STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP001968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DION LASHAY BYRD,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The court violated Mr. Byrd's constitutional right to due process and his Fifth Amendment privilege against self-incrimination by demanding that he explain the offense and, when he would not do so, concluded that prison was necessary because he showed "absolutely no remorse."

The State argues that Mr. Byrd has not shown that the sentencing court actually relied on compelled statements by Mr. Byrd when sentencing him. (Response Brief at 14). Mr. Byrd never argued that the court had done so. Rather, Mr. Byrd argued that the court repeatedly attempted to coerce from him an explanation, which necessarily entailed an admission. When Mr. Byrd refused, the court used his refusal as an aggravating factor, declaring that prison was called for "especially" because he showed "absolutely no remorse." (R. 77: 22).

A. Mr. Byrd did not waive his Fifth Amendment rights by speaking at his sentencing.

The State makes the extraordinary argument that when Mr. Byrd chose to speak at his sentencing, he waived his Fifth Amendment privilege, thereby freeing the court to try to coerce admissions from him. (State's Response at 18). This ignores the ruling in ***Scales*** that such coercion is improper. 64 Wis. 2d at 496, 219 N.W.2d at 293. The support the State offers for its novel proposition is flimsy.

The State begins with a fatally flawed analogy between a defendant's exercise of his right to allocution and his exercise of his right to testify. (Response Brief at 19). The State cites ***Neely v. State***, 97 Wis. 2d 38, 49, 292 N.W.2d

859 (1980), for the proposition that "[A] defendant who testifies is deemed to have waived the privilege, at least with respect to matters reasonably related to the subject matter of his direct examination, and the state is entitled to subject his testimony to adverse cross-examination." The State asserts that the same should be true of a defendant who exercises his right of allocution at sentencing — that essentially he is subject to cross examination. (Response Brief at 21).

However, a defendant who makes the decision to testify must know that he is waiving his Fifth Amendment privilege and know that he will be cross examined. "Because the right not to testify is fundamental, a defendant's waiver of this right must be knowing and voluntary." ***State v. Jaramillo***, 2009 WI App 39, ¶ 11, 316 Wis. 2d 538, 543, 765 N.W.2d 855, 858. Here, having being specifically told that Mr. Byrd would not answer questions about the offense or why he committed it, the judge said "You have the right to tell me whatever you want to tell me. Do you want to talk?" (R. 77: 17). When the court invited Mr. Byrd to speak, Mr. Byrd had no reason to suppose that he would be opening himself up to coercive questioning. There is no basis to conclude that Mr. Byrd knowingly waived the right that counsel had asserted on his behalf moments before. The argument that once Mr. Byrd chose to speak at all at his sentencing, his Fifth Amendment privilege went out the window is untenable.

The State, citing ***Scales***, notes that a defendant may waive his Fifth Amendment privilege, acknowledge guilt, and express contrition. (State's Response at 19). That is true but beside the point. Mr. Byrd specifically chose not to do that. It should be noted that the defendant in ***Scales*** had exercised his right to allocution and made denials. The court ran afoul of

the Fifth Amendment by punishing him for that. ***Id.***, at 488, 219 N.W.2d at 289.

Finally, the State goes far afield, citing a 10th Circuit case, ***Harvey v. Shillinger***, 76 F.3d 1528, 1535 (10th Cir. 1996), that compares the right of allocution to the right to testify. The 10th circuit notes that "[o]nce a defendant chooses to testify, though, he waives his privilege against compelled self-incrimination with respect to the testimony he gives and the testimony is admissible in evidence against him in later proceedings." ***Id***. This decision offers no actual support for the State's position. In ***Harvey***, the defendant exercised his right of allocution and made admissions at sentencing. When his conviction was overturned, and he was re-tried, the statements he made at sentencing were used against him at trial. The 10th circuit upheld this, ruling that Harvey had waived his Fifth Amendment privilege as to the statements he made during the allocution.

Harvey stands for a proposition that is not in question in this case — that when a defendant does waive his Fifth Amendment privilege and make statements at sentencing, those statements can be used against him in a subsequent proceeding. The viability of even this proposition is questionable in Wisconsin since it relies in part on a conclusion that allocution is a statutory right, not a constitutional one. ***Id***., *See*, ***State v. Borrell***, 167 Wis. 2d 749, 482 N.W.2d 883 (1992)(recognizing a due process right to allocution); ***State v. Greve***, 2004 WI 69, ¶¶ 29–34, 272 Wis. 2d 444, 681 N.W.2d 479 (plurality opinion questioning whether right of allocution is a constitutional or merely statutory right).

Had Mr. Byrd waived his Fifth Amendment privilege, as contemplated in ***Scales*** and acknowledged guilt and

expressed contrition, his statements could arguably be used against him at a subsequent criminal proceeding. That question has yet to be resolved in Wisconsin. But that question is not presented here. Mr. Byrd specifically *declined* to make admissions. The court attempted to bully him into doing so, badgered him about his refusal, got angrier and angrier, and ultimately punished him for it.

