

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

CASE NO: 2018 AP000208-CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,
Plaintiff-Respondent

vs.

KENNETH ALEXANDER BURKS,
Defendant-Appellant

ON NOTICE OF APPEAL TO REVIEW THE JUDGMENT OF
CONVICTION ON MARCH 15, 2017 BY MILWAUKEE COUNTY JUDGE
JEFFREY CONEN AND THE DECISION OF JUDGE CONEN DENYING
DEFENDANT'S POST CONVICTION MOTION ON JANUARY 25, 2018

BRIEF AND APPENDIX OF APPELLANT- DEFENDANT

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STATE OF WISCONSIN
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ON NOTICE OF APPEAL TO REVIEW THE JUDGMENT OF
CONVICTION ENTERED BY MILWAUKEE COUNTY JUDGE JEFFREY CONEN
ON MARCH 15, 2017 AND THE DECISION OF JUDGE CONEN DENYING
DEFENDANT'S POST CONVICTION MOTION ON JANUARY 25, 2018

ISSUES PRESENTED

I. TRIAL DEFENSE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO
OBJECT TO THE IMPERMISSIBLE VOUCHING BY DETECTIVE KURTZ OF THE
TRUTH OF THE STATE'S STAR WITNESS

II. TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO OBJECT
TO THE TRIAL COURT'S RELIANCE ON AN IMPERMISSIBLE SENTENCING
FACTOR AT THE SENTENCING HEARING. A NEW SENTENCING HEARING IS
REQUIRED.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

This appeal involves issues of law, including the need to establish clearer standards
as to how far a trial judge may go in justifying a lengthy sentence by relying on factors which are
not in the control of the defendant –i.e. the over prescription of controlled substances by medical
providers. Lower courts need additional guidance in determining when societal factors which
are not caused by defendant are appropriate to be considered by a sentencing judge. Oral

argument would assist lower courts in establishing these guidelines. Publication would serve as a blueprint for future courts when they address these issues. Oral argument and publication are requested in this case.

STATEMENT OF THE CASE

On February 13, 2016 a Criminal Complaint was filed charging Defendant with two counts of distribution of heroin , 3 grams or less, pursuant to Wis. Stats sec. 961.41)lm)(d). The Criminal Complaint states that on two occasions --. February 7, 2016 and February 8 , 2016 defendant delivered under 3 grams of heroin to a source of information E.G.. (1 :1-3).

On the first occasion, E.G. allegedly received the narcotics from defendant on February 7, 2016 and then she delivered a portion of it to N. C .K. Later that evening, N. C. K. died from a drug overdose allegedly caused from the heroin originally provided by Defendant. The second charge of delivery of heroin arose from a controlled buy arranged by Milwaukee police on February 8, 2016 in which E.G. purchased a small amount of heroin from Defendant.

On February 19, 2016 Defendant-Appellant waived his preliminary hearing and the matter was set for trial before the Milwaukee Circuit Judge Jeffery Conen. On April 27, 2016 the State filed an Amended Criminal Complaint and Information (6:1-4),7:1) amending the first count of the initial complaint to First Degree Reckless Homicide (Len Bias law) pursuant to Wis. Stats Sec.940.02(2)(a). The Information was amended due to reports from the medical examiner which concluded that the drugs allegedly provided to N. C. K. by defendant and E.G. on February 7, 2016 were a substantial factor in his death.

The matter went to trial before Judge Conen on December 5, 2016. On the first day of trial

Milwaukee Police Officers/Detectives testified about the location of N. C. K.'s body and the items found at that location. On the second day of trial, Detective Todd Kurtz testified about his contacts with E.G. and his review of her cell phone records concerning her drug purchase on February 7, 2016. Detective Kurtz, who had interviewed E.G., told the jury that her statements to him were "very believable". This testimony clearly constituted impermissible vouching by the Detective of the truthfulness of the State's main witness, E.G. Detective Nick Stachula then testified about the controlled buy on February 8, 2016 and the contents of the cell phone obtained from defendant.

