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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2017AP001851 CR

DEMARIO D. FLEMING,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order from Milwaukee County Case No. 2016CF004146 Partially Granting Postconviction Motion for Additional Sentence Credit and Denying Motion to Modify No Contact Order entered by the Honorable Dennis R. Cimpl, Circuit Court, Branch 19, Milwaukee County

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BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. Whether Mr. Fleming is entitled to sentence credit on this case for the time he spent in custody on Milwaukee County case 16 CF 566 for Armed Robbery that was dismissed when Mr. Fleming committed the intimidation of a witness offenses in this case while in custody for the armed robbery, he was sentenced for intimidating a witness from the armed robbery case and the judge considered the armed robbery when imposing his sentences for intimidation.

A. Circuit Court's Answer: No. Mr. Fleming is not entitled to credit in this case for the time he spent in custody solely in connection with the dismissed armed robbery charges in 16 CF 566 because Mr. Fleming's conduct in that case was not in connection with the course of conduct for which he was sentenced in this case.

II. Whether the no contact condition of Mr. Fleming's extended supervision should be modified to allow contact with Moneeka Humphrey when they have a child together and Ms. Humphrey wants to have contact with Mr. Fleming.

B. Circuit Court's Answer: No. The no contact order with Moneeka Humphrey should not be modified

because the interests of justice must supersede Ms. Humphrey's personal interests.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE

On September 12, 2016, Demario Fleming was charged by Criminal Complaint with two counts of Felony Intimidation of a Witness. (1:1, 5.) The Criminal Complaint alleged that on two occasions Mr. Fleming attempted to dissuade a witness, P.S., from giving testimony. (*Id.* at 1.)

At the time of the offenses, Mr. Fleming was in custody for charges of Armed Robbery in case 16 CF 566. (*Id.* at 1-2.) The Armed Robbery charges were based on reports that four people from Pennsylvania were robbed at gunpoint on January 31, 2016 in Milwaukee by three young individuals. (*Id.* at 1.) Mr. Fleming was arrested for the armed robbery on the same day. (32:5.) One of the alleged victims in the armed robbery case was P.S. (1:2.)

The police obtained recorded jail phone calls made by Mr. Fleming to others in an attempt to dissuade P.S. from testifying. (*Id.* at 2-5.) Specifically, Count one was based on a phone call from Mr. Fleming to his girlfriend, Moneeka Humphrey, on February 6, 2016. (*Id.* at 1.) Count two was based on a phone call from Mr. Fleming to his mother on February 8, 2016. (*Id.*)

Mr. Fleming had an initial appearance on the present case on September 12, 2016 in which $20,000.00 cash bail was set. (32:1, 12.) Subsequently, Mr. Fleming pled guilty

to both counts of Felony Intimidation of a Witness on February 14, 2017. (39:1, 4.) At the plea hearing, the State moved to dismiss the four Armed Robbery charges in 16 CF 566 without prejudice. (*Id.* at 13.) The circuit court then dismissed case 16 CF 566 without prejudice. (*Id.* at 13-14.)

At the sentencing hearing on February 15, 2017, Mr. Fleming still remained in custody and his trial attorney requested 380 days sentence credit from the date of Mr. Fleming's arrest on January 31, 2016 for the armed robbery to the sentencing date in the present case. (40:1, 30.) He argued that Mr. Fleming was entitled to sentence credit under Wis. Stat. § 973.155 for all days spent in custody in connection with the course of conduct for which the sentence was imposed. (*Id.*)

The State asserted that Mr. Fleming was only entitled to sentence credit from the date of his initial appearance on this case of September 12, 2016. (*Id.*)

The circuit court sentenced Mr. Fleming on Count one to four years initial confinement and three years extended supervision with credit for 380 days. (*Id.* at 43.) The court noted "I don't know if [the State] is right or [Mr. Fleming's trial attorney] is right." (*Id.*)

On Count two, Mr. Fleming was sentenced to three years initial confinement and three years extended supervision, consecutive to Count one. (*Id.*) Further, as a condition of extended supervision, the court ordered no contact with Ms. Humphrey. (*Id.* at 42.) The court explained that it believed she was a victim in this case. (*Id.*) She had to run away because she was afraid of Mr. Fleming, she lost her job and the court had to issue a warrant for her when she did not come to court to testify in the armed robbery case. (*Id.* at 38, 42-43.)

