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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. Mr. Walls Did Not Forfeit His Right To Review.

The state asserts that “[a] defendant’s unexcused failure to make a contemporaneous objection to a circuit court’s alleged Fifth Amendment violation at sentencing is no different than failure to object to other alleged sentencing errors for which forfeiture applies.” (State’s Br.9).

On the contrary, the Wisconsin Supreme Court has explicitly explained that, “some rights are not lost by a counsel’s or a litigant’s mere failure to register an objection at trial. These rights are so important to a fair trial that courts have stated that the right is not lost unless the defendant knowingly relinquishes the right. ...a criminal defendant has certain fundamental constitutional rights that may only be waived personally and expressly, including the right to the assistance of counsel, *the right to refrain from self-incrimination*, and the right to have a trial by jury...Such rights cannot be forfeited by mere failure to object.” *State v. Ndina*, 2009 WI 21, ¶31, 315 Wis. 2d 653, 761 N.W.2d 612 (emphasis added; quotations and citation omitted).

Accordingly, Mr. Walls did not forfeit his right to appellate review.¹

¹ Moreover, the law does not require that sentencing claims be raised in any manner other than through a postconviction motion on the merits in the circuit court. See *State v. Grady*, 2007 WI 81, ¶14 n.4, 302 Wis. 2d 80, 734 N.W.2d 364 (“The State contends that Grady waived [sic] the issues presented. Grady did not waive [sic] the issues presented because he filed a postconviction motion pursuant to WIS. STAT. § 809.30(2)(h). Filing a postconviction motion is a timely means of

II. Mr. Walls Is Entitled To A New Sentencing Hearing Because The Sentencing Court Violated His Fifth Amendment Right Against Self-Incrimination.

In arguing that the circuit court did not violate Mr. Walls' Fifth Amendment rights, the state tries three approaches: first, it attempts to distance what happened here from a Fifth Amendment violation by presenting a distinction without a difference: asking a defendant to admit guilt and the court here asking "Walls to explain why he did what he did." (State's Br.14). Second, the state attempts to paint Mr. Walls' responses during the sentencing hearing as part and parcel of his independent choice to allocute, and the court's "pointed questions" as proper sentencing considerations of Mr. Walls' character, rehabilitative potential, and risk to the public. (State's Br.12-14). Last, the state argues, in the alternative, that the court did not give undue weight to Mr. Walls' responses. (State's Br.15).

As Mr. Walls clarifies below, the cases on which the state primarily relies—*State v. Fisher*, 211 Wis. 2d 665, 565 N.W.2d 565 (Ct. App. 1997), *State v. Carrizales*, 191 Wis. 2d 85, 528 N.W.2d 29 (Ct. App. 1995), *State v. Baldwin*, 101 Wis. 2d 441, 304 N.W.2d 742 (1981), *State v. Thompson*, 172 Wis. 2d 257, 493 N.W.2d 729 (Ct. App. 1992), and *State*

raising an alleged error by the circuit court during sentencing. *See e.g.*, *State v. Gallion*, 2004 WI 42, ¶14, 270 Wis. 2d 535, 678 N.W.2d 197.”).

The state submits that the forfeiture rule “facilitates fair and orderly administration of justice...[and] gives the circuit court a chance to address the perceived error.” (State's Br.8). Mr. Walls filed a postconviction motion presenting this argument to the circuit court, thereby providing the circuit court an opportunity to consider the argument for itself and a chance to address the perceived error.

v. Fuerst, 181 Wis. 2d 903, 512 N.W.2d 243 (Ct. App. 1994)—do not sanction what happened here.

- A. The sentencing court imposed the harshest possible sentence based on Mr. Walls' failure to answer questions aimed at eliciting admissions of guilt about his crime.

Citing *Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286 (1974), the state accurately observes that “a sentencing court may not impose a harsher sentence for a defendant’s failure to admit guilt after a finding of guilt.” (State’s Br.12). However, it contends there was no violation in this case because the circuit court did not ask Mr. Walls to admit his guilt. (State’s Br.12).