Neither ***Harvey***, nor any other authority cited by the State, remotely supports the notion that a defendant who accepts the court's invitation to speak at sentencing thereby subjects himself to whatever coercive and angry demands for admissions and explanations the judge chooses to make. There is no authority to support the notion that by speaking, Mr. Byrd consented to the judge imposing a harsher sentence based on his refusal to admit guilt and explain his actions.

B. The court relied on Mr. Byrd's refusal to admit guilt in deciding that prison was necessary.

At the first sentencing the court attempted to coerce an admission from Mr. Byrd and then punished him for refusing to comply. The State, citing ***State v. Baldwin***, 101 Wis. 2d 441, 457–59, 304 N.W.2d 742 (1981), correctly asserts that a sentencing court's mere acknowledgment of a defendant's lack of remorse and refusal to admit guilt does not constitute an abuse of discretion. (Response Brief at 22). But what the court did here was not a mere acknowledgment.

The court determined that prison was the only way to get the message across to Mr. Byrd, "especially" because he showed "absolutely no remorse." (R. 7: 22). Mr. Byrd did apologize during his allocution (R. 77: 19), so it was not an apology that was lacking. What was lacking in the court's view was an admission. The only thing the court could have meant when it said that prison was especially appropriate for

someone who showed absolutely no remorse was that prison was especially appropriate for Mr. Byrd because he had not answered the court's questions and admitted guilt. It is important to note that a prison sentence was not inevitable in this case as it is in many cases. Even the State's recommendation recognized that the judge might conclude that a probationary term with conditional jail time would be appropriate. The prosecutor's original sentencing recommendation was as follows:

> I think there needs to be a period of incarceration. I think that period of incarceration needs to be coupled with some sort of supervision with however the Court structures it.

(R. 77: 11). This recommendation contemplated either a prison sentence or probation with a period of condition time in jail. It was not an affirmative recommendation of prison at all, let alone a sentence approaching the maximum.

The court's questioning of Mr. Byrd about why he committed the offense was protracted. It is clear from the transcript that the judge wanted an explanation from Mr. Byrd and was angry when he did not get one. The court's displeasure about this was a central theme of his remarks.

A court may reward a defendant who admits guilt and expresses contrition, but it may not, consistent with the Fifth Amendment, punish a defendant for refusing to do so. Here, the sentencing judge was under no obligation to grant Mr. Byrd any consideration based on what it saw as a hollow apology, but he was not permitted to punish Mr. Byrd for refusing to admit and explain his offense. As the Court in ***Scales*** said, "The exercise of the right against self-incrimination is a one-way street." ***Scales***, 64 Wis. 2d at 496,

219 N.W. 2d at 293. This judge went down that street the wrong way.

The State argues that even if the court violated Mr. Byrd's constitutional rights at the first sentencing, that did not materially influence the court's exercise of discretion at the resentencing. (Response at 22). The State makes the point that the court's attitude toward Mr. Byrd at the "resentencing" was different. (Response Brief at 15, 22). The State has a point. The court did not adopt the same hostile and challenging tone with Mr. Byrd at the resentencing. But this does not appear to be due to any reassessment by the court of its own conduct or any change in the court's view of Mr. Byrd's previous refusal to admit guilt. At the resentencing, the judge again felt free to seek an admission from Mr. Byrd. He asked whether Mr. Byrd recalled committing the offense or whether he was "still in denial." (R. 79: 11). What changed was Mr. Byrd's response, which seemed to appease the court. He did not deny the offense or refuse to speak of it. Instead, he made an implicit admission, saying "I was so hallucinatal (sic) around that time where I just really can't recall that." (R. 79: 11).

While the court was not as openly hostile toward Mr. Byrd at the resentencing, the court had staunchly maintained that Mr. Byrd's constitutional rights were not violated at the first hearing. (R. 78: 4). As Mr. Byrd argued in his initial brief, a resentencing by the same judge is no remedy when the judge has not acknowledged that there was anything wrong with the original sentencing hearing. The State faults Mr. Byrd for failing to cite authority in support of this proposition. (Response Brief at 16-17). It is difficult to imagine what kind of authority might address such a question. Mr. Byrd asserts that this is a matter of common sense.

Besides, while the court called the hearing a resentencing, it was not really a resentencing at all. At a resentencing, "[i]n effect, the resentencing court is starting over." ***State v. Wood***, 2007 WI App 190, ¶ 6, 305 Wis. 2d 133, 139, 738 N.W.2d 81, 84. Here, the circuit court did not start over. The court saw the question before it as limited to whether Mr. Byrd's mental illness outweighed *everything* that the judge said at the original sentencing. (R. 79: 11).The court reviewed the transcript of its original flawed sentencing and asked only whether the new information about Mr. Byrd's mental illness was enough to override everything that went before.

Mr. Byrd maintains that he has not yet had a fair sentencing hearing and that one is required.

II. The circuit court's conclusion that a maximum sentence was warranted for Mr. Byrd was improperly driven by the court's disagreement with the statutory maximum penalty for the offense.

