STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP1739-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY L. LANDRY,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Both Entered in the Kenosha County Circuit Court, the Honorable Chad G. Kerkman, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

I. Did the circuit court erroneously exercise its discretion when it ordered Mr. Landry to comply with the sex offender registry without (a) making the statutorily-mandated determinations or (b) explaining its rationale behind those determinations?

The circuit court had discretion to decide whether to require Mr. Landry to comply with the sex offender registry. It ordered him to comply with the registry, and denied his post-conviction motion to vacate that requirement.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Landry does not seek oral argument. Publication may be warranted to address how ***Gallion*** applies to a circuit court's discretionary determination of whether to require a defendant to comply with the sex-offender registry.

STATEMENT OF THE FACTS AND CASE

The State originally charged Mr. Landry with one count of second degree sexual assault (intercourse) and one count of false imprisonment. (1). The Complaint alleged that on one occasion in 2013, Mr. Landry touched and put his finger inside the vagina of his ex-girlfriend (A.D.) without her consent and by use of force. (1).

Mr. Landry ultimately pled no contest to two reduced charges of fourth degree sexual assault in violation of Wisconsin Statute § 940.225(3m), Class A misdemeanors. (30;80). As part of the plea agreement in this case, Mr. Landry also pled no contest to one count of felony bail

jumping (a Class H felony) in violation of Wisconsin Statute § 946.49(1)(b) in Kenosha County Case Number 14-CF-286, and one count of hit and run (an unclassified misdemeanor) in violation of Wisconsin Statute § 346.67(1) in Kenosha County Case Number 13-CT-684. (80).

The State agreed to recommend a maximum period of probation with conditional jail time in an amount up to the court. (80:2-4). The State also requested a pre-sentence investigation report (hereinafter "PSI"). (80:4).

The PSI listed Mr. Landry's prior criminal offenses. None of those offenses involved sexual assault charges. (31:6-10). The only prior charge that appeared to involve any sexual behavior was a 2006 conviction for disorderly conduct and resisting an officer following police finding Mr. Landry having sex in a car in a park after hours. (31:9).

The Department of Corrections recommended three years of probation and a withheld sentence for the sexual assault and bail jumping convictions, and a concurrent period of jail time for the hit-and-run conviction. (31:23).

The PSI-writer concluded that the most significant criminogenic needs Mr. Landry had were his "anger, social adjustment problems and substance abuse." (31:22). Nevertheless, the PSI-writer also recommended that Mr. Landry take part in sex offender treatment and be required to register as a sex offender. (31:22).

The PSI-writer concluded that he should be required to register as a sex offender because he (a) declined to provide his account of what happened with his ex-girlfriend in this case to the PSI-writer and (b) though he did provide written information about his overall sexual history and behavior in paperwork to the PSI-writer, he told the writer he did not wish to discuss it with her because he "did not feel

comfortable talking about sex with a woman". (31:4,17,22). The PSI-writer explained: "His power/control issues, coupled with his denial and refusal to address his sexual behavior only highlight the fact that he is a danger to the community, and at the very least should be required to register with the Sex Offender Registry." (31:22).

Mr. Landry's attorney submitted an alternative PSI, prepared by a clinical forensic counselor and sentencing specialist, who indicated that he did not believe that compliance with the sex offender registry was necessary given that Mr. Landry has no prior history of sexual assault cases. (35:14-15).

At sentencing, the State recommended the maximum allowable period of probation with conditional jail time in an amount left up to the court. (81:8). The State noted that the Department of Corrections was recommending compliance with the sex offender registry, but did not itself take a position on whether Mr. Landry should have to comply. (81:15-16).

Mr. Landry's attorney noted that Mr. Landry's last conviction prior to this case was five years earlier. (81:19). He noted that in the two years since the conduct resulting in the bail jumping conviction in 2014, Mr. Landry had no problems on bond, had been able to get employment as a forklift operator, and had received a promotion at that job. (81:20). He also noted that Mr. Landry had gotten married and was raising three children. (81:20,23).

Defense counsel also recommended probation. (81:21). Defense counsel noted that Mr. Landry indicated that he would be willing to comply with any sex offender treatment imposed by the court. (81:24).