Yet, the court used the sentencing hearing as an opportunity to repeatedly press Mr. Walls to explain his offense—in other words, to elaborate on his guilt. The state argues that “[i]t was no violation of Walls’s Fifth Amendment right to freedom from self-incrimination for the circuit court to ask Walls questions about the circumstances surrounding the offense of conviction.” (State’s Br.12). In this case, the sentencing court’s questions about his fleeing were:

- “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?”
- “You were a law abiding citizen, why would you take the cops on that long chase?”
- “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). These coercive, repetitive questions were designed to elicit admissions of guilt and should not be minimized as merely fleshing out the circumstances surrounding Mr. Walls’ conviction in order to give the court insight into his character.

The state nevertheless argues, “The circuit court did not demand Walls admit to felony fleeing. The court asked Walls to explain why he did what he did.” (State’s Br.14). This is a distinction without a difference. Further, in *State v. Carrizales*, the defendant pled no contest to one count of second-degree sexual assault and was ordered to attend a sex offender treatment program as a condition of his probation. 191 Wis.2d 85, 89. The defendant argued his Fifth Amendment right against self-incrimination was violated because his sex offender treatment program required that he admit he committed the sexual assault. *Id.* This Court, in explaining that Carrizales’ right against self-incrimination was not violated due to the fact that he had already pled no contest and been sentenced, and therefore his admission of guilt would not incriminate him in a future criminal proceeding, explained he had “no right against self-incrimination *with regard to admitting the facts surrounding this conviction.*” *Carrizales*, 191 Wis. 2d 85, 97 (emphasis added). Thus, the state’s argument that asking Mr. Walls to

“explain why he did what he did” was not a violation of his right against self-incrimination—insofar as it believes there is a distinction between a compelled admission of guilt and compelled admission to the facts surrounding the conviction—fails.

Ultimately, Mr. Walls’ failure to satisfy the court’s “pointed questions” resulted in the court noting it “had no choice” but to impose the harshest sentence available: one-and-a-half years of initial confinement and two years of extended supervision, run consecutive to Mr. Walls’ nine-year revocation sentence. (State’s Br.14; 50:17; App.117). The court flatly told Mr. Walls that it had no choice but to sentence him to the maximum possible penalty because it did not believe his answers to its questions: “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. So when I look at all of that, you go to prison—back to prison....” (50:16-17; App.116-17).

- B. Mr. Walls faced a “veritable ‘Catch-22’” when his sentencing court asked him a series of questions about his guilt.

The state attempts to paint Mr. Walls’ responses during the sentencing hearing as part and parcel of his independent choice to allocute. (State’s Br.12). However, all Mr. Walls volunteered of his own accord was the simple sentence, “I just want to say that I do accept my consequences.” (50:8; App.108). The rest of his statements at

sentencing were responses to the court's relentless questions—about his actions, his revocation, and his alibi defense at trial.

Moreover, the state's argument that Mr. Walls "chose to speak" ignores practical realities. (State's Br.12). As the Wisconsin Supreme Court explained in the context of police questioning and the Fifth Amendment privilege against self-incrimination, a person is left with two choices: either speak or remain silent, a "veritable 'Catch-22.'" *State v. Fencil*, 109 Wis. 2d 224, 237, 325 N.W.2d 703 (1982). Mr. Walls was placed in the terrible position of being pointedly interrogated by the one person who had the power to send him to prison for a very long time—and who ultimately exercised that power. Given the coercive circumstances, characterizing Mr. Walls' responses to the sentencing court's questions as part of his voluntary choice to allocute is misleading. (State's Br.17).

In addition, WIS. STAT. § 972.14(2), which governs statements before sentencing, only provides, "Before pronouncing sentence, the court shall ask the defendant why sentence should not be pronounced upon him or her and allow the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to the sentence." That statute does not authorize a sentencing court to demand answers from a defendant whose liberty depends on the court's goodwill. Nor does the State point to any authority that gives a sentencing court a free pass to interrogate a defendant about his crime just before imposing sentence.