In imposing the sentences, the court addressed Mr. Fleming and explained "There is no question you were the leader of that armed robbery crew. I am not going to sentence you for the armed robbery. I can't. I wish I could. I'm sentencing you for the intimidation of a witness. But I can and do consider your role in those armed robberies and the games you were playing with regard to those armed robberies." (*Id.* at 37-38.)

On May 3, 2017, the Department of Corrections sent a letter to the circuit court requesting that the court review the Judgment of Conviction for the sentence credit that was ordered in this case. (22.) The DOC indicated that the offense occurred on February 6, 2016 and the sentencing date was February 15, 2017 which was 375 days later.

Therefore, "it appears the Court granted more jail credit than allowed per Wis. Stat. § 973.155(1)." (*Id.*)

On May 8 2017, the circuit court issued an Order Amending the Judgment of Conviction. (23.) The order indicated that the Criminal Complaint was filed on September 14, 2016 and a cash bond was set on the same date. (*Id.*) The court went on to say that Mr. Fleming was sentenced on February 15, 2017. (*Id.*) The circuit court then ordered that the Judgment of Conviction be amended to reflect 154 days of sentence credit. (*Id.*)

Mr. Fleming subsequently filed a Postconviction Motion arguing that he is entitled to 381 days of sentence credit pursuant to Wis. Stat. § 973.155(1)(a) from the date of his arrest on January 31, 2016 in the armed robbery case 16 CF 566 to his sentencing date in the present case of February 15, 2017. (27:1-5.)

Alternatively, Mr. Fleming argued that he is entitled to 375 days of sentence credit from the date of the offense in Count one of this case, February 6, 2016, to the sentencing date of February 15, 2017. (*Id.* at 5.)

Mr. Fleming also indicated in the postconviction motion that if his request was denied and the court based his sentence credit from the date of his initial appearance on this case, that the correct date of his initial

appearance was on September 12, 2016, not on September 14, 2016 as noted by the court in the Order Amending the Judgment of Conviction. (*Id.* at 4-5.)

Finally, Mr. Fleming also argued that the no contact condition of extended supervision should be modified to allow contact with Ms. Humphrey as they have a one year old daughter together and both Mr. Fleming and Ms. Humphrey want to have contact with each other. (*Id.* at 6.)

The circuit court filed a Decision and Order Partially Granting Postconviction Motion for Additional Sentence Credit and Denying Motion to Modify No Contact Order. (28.) The court denied Mr. Fleming's request to grant him sentence credit from his arrest date of January 31, 2016 in the armed robbery case. (*Id.* at 1-2.) The court concluded that Mr. Fleming's conduct in the armed robbery case was not in connection with the course of conduct for which he was sentenced in this case. (*Id.*)

The court also denied Mr. Fleming's request for sentence credit from the date of the offense in Count one. (*Id.* at 2.) The court explained that custody did not occur until his initial appearance when cash bail was set on September 12, 2016. (*Id.*)

The court only granted Mr. Fleming an additional two days sentence credit as his initial appearance was on

September 12, 2016 and not on September 14, 2016 as initially indicated in the Order Amending Judgment of Conviction. (*Id.* at 1.)

The court also denied Mr. Fleming's motion to modify the no contact order with Ms. Humphrey. (*Id.* at 2-3.) The court explained that it stands by the determination for the no contact order for the reasons set forth in the record. (*Id.* at 2.) Mr. Fleming now appeals the circuit court's order denying postconviction relief.

STANDARD OF REVIEW

Mr. Fleming bears the burden of demonstrating that he is entitled to additional sentence credit under Wis. Stat. § 973.155(1). *State v. Carter*, 2010 WI 77, ¶ 11, 327 Wis. 2d 1, 7, 785 N.W.2d 516, 519. Interpretation and application of Wis. Stat. § 973.155(1) to the facts of this case is a question of law that this Court determines independently of the circuit court. *Id.* at ¶ 12.

In reviewing whether the circuit court properly exercised its discretion in ordering Mr. Fleming to have no contact with Ms. Humphrey, this Court will uphold a circuit court's discretionary decision as long as the court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *State v.*

Roach, 2012 WI App 73, ¶ 10, 342 Wis. 2d 251, 816 N.W.2d 352 citing *LeMere v. LeMere,* 2003 WI 67, ¶ 13, 262 Wis.2d 426, 663 N.W.2d 789.

ARGUMENT

This Court should reverse the circuit court's decision that Mr. Fleming is not entitled to sentence credit on this case for the time he spent in custody on the armed robbery case. "A convicted offender shall be given credit toward the service of his...sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a).

Mr. Fleming is entitled to sentence credit for the time he spent in custody on the armed robbery case because it is in connection with the course of conduct for which sentence was imposed. Although the armed robbery case was dismissed, Mr. Fleming was convicted of intimidating a witness from the armed robbery case, he took responsibility for the armed robbery at sentencing for the intimidation convictions and the circuit court considered the armed robbery when imposing the prison sentences for intimidation.

Additionally, this Court should reverse the circuit court's decision that the no contact order with Ms. Humphrey should not be modified. Mr. Fleming and Ms.

Humphrey both want to have contact with each other in order to facilitate communication and visitation with their one year old daughter.

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DECISION DENYING MR. FLEMING'S POSTCONVICTION MOTION FOR ADDITIONAL SENTENCE CREDIT FOR THE TIME HE WAS IN CUSTODY ON THE ARMED ROBBERY CASE BECAUSE IT IS IN CONNECTION WITH THE COURSE OF CONDUCT FOR WHICH SENTENCE WAS IMPOSED.

Wis. Stat. § 973.155(1)(a) provides that "a convicted offender shall be given credit toward the service of his...sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." "The provisions of the sentence credit law, Wis. Stat. § 973.155(1), are mandatory." *Carter*, 2010 WI 77 at ¶ 51. "A sentencing court must give credit accorded by statute because 'a person may not serve more time than that for which he is sentenced.'" *Id.*

In applying Wis. Stat. § 973.155(1)(a) to the present case, it is not disputed that Mr. Fleming was in custody from the day he was arrested for armed robbery charges on January 31, 2016 until the day he was sentenced in this case on February 15, 2017. (32:5; 40:1, 30.) Instead, the issue is whether the days Mr. Fleming spent in custody on the armed robbery were "in connection with the course of conduct for which sentence was imposed."

In order to be "in connection with" there must be a factual connection between the custody and the conduct for which sentence was imposed. *Carter*, 2010 WI 77 at ¶¶ 56-57. In this case, there is a factual connection between Mr. Fleming's custody and the conduct for which sentence was imposed.

Mr. Fleming was arrested on January 31, 2016 for charges of armed robbery. (32:5.) He was subsequently charged in Milwaukee County case 16 CF 566 for Armed Robbery. (1:1-2.) He was in custody for the armed robbery charges when he committed the offenses in the present case. (*Id.*) On February 6, 2016 and February 8, 2016 Mr. Fleming made phone calls to Ms. Humphrey and to his mother from the jail that were recorded in which he attempted to dissuade P.S. from testifying in the armed robbery case. (*Id.* at 1-5.) P.S. was one of the alleged victims in the armed robbery case. (*Id.* at 2.)

Mr. Fleming was subsequently charged with two counts of Felony Intimidation of a Witness on September 12, 2016. (*Id.* at 5.) On that same day, Mr. Fleming had his initial appearance in which cash bail was set. (32:1, 12.) Mr. Fleming later pled guilty to both counts of Felony Intimidation of a Witness on February 14, 2017. (39:1, 4.)

On the same day, the State moved to dismiss the four armed robbery charges in 16 CF 566 without prejudice. (*Id.* at 13.) The State also noted "that this was not dismissed as any part of any kind of a resolution of the case for sentencing." (*Id.*)

Based on the State's motion, the circuit court dismissed 16 CF 566 without prejudice and noted that it was not part of any negotiation. (*Id.* at 13-14.)

On February 15, 2017, Mr. Fleming was sentenced on the present case. (40:1.) At sentencing, Mr. Fleming addressed the court and apologized for his actions and took responsibility for his behavior. (*Id.* at 33.) The court specifically asked Mr. Fleming whether he was taking responsibility for the armed robberies. (*Id.*) Mr. Fleming responded "I can take responsibility for them too." (*Id.*) The court replied "you can?" (*Id.*)

Mr. Fleming stated "I do, actually. I accept the consequences that come behind it. Because, you know, they are my actions." (*Id.*)

The court went on to explain the goals of sentencing Mr. Fleming, including punishment, deterrence and providing for Mr. Fleming's rehabilitative needs. (*Id.* at 34.) The court addressed the nature of the crime, need to protect the community and Mr. Fleming's character. (*Id.* at 36-37.)

However, the court also considered the armed robbery. (*Id.* at 37-38.) The court stated:

> There is no question you were the leader of that armed robbery crew. I am not going to sentence you for the armed robbery. I can't. I wish I could. I'm sentencing you for the intimidation of a witness. But I can and do consider your role in those armed robberies and the games you were playing with regard to those armed robberies.

(*Id.* at 37-38.) After imposing prison sentences, the court found Mr. Fleming ineligible for the Challenge Incarceration Program and the Substance Abuse Program "because of the nature of this crime, intimidation of a witness, because of the fact that it was successful in keeping [him] from being convicted for four armed robberies that [he took] responsibility for here...." (*Id.* at 44.)

Based on the facts of this case, the nature of the offenses and the court's consideration of the armed robbery in imposing Mr. Fleming's sentences in this case, his custody for armed robbery was in connection with the course of conduct for which sentence was imposed. Therefore, he should be entitled to sentence credit from the date he was arrested on the armed robbery even though the armed robbery case was dismissed and not read-in.

In *State v. Floyd*, 2000 WI 14, ¶ 32, 232 Wis. 2d 767, 779, 606 N.W.2d 155, 161, the court held that "pre-trial confinement on a dismissed charge that is read in at

sentencing relates to 'an offense for which the offender is ultimately sentenced.'" The court did limit it's holding to charges that are dismissed and read in at sentencing by noting that there is an important distinction between read-ins and other charges, including dismissals. *Id.* at ¶¶ 30-31.

The court explained that "read-ins constitute admissions by the defendant to those charges." *Id.* at ¶ 25. Read-ins are considered by the sentencing court as part of the defendant's conduct in determining the appropriate sentence. *Id.* There is also "exposure to the risk of a lengthier sentence as a result of consideration by the court of read-in charges." *Id.* at ¶ 26. The court indicated that read-ins stand apart from other charges that may be considered by a sentencing court because "the implication is that more weight is placed in the admitted charges than on unproven or acquitted offenses." *Id.* at ¶ 27.

However, the dismissed charges of armed robbery in this case had the same effect as a read-in as the court described in *Floyd*. Mr. Fleming admitted to the armed robberies at the sentencing hearing and took responsibility for them. (40:33.) The court specifically considered the armed robberies as part of Mr. Fleming's conduct in determining the appropriate sentence. (*Id.* at 37-38, 44.)

Mr. Fleming was also exposed to the risk of a lengthier sentence as a result of the court considering the armed robberies. Finally, although the armed robbery charges were dismissed and therefore unproven, read-in charges are also unproven.

The court in *Floyd* stressed that the distinction between read-in charges and dismissed charges was that more weight is placed on admitted charges than unproven or acquitted offenses. *Floyd*, 2000 WI 14 at ¶ 27. However, Mr. Fleming did admit to the armed robbery at the sentencing hearing even though the case was dismissed.

Therefore, there is no distinction in this case between whether the armed robbery charges were dismissed or dismissed and read-in because regardless of the label it had the same effect.

Mr. Fleming should not be deprived of receiving sentence credit for 225 days that he was held in custody from January 31, 2016 to the date of his initial appearance on this case of September 12, 2016 simply because the armed robbery was dismissed and not read-in.

Although the court in *State v. Piggue*, 2016 WI App 13, ¶ 1, 366 Wis. 2d 605, 606–07, 875 N.W.2d 663, 663–64, *review denied*, 2016 WI 78, ¶ 1, 371 Wis. 2d 607, 885 N.W.2d 379 held that a defendant was not entitled to

additional sentence credit for the time he spent in custody awaiting trial for a sexual assault charge that he was acquitted of but convicted of witness intimidation, the case is distinguishable from the present case.

In *Piggue*, the defendant was charged with felony intimidation. *Id.* at ¶ 2. He was on trial a month earlier for sexual assault and he instructed his girlfriend via phone calls and letters to contact the victim to convince her not to testify. *Id.* Piggue was later acquitted of the sexual assault. *Id.* at ¶ 4. But he pled guilty to the felony intimidation. *Id.* at ¶ 3. At the sentencing hearing for the felony intimidation, the State discussed the sexual assault charge. *Id.* at ¶ 4.

The circuit court sentenced Piggue to prison and did not award him any credit for the time he spent in custody for the sexual assault charge. *Id.* at ¶ 6. In imposing the sentence, the court discussed the sexual assault trial, but explained that the primary factor driving the sentence was the gravity of the offense of intimidation. *Id.*

The facts in *Piggue* are distinguishable from the present case. In *Piggue*, the defendant was acquitted. *Piggue*, 2016 WI App 13 at ¶ 4. He did not admit or accept responsibility for the sexual assault at the sentencing

hearing for the intimidation of a witness conviction. See *Id.* at 5.

Whereas in the present case, the armed robbery charges were dismissed, Mr. Fleming was not acquitted at trial. He never had the opportunity to have his day in court. Instead, he was held in custody for over one year, 380 days, from the time he was arrested on January 31, 2016 until the case was ultimately dismissed by the State on February 14, 2017.

Further, Mr. Fleming admitted to the armed robbery and took responsibility for his actions. (40:33.) The trial court specifically considered the armed robbery and Mr. Fleming's admissions when imposing the prison sentences. (*Id.* at 37-38, 44.)

After Piggue's sentencing, he filed a postconviction motion requesting eighty-four days of sentence credit for the time he spent in custody for the sexual assault charge. *Id.* at ¶ 7. The court denied the motion and he appealed. *Id.*

Piggue argued that the trial court considered the sexual assault charge in imposing his sentence for the witness intimidation conviction and therefore he should be given credit for the time he spent in custody for the sexual assault case. *Id.* at ¶ 10. In support of his

argument, he also cited to *Floyd* and noted that "the *Floyd* court based its decision in part on the premise that a read-in constitutes an admission, but that has since been withdrawn in *State v. Straszkowski*, 2008 WI 65, ¶¶ 58, 91-95, 310 Wis. 2d 259, 750 N.W.2d 835.

The court in *Piggue* explained that "even though *Straszkowski* may have clarified that read-ins are not to be construed as admissions, the fact is that read-ins are still distinguishable from acquittals and non-read-in dismissals." *Id.* at ¶ 13. In supporting this proposition the court cited See *Floyd*, 232 Wis. 2d 767, ¶¶ 26-27, 606 N.W.2d 155 (acquittals *may* be considered at sentencing; read-ins *are* considered at sentencing and thus carry more weight). *Id.*

However, *Floyd* does not support that proposition. The court in *Floyd* stated that "By their very nature, read-ins stand apart from other charges that may be considered by a sentencing court. The implication is that more weight is placed on the admitted charges than on unproven or acquitted offenses." *Floyd*, 2000 WI 14 at ¶ 27.