E.G. tied up all the loose ends in the State's case against Mr. Burks by testifying about her activities with Defendant and N. C. K. on February 7, 2016 and February 8, 2016. Finally, the State produced two medical experts who testified that the controlled substances allegedly provided by Defendant were a substantial factor in N. C. K.'s death. The jury trial ended with a conviction as to both counts.

On March 13, 2017 the court sentenced Defendant to fifteen years of initial confinement followed by ten years of extended supervision. The trial court's comments at the sentencing hearing indicate that Defendant's sentence was based in part on a factor it admitted had nothing to do with Mr. Burks— the over prescription of narcotic painkillers by physicians. (T. 122:43).. The court devoted much of its sentencing comments discussing the "doings of the pharmaceutical industry of the AMA," and passing around oxycodone "like candy by doctors if you have a tooth ache or if you have a hang nail or if you have knee surgery." (122:44).

The sentencing transcript demonstrates that the trial court erred by using the systemic

over prescription of narcotic painkillers as a primary factor in determining defendant's sentence. The court's self-described "rant" on this issue had no relevance to the seriousness of Mr. Burks's personal actions or his character. Even though the court gave lip service to the sentencing factors in Gallion, the lion's share of the court's sentencing rationale dealt with a factor unrelated to Mr. Burks.—the excessive prescription of painkillers. To be sure, the seriousness of these offenses do merit incarceration, however, the trial court's consideration of the breakdown in the overall drug distribution system in sentencing Mr. Burks for his actions in this offense is an improper sentencing factor. The court acknowledged that Mr. Burks's had a minimal prior record. Nonetheless, after ranting about the overall flaws in the system which were unrelated to Defendant, the Court sentenced defendant to a twenty five year term of prison comprised of 15 years of initial confinement followed by ten years of extended supervision. The trial court's consideration and reliance on the faults in the system in selecting an exact term of confinement for Mr. Burks is improper. The trial court abused its discretion in relying on this irrelevant sentencing factor.

In its decision denying Defendant-Appellant's Post Conviction Motion on January 25, 2018 the trial court did not agree that Detective Kurtz's comments were impermissible vouching for E.G.'s testimony. It did not agree that it had improperly relied on systemic failures to sentence Defendant to a lengthy prison sentence of twenty five years. (101:1-4). These rulings were erroneous and should be reversed.

Based on these facts, the judgment of conviction should be vacated and the matter should be remanded to the trial court for a hearing pursuant to State vs. Machner or in the

alternative for a new sentencing hearing.

STATEMENT OF FACTS

On April 27, 2016 the Criminal Complaint and Information in this matter was amended to one count of First Degree Reckless Homicide and one count of Delivery of Heroin(3 grams or less). On December 5, 2016 the matter proceeded to trial before Judge Conen in Milwaukee County Circuit Court. During the trial the State presented numerous witnesses in support of its case. Defendant presented no witnesses and did not testify. During the trial Detective Todd Kurtz testified that the State's most important witness E.G. was "very believable". In other words, he impermissibly vouched for the veracity of E.G.'s key testimony in front of the jury to the substantial prejudice of defendant.

1. The impermissible vouching by the State's witness of the truth of the statements of its star witness E.G.

At trial a number of police witnesses testified about the drug buy on February 7, 2016 and text messages found on Mr. Burks cell phone which generally described contacts made between E.G. and Defendant on the evening prior to N.C.K.'s death. The State's star witness was E.G., whose testimony was crucial to the State's case. Her testimony tied in and explained all the cell phone messages, especially those on February 7, 2016 which was the date of the alleged drug delivery that led to N.C. K.'s death. Among other things, E.G. testified that she had obtained the heroin she delivered to N.C.K. on February 7, 2016 from defendant. During her direct examination, she explained the meaning of the text messages and how they related to N.C.K. and Defendant. Without her testimony the State had no witnesses who personally observed the involvement of Defendant in the delivery of the heroin from Defendant to EG or

from E.G. to N.C.K..

When cross examined by trial defense counsel, E.G, who actually delivered the heroin to N..C. K. admitted that nearly a year after his death she still had not been charged with any crime. It is reasonable to assume that E.G.'s obvious incentive to avoid a homicide prosecution by testifying against defendant, would negatively affect the credibility of her testimony at trial.

