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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2265-CR

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

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE DOOR COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. WEBER PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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The briefs have distilled this issue to a narrow question: whether counsel is required to object after the court imposes sentence to preserve the issue for further review. Counihan agrees that this Court should reaffirm the principles underlying the forfeiture rule and should continue to apply this rule when counsel becomes aware of objectionable information *before* sentencing, consistent with long-standing precedent. First Brief at 12. The State seems to agree that counsel need not interrupt the court during its sentencing arguments to preserve an objection.[1] State's Brief at 18-19. Instead, the State proposes that counsel must object "once the court concludes its remarks or before the hearing is adjourned." *Id.* at 19.

Although the State tethers its arguments to the principles underlying contemporaneous objections, the State's proposed rule advances none of these principles. The purpose of requiring a contemporaneous objection is to give judges an opportunity to remedy the error before it "infect[s] the judgment of the court." *State v. Pinno*, 2014 WI 74, ¶ 56,

[1] Although the State tempers its concession, noting that *Samuel* shows that an objection is not "impossible." State's Brief at 18, n. 4 (citing *State v. Samuel*, 2001 WI App 25, ¶ 42, 240 Wis. 2d 756, 623 N.W.2d 565). The court's reference, that Samuel "had as much right to object then as at any other time[,]" is an outlier. This comment is best viewed as *ipse dixit*, as the court did not explain its rationale (likely because the court had already reversed on other grounds). *Samuel*, 240 Wis. 2d 756, ¶¶ 23, 25, 40-41. As previously outlined, requiring counsel to interrupt the court's sentencing remarks is unreasonable. First Brief at 9-11.

356 Wis. 2d 106, 850 N.W.2d 207. But at the point at which the State submits an objection is required, the error has already infected the judgment. Specifically, the State points to two instances where Counihan should have objected: 1) when the court inquired of Counihan personally whether sentence should be pronounced or 2) at the conclusion of the hearing but before the court formally adjourned. State's Brief at 20.

As a starting point, Counihan sees no effective difference between these two points, as the court already rendered its sentence before either point. Just before asking Counihan if sentence should be pronounced, the court already announced that the "maximum of nine months in jail[,]" full restitution, and a $500 fine per count is appropriate in this case. R. 77:63-64. The court's inquiry about pronouncing sentence was not that contemplated by § 972.14(2). This statute requires courts to make this inquiry and then allow the attorneys and the defendant to address the court. Wis. Stat. § 972.14(2). At the point the court asked this question, the attorneys, Counihan, and various other individuals already exhausted their opportunity to address the court. At either of these two points, the court had already relied "most significantly" on its investigation of these files and had announced her sentence. R. 77:47, 63-64.

The State offers no authority for its novel rule that an objection is required after the court imposes sentence but before the hearing is concluded. Indeed, as the State admits, this Court plainly rejected this theory in *Grady*.[2] State's Brief at 13 n. 3; *State v. Grady*, 2007 WI 81, ¶ 14 n. 4, 302 Wis. 2d 80, 734 N.W.2d 364. The State attempts to

[2] Counihan did not rely on *Grady* in her opening brief because she believed the issue to be whether she forfeited her claim by failing to assert a *contemporaneous* objection when the court first disclosed its independent investigation. *Grady* plainly forecloses the new rule proposed by the State.

distinguish *Grady* on the basis that it did not involve new or improper information at sentencing, arguing that prior cases require an objection to this information. State's Brief at 13 n. 3. But again, in these cases, the defendant was aware of the information *before* sentencing and could take remedial action before the error infected the judgment. First Brief at 12. Where the error comes during the course of the court's sentencing remarks, *Grady* makes clear that no objection is required at the conclusion of those remarks to preserve the issue. 302 Wis. 2d 80, ¶ 14 n. 4.

Practically speaking, the State's proposed rule makes no sense. The State submits that had Counihan objected after the court announced her sentence, the matter could have been adjourned to allow the parties to review the files. State's Brief at 16. But then what? The only adequate remedy at this point is to start sentencing anew, where the parties can reframe their sentencing arguments around these files. This is precisely the remedy Counihan requested in her postconviction motion and the remedy that Counihan seeks here. R. 55.

As discussed previously and below, this Court should hold that if the State or the court wants to rely on new information at sentencing, it must give advance notice such that the defendant has a meaningful opportunity to review and rebut this information. Tethering this rule to its forfeiture implications will give teeth to the rule: if a defendant is blindsided with new information at sentencing, sentencing will likely start anew. Counihan's rule will prevent "sandbagging" parties with new information they are unequipped to refute, will encourage parties to diligently prepare, and will prevent adjournments that are easily avoidable by the advance disclosure of information. The State's proposed rule, that a party must object after a court has rendered its sentence, advances none of these principles,

as the objection comes too late: the error has already infected the judgment. While the State attempts (but fails) to lessen the impact of an error on judicial economy, Counihan seeks to avoid the error in the first place.

Even if the Court adopts the State's unprecedented new rule, the Court should ignore the forfeiture in this case because Counihan was under no obligation to object at the time of sentencing, and she reasonably anticipated that her claim would be reviewed directly, consistent with *Tiepelman* and *Travis*. *State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1; *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491.

II. WHETHER A DEFENDANT'S DUE PROCESS RIGHT AT SENTENCING IS VIOLATED WHEN THE COURT CONDUCTS AN INDEPENDENT INVESTIGATION INTO OTHER FILES WITHOUT ADVANCE NOTICE TO THE PARTIES AND RELIES ON THESE FILES AS THE "MOST SIGNIFICANT" INFORMATION AT SENTENCING?

A. Advance Notice Rule in General

The State concedes that Counihan's advance notice rule has "intuitive appeal" and counters with a number of unfounded concerns. State's Brief at 37. None of these concerns are persuasive. First, the State overcomplicates the issue by proposing a litany of supposed unanswered questions: how much time, to whom does the rule apply, what procedure must be followed? *Id.* These answers are intuitive in the rule itself: parties must have advance notice of information sought to be relied on at sentencing such that the party has a *meaningful opportunity* to review and rebut. Although it could, the Court need not set forth a rigid framework to comply with due process.

Second, the State claims that such a rule would be impossible to apply to judges with a longer "institutional memory" who use their decisions in prior cases to sentence a defendant. State's Brief at 38. While Counihan recognizes that it is impossible for a court to divorce itself entirely from how it has handled prior cases, courts must put aside any preconceived bias that flows from these decisions and give each defendant an individualized sentence. *State v. Gallion*, 2004 WI 42, ¶ 48, 270 Wis. 2d 535, 678 N.W.2d 197 (individualized sentencing is the cornerstone of criminal jurisprudence); *State v. Ogden*, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996) (courts should not arrive at sentencing with a preconceived sentencing policy that "fits the crime, but not the criminal.") Finally, the State submits that judges may avoid stating their sentencing rationale on the record in fear that this rationale may serve as a basis for resentencing. State's Brief at 38-39. Judges have a duty to explain the basis of a defendant's sentence on the record. *Gallion*, 270 Wis. 2d 535, ¶ 5. The unfounded assumption that judges would neglect their duties and act contrary to law has no place in this forum.

The State's languid concerns with Counihan's advance notice rule weigh slight as compared to the benefits the rule offers of ensuring all parties are adequately prepared for sentencing, of preventing avoidable adjournments, and of minimizing concerns of judicial bias and ethical violations. When a court frames its sentence around information of which the parties had no notice, the court would have discovered this information as a result of its own investigation.[3] The State submits that the judge's conduct in this case was tolerable, because he did not investigate

[3] Certainly, information can come to the court from other sources, but the court is required to disclose this information to the parties. *See* SCR 60.04(1)(g)1.b. (judges must generally disclose all substantive *ex parte* communications and give the parties an opportunity to respond).

facts about Counihan or her case. State's Brief at 32-33. The judge walked a fine line here, and this Court should discourage judges from acting in this manner, as the risk of crossing the line is great when a judge conducts an independent investigation. In *Piontek*, this Court was principally concerned with the judge conducting his own independent investigation without giving the parties notice before sentencing that he intended to do so and without disclosing the results in advance. *In re Judicial Disciplinary Proceedings against Piontek*, 2019 WI 51, ¶¶ 17, 37, 386 Wis. 2d 703, 927 N.W.2d 552. These same concerns are present here. If a sentencing court wants to investigate other files or information beyond what has been presented, it should first alert the parties of its intent and solicit this information from them.

B. Counihan was Denied Due Process

The State argues that Counihan received adequate due process merely because the court explained that it was relying on these files. State's Brief at 35. The State misses the point. Counihan does not assert that she was denied the right to know why the court chose this sentence: Counihan was denied her due process right to an *opportunity to rebut* this information. *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999). Because Counihan was unaware of this information until after the court began its sentencing remarks, she was unable to exercise her right to rebut this information.