The state argues that the court had a legitimate reason for wanting to know Mr. Walls' motivation for fleeing: in order to help the court better understand Mr. Walls. (State's Br.13). It cites to *State v. Fisher*, 211 Wis. 2d 665, 678, in

which this Court acknowledged a sentencing court's "responsibility to acquire the full knowledge of the character and behavior of the defendant before imposing sentencing." However, *Fisher* is not on point with the facts of this case. In *Fisher*, the sentencing court considered evidence of unproven offenses in its consideration of Fisher's character and in order to determine his potential risk to the public. *Id.* Importantly, the evidence the sentencing court considered stemmed from the court's sentencing of Fisher's co-actor—the sentencing court did not learn about these unproven offenses by compelling Fisher to provide it with information about his character. *Id.* at 677. Unlike in *Fisher*, here, the sentencing court aggressively attempted to compel Mr. Walls to admit guilt, and subsequently used Mr. Walls' answers against him.

The state also argues, "The circuit court simply asked Walls why he did what he had already admitted doing—fleeing police—and why he found himself at the drug deal arranged by the armed robbery victim. Honest, thoughtful answers—as opposed to lies, or indifference—could have worked in Walls's favor. Answers that demonstrated insight into his criminal activity—answers that suggested he now saw the error of his ways and was prepared to forego future antisocial behavior—could have opened the door to a more lenient sentence." (State's Br.13).

This argument directly ignores the Wisconsin Supreme Court's explanation in *Scales* that the exercise of the right against self-incrimination is a *one-way* street. 64 Wis. 2d at 496-97. A judge may take into consideration acknowledgments of guilt and expressions of remorse and contrition as signs of rehabilitative potential. *Id.* But, if a defendant does not choose to acknowledge his guilt and express remorse and contrition in hopes of leniency, that

cannot be held against him. *See id.* It simply does not work in the inverse.

Nevertheless, the state argues that *State v. Fuerst*, 181 Wis. 2d at 915-16, allows a court to “consider a defendant’s refusal to admit guilt—especially in the face of overwhelming evidence—as reflecting the need for rehabilitation and the risk to the public.” (State’s Br.11). But *Fuerst* carefully delineated the bounds of that consideration of lack of remorse: “a sentencing court does not erroneously exercise its discretion by noting a defendant’s lack of remorse *as long as the court does not attempt to compel an admission of guilt[.]*” *Id.* at 915 (emphasis added).

Moreover, in *Fuerst*, the sentencing court “commented on Fuerst’s denial as part of its consideration of whether Fuerst could be successfully rehabilitated and whether Fuerst would be likely to engage in future criminal conduct if placed on probation.” *Id.* at 916. In contrast, the sentencing court here attempted to compel Mr. Walls’ guilt, and its use of Mr. Walls’ answers to its coercive questions was not tied to appropriate sentencing considerations like whether Mr. Walls could be successfully rehabilitated or whether Mr. Walls would be likely to engage in future criminal conduct if placed on probation.

The state posits it was “not the circuit court’s fault” or a violation of the Fifth Amendment that Mr. Walls’ “multiple, inconsistent answers led the court to believe Walls was lying, a relevant character consideration. Lying to the court at sentencing also does not bode well for a defendant’s rehabilitation and reinforces the conclusions that the defendant poses a risk to public safety. These, too constitute proper sentencing considerations.” (State’s Br.14). The state cites to *State v. Baldwin*, 101 Wis. 2d 441, 459 and *State v.*

Thompson, 172 Wis.2d 257, 264-65, respectively, for the premises that (1) a “court may consider a defendant’s refusal to admit guilt in light of the defendant’s inconsistent accounts of the charged crimes as indicative of lying, a relevant sentencing consideration” and (2) that “[c]redibility—or lack of it—is indicative of character, remorse, repentance, and cooperativeness, all proper sentencing considerations.” (State’s Br.11).