The court did not suggest that read-ins "are" considered at sentencing whereas other charges "may" be considered. See *Id.* Instead, the court expressly stated that the distinction between read-ins and other charges is

that read-ins are "admitted" charges and more weight is placed on admitted charges than unproven or acquitted offenses. *Id.*

However, the court in *State v. Straszkowski*, 2008 WI 65, ¶ 5, 310 Wis. 2d 259, 264, 750 N.W.2d 835, 838 expressly clarified that "no admission of guilt from a defendant for sentencing purposes is required (or should be deemed) for a read-in charge to be considered for sentencing purposes and to be dismissed." The court specifically held "that no admission of guilt from a defendant is required for a read-in offense to be dismissed and considered for sentencing purposes...." *Id.* at ¶ 6.

The holding in *Straszkowski* expressly and directly goes against the reasoning given by the court in *Floyd* as to why dismissed and read-in charges are distinguishable from other charges that are dismissed. See *Floyd*, 2000 WI 14 at ¶ 27 ("By their very nature, read-ins stand apart from other charges that may be considered by a sentencing court. The implication is that more weight is placed on the admitted charges than on unproven or acquitted offenses.")

Additionally, the court in *Straszkowski* specifically stated that "a circuit should advise a defendant that it 'may' consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be

increased." *Straszkowski*, 2008 WI 65 at ¶ 5 (Emphasis added). There is no requirement that a sentencing court must consider dismissed and read-in charges at the time of sentencing. See *Id*.

Instead, a sentencing court "may" consider dismissed and read-in charges at the time of sentencing just as the court "may" consider charges that were dismissed. See *Id.*; See *State v. Frey*, 2012 WI 99, ¶ 40, 343 Wis. 2d 358, 374, 817 N.W.2d 436, 444. (A circuit court can consider charges that have been dismissed outright when imposing a sentence). Therefore, there is no distinction between a sentencing court considering a dismissed and read-in charge and a dismissed charge when imposing a sentence.

Although the court in *Floyd* limited it's holding to apply to charges that are dismissed and read-in, the distinction made between read-ins and other dismissed charges has been subsequently withdrawn in *Straszkowski*. Although the distinction between read-ins and other dismissed charges has been withdrawn in *Straszkowski*, the ultimate holding in *Floyd* that defendants are entitled to sentence credit for dismissed and read-in charges is still good law.

And the reasons given by the court in *Floyd* to support its holding, that read-ins can be considered by a court in

imposing a sentence and therefore a defendant's exposure to the risk of a lengthier sentence as a result of considering read-ins, can still be applied to this case. The sentencing court in this case did consider the dismissed armed robbery charges and therefore Mr. Fleming was exposed to the risk of a lengthier sentence. Especially considering that Mr. Fleming admitted to the armed robbery charges and took responsibility for it.

Not only was Mr. Fleming punished for the intimidation of a witness convictions, but he was also punished for the armed robbery. (*Id.*) If a sentencing court is permitted to consider a dismissed charge that is connected to the conduct for which sentence is imposed, then a defendant should be permitted to receive sentence credit for the time he was held in custody for that dismissed charge.

Mr. Fleming was sentenced to a total of seven years in prison based in part on the armed robbery. He should be entitled to receive credit for the time he spent in custody on the armed robbery. Mr. Fleming only received sentence credit from the date of his initial appearance on this case of September 12, 2016 to the date he was sentenced on February 15, 2017. (28:1.)

However, Mr. Fleming is entitled to an additional 225 days of sentence credit from the day he was arrested on the

armed robbery charges, January 31, 2016, to the day of his initial appearance on the present case, September 12, 2016 because the custody is in connection with the course of conduct for which sentence was imposed.