Defense counsel asked the court not to require Mr. Landry to comply with the sex offender registry. (81: 27-28). Counsel argued that given that all parties were recommending probation, that Mr. Landry had no history of sexual assault offenses, and that there would be other protections for A.D. as Mr. Landry would be on supervision, ordering him to comply with the sex offender registry was unnecessary. (81:27-28). "I don't think that Mr. Landry is a risk to be out there committing sexual assaults on other people in the community. There's just no history to suggest that." (81:28).

In imposing sentence, the court noted that Mr. Landry did not have any prior sexual assault convictions but did have the prior incident in 2006 where he was caught having sex in a park and asked law enforcement if they "liked" his penis. (81:30-31;App.108-09). The court also noted that in the bail jumping case, Mr. Landry parked behind A.D. at a gas station and "yelled obscenities at her." (81:31;App.109).

The court concluded that given the two sexual assault counts here and a "number of domestic abuse convictions," Mr. Landry has "some sort of issue with women and with respect in general." (81:31;App.109). It also concluded that Mr. Landry was not taking responsibility for the sexual assault. (81:31;App.109).

Prior to imposing the sentences, the court explained that there would be an "element of punishment in this case." (81:33;App.111). It noted that it would "take into consideration the gravity of the offense, especially in the sexual assault case, and the need to protect the public." (81:33;App.111). It continued: "Evidently women in this community need to be protected from you given your history of domestic violence and the sexual assault that you committed." (81:33;App.111).

The court then imposed sentence: it imposed nine months jail on each of the two sexual assault charges, concurrent with each other. (81:33). It imposed a consecutive period of three years of probation on the bail jumping case, and a $700 fine for the hit-and-run case. (81:33-34;App.111-12).

After imposing these sentences and ordering Mr. Landry to pay a DNA surcharge, the court ordered Mr. Landry to comply with the sex offender registry: "Given the serious nature of the sexual assault and the effect it's had on Ms. D[], I am ordering you to comply with the Wisconsin Sex Offender Registry." (81:35;App.113).

The court did not offer further explanation at sentencing for its decision requiring Mr. Landry to comply with the sex offender registry. *See generally* (81;App.105-15).

Mr. Landry filed a post-conviction motion asking the court to vacate the requirement that he comply with the sex offender registry. (60). Mr. Landry argued that (a) the court failed to make and explain the requisite findings to impose that requirement and (b) the balance of the factors set forth in the statute for a court to consider when assessing whether imposition of the registry would be in the interest of public protection did not favor imposition of the registry requirement. (60).

The State filed a written response, opposing the post-conviction motion, arguing that imposition of the registry requirement was appropriate here. (62).

The circuit court denied Mr. Landry's post-conviction motion following a hearing. (82;64;App.104,116-23). The court did not offer any additional rationale at the post-conviction hearing; rather, it explained that its sentencing

rationale was sufficient. (82:7;App.122). It concluded that it did not erroneously exercise its discretion at sentencing when imposing the sex offender registry requirement. (82:7; App.122).

The court noted that it believed it "made a number of comments at the sentencing to support" its order. (82:7; App.122). It noted that at sentencing it commented that it believed Mr. Landry had an issue with women and respect and that he was not taking responsibility for the sexual assault. (82:7;App.122). It noted that at sentencing it commented that women in the community needed to be protected from Mr. Landry given his history of domestic violence and the sexual assault convictions here. (82:7; App.122). Lastly, it quoted the language it used at sentencing when ordering that Mr. Landry comply with the sex offender registry. (82:7;App.122).

Mr. Landry now appeals.

ARGUMENT

I. The Circuit Court Erroneously Exercised Its Discretion at Sentencing When It Ordered Mr. Landry to Comply with the Sex-Offender Registry without Making or Explaining the Statutorily-Required Determinations. The Requirements of ***Gallion*** Should Apply to this Exercise of Discretion.

A. For certain statutory offenses, including the offenses to which Mr. Landry pled no contest, a circuit court has discretion at sentencing to require that a defendant comply with the sex-offender registry.

Wisconsin Statute § 973.048 discusses a court's authority at sentencing to require a person to comply with the

sex-offender registry. For certain sex offenses, the statutes mandate compliance with the registry unless the court specifically finds otherwise. Wis. Stat. § 973.048(2m).