Soon after E.G. was identified by law enforcement officers, she was interviewed by MPD Detective Todd Kurtz, another key witness for the State at trial. During his testimony , Detective Kurtz was asked by the prosecutor about his contacts with E.G. and whether her comments to him described her contacts with N.C.K. and defendant. He testified as follows:

Prosecutor: So when you talked to Miss E.G. on the 7th did she essentially tell you a story that comported with those text messages ?

Det. Kurtz: Yes, she was very believable. (117:p.43).

Much of E.G.'s trial testimony dealt with her "story" about her interactions with N. C. K. and Defendant on February 7, 2016. Defendant disputed this story. The credibility of E.G.'s version of the events was one of the key issues at trial.

Notwithstanding the importance of her testimony, Detective Kurtz was permitted without objection by trial defense counsel, to state before the jury that her story was "very believable." Testimony in which a witness vouches for the truth of the state's star witness is improper and should have been excluded. Even taken in context, as argued by the trial court in its January 25, 2018 decision., the meaning of these words is clear and unequivocal—E.G. is telling the truth. Trial defense counsel erred by failing to object to their admission as evidence to

the substantial detriment of Defendant Burks.

2. The court's reliance on an irrelevant factor---the over-prescription of narcotics--- in sentencing defendant to a twenty five year term of imprisonment.

Defendant was found guilty of First Degree Reckless Homicide and Delivery of Heroin(3 grams or less) after a three day jury trial on December 7, 2016. He was sentenced on both counts by the Honorable Jeffrey Conen on March 13, 2017 to global sentence of fifteen years initial confinement followed by ten years of extended supervision. A copy of the Judge's sentencing comments at the March 13, 2016 hearing is attached to this Brief.(122:38-49).

Most of the Judge's sentencing decision discussed the problems with the system of over prescription of opioids in the current medical system. This is irrelevant to the proper sentencing factors involving defendant.

In a lengthy self described "rant", the trial Judge stated the following:

..It's got to stop. All of this has got to stop, and there are a number of ways to deal with this. First of all, having nothing to do with Mr. Burks we need to stop the nexus that addicted people from these substances and that is to keep a closer eye on doctors who are over prescribing to have some laws that allow the community, the government, the state, the feds to do something about doctors who claim that it is just their following the Hippocratic oath to keep people out of pain.

.....

A lot of this is the doings of the pharmaceutical industry of the AMA.....

.....

AMA has a huge lobby they had at that point no intention of changing what they did or what they suggested their doctors do and even more so the pharmaceutical industry who maintains a huge profit off of this. They had no intention of changing anything.

.....

I don't want to get into a significant rant about the rest of this but it is something that has bothered me for years about how these drugs were supposed to assist people at the end of their lives —Oxycodone was formulated to make people's lives easier and in the end stages of cancer, bone cancer.

Now it's being tossed around like candy by doctors if you have a toothache or if you have a hang nail or if you have knee surgery....

.....

There are a lot of pharmacists who do a lot of good for a lot of people. They are also partially to blame for the explosion in the use and abuse of opiates and opiate pain killers because they make money off it also.” (122:38-49).

In its sentencing decision, the court seemed to be punishing defendant for the entire opioid epidemic, the over prescription of drugs, and the attitudes of the AMA and the pharmaceutical companies. The court briefly mentioned to need to protect the community and to punish the defendant but did so within the context of blaming defendant for the larger actions of the medical community. The lion’s share of the judge sentencing comments dealt with a factor that was unrelated to Mr. Burks--- the over prescription of pain killers. Although the court acknowledged that defendant had a minimal criminal record , it based its sentencing decision in large part on its anger about the over prescription of narcotics—which had nothing to do with the facts of this offense. Trial defense counsel performed deficiently by not objecting to the court’s reliance on this improper sentencing factor. As a consequence, the Judgment of Conviction should be vacated and the matter remanded for a new sentencing hearing.

ARGUMENT

I. TRIAL DEFENSE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPERMISSIBLE VOUCHING BY DETECTIVE KURTZ OF THE TRUTH OF THE STATEMENTS OF E.G., THE STATE’S STAR WITNESS.

