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

REPLY BRIEF OF DEFENDANT-APPELLANT

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CLARIFICATION OF POSITION ON PUBLICATION

Given that Counihan was ultimately convicted of misdemeanors, this case does not qualify for publication. Wis. Stat. § 809.23(1)(b)(4).

REPLY ARGUMENT

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.

The State has failed to meaningfully address Counihan's due process argument and instead attempts to turn the issue into one of sentencing discretion. State's Brief at 4-7. Counihan has made no claim that the circuit court considered an improper factor; indeed, Counihan agrees that it is within the discretion of the sentencing court to review the sentences of other similarly situated individuals. *See e.g. Jung v. State*, 32 Wis. 2d 541, 553, 145 N.W.2d 684 (1966); *Ocanas v. State*, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975). The key problem in this case is that the court did not give notice that it had conducted an independent investigation and would rely on facts outside of

the record. Thus, Counihan was unable to review or refute the *most significant* information used in fashioning her sentence. R 77 at 47; *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *State v. Spears,* 227 Wis. 2d 495, ¶ 24, 596 N.W.2d 375. *Blackwell*, 49 F.3d 1232, 1239-40 (7th Cir. 1995). To this claim, the heart of Counihan's appeal, the State has offered no argument. *See* State's Brief at 4-7.

The State does make one relevant argument on this issue: that this Court can sometimes consider the circuit court's postconviction explanation of its sentence in determining whether the court relied upon the information at issue. State's Brief at 5-6. However, the court's postconviction explanation cannot contradict its unequivocal comments at sentencing. *See State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491; *State v. Alexander*, 2015 WI 6, 360 Wis. 2d 292, 858 N.W.2d 662. In *Travis*, our supreme court stated that appellate courts, in reviewing a sentence, should look only to the sentencing hearing transcript and should refrain from relying upon the court's postconviction assertions. *Travis*, 347 Wis. 2d 142, ¶ 73. In that case, the circuit court repeatedly mistakenly stated at sentencing that it was required to impose a mandatory minimum period of confinement, although the law did not require such. *Id.*, ¶ 26. At the postconviction hearing, the court retreated from its statements at sentencing, explaining that its sentence was based primarily on the defendant's prior record and that it did not rely

on its inaccurate understanding of a mandatory minimum in issuing the sentence. *Id.*, ¶¶ 38-40. In concluding that the circuit court did rely on the inaccurate information, our supreme court looked first to the sentencing transcript and concluded that the circuit court repeatedly referenced the supposed mandatory minimum several times; it did not merely mention such. *Id.*, ¶ 44. Even though the circuit court did not explicitly state that the mandatory minimum was a factor in its sentence, its "explicit *attention*" to such evidenced the court's reliance. *Id.*, ¶¶ 44, 49 (emphasis added). Under these circumstances, where the court's reliance was clear from the sentencing transcript, our supreme court concluded it is improper to look to the court's later renunciation of such reliance. *Id.*, ¶ 73.

In *Alexander*, our supreme court distinguished *Travis*, concluding that it is proper to consider a sentencing court's postconviction explanation where the court merely *supplements* its sentencing comments. *See Alexander*, 360 Wis. 2d 292, ¶ 33. In *Alexander*, the defendant challenged the circuit court's improper reliance on compelled statements made to his probation officer, which were appended to the presentence report, in which the defendant implicated himself in additional crimes. *Id.*, ¶¶ 1, 9. At the postconviction hearing, the circuit court explained that the presentence report contained other–properly obtained–information as to the additional crimes; thus, the compelled statement to his probation agent was

something the court was already aware of. *Id.*, ¶¶ 7, 12. Our supreme court looked to both the sentencing transcript and the postconviction transcript to determine reliance. *Id.*, ¶ 30. In so doing, the court noted that the circuit court did not give explicit attention to the defendant's compelled statement at sentencing and thus accepted the circuit court's postconviction explanation as to upon what the circuit court actually relied at sentencing. *Id.*, ¶ 33.