For other statutorily-listed offenses—including fourth degree sexual assault under Wisconsin Statute § 940.225(3m)—the statutes explain that a court "*may* require the person to comply with the reporting requirements" but only if the circuit court makes two findings: "if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01(5), and that it would be in the interest of public protection to have the person report under s. 301.45." Wis. Stat. § 973.048(1m)(a)(emphasis added).

Conduct is "sexually motivated" when "one of the purposes for [the] act is for the actor's sexual arousal or gratification or for the sexual humiliation or degradation of the victim." Wis. Stat. § 980.01(5).

The statute that gives a court the discretion to require compliance with the registry also lists factors a court may use to determine whether it would be in the interest of public protection to have the person report ("the court may consider any of the following"):

> (a) The ages, at the time of the violation, of the person and the victim of the violation.
>
> (b) The relationship between the person and the victim of the violation.
>
> (c) Whether the violation resulted in bodily harm, as defined in s. 939.22(4), to the victim.
>
> (d) Whether the victim suffered from a mental illness or mental deficiency that rendered him or her temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions.

> (e) The probability that the person will commit other violations in the future.
>
> (g) Any other factor that the court determines may be relevant to the particular case.

Wis. Stat. § 973.048(3).[1]

The sex offender registry statute provides that if a person such as Mr. Landry has been ordered to comply with the sex offender registry, he *must* register as a sex offender until "15 years after discharge from parole, extended supervision, community supervision, or aftercare supervision for the sex offense." Wis. Stat. § 301.45(5)(a)2.[2]

B. Wisconsin Statute § 973.048(1m)(a) requires a sentencing court to consider specific factors unique to whether sex-offender registry compliance is appropriate. The requirements of ***Gallion*** should apply to this exercise of discretion.

The plain language of the statute, the requirements of registry compliance, and this Court's related case law, all reflect that a court must conduct an exercise of discretion specific to sex-offender registry compliance—an exercise beyond the standard consideration of sentencing factors applicable in every criminal case—and that ***Gallion*** should apply to this exercise of discretion.

While deference is given to a circuit court's exercise of its discretion at sentencing, the exercise of discretion "contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the

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[1] There is no (f) in the statute.

[2] In limited circumstances for certain offenses or repeat offenders (not at issue here), a court may impose a lifetime registration requirement. See Wis. Stat. § 301.45(5).

record that yield a conclusion based on logic and founded on proper legal standards." *See* ***State v. Delgado***, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999).

As such, the record created by the circuit court in exercising this discretion "must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case." *See* ***id.*** at 281. A circuit court must do more than state "magic words." ***State v. Gallion***, 2004 WI 42, ¶ 37, 270 Wis. 2d 535, 678 N.W.2d 197.

The plain language of the registry statute demands particular considerations when a court imposes discretionary sex-offender registry compliance. The two statutory determinations are a prerequisite to such a discretionary order. As this Court has explained: "a circuit court may exercise its discretion in ordering sex-offender registration…only if the two statutory criteria are met: (1) the offense must have been sexually motivated, within the meaning Wis. Stat. § 980.01(5); and (2) registration is necessary for protection of the public." ***State v. Jackson***, 2012 WI App 76, ¶ 27, 343 Wis. 2d 602, 819 N.W.2d 288 (emphasis added).

Importantly, these two determinations—particularly the latter—are different than the three primary factors a court must always consider when exercising its discretion in imposing sentence: the gravity of the offense, the character of the offender, and the need to protect the public. ***McCleary v. State***, 49 Wis. 2d. 263, 274-76, 182 N.W.2d 512 (1971).

The question of whether and how the public is protected by placing a defendant in jail or prison for particular lengths of time is different than the question of whether and how the public is protected by requiring that defendant to register as a sex offender for fifteen years *after* he has completed that sentence.

Indeed, compliance with the registry mandates that a person update the Department of Corrections with any changes to a multitude of personal information including, among other things:

- Address;
- Employer;
- "Information sufficient to identify the person" including weight and hair color;
- "[E]very Internet user name the person uses, and the name and Internet address of every public or private Internet profile the person creates, uses, or maintains".

Wis. Stat. § 301.45(2)(a).

