STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP001506-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANGELA L. STATEN

Defendant-Appellant.

On Appeal from a Judgment Of Conviction and from an Order Denying Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, The Honorable Jeffrey Wagner, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the disparity between the sentences imposed by the same court for Angela Staten and her co-defendant sisters in the same tax-fraud scheme render the court's sentence for Angela Staten harsh and excessive?

The circuit court denied Angela's postconviction motion for sentence modification.

2. Did the court erroneously exercise its discretion when it imposed a bifurcated prison sentence instead of probation on two counts because it felt it had already imposed "a sufficient amount" of extended supervision on the other three counts?

The circuit court denied the postconviction motion for sentence modification, or alternatively, resentencing.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument would be welcomed if it would be helpful to the court. This is a fact-specific case, and therefore publication is not warranted.

STATEMENT OF CASE AND FACTS

Investigation and Initial Charging

In early 2015, the State charged three sisters – Angela, Tawanda, and Sharon Staten – for their roles in a large-scale tax fraud scheme involving fraudulent income tax filings and homestead credit claims from 2010-2012. (*generally* 1; 52:20-97; App. 136-61). The women were charged separately, and the complaints, with further details provided by the State at sentencing, detailed how each woman was implicated in the overarching scheme and how individual fraudulent filings were attributable to each defendant.

As to Tawanda and Sharon,[1] Wisconsin Department of Revenue (WDOR) investigators found notebooks in each of their homes filled with hundreds of identities (names, social security numbers, etc.), debit cards containing fraudulent tax return funds, and computers that had accessed "various tax related websites." (52:29-30, 66-68). Recorded phone calls from the jail showed that Sharon obtained tax filer identities from her boyfriend/co-conspirator James Cross, and during the execution of a search warrant of Sharon's home, investigators found 58 prepaid debit cards issued with the names of people not residing there, along with notebooks and papers containing more than 300 personal identities. (52:20, 29-30, 53, 107; App. 145). Similarly, at Tawanda's

[1] The sisters will each be referred to by their first names within this brief to distinguish them from one another.

home, investigators found 24 debit cards and three notebooks full of hundreds of stolen identities. (52:66-78, 135; App. 172).

Investigators did not find the same sophisticated bookkeeping system or quantity of direct evidence as to Angela. (*See generally* 1 compared to 52:20-97). In Angela's case, the State relied on (1) calls Angela had with her incarcerated boyfriend/co-conspirator, Anthony Coleman, during which they discussed different inmate identities for filing false returns, only eight identities alleged, (2) notes in her purse that contained six prisoner identities and "various Foodshares … cards in other persons' names, and handwritten notes of several persons' dates of birth and social security numbers," nine of which were linked to fraudulent filings, and (3) seven Wisconsin Department of Revenue (WDOR) letters found at Angela's home addressed to filers who did not live there. (*See generally* 1).

Investigators also circumstantially linked filings to the three sisters by way of handwriting samples or common denominators such as internet protocol (IP) addresses, home addresses, or employers. (*i.e.* 1:41- Count 31 in Angela's case was based only on that return having been filed using an IP address linked to Angela's home address.)

A total of $234,390 in damages was alleged. (1:17, 52:28, 66). Angela was linked to "more than 225 fraudulent income tax returns and fraudulent homestead credit claims" with losses "far in excess of

$10,000." (1:48). Sharon was linked to 300, with "losses in excess of $50,000." (52:54). Tawanda was linked to 255 and a loss of $89,298. (52:97). While these numbers fall short of the $234,390 in losses and claimed "2,000 fraudulent income tax returns and homestead credit claims," there was an unknown number of additional people involved in the scheme and potentially contributing to the losses. (1:48; 52:5; 62:16; App. 116).

There were minimal allegations of actual cooperation amongst the sisters, and no allegations that the women were sharing profits. Specific counts from each complaint do not overlap between sisters—i.e. no two sisters are charged with a count based on the same individual filer. (*See generally* 1; 52:21-97). Angela admitted to sharing three names with Sharon in 2010. (1:35, 48). Jail recordings capture Angela at one point saying that another sister "told her to keep [the returns] under a certain amount 'cause the IRS is getting strict," though it seems she was possibly speaking about another sister, Sheila. (1:20-21). Informants alleged that the sisters shared a common source who gave them identities of Mississippi inmates. (1:48). Finally, notebooks from both Tawanda's and Sharon's homes had each other's fingerprints on them, but not Angela's prints. (52:53).

Angela was charged with 40 counts as follows:

> **Counts 1 and 2**: Conspiracy to Commit Unauthorized Use of an Entity's Identifying Information or Documents as a Repeater, Wis. Stat. § 943.203(2)(a).