In this case, although the court gave considerable attention to these other cases at sentencing and even explicitly stated that these cases were the most significant of all items it reviewed for sentencing, the court later retreated from its reliance on these items, justifying that it had already arrived at sentence and that it used these cases as merely a cross-check rather than a "recipe." R 77 at 47-52; R 80 at 90-91.

At sentencing, however, the court explained that these cases provided "guidance" in its sentencing decision. R 77 at 54. The court noted that while it was not relying "solely" on these cases, it did rely on them "most significantly." *Id.* at 47, 54. Like in *Travis*, the court's explicit attention and thorough discussion of those cases, reveals that the court did place significant emphasis on those cases in sentencing Counihan. *Id.* at 47-52; *Travis*, 347 Wis. 2d 142, ¶¶ 44, 49. Indeed, when pronouncing sentence, the court used these cases as the benchmark stating, "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."* R 77 at 62 (emphasis added).

In any event, whether the court used these cases as a guideline to sentence Counihan or whether it used these merely as a "double-check," the fact remains that the court did rely, "most significantly," on these cases. R 77 at 47-52. As discussed at length, the heart of Counihan's claim is that she had no notice of these cases, no knowledge of the information contained therein, and no opportunity to confirm the accuracy or rebut that information.

As a side note, the State argues that *Counihan* "fails to establish that the court would not have sentenced Counihan in the same manner without the information." State's Brief at 6 (emphasis added). This is not Counihan's burden. Rather, Counihan must show actual reliance, and the burden then shifts to the State to establish that the reliance was harmless by showing that the court would have imposed the same sentence absent the information. *State v. Tiepelman*, 2006 WI 66, ¶ 26, 291 Wis. 2d 179, 717 N.W.2d 1. The State has advanced no argument on this point.

II. Counihan has not forfeited her direct due process claim as a result of sentencing counsel's silence. Alternatively, sentencing counsel was ineffective in failing to object or request a continuance.

A. Counihan has not forfeited her due process challenge

The State does not refute Counihan's argument that she has not forfeited this issue; thus, the Court should review this issue on its merits and not reach the issue of ineffective assistance of counsel. *Charolais Breeding Ranches, Ltd. V. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979)(stating that unrefuted arguments are deemed conceded); Counihan's Opening Brief at 12-13.

B. To the extent the Court believes Counihan forfeited her direct due process challenge, sentencing counsel was ineffective

With regard to the deficiency prong, the State essentially argues that since it was proper for the circuit court to review and significantly rely upon information outside the record in reaching a sentence, without notice to Counihan, counsel had no duty to object. *See* State's Brief at 8. As discussed under the first issue, the circuit court violated Counihan's right to due process in considering this information without giving Counihan notice and the opportunity to review and refute this information. Counihan's Opening Brief at 7-12;

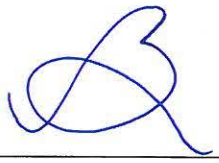
Supra, 1-5. Counsel acknowledged that it would have been beneficial to Counihan's case to have had an opportunity to review the information relied upon in sentencing Counihan. R 80 at 34, 45-46. Thus, counsel was deficient in failing to preserve Counihan's due process right to have notice of all information upon which the court relied in sentencing her and the opportunity to refute that information.

As to prejudice, contrary to the State's assertion, Counihan has established, that she was deprived of "a sentencing proceeding whose result is fair and reliable." *See State v. Smith*, 207 Wis. 2d 258, ¶ 38, 558 N.W.2d 379 (1997). 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.

CONCLUSION

For the reasons outlined above and in Counihan's opening brief, Counihan requests that this Court remand this matter for resentencing.

Dated this 10TH day of May, 2018



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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,517 words.

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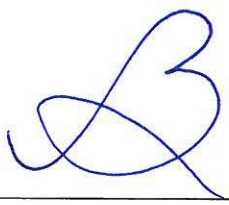

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I hereby certify that:

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:

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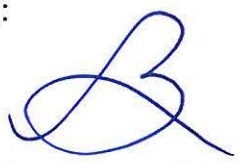

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