The State seems to concede that Counihan had inadequate notice of this information, but argues that Counihan had the burden to remedy this inadequacy by objecting, relying on the same arguments it makes as to forfeiture. State's Brief at 35. If the Court reaches this issue, it will have already resolved the forfeiture issue in

Counihan's favor, dismissing of these arguments. To reiterate, Counihan had no reasonable opportunity to object to this information or request an adjournment when the court first disclosed this information during the course of its sentencing remarks. Also, an objection after the court rendered sentence would be meaningless, as the error had already infected the judgement. At that point, the only remedy was to start sentencing anew.

The State further suggests this Court's reference in *Gallion*, permitting courts to consider the distribution of sentences of similar cases, gave Counihan adequate notice that the court would do so in her case. State's Brief at 35; *Gallion*, 270 Wis. 2d 535, ¶ 47. The Court made this reference in the context of the sentencing guidelines, which sought to remedy unjustifiable disparity in sentences for like offenses. *Id.*; *State v. Barfell*, 2010 WI App 61, ¶ 7, 324 Wis. 2d 374, 782 N.W.2d 437. These guidelines have now been abolished. *State v. Carlson*, 2014 WI App 124, ¶ 33, 359 Wis. 2d 123, 857 N.W.2d 446. As the court noted in *Carlson*, defendants can present such information, but its relevance is limited given the focus on individualized sentencing. *Id.* In any event, this reference in *Gallion* did not give Counihan notice that the court would undertake an independent investigation into this information without notice to, or input from, the parties.

Here, like in *Gardner*, we do not know what portions of these files the court reviewed and relied upon. *Gardner v. Florida*, 430 U.S. 349, 356 (1977). As the Court noted in *Gray*, "Gardner literally had no opportunity to even see the confidential information, let alone contest it." *Gray v. Netherland*, 518 U.S. 152, 168 (1996). The *Gray* court distinguished *Gardner* on the basis that Gray did have an opportunity to challenge the information by cross-examining the witness. *Id.* Indeed, Gray learned that the government

intended to call this witness the day before the hearing but neglected to request a continuance to adequately prepare to rebut this information. *Id.* at 157. Unlike in *Gray*, where the defendant had some advance notice and the opportunity to challenge the information, Counihan had *no* notice of this information until it was too late.

The gravamen of the State's argument is that Counihan has not shown that the information relied upon by the court was inaccurate. State's Brief at 25, 26, 36. Again, the State misunderstands the issue. Counihan's challenge is to the corollary right of the *opportunity to rebut* information presented at sentencing. Counihan never got the opportunity to review these files, to determine the completeness of the information, to rebut or distinguish these files, or to incorporate these files into her sentencing argument. Counihan is entitled to a new sentencing hearing where she has the opportunity to rebut this information and to reframe her sentencing arguments around these files.

III. ALTERNATIVELY, WHETHER COUNIHAN WAS DENIED HER SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT OR REQUEST A CONTINUANCE AFTER THE COURT REVEALED THAT IT CONDUCTED ITS OWN INVESTIGATION AND RELIED ON THE RESULTS OF THAT INVESTIGATION IN FORMING THE SENTENCE?

Given Counihan's looming word count limit, she will rely primarily on the arguments presented in her opening brief on this issue. To reiterate, if this Court concludes that Counihan forfeited her due process claim, this forfeiture resulted from counsel's deficient failure to preserve her due process rights.

As to prejudice, the State submits that "a reasonable probability of a different outcome remains the starting point under *Strickland*[.]" State's Brief at 31. *Strickland* expressly rejected this outcome-determinative approach and instead focused on the *process* to reach that result. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). As the Supreme Court recently reaffirmed, "the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Weaver v. Massachusetts*, __ U.S. __, 137 S. Ct. 1899, 1911 (2016) (quoting *Strickland*, 466 U.S. at 696).[4]

CONCLUSION

For the reasons presented, this Court should remand for a new sentencing hearing.

Dated this 13th day of August, 2019

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[4] The fact that *Weaver* involved a "structural error" is of no consequence, as the term "carries with it no talismanic significance as a doctrinal matter." *Weaver,* 137 S. Ct. at 1910. When the error was raised under the ineffective assistance of counsel rubric, the defendant must still establish *Strickland* prejudice. *Id.* at 1911. The defendant could establish prejudice by showing either that the result would have been different *or* that the proceeding was rendered fundamentally unfair. *Id.*

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief for review conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) for a brief produced using the following font:

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Dated this 13th day of August, 2019

Signed:

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Dated this 13th day of August, 2019

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