> **Count 3**: Theft by Fraud (Value Exceeding $10,000) as Party to a Crime (PTAC) and a Repeater, Wis. Stat. § 943.20(1)(d) & (3)(c).
>
> **Counts 4-33**: Unauthorized Use of an Entity's Identifying Information or Documents as PTAC and as a Repeater (Counts 4-33), Wis. Stat. § 943.203(2)(a).
>
> **Counts 34-40**: Fraudulent Claim for Income Tax Credit as PTAC and as a Repeater (Counts 34-40), Wis. Stat. § 71.83(2)(b)4.

(*See generally* 1). Counts 1-3 charged Angela for the overarching conspiracy. (1:1-2, 17). Counts 4-40 charged specific fraudulent filings allegedly attributable to her. (1:21-46). Angela had a felony conviction during the five-year period immediately preceding the commission of these offenses, increasing her exposure by four years on each count. (52: 1-17); Wis. Stat. § 939.62(1)(b).

As for Tawanda and Sharon, in separate complaints, Counts 1-3 charged each for their roles in the tax fraud conspiracy as follows:

> **Counts 1-2:** Conspiracy to Commit Unauthorized Use of an Entity's Identifying Information or Documents as a Repeater, Wis. Stat. § 943.203(2)(a), and Conspiracy to Commit Fraudulent Claims for Credit as a Repeater, Wis. Stat. § 71.83(2)(b)(4).
>
> **Count 3**: Theft by Fraud (Value Exceeding $10,000) as Party to a Crime (PTAC) and a Repeater, Wis. Stat. § 943.20(1)(d) & (3)(c).

(52:20-21, 28, 56-57, 66). Then, like Angela, the remaining counts charged a series of filings specifically attributed to each woman. Sharon was charged with a total of 16 counts. (52:20-55). Tawanda was charged with a total of 28 counts. (52:56-97). Sharon and Tawanda were charged as repeaters as well, but the State alleged misdemeanor priors, exposing each to an additional two years on each count. (52:20-97).

Plea and Sentencing

All three cases were assigned to the Honorable Jeffrey Wagner, who ultimately sentenced the three women separately following their guilty pleas. Angela pled guilty to Counts 1-5 on January 19, 2016, three weeks before trial. (21:10; 61:1-2). The State agreed to recommend a total of 10 years of initial confinement and 10 years of extended supervision on Counts 1-3, followed by a consecutive 6 years of probation with an imposed and stayed 2 years of initial confinement and 2 years of extended supervision on both Counts 4 and 5. (61:3-4).

Sharon and Tawanda both waited until the morning of their respective trials to plead guilty. Each pled to Counts 1-3, Sharon on January 19, 2016 and Tawanda on February 29, 2016.[2] As in Angela's

[2] *See* CCAP records for *State v. Sharon Staten*, Milwaukee County Case 15CF872, *State v. Tawanda Staten*, Milwaukee County Case 15CF870. This Court may take judicial notice of CCAP entries. *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

case, the State agreed to recommend that Sharon and Tawanda each serve 10 years of initial confinement.[3] (52:104, 129; App. 166). All three women stipulated to joint and several restitution of $202,520.[4]

Judge Wagner sentenced Angela first on February 9, 2016, followed by Sharon on February 25, 2016, and Tawanda on April 19, 2016. (1:1; 52:98, 126; App. 136, 163). At different sentencings for the three women, the State argued that the three sisters were involved equally, and that they were "part of a complicated tax fraud scheme." (52:105, 134; 62:5; App. 105, 143, 170). The State argued for equal culpability and said that its recommendation that each woman receive 10 years initial confinement

[3] A chart which lays out the specifics of the State's recommendations and sentenced imposed for all three women is included at the end of this section.

[4] The $234,390 figure represented all losses the investigators believed were related to an overarching fraud scheme that the Staten sisters were a part of. According to investigators on the case, that number was modified for purposes of determining restitution to include only those returns that they thought could be circumstantially connected to one of the three women via common denominators between filings such as employers, home addresses, or IP addresses. Investigators were able to parse out large aggregations of the filings they specifically believed were attributable to Tawanda or Sharon because of the volume of evidence found directly linking those two to specific identities (i.e. via the notebooks). This same accumulation of data was not produced for Angela because investigators did not find the same volume of evidence in her case. (52:6).

would be "consistent with an evenhanded application of justice." (52:134-136; App. 171-73).

At each sentencing, the State and the court referred to the sisters collectively, stating "these defendants," (62:9; 52:108; App, 109, 146), "the sisters were" (52:156, App. 193), and "you and your sisters" (52:157; App. 194). No evidence was presented that Angela was in any way a "ring leader" or mastermind, or that she was any more culpable than her sisters in the tax fraud scheme. Nor did the sentencing court apportion different levels of blame or responsibility, or comment on the sisters' individual prior records or the significance of the maximum exposure each faced. (*see generally* 62; 52:98-161; App. 101-98). When Tawanda sought to diminish her role as compared to her sisters, the court said "… certainly you're as responsible as your sisters," emphasizing that the three women were "jointly responsible," and said, "you're basically in the same position as the other two." (52:156-57; App. 193-94).