The Wisconsin Supreme Court has described the sentencing court's obligation to give effect to the legislature's intent when setting a sentence within the range established by the legislature:

> When the legislature grants sentencing power to the courts to impose sentences covering a range, . . . it is apparent that it left it to the judicial discretion to determine where in that range the sentence should be selected. It is also apparent that the legislature concluded that all criminals convicted of a particular crime were not to be treated alike in respect to sentencing. Some were to be sentenced to probation, some were to be sentenced to short terms, and some to the maximum. *Since it is the role of the courts to find rationality in legislative enactments where possible, we must conclude*

> *that the legislature intended that maximum sentences were to be reserved for a more aggravated breach of the statutes, and probation or lighter sentences were to be used in cases where the protection of society and the rehabilitation of the criminal did not require a maximum or near maximum sentence*. The legislature intended that individual criminals, though guilty of the same statutory offense, were not necessarily to be treated the same but were to be sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy.

McCleary v. State, 49 Wis. 2d 263, 275, 182 N.W.2d 512, 518–19 (1971) (emphasis added). ***McCleary***'s description of the interplay between the roles of the legislature and the sentencing judge does not allow the judge to sentence based on his belief that his opinion about the general seriousness of the offense trumps that of the legislature. Nonetheless, the State asserts that a sentencing judge's disdain for the penalties the legislature has provided is not an improper factor for him to consider in deciding upon a sentence. In doing so, the State says, the court does not run afoul of ***McCleary***. The State simply declares this to be so without explanation. (State's Brief at 13-14).

The Court in ***McCleary*** made clear that a sentencing judge must respect legislative intent; his discretion is not unbridled. As the court observed, "[j]ust because the legislature provides a range of ten years, it would be nonsense to conclude that, in a particular case, it would make no difference in terms of legislative intent whether the sentence was for one year or ten." ***Id***., at 276. By setting the statutory maximum as his personal minimum or mid-point, the judge disregarded legislative intent and erroneously exercised his discretion.

The State then argues that even if it would have been improper for the judge to impose a maximum sentence based on his personal belief that the maximum penalty provided by the legislature was inadequate, the judge did not do that here.

At the original sentencing, the court expressed its disagreement with the maximum penalty set by the legislature for Mr. Byrd's offense. The Court opined that it was "shocking" that a bomb scare was only a Class I felony. The court called this "ridiculous," adding that the offense "is one of the *most serious felonies* that I know of." (R. 77: 21-22) (emphasis added). At the "resentencing," the court reiterated "to this day, a year later, I'm still shocked that this is only the minor felony that it is, a year and a half and two years."(R. 79: 12). Nonetheless, the State insists that he judge did not rely on his disdain for the legislature's classification of the offense when he sentenced Mr. Byrd.

Rather, the State insists that the court properly exercised its discretion because it sentenced Mr. Byrd based on individualized consideration of the seriousness of his offense, the need to protect the public, and his character. (Response brief at 13). The State notes that in considering the seriousness of Mr. Byrd's offense, the court discussed the ill-effects of the crime — fear, inconvenience, and expense. (Response Brief at 12). But the same can be said of virtually any violation of Wis. Stat. § 947.015. It is the nature of the offense. This does not explain what made Mr. Byrd's offense a "more aggravated breach" of the statute such that a maximum sentence was warranted. The State points out that the station president requested a maximum sentence. (Response Brief at 6, 12). But the station president believed the maximum was called for because "[Mr. Byrd] knew exactly was he was doing and was deliberate in his actions."

(R. 24: 1.). Again, this could be said of absolutely any bomb scare. It is impossible to commit this crime unintentionally.

The State also points to the need for general deterrence to prevent "copycats." (Response Brief at 12). Again, this is a factor in any bomb scare case. The State says that the particular need for general deterrence in this case prompted the prosecutor to request a prison sentence. (Response Brief at 6). The State is mistaken about that. The prosecutor's original sentencing recommendation contemplated either a prison sentence or probation with a period of condition time in jail. It was not an affirmative recommendation of prison at all, let alone a sentence approaching the maximum. (R. 77: 11).

As far as Mr. Byrd's character, the sentencing court noted nothing particularly aggravating. And central to any assessment of Mr. Byrd's character is the well-documented, classic mitigation in the form of diminished culpability based on a long-standing, severe mental illness.

The State essentially argues that the court properly exercised its discretion when it concluded that in a bomb scare case where there is deliberate action resulting in fear, inconvenience, expense and a need for general deterrence — essentially *any bomb scare case* — a maximum sentence is justified even in the face of very substantial mitigation. This is contrary to ***McCleary***'s conclusion that the legislature intended the maximum sentence to be reserved for the "more aggravated breach" of the statute. ***Id***.

The only justification the judge really offered that went any distance toward explaining his decision to give a maximum sentence here was his belief that the legislature did not provide severe enough penalties and that the maximum

penalty did not adequately punish even a mine-run violation of this law.

CONCLUSION

For the foregoing reasons, Mr. Byrd requests that this Court order resentencing before a different judge.

Dated this 23rd day of March, 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 2,991 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 23rd day of March, 2018.

Signed:

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