STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2017AP2265-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
CARRIE E. COUNIHAN,
Defendant-Appellant.

On Notice of Appeal to Review Judgment of Conviction and Order Denying Motion for Postconviction Relief Entered in the Circuit Court for Door County, the Honorable David L. Weber Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Whether Counihan's right to due process at sentencing was violated when the circuit court conducted an independent investigation of "similar" cases, relied on this information as the "most significant" of all information at sentencing, but failed to give the parties advance notice of such to allow the defense to review and rebut this information?

The circuit court did not directly address this issue.

II. In the alternative, whether Counihan's defense counsel was ineffective in failing to object to the court's reliance on information it had not reviewed or request a continuance to review that information?

The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Rule 809.22, as Counihan's arguments are substantial and do not fall under the class of clearly frivolous upon which oral argument may be denied under Rule 809.22(2)(a). This case is appropriate for publication under Rule 809.23, as it applies an established rule of law to a factual situation that is significantly different from that in published opinions.

STATEMENT OF THE CASE

The issue in this case focuses solely on the court's sentencing procedure. At sentencing, the court–for the first time–advised the parties that it had reviewed several other cases that it deemed similar to Counihan's and these cases were the "most significant" of all the information it reviewed in fashioning a sentence. Counihan had no prior knowledge of those cases, had no knowledge of what information was contained within those cases, had no knowledge as to whether that information was accurate, and had no opportunity to review or rebut that information. Counihan is entitled to resentencing where she is aware of the information relied upon by the court, and has an opportunity to review and rebut that information.

FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 2015, the State filed a criminal complaint against the defendant, Carrie E. Counihan, charging her with one count of theft in a business setting greater than $10,000 and eleven counts of unauthorized use of an entity's identifying information. R 1. The complaint alleged that Counihan, while acting in her role as Executive Director for the Door County Humane Society (hereinafter "DCHS"), used the company credit card for personal expenses such as restaurants, clothing, and

personal care. R 1 at 8, 12. Counihan purportedly admitted to carelessly using the company card, as opposed to her personal card, eighty-six times from January 2009- January 2015, with charges totaling approximately $13,000. *Id.* at 18. The complaint further alleged that Counihan used additional DCHS funds for personal expenses, with a total loss, including the credit card charges, of $22,803.02. *Id.* at 24-25.

The parties ultimately reached a plea agreement, and the State filed an amended information charging one count of theft in a business setting over $10,000, five counts of misdemeanor theft in a business setting, and six counts of unauthorized use of an entity's identifying information. R 22-23. The agreement called for Counihan to plead no contest to the five misdemeanor theft charges, to make an advance payment of restitution and fines of $12,583.30, to pay a $500 fine on each count, and to write a letter of apology. R 22 at 3. In exchange, the State would dismiss the felony counts and recommend three years probation and sixty days jail time to be stayed, provided that Counihan complied with all probation conditions. *Id.* On October 13, 2016, Counihan pled no contest to the five misdemeanor theft charges pursuant to the agreement. R 76 at 8. Following Counihan's plea, a number of community members expressed outrage over the court's acceptance of Counihan's plea to only misdemeanor charges. R 82-86.

At sentencing, the State and the defense both recommended two years probation with sixty days of stayed jail time. R 77 at 7, 27. The case garnered significant media attention. R 80 at 16. The court made a point to note to the gallery at sentencing that it had nothing to do with the reduction of charges from felonies to misdemeanors, as that decision is solely within the purview of the prosecutor.[1] R 77 at 48-49. After the State and defense made their sentencing arguments, after Counihan exercised her right to allocution, and after several community members gave statements in support of–and against–Counihan, the court curiously advised the parties that, in addition to the items in the record, it had reviewed several other "similar" cases in Door County. *Id.* at 47. The court noted that these cases were perhaps the *most significant* of all the items it reviewed in reaching a sentence. *Id.* The court focused the majority of its sentencing decision comparing and contrasting these cases to Counihan's, explaining that the amounts in those cases ranged from several thousands of dollars to $300,000 and that every one of the defendants, with the exception of one, spent time in jail. *Id.* at 47-52. With these cases as its guide, the court rejected the joint probation recommendation, and sentenced Counihan to nine months jail. *Id.* at 62-63.

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[1] The court, who had been on the bench only three to four months at the time, was incorrect in this regard, as it has the discretion to reject a plea agreement that it does not find to be in the public's best interests. *State v. Conger*, 2010 WI 56, ¶¶ 24, 27, 325 Wis. 2d 664, 797 N.W.2d 341; R 80 at 89.

[2] Attorney Brabazon claimed additional deficiencies, which Counihan does not

Counihan had no notice that the court had reviewed these cases and would be incorporating them into its sentencing decision; thus, she was unable to make any investigation or argument as to the accuracy of this information or present distinguishing factors between the facts of those cases and her case.

On October 16, 2017, Counihan filed a notice of appeal *pro se*, which this Court dismissed, as the issues Counihan asserted had not been properly preserved. R 49. Counihan, still *pro se*, then filed a motion for postconviction relief, making various arguments related to the court's sentencing decision. R 50. Counihan subsequently retained Attorney Shane Brabazon, and Attorney Brabazon filed an amended motion for postconviction relief, arguing that Counihan was not properly advised of her right to seek post-conviction relief and that she received ineffective assistance of counsel at the sentencing hearing. R 55.

As to the ineffective assistance of counsel claim, Attorney Brabazon asserted that counsel was deficient in his response–or lack thereof–to the court's conduct in independently researching "similar" cases and using those cases as a guide in sentencing Counihan.[2] Specifically, Attorney Brabazon claimed that sentencing counsel should have objected to the court's reliance on these cases because this

[2] Attorney Brabazon claimed additional deficiencies, which Counihan does not maintain on appeal. *See* R 55.

information had not been previously disclosed to Counihan, that counsel should have requested an adjournment to research these "similar" cases, that counsel should have presented evidence that distinguished these cases, and that counsel should have protected the record by asking the court to explain precisely what information it reviewed in these cases. *Id.* at 2.

At the *Machner*[3] hearing, sentencing counsel testified that the court's conduct in reviewing prior cases was "notable . . . . [i]t rarely happens." R 80 at 32. Counsel acknowledged that he did not question the judge on what specific items from those case files he reviewed. *Id.* at 34. When asked whether he had reviewed any of the cases the court cited at sentencing–either prior to after the sentencing hearing–counsel acknowledged that he did not. *Id.* at 36. Counsel justified his failings by testifying that any benefit in reviewing those files would have been "tremendously minimal" and those cases would have only highlighted the fact that Counihan's case was much more aggravating than the facts of the other cases the court considered. *Id.* Counsel finally conceded that it would have been beneficial to have explained the differences between Counihan's case and the other cases, particularly since the court used those cases as the framework for fashioning Counihan's sentence. *Id.* at 45-46.

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[3] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)

The court denied Counihan's postconviction motion. R 61. The court explained that in sentencing a defendant, it can "conduct an inquiry broad in scope and largely unlimited as to the kind of information considered." R 80 at 89. The court concluded that sentencing counsel was not ineffective and that Counihan was not prejudiced because it did not "find that it would change anything." *Id.* at 93. Following the court's denial of her postconviction motion, Counihan retained undersigned counsel, and this appeal follows. R 63.

I. Counihan's due process right to be sentenced upon accurate information and corollary right to rebut the information admitted at sentencing was violated when the court conducted an independent investigation of "similar" cases, relied "most significantly" on this information in fashioning a sentence, but failed to give Counihan notice of such to allow her to review and rebut this information.

A defendant has a due process right to be sentenced upon accurate information. *State v. Tiepelman,* 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1. As part of that guarantee, a defendant has the right to rebut evidence that is admitted by the sentencing court. *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *State v. Spears,* 227 Wis. 2d 495, ¶ 24, 596 N.W.2d 375 (1999); *See also State v. Damaske*, 212 Wis. 2d 169, 196, 567 N.W.2d 905 (Ct. App. 1997). In determining whether this right has been

violated, the Court reviews this issue *de novo*. *See Tiepelman*, 291 Wis. 2d 179, ¶ 9.

A sentencing court has few limits in terms of the information it can consider in sentencing a defendant, so long as the defendant has an opportunity to rebut that information. *Damaske*, 212 Wis. 2d at 195-96. In evaluating whether a defendant has been denied the right to rebut information considered by the court at sentencing, the courts apply the following two-prong test: (1) whether the evidence considered by the sentencing court had previously been disclosed to the defendant and (2) whether the defendant was given an opportunity to respond. *U.S. v. Blackwell*, 49 F.3d 1232, 1237 (7th Cir. 1995).