If this information changes, the person must notify the Department of Corrections within ten days. Wis. Stat. § 301.45(4)(a). If the person knowingly fails to do so, and the registration was imposed for a misdemeanor conviction (as it was here), the person may face up to nine months jail for the first failure to update this information; for all subsequent failures, the person may be imprisoned for up to six years. Wis. Stat. §§ 301.45(6)(a), 939.50(3)(h), 973.01(2)(b)8.

Ordering compliance with the registry thus imposes a significant, heavy burden on an individual that lasts far beyond the original sentence and, if not complied with, carries the possibility of additional criminal charges. Given the significance of a court's decision to impose this requirement, and the plain-language of the statute, the requirements of ***Gallion*** must apply to this important exercise of sentencing discretion.

This Court has extended the rationale of ***Gallion*** to other components of a court's exercise of discretion at sentencing beyond the sentence itself. This Court recently issued a published decision holding that ***Gallion*** applies to a court's decision of whether to make a defendant's conviction eligible for expungement. ***State v. Helmbrecht***, 2017 WI App 5, 373 Wis. 2d 203, 891 N.W.2d 412.

Wisconsin's expungement statute provides if the person was under twenty-five at the time of the offense and the conviction has a maximum sentence of six years in prison or less, "the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence *if the court determines the person will benefit and society will not be harmed by this disposition.*" Wis. Stat. § 973.015(1m)(a)1 (emphasis added).

The structure and language of the expungement statute thus parallels the structure and language of the sex offender registry statute: if the conviction falls within statutorily-limited parameters (there, age of the offender and maximum prison sentence; here, the statutory offense), the court "*may*" order it *"if the court determines*" that "a" and "b" are true (there, (a) the person will benefit and (b) society will not be harmed; here, (a) the conduct was sexually motivated and (b) it would be in the interest of public protection to have the person report). *Compare* Wis. Stat. § 973.015(1m)(a)1 *with* Wis. Stat. § 973.048(1m)(a)(emphasis added).

In ***Helmbrecht***, the defendant argued that ***Gallion*** should apply to the statutorily-mandated expungement determinations, and that those criteria require a court to consider "specific factors unique to expungement." 2017 WI App 5, ¶ 9. This Court concluded that the expungement statute "clearly contemplates the exercise of discretion and puts forth two factors for the sentencing court to utilize in exercising that discretion". ***Id.***, ¶ 11.

This Court held that when assessing whether to grant expungement, "the sentencing court should set forth in the record the facts it considered and the rationale underlying its decision for deciding whether to grant or deny expungement." ***Id.***, ¶ 12.

Importantly, this Court held that a sentencing court must do more than repeat the statutorily-mandated determinations:

> Thus, in exercising discretion, the sentencing court must do something more than simply state whether a defendant will benefit from expungement and that society will or will not be harmed. We have repeatedly held that the utterance of "magic words" is not the equivalent of providing a logical rationale. Rather, the sentencing record should reflect the process of reasoning articulated in ***Gallion***.

Id., ¶ 13.[3]

Gallion should equally apply when a court decides whether to make a defendant comply with the sex offender registry. If anything, the sex offender registry statute goes even further than the expungement statute, as it specifically lists factors a court may consider to determine whether it is in the interest of public protection to have the person register. *Compare* Wis. Stat. § 973.015(1m)(a)1 *with* Wis. Stat. § 973.048(1m)(a). The statutory listing of these factors

[3] Prior to the 2014 law-change to the DNA surcharge statute, this Court also held that ***Gallion*** applied to a court's discretionary decision of whether to impose the DNA surcharge. ***State v. Cherry***, 2008 WI App 80, ¶¶ 9-10, 312 Wis. 2d 203, 752 N.W.2d 393 (a court must do something more than "stating that it is imposing the DNA surcharge simply because it can"; it instead must "consider any and all factors to the case before it" and "set forth in the record the factors it considered and the rationale underlying its decision").

further demonstrates that the discretionary imposition of the sex offender registry demands a thorough, separate ***Gallion*** analysis.

Indeed this Court has already indicated that ***Gallion*** should apply here: in ***State v. Jackson***, when this Court analyzed whether a circuit court erred in concluding that particular conduct was sexually motivated and exercised its discretion to require compliance with the sex offender registry, this Court cited ***Gallion*** in explaining how it reviewed the circuit court's order. 2012 WI App 76, ¶ 7 (citing ***Gallion***, 2004 WI 42, ¶ 17).[4]

C. The circuit court here erroneously exercised its discretion at sentencing when it ordered Mr. Landry to comply with the sex offender registry without making or explaining the statutorily-required determinations. The court's rationale in denying Mr. Landry's post-conviction motion did not remedy this error.