A. The Constitutional Standard and procedural requirements

The right to effective assistance of counsel stems from the Sixth Amendment of the United States Constitution and Article I Section 7 of the Wisconsin Constitution, which guarantees a defendant a fair trial and effective assistance of counsel. The test for effective assistance of counsel is two pronged. First, the defendant must demonstrate that his trial counsel’s

performance was deficient and second the defendant must demonstrate that the deficient performance prejudiced him. Strickland vs. Washington, 104 S.Ct. 2052, 466 U.S. 668(1984). State vs. Sanchez, 201 Wis. 2d 219, 227-228 , 548 NW. 2d 69(19996). In order to show prejudice, the Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State vs. Sanchez, 201 Wis. 2d 219 at 236 citing Strickland vs. Washington, 466 U.S. at 694.

Once the Defendant shows prejudicial ineffectiveness of his counsel in his Motion papers, the trial court must then conduct an evidentiary hearing to determine whether or not counsel's representation was deficient and fell below an objective standard of reasonableness. State vs. Machner, 92 Wis. 2d 797(Ct. App. 1979): State vs. Curtis, 218 Wis. 2d 550 (Ct. App. 1998).

B. Trial counsel was prejudicially ineffective in failing to object to the impermissible vouching of the statements of the State's star witness by Detective Kurtz.

It is well established in Wisconsin case law that no witness, expert, or other may give an opinion that another mentally and physically competent witness is telling the truth. State vs. Haseltine, 120 Wis. 2d 92, 352 NW2d 673(Ct. App. 1984). It is the province of the jury to decide the credibility of the witness. Haseltine, 120 Wis. 2d at 96.

In the present case, Detective Kurtz testified that E.G.'s story explaining the e mails was "very believable". As a consequence, when E.G. later testified, the jury had already heard that his testimony that E.G.'s story was true.

This impermissible vouching was not harmless error.. Once an error is established , the burden to establish that it was harmless is on the State which is the beneficiary of the error. State vs. Anderson, 2006 WI 77, 291 Wis. 2d 673, 717 NW2d 74. In these facts, the credibility of E.G.'s testimony was essential to the State's case. She was the only witness who directly participated in the phone calls and messages on February 7, 2016. She was the only witness who could explain what she meant by making/receiving these calls. Her credibility was challenged during the defense's counsel's cross examination of her at trial. Unfortunately, because her statements were deemed to be "very believable" by Detective Kurtz, the jury had little to decide. E.G.'s credibility had already been determined by the Detective.

If this impermissible vouching had not occurred, E.G.'s credibility would not have been supported by Detective Kurtz's testimony. Absent this vouching error, it is clear that a rational jury would not have found defendant guilty. There would be no live witness who could tell the entire story of the drug transactions on February 7, 2016. Trial defense counsel performed deficiently to the substantial prejudice of defendant by not objecting to this improper statement.

The judgment of conviction should be vacated and the matter remanded for a new trial.

II. TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S RELIANCE ON AN IMPERMISSIBLE FACTOR AT THE SENTENCING HEARING. THIS FAILURE REQUIRES A NEW SENTENCING HEARING.

A trial court abuses its discretion when it imposes a sentence on the basis of improper factors. There must be a showing that in determining a sentence , the trial court did not base its sentence on factors which were not proper in or irrelevant to sentencing. Jung vs. State, 32 Wis. 2d 541 at

548. The Court of Appeals reviews sentencing decisions under the erroneous exercise of discretion standard. An erroneous exercise of discretion occurs when a circuit court imposes a sentence when it misapplies the applicable law. A trial court misapplies the law when it relies on clearly irrelevant or improper factors. State vs. Loomis, 371 Wis. 2d 235, 881 NW2d 749(2016).

It is a well settled principle of law that a circuit court can exercise its discretion at sentencing. On appeal, review is limited to determining if discretion was erroneously exercised. When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion. The term discretion contemplates a process of reasoning. This process must depend on the facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal standards. State vs. Gallion, 270 Wis. 2d 535, 678 NW 2d 197, 2004.