In *Blackwell*, the sentencing court gave defendant Harvey an increased sentence based on its belief that Harvey played a key role in the crime, and the court based this belief off of its independent review of the testimony at the hearings of Harvey's codefendants. *Id.* at 1235. However, no evidence in this regard was presented at the sentencing hearings and the parties had no advance notice that the court would be reviewing, and relying upon, this information. *Id.* Harvey challenged his sentence on due process grounds arguing that because he was not present at these prior hearings, he had no meaningfully opportunity to challenge that evidence. *Id.*

The Seventh Circuit concluded that Harvey's due process right was violated because the sentencing court considered significant evidence that was not disclosed to Harvey and that Harvey had no opportunity to rebut this evidence. *Id.* at 1239-1240. The court explained that if Harvey had notice that the court would consider this information, he likely would have approached sentencing in a different fashion, getting the transcripts from the prior hearings and potentially calling witnesses. *Id.* at 1239. The court held that Harvey's right to due process was violated and remanded the case for resentencing. *Id.* at 1240.

At sentencing in this case, the State and defense agreed on a joint sentencing recommendation of two years probation with sixty days of stayed jail time, Counihan exercised her right to allocution, and several witnesses spoke in support of–and against–Counihan. R 77 at 7, 27-47. After all parties had a chance to speak, the court began its sentencing discussion. R 77 at 47. The court outlined all of the information it had reviewed and stated, "[p]erhaps *most significantly,* I pulled all files that we could find in Door County where somebody has pled to theft in a business-type setting." *Id.* (emphasis added). The court noted six or seven files that it reviewed "in detail" and recited the case numbers to include 15 CF 90, 13 CF 76, 11 CF 128, 11 CF 104, 08 CF 072, 11 CF 066, and 93 CF 133. *Id.* at 47, 52. The court focused the majority of its sentencing decision comparing

and contrasting these cases to Counihan's, explaining that the amounts ranged from several thousands of dollars to $300,000 and that every one of the defendants, with the exception of one, spent time in jail.[4] *Id.* at 47-52. The court further explained that the defendants in those cases received from fifteen days to one in year, with several spending a year and several spending six months in jail. *Id.* at 53. The court identified the case that it believed was most like Ms. Counihan's involved the defendant (presumably an attorney) stealing $30,000 from another law firm in town and spending eleven months in jail. *Id.* at 63. The court initially termed that case "the precedential case" but then clarified that it was simply a similar case. *Id.*

Using these cases as its guide, the court rejected the joint probation recommendation and imposed nine months jail time. *Id.* The court closed its sentencing decision with the following comment: "I feel that the maximum of nine months in jail is appropriate in this case, given the length and persuasiveness of the criminal activity. All other cases, except one, received jail time, and I don't see any reason why you shouldn't serve jail time." *Id.* Based on this, it is clear that the sentencing court

[4] This information appears incorrect. Based on the information introduced at the post conviction motion hearing, the defendant in 11 CF 104 received no jail time. R 59 at 41. The defendant in 13 CF 76, was sentenced to six months in jail, which would be stayed as long as he was making his restitution payments. *Id.* at 11. Because we do not know what information the court reviewed, we do not know whether this defendant served any jail time.

heavily relied on these other cases in sentencing Counihan.

The court first alerted the parties that it had reviewed these other cases during its sentencing monologue, and Counihan had no notice that the court would "most significantly" rely on these cases in fashioning a sentence. R 77 at 47. As a result, Counihan had no opportunity to review these cases to determine whether the facts relied upon by the sentencing court were accurate. Likewise, Counihan had no opportunity to ensure that the court had reviewed *all* the relevant cases or to determine whether any other cases supported the joint recommendation. Finally, Counihan had no opportunity to rebut the court's reliance on those cases to show how the facts of those cases differed from Counihan's case. The sentencing court's reliance "most significantly" on these other cases in fashioning a sentence, with Counihan having no opportunity to review or rebut this information, violated Counihan's right to due process, and she is entitled to resentencing. R 77 at 47; *Gardner,* 430 U.S. 349; *Blackwell*, 49 F.3d 1232.

