STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2017AP002087-CR
Eau Claire County Case 2015CF000486

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY C. LOKKEN,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Entered in Eau Claire County Circuit Court, Honorable Jon M. Theisen, Presiding

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DEFENDANT-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPPLEMENTAL STATEMENT OF FACTS

The State notes that "Lokken and his office manager stole over one-half million in taxpayer dollars." Resp. Br. at 2. However, it then contends there was "nothing incorrect about" the postconviction court's remark that "'the record reflects that the defendant *and his co-defendant* committed theft of over one million dollars.'" Resp. Br. at 34, quoting R.80:1 and App. Br. at 38 (emphasis added in State's brief).

The State's brief overlooks the State's position at sentencing, discussed at page 38 of Lokken's brief:

> The prosecutor contended that additional monies were stolen prior to 2011. But he emphasized that he did ***not*** "want the court to make a record that takes into account improper consideration of those amounts." [92:34.] The postconviction court does exactly what the prosecutor urged it to avoid: it "takes into account improper consideration" of amounts in excess of what it had agreed to consider when it accepted the plea and when it imposed sentence.

On appeal, the State concludes that the postconviction court's conclusion—that additional money was stolen—demonstrates that, at sentencing, the court had properly considered the additional thefts "as relevant to the defendants' ability to pay joint and several restitution." Resp. Br. at 34. The State concedes that claims of additional thefts were based on "evidence from [office manager] Onarheim's home." *Id.* Additional money obtained by Onarheim might be relevant to her ability to pay (if, for example, she still had some of the additional money), but it sheds no light on

Lokken's ability to pay, much less pay within 4.5 years while incarcerated. Even if this evidence was relevant to pay under a joint-and-several theory, its consideration still constituted an unfair reneging by the court on the commitment urged by the prosecutor at sentencing.

ARGUMENT

I. The Court Imposed an Unlawful Sentence on Count Two: the State's Claim that Lokken Characterized that Sentence as being Withheld is Both False and Unavailing.

A. The sentence is not presumed reasonable: its legality is independently reviewed on appeal.

The State's brief does not appear to dispute this argument, presented at page 19 of Mr. Lokken's brief. Allegations not refuted by respondents are deemed to be admitted. ***Charolais Breeding Ranches, Ltd v FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

B. The sentencing court imposed a prison/probation hybrid that is unlawful because it is not authorized by statute and contravenes case law.

This argument is presented at pages 20-23 of Lokken's brief. The State does not appear to dispute that sentencing dispositions must be specifically authorized by statute. Nor does the State argue cite any statute authorizing a court to place a person on probation along with an order providing in advance that the probation be revoked for failing to satisfy a condition.

Instead, the State appears to argue that Lokken misunderstands the nature of the sentence. Resp. Br. at 2, 10. As a threshold matter, Lokken notes that the State itself goes on to argue that the sentence is ambiguous. *See*, Resp. Br. at 17-18 (arguing it is reasonable to interpret the sentence to

mandate an end to probation but also reasonable to interpret the sentence as merely informing Lokken of potential consequences for failing to pay restitution). Thus, if Lokken did misunderstand the sentence, his misunderstanding would be eminently understandable.[1]

But the claimed misunderstanding cited by the State does not rescue the ambiguous sentence. The State claims Lokken "argues that the circuit court withheld sentence on count two..." Resp. Br. at 10.

Lokken has never argued that the sentence was withheld. Such an argument would only emerge if one assumed that the 10 years of "conditional prison" imposed by the court was conditional incarceration, leaving no other "sentence" and requiring Lokken, upon revocation, to return to court to receive a "sentence" in addition to the "conditional prison." This problem is discussed at page 21 of Lokken's brief. The Double Jeopardy implications of piling prison on prison are so obvious that this requires no further consideration as a potential alternative interpretation.

The State's arguments imply that, once the sentence is correctly viewed as imposed-and-stayed, it is valid. However, the State cannot get around the separation-of-powers restrictions on judicial authority to mandate terminating of probation and imposing prison.

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[1] Lokken disagrees that the sentence is ambiguous: the sentencing explanation, when considered with the postconviction explanation, cannot reasonably construed to be confined to advising Lokken of what *might* happen. The court and the judgment of conviction plainly state what will happen.