The court's decision requiring Mr. Landry to comply with the sex offender registry failed to satisfy ***Gallion***. The court failed to both (1) make the statutorily-required determinations and (2) explain its rationale for those determinations.

[4] Mr. Landry also asks this Court to take judicial notice of the State of Wisconsin's Response Brief (filed 4/26/17) in the pending appeal of ***State v. Christopher A. Kline***, 2017AP15-CR. Mr. Kline similarly argued that the requirements of ***Gallion*** should apply to a court's discretionary imposition of compliance with the sex offender registry. The State agreed that ***Gallion*** should apply to a circuit court's discretionary imposition of the sex offender registry requirement. (Response Brief at 8-10).

Appellate review of a circuit court's sentencing discretion is limited to determining whether the circuit court erroneously exercised that discretion. ***State v. Taylor***, 2006 WI 22, ¶ 17, 289 Wis. 2d 34, 710 N.W.2d 466.

As he noted to the circuit court, Mr. Landry does not dispute that the offenses were sexually motivated under the statutory definition. (60:4). But the court still failed to make that specific finding as required by statute. *See generally* (81;App.105-15).

More importantly, the court failed to offer the process of reasoning required by ***Gallion*** as to the second requisite finding: that it would be in the interest of public protection to require Mr. Landry to comply with the registry.

The court only said that it was imposing the registry "[g]iven the serious nature of the sexual assault and the effect it's had on Ms. D[]." (81:35;App.113). This same explanation could seemingly be given in every sexually-motivated offense. It does not offer a process of reasoning to make clear why the court believed that it would be in the interest of public protection to require Mr. Landry in particular to register as a sex offender for fifteen years after completing his sentences in this case.

Indeed, if the court had offered that same explanation, and only that explanation, as the basis for the jail sentences it imposed, such a limited rationale would not satisfy ***Gallion***. It would fail because it alone does not explain how the court got from point A (the serious nature of the assault and its effect on the victim) to point B (nine month jail sentences being the minimum confinement necessary to achieve its objectives). *See* ***Gallion***, 270 Wis. 2d 535, ¶ 44.

It similarly fails as the basis for imposition of the sex offender registry requirement, because it does not make clear how the court got from point A (the serious nature of the assault of his ex-girlfriend and its effects on her) to point B (finding that it is in the interest of public protection to require Mr. Landry—an employed, married man with three children and no prior history of sexual assault; a man who the court ordered to serve jail time here with consecutive probation in the bail jumping case—to register as a sex offender for fifteen years).

Nor does the court's earlier comment that women in the community "[e]vidently" need to be protected from Mr. Landry due to his "history of domestic violence and the sexual assault that [he] committed" satisfy ***Gallion*** with regard to its imposition of the registry requirement. *See* (81:33;App.111). The court made this comment when explaining its basis for imposing its sentences, not in explaining why the registry requirement would be appropriate. *See* (81:33-36;App.111-14). Where Mr. Landry had no prior sexual assault convictions, and where his sexual assault convictions here involved his ex-girlfriend, the court did not explain how it believed requiring Mr. Landry to register and report as a sex offender for fifteen years would serve to protect the community.

The court also failed to supplement its insufficient rationale post-conviction. Mr. Landry recognizes that a circuit court may further explain its sentencing rationales in addressing a post-conviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). But the court here failed to do so. It only restated the comments it made at sentencing and explained that it believed those comments were sufficient. *See* (82;App.116-23). The court was incorrect because its rationale failed to satisfy ***Gallion***.

CONCLUSION

For these reasons, Mr. Landry respectfully requests that this Court reverse the circuit court's order denying his post-conviction motion and remanding this matter with an order that the circuit court exercise its discretion on whether to order compliance with the sex offender registry in the proper manner as prescribed by this Court.

Dated this 10th day of January, 2018.

Respectfully submitted,

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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: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,895 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 10th day of January, 2018.

Signed:

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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 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 10th day of January, 2018.

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* The Appendix documents have been redacted to comply with confidentiality rules.