Affirming the sentence in this case will set a troubling precedent. When a circuit court independently reviews and relies upon information that is not part of the record, there is no method for this Court to determine whether the court exercised proper discretion. Counihan is entitled to a sentencing hearing where all information relied upon by the court in fashioning a sentence is made part of the

record, where Counihan has the opportunity to review that information, and where Counihan has an opportunity to rebut that information.

II. To the extent this Court concludes that Counihan forfeited her direct due process claim as a result of defense counsel's failure to object or request a continuance, defense counsel was ineffective

A. Counihan has not forfeited her due process challenge

This Court noted in *Groth* that the law is unclear as to whether waiver[5] may be invoked to preclude a defendant's right to due process, given the "paramount importance of the 'integrity of the sentencing process[.]'" *State v. Groth*, 2002 WI App. 299, ¶ 25, 258 Wis. 2d 889, 655 N.W.2d 163 (overruled on other grounds)(quoting *State v. Mosley*, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996)). This Court should not apply the forfeiture rule to this case where a defendant's right to due process is violated during the court's sentencing comments, after the parties' opportunity for comment or argument has been exhausted. Counihan agrees that defense counsel has a clear duty to preserve a claim to objectionable information *prior* to the court beginning its sentencing monologue. *See State v. Benson*, 2012 WI App 101, ¶ 17 344 Wis. 2d 126, 822

[5] Cases have frequently used the terms "waiver" and forfeiture" interchangeably; however, these terms are distinct legal concepts. Waiver is the intentional relinquishment of a known right, whereas forfeiture is the failure to timely assert a right. *State v. Ndina*, 2009 WI 21, ¶¶ 28-29, 315 Wis. 2d 653, 761 N.W.2d 612.

N.W.2d 484. However, Counihan is aware of no law that imposes a duty on defense counsel to interrupt the court in the process of sentencing his or client to preserve a due process claim. Indeed, such a duty would place defense counsel in the untenable position of having to balance the duty to preserve the defendant's claim with the risk of aggravating the court by interrupting it at a time when the court–and only the court– has the floor.

The seminal case addressing a defendant's forfeiture of a claim on appeal where defense counsel failed to object or correct information at sentencing is *Benson*. 344 Wis. 2d 126. The *Benson* rule is inapplicable to the facts of this case, as the objectionable information in *Benson* came prior to sentencing, giving counsel ample time and notice to object. *Id.*, ¶17. The facts of this case closely resemble those in *Tiepelman*, where the objectionable information came during the court's sentencing speech. *Tiepelman*, 291 Wis. 2d 179, ¶ 6. Like our supreme court did in *Tiepelman*, this Court should review Counihan's due process claim directly, without consideration as to whether her claim was forfeited. *See id.*

B. If this Court concludes that sentencing counsel had a duty to object, defense counsel was deficient in his failure to do

The 6th Amendment guarantees a criminal defendant the right to the effective

assistance of counsel. U.S. Const. Amend VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To show that counsel was ineffective, a defendant must prove the following: (1) that counsel's performance was deficient and (2) that such deficiencies prejudiced the defendant. *Strickland*, 466 U.S. at 687. To prove that counsel was deficient, the defendant must show that counsel's performance fell below an objectively reasonable standard. *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305. To show that counsel's deficient performance was prejudicial, the defendant must show a reasonable probability that but for counsel's errors, the outcome would have been different. *Id.* ¶ 20. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The focus is not on the outcome itself, but on the reliability of the proceedings. *Id.*

The question of whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. *State v. Smith*, 207 Wis. 2d 258,¶ 11, 558 N.W.2d 379 (1997). This Court will give deference to the circuit court's finding of fact unless clearly erroneous; however, this Court reviews the ultimate question of whether counsel's actions violated a defendant's right to the effective assistance of counsel *de novo* and without deference to the circuit court. *See id.*

In this case, defense counsel stood silent at sentencing when the court stated it had reviewed other cases and had relied "most

significantly" on those cases in determining an appropriate sentence. R 77 at 47. As discussed above, counsel had no duty to interrupt the court to preserve a defendant's due process claim, after the opportunity for counsel to speak had ended. *Supra*, 12-13. To the extent the concludes that defense counsel had a duty to object to preserve a due process claim, defense counsel was deficient in doing so.

On September 5, 2017, postconviction counsel filed a postconviction motion asserting that sentencing counsel was deficient in failing to object to the court's reliance on the other cases or in failing to request a continuance to review those cases. R 55. At the *Machner* hearing, sentencing counsel testified that the court's conduct in reviewing prior cases was "notable . . . . [i]t rarely happens." R 80 at 32. Counsel acknowledged that he did not question the judge on what specific items from those case files he reviewed. *Id.* at 34. When asked whether counsel had reviewed any of the cases the court cited at sentencing–either prior to after the sentencing hearing– counsel acknowledged that he did not. *Id.* at 36. Counsel justified his failings by testifying that any benefit in reviewing those files would have been "tremendously minimal" and those cases would have only highlighted the fact that Counihan's case was much more aggravating than the facts of the other cases the court considered. *Id.*

Counsel's justification for his deficiencies is puzzling. Counsel conceded that he did not

review the other cases and could not identify any factors distinguishing–either aggravating or mitigating–those cases from Counihan's case; thus, how would counsel know the effect of distinguishing those cases from Counihan's case? *See id.* at 44. Counsel finally conceded that it would have been beneficial to have explained the differences between Counihan's case and the other cases, particularly since the court used those cases as the framework for fashioning Counihan's sentence. *Id.* at 45-46.

Counsel was deficient in failing to object to the court's use of extraneous information in arriving at a sentence and in failing to request a continuance or recess to review the information relied upon by the court. As discussed above, Counihan was denied her right to due process when the sentencing court sentenced her "most significantly" on information of which she was unaware, had no chance to review, and had no opportunity to rebut. *Supra*, 7-12; *See* R 77 at 47. Counsel acknowledged that he failed to object to the court's reliance and that reviewing that information would have been beneficial to Counihan's case. R 80 34, 45-46. Thus, counsel was deficient.

The deficiency and prejudice prongs are intertwined in this case, as the prejudice resulting from counsel's error is that Counihan was deprived of "a sentencing proceeding whose result is fair and reliable." *See Smith*, 207 Wis. 2d 258, ¶ 38. Without knowing specifically what the court reviewed and what was

contained within that information, Counihan was denied her due process right to ensure that she is sentenced upon accurate information and to rebut that information. *Gardner*, 430 U.S. at 362.

As a side note, the circuit court applied the wrong standard of law in concluding that there was no prejudice to Counihan, as the court incorrectly believed that Counihan must show that the court would have given her a different sentence. R 80 at 82. In *Smith*, our supreme court explained that the correct standard of prejudice in an ineffective assistance of counsel at sentencing claim is whether the defendant was deprived of "a sentencing proceeding whose result is fair and reliable." *Smith*, 207 Wis. 2d 258, ¶ 38. In announcing the proper prejudice standard in the sentencing context, the *Smith* court noted at the outset that "[t]he *Strickland* test is not an outcome-determinative test[,]" and the court explained that "[r]etrospective testimony by the judge who sentenced [the defendant] would be inappropriate, and irrelevant." *Id.*, ¶ 37.

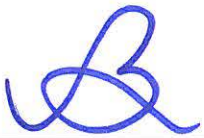
The basic tenets of our criminal justice system include notice, disclosure, and the opportunity to refute. This Court cannot approve of a sentencing court's independent investigation and reliance on facts unknown to the parties in fashioning a sentence, particularly when the court considers this information as the most significant factor in arriving at a sentence. *See* R 77 at 47.

Counihan is entitled to a new sentencing hearing where she has notice of the information relied upon by the court, particularly that which the court considered "most significant," in fashioning a sentence and where she has an opportunity to refute this information.

CONCLUSION

Based on the above errors, Counihan requests that this Court remand this matter for resentencing.

Dated this 2nd day of March, 2018



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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 3,916 words.

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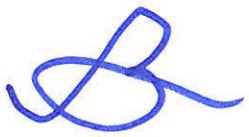

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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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.

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Dated this 2nd day of March, 2018

Signed:

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CERTIFICATE AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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.

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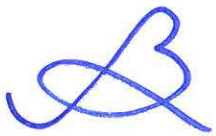

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APPENDIX

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