C. The court imposed an unreasonable and therefore unlawful condition of probation when it ordered probation ended after 4.5 years for failing to pay $688,334.04 in restitution regardless of the reason for the failure or the amount that was paid.

This argument is presented at pp. 23-27 of Lokken's brief. The State does not address any of the cases cited in that argument: ***State v. Torpen***, 2001 WI App 273, ¶8, 248 Wis. 2d 951, 637 N.W.2d 481, ***State v. Hoppe***, 2014 WI App 51, ¶8, 354 Wis. 2d 219, 847 N.W.2d 869, ***Huggett v. State***, 83 Wis. 2d 790, 799, 266 N.W.2d 403 (1978), ***State v. Fernandez***, 2009 WI 29, ¶23, 316 Wis. 2d 598, 764 N.W.2d 509, ***State v. Nienhardt***, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995), or ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). Under ***Charolais Breeding Ranches***, this court should deem the State to have conceded the arguments presented.

D. The unusual sentence-structure disrupts the orderly administration of justice and its harshness adds to the appearance of a lack of impartiality.

This argument is presented at pages 27-29 of Lokken's brief. The State does not argue—and Lokken respectfully submits it cannot argue—that the sentence structure is well-grounded in the statutes, easy to understand, or easy to implement. Since the sentence cannot be salvaged on that basis, the State must resort to proposing a further, also novel and complex, rationale for either upholding the sentence or at least postponing the need to deal with the ambiguities it presents.

Without evidentiary or other Record-support, the State argues "there is no hardship to Lokken if this Court withholds consideration of his claim" that revocation of probation for failure to pay all ordered restitution is unlawful. Resp. Br. at 16.

This court should not accept the State's assertion. The State has not proven that Lokken would not:

- Suffer the harm of harsher prison conditions or delayed work-release or programming opportunities based on his sentence structure.
- Suffer the stress of wondering, at his advanced age, how much total prison incarceration he will face.

More fundamentally, the State has not cited any case that would justify this court in failing to resolve the meaning of the sentence, as well as its legality, within the context of Wis. Stat. §809.30.

In ***State v. Swiams***, 2004 WI App 217, 277 Wis. 2d 400, 690 N.W.2d, 690 N.W.2d 452, this court determined that reconfinement decisions of circuit courts were reviewable as sentencing decisions in Rule 809.30 postconviction proceedings and appeals. This court rejected the circuit court's conclusion that such reviews were confined to new-factor/sentence modification motions, as well as the State's view, under which reconfinement decisions could only be reviewed by common law certiorari petitions. *Id.*, ¶¶ 20-22. As a matter of "common sense," "a hearing to determine whether a person should be sent to prison (or returned to prison) and for how long is a 'sentencing.'" *Id.*, ¶22.

Rule 809.30 review promotes "meaningful assessment of decisions that deprive persons of their liberty. *Id.* at ¶23, citing ***State v. Gallion***, 2004 WI 42, ¶¶19, 76, 270 Wis. 2d 535, 678 N.W.2d 197.

The State's "ripeness" argument, if accepted, would simply become an excuse for avoiding review provided to all other sentencing decisions in this State. Instead of encouraging clear explanations by circuit courts, given after verifying their statutory authority, the refusal to provide

timely review under 809.30 would encourage carelessness and invite confusion.[2]

II. This Court Should Order Re-sentencing on all Counts.

This argument is presented at pages 29-32 of Lokken's brief. The State argues that, if re-sentencing is ordered, it should only be for count two. Resp. Br. at 20.

Relying on ***State v. Church***, 2003 WI 71, ¶¶3, 26, 262 N.W.2d 678, 665 N.W.2d 141, the State argues that re-sentencing on only one count is necessary because the unlawful sentence on one count does not vitiate "the overall dispositional scheme of the initial sentence."

Church is not on point. There, the offending count resulted in an unlawful *conviction*, not an unlawful *sentence*. So the question was not whether to order re-sentencing after vacating an unlawful sentence. That is the question in this case, and ***Church*** does not answer it.