Neither of those cases involves lying or credibility issues. In **Baldwin**, the court considered, among other things, the fact that the defendant consistently denied his guilt and showed no remorse. 101 Wis.2d at 444. The Wisconsin Supreme Court simply explained that “[a] defendant’s attitude toward the crime may well be relevant in considering [the defendant’s demeanor, his need for rehabilitation, and the extent to which the public might be endangered by his being at large].” **Baldwin**, 101 Wis.2d at 459.

In **Thompson**, the defendant was upset that the sentencing court considered his “laudable background” as an aggravating factor instead of a mitigating factor. 172 Wis.2d at 259. This Court noted a trial court must consider the gravity of the offense, a defendant’s character, and the public’s need for protection; it may also consider a number of other factors, including the defendant’s personality, character and social traits, the defendant’s demeanor at trial, the defendant’s remorse, repentance or cooperativeness, and the defendant’s rehabilitative needs. **Id.** at 264-65.

The sentencing court’s questions and reactions to Mr. Walls’ responses were not measured examinations of proper sentencing considerations such as Mr. Walls’ character, his risk to the public, or his rehabilitative potential. The court’s questions compelled Mr. Walls to admit guilt and the court

took negative inferences from Mr. Walls' answers to questions it compelled him to answer. It did not tailor Mr. Walls' responses to proper sentencing considerations. Simply put, the court held against Mr. Walls his failure to acknowledge his guilt and to express remorse and contrition, in violation of the Wisconsin Supreme Court's dictates in *Scales* and the Fifth Amendment.

C. The court gave undue weight to Mr. Walls' compelled responses.

The state also argues, in the alternative, that the circuit court did not give undue weight to Mr. Walls' refusal to admit guilt. (State's Br.14-15); see *State v. Baldwin*, 101 Wis.2d 441, 457-58. This claim is contradicted by the record. The court's demands for Mr. Walls to explain his criminal conduct and admit guilt overwhelmed the sentencing hearing. (50:8-9, 16-17; App.108-9, 116-7). In *Baldwin*, the supreme court determined the sentence imposed was well within the maximum for which he may have been sentenced, and it believed the trial court "considered a variety of factors, giving no undue or overwhelming weight to any one in particular." *Id.* at 459.

Here, the sentencing court remarked, after imposing a sentence more than six times the maximum initial confinement allowed by law, by operation of Mr. Walls' revocation sentence, "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.118-19). Notably, in arguing that the circuit court's "no choice" comment reflected its conclusion that "Walls plainly deserved the maximum available sentence[.]" the state fails to address the fact that the sentencing court chose to run Mr. Walls' maximum available sentence consecutive to a 9-year

revocation sentence that arose for the same underlying conduct. (State's Br.18).

Last, the state asserts this case is more like **Gregory v. State**, 63 Wis.2d 754, 218 N.W.2d 319 (1974) than like **Finger v. State**, 40 Wis.2d 103, 161 N.W.2d 272 (1968) or **Scales**. (State's Br.16). As Mr. Walls explained in his brief-in-chief, in **Gregory**, the sentencing court explicitly disclaimed any attempt to compel the defendant to concede guilt. 63 Wis.2d at 759; (Brief-in-chief at 11-12). Additionally, in **Gregory**, the sentencing court carefully tailored the defendant's assertions of innocence to its belief that they reflected on his lack of rehabilitation. **Id.** As discussed above, here, the sentencing court asked Mr. Walls over and over and over to explain his crime. These were clear attempts to urge or coerce him into confessing guilt. And, in **Gregory**, the supreme court noted the defendant was sentenced to one-tenth of the legislative maximum. **Id.** Thus, the court in **Gregory** neither attempted to compel the defendant to concede guilt, nor did it impose a harsher sentence for the defendant's failure to admit guilt. For these reasons, this case is not comparable to **Gregory**, but, as argued in Mr. Walls' Brief-in-chief, is more akin to **Scales**. (Brief-in-chief at 10-11, 14).

CONCLUSION

For these reasons, and those stated in Mr. Walls' brief-in-chief, this Court should reverse and remand for resentencing.

Dated this 28th day of February, 2018 .

Respectfully submitted,

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

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, 999 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 28th day of February, 2018.

Signed:

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant