say, sir?

Defendant: I just want to say that I do accept my consequences.

The Court: Why did you flee?

Defendant: I was scared.

The Court: Why?

Defendant: I am on supervision.

The Court: So what? You didn't do anything wrong.

Defendant: I am not supposed to have police contact.

The Court: Well, as far as you knew, sir, they stopped you, they asked you to get out of the car so you could talk about something, you didn't know what it was about, you get out of the car, for all you know they would of [sic] talked to you and let you go, and then in the morning you would call you PO and say, hey, I was stopped by the cops for no reason. That is as far as you knew that night, right?

Defendant: That is factual.

The Court: Why didn't you do it? This ain't your first time running around with the cops.

Defendant: I was wrong.

The Court: But why? Why did you flee? Why did you put the citizens of Milwaukee in danger? Why did you put all of these cops in danger with this speeding? There must of [sic] been five or six

squads chasing you. I want to know why you fled.

Defendant: I have no reason.

(50:8-9; App.108-9).

Following additional questioning regarding Mr. Walls' revocation and his notice of alibi, the circuit court began its sentencing remarks, noting:

I saw the video. There was certainly traffic around. I have no idea why he is running. I don't buy his excuse at all that he was running because he was afraid of what his P[robation] O[fficer] might do. Especially when he tells me, and [his trial attorney] represents to me that he was doing okay on extended supervision because it was the only charge in the reconfinement hearing. So he had nothing to fear from his PO. He obviously had something to fear from the cops. I don't know what it is. The jury says it wasn't because he was involved in this armed robbery. I know he took place [sic] in a drug deal set up by the victim of the armed robbery. He said he didn't know it was a drug deal. I guess I don't believe him.

(50:9-12, 14; App.109-12).

The court proceeded with its sentencing remarks, discussing the serious nature of the crime, the need to protect the public, and Mr. Walls' character, and Mr. Walls requested an additional opportunity to speak. (50:13-15; App.113-5). Then, the court continued with its questioning:

The Court: *Then why did you run? Why did you run from the cops if you were fine and if you were doing nothing wrong? You were a law abiding citizen, why would you take the cops on that long chase?*

Defendant: I have no excuse.

The Court: Well, I chose [sic] to believe that the reason you did it is because you were afraid of something that you had done either on extended supervision, in violation of your extended supervision, or you had violated the law. The jury said it wasn't because of an armed robbery. I know you were involved in at least one drug deal. You say you didn't know it was a drug deal. I chose not to believe you. *Until you can give me a logical explanation as to why you fled from the cops*, I don't know. So when I look at the serious nature of the crime, the need to protect the community, and your lack of character, because you are telling me you were never involved in a—never involved in a gang, well, I don't believe you. Because I don't believe you for a minute anyway. *Because I think you are lying to me and you won't tell me why you ran from the cops.*

(50:16-17; App.116-7)(emphasis added).

Saying, "I have no choice[.]" the court sentenced Mr. Walls to the maximum possible penalty: one-and-a-half years of initial confinement and two years of extended supervision, consecutive to Mr. Walls' nine-year revocation sentence. (50:17; App.117). The court explained the terms of extended supervision, told Mr. Walls he was not eligible for the Challenge Incarceration Program or the Substance Abuse Program, and his closing remark was: "I still don't know why your client fled that night if he was a model prisoner on extended supervision as he claims. I don't think he was." (50:18-19; App.118-9).

Postconviction

On August 1, 2017, Mr. Walls filed a postconviction motion arguing he was entitled to resentencing. (32:1-9). He argued that the circuit court violated his Fifth Amendment privilege against self-incrimination by attempting to coerce him into admitting guilt during sentencing, and then relied on his failure to do so to impose the maximum prison sentence available. (32:1-9).

On August 3, 2017, the Honorable Dennis R. Cimpl denied Mr. Walls' postconviction motion for resentencing. (33; App.121-3). The postconviction decision explained why the court believed a maximum sentence was warranted:

During its sentencing decision, the court accepted that the defendant was not involved in the armed robbery but believed that he fled because he was afraid of something he had done either on extended supervision or in violation of the law. The court heard evidence at the trial that the defendant was involved in a drug deal and believed that to be true, despite the defendant's denial. In determining an appropriate punishment for the fleeing, the court considered the egregious nature of the offense (speeding between 60 and 80 miles an hour through residential neighborhoods, disregarding stop signs and traffic lights), the defendant's prior record, including very serious charges of first-degree intentional homicide, two counts of attempted first-degree intentional homicide and keeping a drug house – all of which were reduced to a single charge of first-degree reckless injury under the terms of a plea agreement) [sic], the defendant's gang affiliation (which he denied), his character for lying and the need to protect the public. Based on all these circumstances, the court determined that a maximum consecutive sentence was warranted in this case.

(33:2; App.122).

The postconviction court also explained its denial of the Fifth Amendment claim:

The court's questions were put to the defendant in the exercise of its duty to acquire full knowledge of his character and behavior. See *State v. Fischer*, 211 Wis. 2d 664 (Ct. App. 1997).[sic]¹ Consequently, the court was entitled to consider the facts adduced at trial, including the facts relating to the drug deal, even though the defendant was not charged with drug dealing and he denied that he was involved in that kind of activity. *State v. Hubert*, 181 Wis. 2d 333 (Ct. App. 1993) (a court may consider uncharged or unproven criminal acts because the court has the obligation to acquire full knowledge of the character and behavior of the defendant.) In any event, the defendant's responses did not materially impact upon the court's sentencing decision. There were other more compelling factors the court considered in imposing a maximum prison sentence, most particularly the egregious nature of the fleeing, which put the lives of innocent people and the pursuing officers at risk. The court did not give undue weight to the defendant's responses in considering his character and did not punish the defendant more severely because of them. The court considered a variety of factors within the exercise of its discretion and imposed the sentence it deemed to be necessary to achieve the goals of punishment, deterrence and community protection. In accord *State v. Baldwin*, 101 Wis. 2d 441, 456-59 (1981); *State v. Carrizales*, 191 Wis. 2d 85 (Ct. App. 1995).

(33:3; App.123).

¹ The correct citation is *State v. Fischer*, 211 Wis. 2d 665, 565 N.W. 2d 565 (Ct. App. 1997).

Mr. Walls appeals from the judgment of conviction and the denial of his postconviction motion.

ARGUMENT

I. Mr. Walls is Entitled to a New Sentencing Hearing Because the Sentencing Court Violated His Fifth Amendment Right Against Self-Incrimination.

The Fifth Amendment's self-incrimination clause is applicable to the states through the due process clause of the Fourteenth Amendment. In addition, Article I, §8 of the Wisconsin Constitution provides that no person may be compelled in any criminal case to be a witness against himself or herself. *See State v. Hoppe*, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407.

The Fifth Amendment privilege against self-incrimination applies to both the guilt and punishment phases of a criminal prosecution. *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981); *Scales v. State*, 64 Wis. 2d 485, 495-96, 219 N.W.2d 286 (1974); *State v. McConnohie*, 121 Wis. 2d 57, 68, 358 N.W.2d 256 (1984). It is improper for a sentencing court to impose a harsher sentence because a defendant refuses to admit guilt despite a finding of guilt. *Scales*, 64 Wis. 2d at 495; *see also Finger v. State*, 40 Wis. 2d 103, 112, 161 N.W.2d 272 (1968); *Gregory v. State*, 63 Wis. 2d 754, 758-59, 218 N.W.2d 319 (1974). The Fifth Amendment "privilege is 'as broad as the mischief against which it seeks to guard,' and ... is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent *unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty...for such silence.*'" *Estelle*, 451 U.S. at 467-68 (quotation omitted)(emphasis added).

In *Scales*, the Wisconsin Supreme Court concluded the sentencing court failed to properly exercise its discretion when it told the defendant: “It is my judgment that until you demonstrate some remorse, until you acknowledge your responsibility for the crime that you have committed, probation is not in order and efforts at rehabilitation will come to naught.... It is for that reason that it is my judgment...that I can do nothing but order your incarceration....” 64 Wis. 2d 485, 494-95. In deciding *Scales*, the Wisconsin Supreme Court noted it had previously held it was an improper criterion to impose a harsher sentence because, after a finding of guilt, the defendant refused to admit guilt. *Id.* at 495. After considering a similar Fifth Circuit Court of Appeals case, *Thomas v. United States*, 368 F.2d 94 (5th Cir. 1966), the Wisconsin Supreme Court determined, “*Thomas* held that a defendant, even after conviction, could not be compelled to pay a price for the retention of his Fifth Amendment rights. In the instant case, *Scales* was obliged to pay that price. We conclude that the procedure utilized at sentencing was coercive and in derogation of *Scales*’ Fifth Amendment rights.” *Scales*, 64 Wis. 2d at 496.

The Wisconsin Supreme Court further explained:

We have, on numerous occasions, held that a posttrial confession of guilt and an expression of remorse may be considered in mitigation of a sentence. From these cases, the state argues that, if remorse may be used in mitigation, lack of remorse may properly be considered in sentencing. We do not agree. The rights against self-incrimination discussed in *Thomas* are based upon the founding fathers’ fear of governmental coercion. The Bill of Rights confers no rights upon the state, but limits the power of the state. *The exercise of the right against self-incrimination is a one-way street. If the defendant*

exercises that right, he may not be penalized for it, even after a jury's determination of guilt. On the other hand, in the expectation of leniency, he may waive that right and acknowledge his guilt and express his contrition and remorse. A trial judge may, but he need not, take into consideration such expressions as indicative of the likelihood that the rehabilitatory process hoped for in the criminal law has commenced; but where, as here, the defendant refuses to admit his guilt, that fact alone cannot be used to justify incarceration rather than probation.

The crime with which the defendant was charged and for which he was found guilty is a serious offense and the judge, in the exercise of his discretion, based upon proper relevant factors, might well have chosen to impose a term of incarceration rather than probation, but he did not make that crucial decision on such other factors.

Scales, 64 Wis. 2d at 496-97 (emphasis added).

Like in ***Scales***, “the procedure utilized at sentencing was coercive and in derogation of” Mr. Walls’ Fifth Amendment rights. 64 Wis. 2d at 496. The sentencing court’s insistent, repeated demands that Mr. Walls explain his offense were improper, as was the court’s conclusion that it had “no choice” but to sentence Mr. Walls to the maximum possible punishment—consecutive to his substantial revocation sentence. (50:17; App.117). Notably, the sentence was pronounced just after the court told Mr. Walls, “I don’t believe you for a minute anyway. Because I think you are lying to me and you won’t tell me why you ran from the cops.” (50:17; App.117). The court’s attempts to pressure Mr. Walls to explain his offense and admit guilt violated Mr. Walls’ right to remain silent unless *he* chose “to speak in the unfettered exercise of his own will[.]” ***Estelle***, 451 U.S. at

467. The court's questioning demanded answers and explanations that it was not entitled to—unless Mr. Walls decided to voluntarily give them in hopes of leniency. *Scales*, 64 Wis. 2d at 496-97.

That Mr. Walls is entitled to resentencing is made clear in light of Wisconsin Supreme Court decisions in similar cases. In *Gregory v. State*, the Wisconsin Supreme Court considered whether the circuit court erred in relying at sentencing on the defendant's "declaration of non-complicity in the crime alleged." 63 Wis. 2d 754, 759. The supreme court explained:

The colloquy that followed between the defendant and trial judge regarding the defendant's perpetration of the crime of armed robbery resulted only from the defendant's assertion that he had reformed. We characterize the actions of the trial court as a mere interruption in a continued proclamation by the defendant of his desire for probation because of his lack of complicity in the armed robbery. While the actions of the trial court could be characterized as a statement of its belief as to the incredulity of the defendant, we find no evidence that the court's statements influenced the judge's discretion or that the judge abused his discretion in imposing sentence. The record fails to disclose any request by the trial judge that the defendant in fact admit his guilt.

Id., 758-59. In addition, the supreme court in *Gregory* noted that the sentencing court had explicitly disclaimed any attempt to compel the defendant to concede guilt; but rather, believed the defendant's assertions of innocence reflected on his lack of rehabilitation. *Id.*, 759.

Unlike in *Gregory*, the record here shows a clear attempt to urge or coerce Mr. Walls into confessing guilt

when the court asks Mr. Walls numerous times to explain why he fled. Throughout the course of the sentencing hearing, before imposing the maximum penalty consecutive to the revocation sentence, the court demanded:

- “But why? Why did you flee?”
- “Why did you put the citizens of Milwaukee in danger?”
- “Why did you put all of these cops in danger with this speeding?”
- “I want to know why you fled.”
- “Then why did you run?”
- “Why did you run from the cops if you were fine and if you were doing nothing wrong?”
- “Until you can give me a logical explanation as to why you fled from the cops, I don’t know.”
- “I think you are lying to me and you won’t tell me why you ran from the cops.”

(50:8-9, 16-17; App.108-9, 116-7); *Cf. id.* (“The record fails to disclose any request by the trial judge that the defendant in fact admit his guilt.”).