The State does not dispute Lokken's argument that reviewing courts examine sentencing explanations as a whole. *See*, ***State v. Berggren***, 2009 WI App 82, ¶45, 320 Wis. 2d 209, 769 N.W. 2d 110 (sentencing courts not required to separately explain decision to impose consecutive sentences). Once this court concludes that the sentence on count two is unlawful, it will confront the sentence as a whole. Unless this court wants to participate in a shared, collective exercise of discretion, it cannot change the sentence on just one count or independently determine the correct sentence on that count or others, without altering the total custody and supervision to be imposed.

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[2] Ironically, under the State's proposal, the judiciary, having arrogated executive branch authority by mandating revocation on the front end, would then abdicated its duty to provide Rule 809.30 review, leaving the Department of Corrections to decide whether, and under what legal standards, it should implement revocation. Why not review the sentence now?

The State does not address ***Berggren***. It neither disputes nor addresses the argument that sentencing decisions are reviewed as a whole.

In ***State v. Vesper***, 2018 WI App 31, ¶21, __Wis. 2d __, 912 N.W.2d 418 (petition for review filed May 25, 2018), this court affirmed a sentencing explanation, concluding that drunk-driving sentence guidelines and cases such as ***State v. Ramel***, 2007 WI App 271, ¶24, 306 Wis. 2d 654, 743 N.W.2d 502, did not require separate explanations for the amount of a fine, at least beyond the explanation provided by the sentencing court.

Concurring, Judge Hagedorn warned against a "creeping effort to ***Gallioni***ze individual parts of a global sentence rather than to require the demonstrated sentencing rationale only more generally." ***Vesper***, ¶46 (Hagedorn, J., concurring). Judge Hagedorn agreed that separate explanations should not be required, but he believed they were mandated by cases such as ***Ramel*** and ***State v. Kuechler***, 2003 WI App 245, 268 Wis. 2d 192, 673 N.W.2d 335. *Id.* at ¶48.

If the sentencing explanation in this case "covered" all counts, and if this court agrees that the sentence on one count is unlawful, the sound administration of justice is best served by ordering resentencing on all counts for the following reasons.

First, permitting a circuit court to revisit all counts will, by giving that court flexibility, ensure that that court fully exercises discretion instead of having it partially exercised by another court or courts.

Second, if there is to be any re-sentencing, the amount of judicial resources expended will not differ considerably by ordering it on all counts versus one: either type of re-sentencing requires the sentencing court to be familiar with all relevant facts and factors.

Third, re-sentencing on all counts will best promote the appearance of fairness.

Fourth, by allowing the circuit court to revisit all counts, this court will permit the circuit court to address the real question, rather than the question the State erroneously frames.

The State says the circuit court should only be permitted to revisit the "outlier," count two, so that it can "either ... find a lawful way to give Lokken an opportunity to avoid the additional five years' custody [plus an additional five years on supervision], or it would impose the five years' custody that it deemed appropriate." Resp. Br. at 21.

This is not the lawful inquiry on remand. Though the sentence on count two was in fact unlawful, it still must be assumed to represent the circuit court's conclusion that serving it might not be necessary.

Indeed, while the State now implies that the sentencing court found the additional imprisonment in count two to be within the minimum necessary confinement, the post-conviction explanation shows the court's conclusion was not so clear. Post-conviction, the court said it "strongly considered sentences of approximately fifteen years incarceration as fair and appropriate sentences. [That would encompass the stayed imprisonment in count two.] However, the Court also wanted to give the defendants consideration in the event that they were able to make the victim whole." (80:3, A-Ap. 103).

This passage demonstrates that (1) the court did not determine that the custody/supervision in count two was minimally necessary; the court "strongly considered" it, and concluded it would be necessary if the victims were not made whole; and (2) the court's disposition in count two was inextricably mixed with the dispositions it ordered on the other counts.

These circumstances show that the minimum-custody standard will not have been sufficiently addressed by leaving the sentences intact while ordering re-sentencing on count two alone. While Lokken does not agree that the sentencing explanation, even as supplemented by the postconviction explanation, adequately explains how the sentences represent the minimum necessary confinement, it is clear that, to the extent the court considered the standard (which did not mention at sentencing), it did so in a global manner. The State's proposal, by permitting only the same amount of total incarceration or more incarceration, would amount to having this court overturn the minimum amount of custody that the sentencing court apparently considered to be at least possibly appropriate, assuming restitution was paid. Thus, this court will have exercised part of the sentencing discretion.

