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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

The State recognizes that the circuit court "did not explicitly make the specific findings required by Wis. Stat. § 973.048(1m) when it ordered Landry to register." (Response Brief at 6). The State also recognizes that though there is "significant overlap", "the regular sentencing factors are not the same as those for registration[.]" (Response Brief at 9).

The central dispute is whether the circuit court's comments when imposing Mr. Landry's sentences were in turn sufficient to constitute a proper exercise of discretion to require Mr. Landry to register as a sex-offender for fifteen years after completion of his sentences.

The court's comments concerning protection of the public when imposing sentence failed to constitute a proper exercise of discretion to impose the registry because the court did not *connect* those comments to its decision to impose the registry.

A sentencing court must always consider protection of the public when imposing any criminal sentence. ***McCleary v. State***, 49 Wis. 2d 263, 274-76, 182 N.W.2d 512 (1971). Further, it is hard to fathom a sex crime case where a court would not find at least some level of need to protect the public. To hold that a court's consideration of the need to protect the public when addressing the length of sentence in

turn automatically constitutes a proper exercise of discretion to impose the discretionary sex-offender registry would be to render superfluous the statutorily-mandated registry findings.

Indeed, the comments relied on by the State here—that the court believed Mr. Landry has "some sort of issue with women," that it did not believe he was "taking responsibility for the sexual assault," and that "[e]vidently women in this community need to be protected from [him] given [his] history of domestic violence and the sexual assault that [he] committed"—were all made prior to the court imposing the jail sentences. *See* (81:28-33;Initial App.106-11).

The court then imposed consecutive probation on the bail jumping case, then the conditions of probation, then a fine, and then addressed Mr. Landry's DNA sample and corresponding cost. (81:33-34;Initial App.111-12).

Only after doing all of that did the court address the sex offender registry requirement: "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;Initial App.113).

Thus, the only explanation the court connected to why it believed Mr. Landry should have to comply with the sex-offender registry was that one sentence. That one sentence does not reflect the "process of reasoning" necessary to constitute a proper exercise of discretion. *See* ***State v. Helmbrecht***, 2017 WI App 5, ¶ 13, 373 Wis. 2d 203, 891 N.W.2d 412.

The State asserts that Mr. Landry forfeited his argument that ***Gallion***[1] should apply to the court's exercise of discretion to impose the sex-offender registration requirement

[1] ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

because he "never argued in the circuit court that ***Gallion*** should apply…Instead, Landry only argued that the court erred by ordering registration." (Response Brief at 8).

The State is correct that Mr. Landry never explicitly argued post-conviction that the "requirements of ***Gallion*** should apply" to the court's exercise of discretion. *See* (60;82;Initial App.116-22). But the heart of Mr. Landry's post-conviction arguments were that the court was required—and failed—to exercise discretion beyond consideration of the normal sentencing factors when making the findings necessary to impose the registry requirement:

- Citing ***State v. Jackson***, 2012 WI App 76, 343 Wis. 2d 602, 819 N.W.2d 288, Mr. Landry argued that a "circuit court's decision to order compliance with the sex-offender registry under Wis. Stat. § 973.048 is reviewed for an erroneous exercise of discretion." (60:5).

- Mr. Landry argued that the "circuit court did not make the requisite findings" at sentencing. (60:6).

- He further argued: "Though the court did, in the context of discussing its overall sentence, discuss the nature of the offenses and the need to protect the public, (Sentencing Tr., 31-33), those generalized factors—factors that a court must consider at every sentencing—are notably different from the particularized findings that a court must make before ordering a defendant to comply with the sex-offender registry." (60:6).

Therefore, though he did not state "***Gallion*** must apply" to this exercise of discretion, Mr. Landry did argue post-conviction that a court must perform a separate process of reasoning—a separate exercise of discretion subject to

review for erroneous exercise—to properly impose the discretionary registry requirement. That is also the argument he makes to this Court.

But even if this Court should agree with the State that Mr. Landry forfeited his argument that the requirements of ***Gallion*** should apply to the court's exercise of discretion in making the findings necessary to impose the sex-offender registry requirement, forfeiture is a rule of judicial administration. *See, e.g.*, ***In re Guardianship of Willa L.***, 2011 WI App 160, ¶ 23, 338 Wis. 2d 114, 808 N.W.2d 115.

Given that (a) the State, as it acknowledges, has elsewhere recognized that ***Gallion*** should apply to the court's discretionary imposition of the sex-offender registry, (Response Brief at 9, n.1), (b) this Court has previously indicated that ***Gallion*** should apply, *see* ***State v. Jackson***, 2012 WI App 76, ¶ 7 343 Wis. 2d 602, 819 N.W.2d 288 (citing ***Gallion*** when analyzing whether a court erroneously exercised its discretion when imposing the discretionary registry requirement), and (c) Mr. Landry's post-conviction arguments encompassed the ***Gallion*** arguments he makes to this Court, this Court should address his argument that the court failed to comport with ***Gallion*** when imposing the sex-offender registry requirement.[2]

The State cites the long-standing principle that if the "[i]f the facts are fairly inferable from the record, and reasons indicate the consideration of legally relevant factors, the

[2] In his statement on oral argument and publication in his Initial Brief, Mr. Landry explained that 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. Mr. Landry here just wishes to clarify that given that this is a one-judge case, publication would require this Court to convert this to a three-judge panel pursuant to Wis. Stat. § 752.31.

sentence ordinarily should be affirmed." (Response Brief at 9)(quoting ***State v. Grady***, 2007 WI 81, ¶ 33, 302 Wis. 2d 80, 734 N.W.2d 364)(quoting ***McCleary***, 49 Wis. 2d at 281).

Central to this rule of deference to the circuit court, however, is the preliminary requirement that the circuit court's "exercise of sentencing discretion must be set forth on the record." ***Gallion***, 270 Wis. 2d 535, ¶ 4. The problem here is that the circuit court did not offer the "process of reasoning" required to constitute a proper exercise of discretion when it ordered Mr. Landry to comply with the stringent rules of registering as a sex-offender for fifteen years after completion of his sentences. *See* ***McCleary***, 49 Wis. 2d at 277; (81; Initial App.101-15). As such, it erroneously exercised that discretion.

CONCLUSION

For these reasons and those set forth in his Initial Brief, 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 13th day of April, 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 1,264 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 13th day of April, 2018.

Signed:

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