And, unlike in *Finger*, *Williams*, and *Baldwin*, Wisconsin Supreme Court cases in which similar challenges were raised, the record here establishes that Mr. Walls’ refusal to confess guilt influenced the circuit court’s sentencing discretion. In *Finger v. State*, 40 Wis. 2d 103, 113, the Wisconsin Supreme Court placed weight on the fact that the judge imposed only half of the maximum potential

sentence and explained, “While the court indicated its displeasure with the fact that the defendant refused to confess his guilt, we find no evidence that this displeasure materially influenced the judge’s discretion....”

Then, in *Williams v. State*, 79 Wis. 2d 235, 240, 255 N.W.2d 504 (1977), the Wisconsin Supreme Court again noted that the judge did not impose the maximum sentence, and concluded, “There is no indication in the record that the trial court placed undue or improper emphasis upon the defendant’s exercise of his [F]ifth [A]mendment rights.” Last, in *State v. Baldwin*, 101 Wis. 2d 441, 458-59, 304 N.W.2d 742, 751-52 (1981), the supreme court held that the sentencing court did not give “undue or overwhelming weight to any one [factor] in particular. The sentence imposed was well within the maximum for which the defendant might have been sentenced, and while it is evident that the defendant’s failure to admit his guilt and his lack of remorse were factors in the sentencing decision, we do not believe it was improper or an abuse of discretion.”

In contrast, here the sentencing court’s focus on Mr. Walls’ refusal to admit guilt dominated its sentencing discussion. (50:8-12, 14, 16-19; App.108-12, 114, 116-9). In addition, after imposing the maximum penalty, consecutive to Mr. Walls’ lengthy revocation sentence, the court remarked, “I still don’t know why your client fled that night if he was a model prisoner on extended supervision as he claims. I don’t think he was.” (50:18-19; App.118-9).

While the sentencing court, in its postconviction decision, disclaimed giving undue weight to the defendant’s responses or punishing the defendant more severely because of them, this Court is not bound by the circuit court’s “retrospective review” of its sentencing decision. *State v.*

Travis, 2013 WI 38, ¶¶48, 77, 347 Wis. 2d 142, 832 N.W.2d 491; (33:1-3; App.121-3). In *Travis*, the Wisconsin Supreme Court noted, “We acknowledge the circuit court’s conclusion at the postconviction motion hearing that the sentence it imposed would have been the same even if it had not been mistaken about the mandatory minimum. We are not, however, bound by the circuit court’s retrospective review of its sentencing decision that was made almost a year before.” *Id.*

Contrary to the circuit court’s disclaimer, its insistence on Mr. Walls’ admission of guilt, and its punishment when he would not, violated his Fifth Amendment right to remain silent at sentencing. The court’s demands for Mr. Walls to explain his actions and admit guilt overshadowed its sentencing remarks, resulting in the court’s determination that it had “no choice” but to sentence Mr. Walls to the maximum possible punishment based on its dissatisfaction with Mr. Walls’ answers—albeit, while referencing other, actually relevant considerations of the serious nature of the crime, the need to protect the community, and Mr. Walls’ character. (50:13-15, 17; App.113-5, 117).

The domination of the sentencing hearing by the court’s unwavering focus on getting an answer to his questions demonstrates that, like in *Scales*, the decision to sentence Mr. Walls to the maximum penalty consecutive to his revocation sentence was improperly based upon his refusal to confess guilt and to express remorse. *See Scales*, 64 Wis. 2d at 497. A fleeing offense is a Class I felony that carries a maximum penalty, as set by the legislature, of three-and-a-half years in the Wisconsin state prison system: one-and-a-half years of initial confinement and two years of extended supervision. *See* WIS. STAT. §§ 946.04(3), 939.50(3)(i). By nature of ordering the maximum penalty and

running it consecutive to Mr. Walls' revocation, Mr. Walls will serve an aggregate 10-and-a-half years in confinement as the result of this low-level Class I felony offense. (50:5; App.105).

Mr. Walls should not have been penalized for his failure to express contrition, remorse, or guilt via an explanation the judge deemed worthy or true. Despite seemingly thinking otherwise, the court was not entitled to an explanation from Mr. Walls. *Scales*, 64 Wis. 2d at 496-97 ("The exercise of the right against self-incrimination is a one-way street."). Mr. Walls' Fifth Amendment rights were violated by the court's actions, and accordingly, he is entitled to resentencing.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for resentencing.

Dated this 17th day of October, 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 3,790 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 17th day of October, 2017.

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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.

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 one or more initials or other appropriate pseudonym or designation 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.

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APPENDIX

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