Alternatively, if the Court did not award the aforementioned sentence credit, Mr. Fleming should receive an additional 219 days of sentence credit from the date of the offense in Count one of this case, February 6, 2016, to the day of his initial appearance on September 12, 2016. Mr. Fleming was in custody at the time he committed Count one in this case and he was ultimately sentenced for his conduct of intimidation of a witness that occurred on February 6, 2016.

Although he was being held in custody at the time for armed robbery, the armed robbery is in connection with the intimidation of a witness convictions and Mr. Fleming was sentenced based on the intimidation of a witness and the armed robbery.

II. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DECISION DENYING MR. FLEMING'S POSTCONVICTION MOTION TO MODIFY THE NO CONTACT ORDER WITH MONEEKA HUMPHREY BECAUSE SHE WANTS TO HAVE CONTACT WITH HIM, THEY HAVE A CHILD TOGETHER AND THE NO CONTACT IS NOT IN THE INTEREST OF PUBLIC PROTECTION.

At the sentencing hearing, the Court ordered that Mr. Fleming have no contact with Moneeka Humphrey. (40:42.)

Pursuant to Wis. Stat. § 973.049(2), when imposing a sentence on an individual, a court has discretion to "prohibit the individual from contacting victims of, witnesses to, or co-actors in, a crime considered at sentencing during any part of the individual's sentence or period of probation if the court determines that the prohibition would be in the interest of public protection." The sentencing court may also determine who the victims or witnesses to any crime are. *Id.*

At sentencing, the court explained that it believed that Ms. Humphrey was a victim in this case. (40:42.) The court stated that she had to run away because she was afraid of Mr. Fleming, she lost her job and the court had to issue a warrant for her when she did not appear to testify in the armed robbery case. (*Id.* at 38, 42-43.)

However, Ms. Humphrey is not a victim in this case. The victim in this case was P.S., who was the alleged victim in the armed robbery. (1:1-2.) Mr. Fleming attempted to dissuade P.S. from testifying in the armed robbery case through phone calls that he made to Ms. Humphrey. (*Id.* at 2-4.) Mr. Fleming did not make any threats to Ms. Humphrey or attempt to intimidate her.

Further, Ms. Humphrey wants to have contact with Mr. Fleming. (27:8-9.) She has even signed an affidavit

indicating her interest in having contact with Mr. Fleming. (*Id.*) They have a one year old daughter together. (*Id.* at 8.) Ms. Humphrey would like to have contact with Mr. Fleming in order to facilitate contact and visitation between Mr. Fleming and his daughter. (*Id.* at 8-9.)

Ms. Humphrey does not have anyone to take their daughter to see Mr. Fleming while he is incarcerated. (*Id.* at 9.) The no contact order with Ms. Humphrey is inadvertently prohibiting Mr. Fleming from having contact with his daughter as well. Mr. Fleming was sentenced to a total of seven years in prison. (40:43.) That is a substantial period of time for Mr. Fleming to not have any contact with his daughter.

Even when Mr. Fleming is released from prison he will be on extended supervision for six years. (*Id.*) He will still be subject to the no contact order during this time as well. Essentially the no contact order will prohibit Mr. Fleming and Ms. Humphrey from co-parenting or raising their daughter together for the next thirteen years.

The no contact order is not in the interest of public protection. There is no threat to the public if Mr. Fleming and Ms. Humphrey have contact with each other. Instead, they should be allowed to have contact with each other for the interests of their child and to be able to co-parent.

CONCLUSION

For the foregoing reasons, Mr. Fleming respectfully requests that the Court reverse the circuit court's decision and grant his postconviction motion for additional sentence credit and to modify the no contact order with Ms. Humphrey.

Dated this 24th day of November, 2017.

Respectfully Submitted,

_____

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CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 23 pages.

Dated this 24th day of November, 2017.

_____
Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: this electronic brief is identical in content and format to the printed form of the brief as of this date.

A copy of this certificate has been served with the paper copies of this brief with the court and served on all opposing parties.

Dated this 24th day of November, 2017.

_____
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