One can certainly understand why the State would seek the risk-free, upside-only situation for which it argues. It wishes to lock in the prison terms on the other counts and possibly obtain additional prison in count two. While the State would benefit in this case, a parsimonious approach might hurt it in other cases. For example, if a court imposed and stayed very short sentences on several counts but imposed lengthy prison on a count where the rationale was later overturned, it would be the defendant seeking the strategic advantage. The wide discretion afforded to sentencing courts is best accommodated by a rule denying either party the lopsided advantage provided by limiting re-sentencing to a single count.

III. This Court Should Order Re-Sentencing Before a Different Judge to Protect the Appearance of Impartiality and Ensure Mr. Lokken's Bargained-For Sentencing Recommendations are Considered Under All Applicable Standards.

The State argues that the sentencing judge was not objectively biased. Resp. Br. at 30-35. The State does not address the threshold argument that this court should order

resentencing before a different judge without reaching the appearance-of-bias issue.

Citing ***Cholvin v. Wisconsin Dep't of Health and Family Servs.,*** 2008 WI App 127, ¶34, 313 Wis. 2d 749, 758 N.W.2d 118 (unnecessary to reach additional issues if resolution of one issue disposes of the appeal), Lokken notes assigning the case to a new judge could avoid future litigation about the presumption of vindictiveness. App. Br. at 33-34, citing ***North Carolina v. Pearce,*** 395 U.S.711, 725-26 (1969), ***Alabama v. Smith,*** 490 U.S.794, 799 (1989), and ***Plumley v. Austin,*** 135 S.Ct. 828 (2015) (Thomas and Scalia, JJ., dissenting from denial of certiorari). The State does not discuss these cases.

The risk of bias in this case is not based on the duration of the sentence. It is based on the unfair manner in which the sentencing court excluded Lokken from the protections identified in the cases cited in Section I.C. of this argument, cases not addressed by the State. There is no good reason to deny Lokken re-sentencing on all counts, and there is no good reason to deny him re-sentencing before a judge who ensures that the sentence on each count includes the procedures and protections, as well as the penalties, that apply to everyone sentenced in this State.

IV. The Sentencing Court's Order Denying Postconviction Relief Buttresses and Adds Reasons to Order Re-sentencing on all Counts Before a Different Judge.

Sentencing courts can clarify their decisions in postconviction proceedings. *See, **State v. Fuerst,*** 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). This argument is presented at pages 37-42 of Lokken's brief. The State's brief relies selectively on portions of the postconviction decision, but does not discuss ***Fuerst*** or Lokken's arguments that, pursuant to that case, the postconviction explanation should be considered as evidence that the sentence was unlawful. This court should deem the State to have conceded these arguments under ***Charolais Breeding Ranches.***

The State does not dispute that the postconviction court confirmed that (1) it ordered the ten-year term of probation on count two to terminate at the 4.5 year point unless all restitution was paid and (2) it based its restitution order and condition on an unlawful theory that Lokken could be subjected to additional incarceration unless he found a way to obtain money from third parties under no legal obligation to pay it. Hence, the State effectively concedes this rationale is an unlawful ground for the sentence imposed.

CONCLUSION

Larry C. Lokken asks this court to reverse the judgments of conviction and order denying postconviction relief, and remand for resentencing on all counts before a different judge.

Dated at Milwaukee, Wisconsin, July 26, 2018.

Respectfully submitted,

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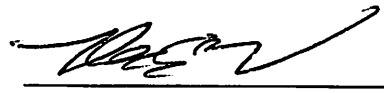

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,620 words.

RANDALL E. PAULSON

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

RANDALL E. PAULSON

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on the 26th of July, 2018, I caused 10 copies of this Reply Brief to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin, 53701-1688. On this date, I also served three copies of the brief, also by U.S. Mail, on Assistant Attorney General Kara L. Mele, Wisconsin Department of Justice, Criminal Appeals Unit at the addresses on file with this court.

RANDALL E. PAULSON