In these facts, the trial court considered and relied upon its need to blame defendant for the failings of the drug industry, the AMA, and the over prescription of drugs. The record of the sentencing hearing indicates that the trial court devoted only a small portion of its sentencing comments to discussing the facts as they related to Mr. Burks. The court punished Mr. Burks not only for his own actions but those of the pharmaceutical industry and doctors who over prescribed opioids. The court improperly sentenced Mr. Burks based upon the need to protect the community from doctors, pharmacists, and other systemic actors who had nothing to do with Mr. Burks. To be sure the offense of First Degree Reckless Homicide is a serious one requiring incarceration. Nonetheless, the court did not primarily discuss the specific actions of Mr. Burks in this committing this offense. In deciding how much prison Mr. Burks should receive , the

court considered the larger problems of opioid addiction and missteps of doctors and other actors who had nothing to do with the facts of this case. In the end, Mr. Burks received a sentence of fifteen years of initial confinement, five years more than the sentence recommended by the Defense.

This is clearly an impermissible sentencing factor and the court erroneously exercised its discretion in sentencing Defendant to a global sentence of twenty five years in prison.

Even more disturbing is the fact that, when the court utilized this flawed rationale in sentencing defendant, trial defense counsel did not object. He did nothing. As a consequence thereof, the error stood uncorrected and defendant received a prison sentence based in part on the overall flaws in the prescription drug system and not proper sentencing factors under Gallion. Had trial defense counsel objected to this error, there is a reasonable probability that the outcome of the proceeding would have been different. Here, based upon relevant and applicable case law, this failure to object was prejudicially ineffective, Defendant is entitled to a new sentencing hearing.

CONCLUSION

Based on the above facts, trial defense counsel was prejudicially ineffective at sentencing for failing to object to the impermissible vouching of Detective Kurtz of the statements of the State's star witness. Had defense counsel objected to this impermissible vouching there is a reasonable probability that the outcome of the trial would be different. Defendant is entitled to a new trial in this matter. Trial counsel also erred in failing to object to the court's partial reliance in sentencing defendant on the systemic problems in the drug prescription industry which had

nothing to do with defendant's actions in this case. This was a legally impermissible sentencing factor. The trial court's reliance on this factor constitutes an erroneous exercise of the trial court's sentencing discretion. The trial court erred by not scheduling a hearing pursuant to State vs. Machner to fully address with these issues of defense counsel's ineffectiveness. Defendant is entitled to a new sentencing hearing.

Based upon the facts and arguments stated herein, this court should reverse the Judgment of Conviction and remand this matter for either Machner hearing on trial counsel's ineffectiveness or in the alternative schedule a new sentencing hearing.

Dated this 21st day of March, 2018 in Waukesha, Wisconsin.

Respectfully Submitted,

Electronically Signed by Michael S. Holzman
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CERTIFICATION

I HEREBY CERTIFY THAT THE Appellant's Brief of the Defendant-Appellant Kenneth Alexander Burks in the matter of State vs. Kenneth Alexander Burks, Case No. 2018 AP 000208-CR conforms to the rules contained in Wis. Stats. Sec. 809.19(b)© for an Appellant's Brief produced with a proportional font and the length of the Brief is 13 Pages. The Brief contains 4,312 words.

Dated this 21st day of March, 2018 in Waukesha, Wisconsin.

SS//Michael S. Holzman
Michael S. Holzman
Attorney for Defendant-Appellant

CERTIFICATION

I HEREBY CERTIFY THAT FILED WITH THIS BRIEF either as a separate document or filed with this Brief is an Appendix that complies with Wis. Stats. Sec. 809.19(A) and that it contains the following:

1. A table of contents
2. Relevant trial entries.
3. The findings and opinions of the trial court.
4. Portions of the record essential to the issues raised including oral and written rulings or decisions showing the trial court's reasoning concerning these issues.

I hereby certify that if the record is required to be confidential portions of the record included in this appendix are reproduced using the 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 reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of March, 2018 in Waukesha, Wisconsin.

SS//Michael S. Holzman
Attorney for Defendant-Appellant

CERTIFICATION

I FURTHER CERTIFY THAT the text of the electronically filed Brief in this matter is identical to the text of the paper Brief filed with the Court of Appeals.

Dated this 21st day of March , 2018 in Waukesha, Wisconsin.

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