As for mitigation, the State at sentencing told the Court that Angela's guilty plea three weeks in advance of trial was mitigating, as it had "spar[ed] the witnesses and court system the burden of trial," as opposed to the other two sisters, who pled on the day of trial, requiring the State to fully prepare. (21:11; 52:108-109, App. 146-47).

All three women indicated issues with alcohol and substance abuse. (52:114, 147; 62:20; App. 152,

184, 120). All three women had a long-standing background of repeated thefts. (62:14; 21:4-5; 52:106, 137; App. 114, 144, 174). Both Angela and Tawanda had open cases at the time they were sentenced. (21:5; 52:138; App. 175). Additionally, all three sisters were engaged in other criminal activity during the time the tax fraud scheme was alleged to have occurred. (1:19; 52:39; *See* CCAP records for Waukesha Co. Case 13CF1426; App. 176).

In sentencing Angela, the court initially imposed a total of 12 years of initial confinement and 12 years of extended supervision on Counts 1-4, and a consecutive probation term with an imposed and stayed bifurcated imprisonment sentence on Count 5. (62:30-31; App. 130-31). Then before departing the bench, the court suddenly changed its mind:

> You know what? After thinking about it for a second --- or since the sentencing has been going on, I don't think probation is really appropriate because she's on ES. So on that last count, on Count 5, the Court's going to strike that last sentence because she'll have a sufficient amount of ES time. So that Court's just going to make it four years; two years in, two years out.

(62:33; App. 133). Thus, under the court's sentence, Angela received a total of 14 years of initial confinement and 14 years of extended supervision and was deemed ineligible for the Substance Abuse Program (SAP) and Challenge Incarceration Program (CIP). (31:1-6; App. 202-08). This sentence exceeded

the State's 10-year upfront initial confinement recommendation by 40%. (62:30-33; App. 130-33).

As for the programming determination, the court said: "She's gone through a number of different programs based on her prior criminal convictions. I mean, why -- what is she going to learn now? She's habitual. What is she going to learn now when she hasn't learned in the past[?]" (62.32; App. 132).

In contrast, two weeks later at Sharon's sentencing, the court followed the State's recommendation, imposing the 10 years of upfront initial confinement requested, and found Sharon eligible for SAP. (52:121-23; App. 159-61). The sentencing court called the State's recommendation "reasonable … as far as resolving this case." (52:121; App. 159). Similarly, two months later at Tawanda's sentencing, the court again followed the State's 10-year confinement recommendation and found her eligible for SAP. (52:153-54, 158-59; App. 190-91, 196-97).

The following page contains a summary of the dispositions in all three cases: [5]

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[5] The court's sentence on Counts 1 and 2 in Angela's and Sharon's cases originally included 4 years of extended supervision, but that amount was subsequently reduced to the statutory maximum of 3 years. Wis. Stat. § 973.01(2)(d)(5); (30:1; *see* CCAP records for 15CF872, entry dated 4/6/2016). At Tawanda's sentencing, the State accordingly recommended the statutory maximum of 3 years extended supervision on Counts 1 and 2. (52:129; App. 166).

	Angela	Sharon	Tawanda
State's Recommendation	**Count 1:** 4 IC, 4 ES **Count 2:** 4 IC, 4 ES **Count 3:** 2 IC, 2 E **Count 4:** 6 years probation, stayed and imposed 2 IC, 2 ES **Count 5:** 6 years probation, stayed and imposed 2 IC, 2 ES *All counts consecutive **Total:** 10 IC, 10 ES and 6 years consecutive probation with stayed and imposed 4 years initial confinement and 4 years extended supervision	**Count 1:** 4 IC, 4 ES **Count 2:** 4 IC, 4 ES **Count 3:** 2 IC, 2 ES *All counts consecutive **Total:** 10 IC, 10 ES	**Count 1:** 4 IC, 3 ES **Count 2:** 4 IC, 3 ES **Count 3:** 2 IC, 2 ES *All counts consecutive **Total:** 10 IC, 10 ES
Sentence Imposed	**Count 1:** 4 IC, 3 ES **Count 2:** 4 IC, 3 ES **Count 3:** 2 IC, 2 ES **Count 4:** 2 IC, 2 ES, **Count 5**: 2 IC, 2ES No SAP/CIP *All counts consecutive **Total**: 14 IC, 12 ES	**Count 1:** 4 IC, 3 ES **Count 2:** 4 IC, 3 ES **Count 3:** 2 IC, 2 ES SAP, NO CIP *All counts consecutive **Total**: 10 IC, 8	**Count 1:** 4 IC, 3 ES **Count 2:** 4 IC, 3 ES **Count 3:** 2 IC, 2 ES SAP, NO CIP *All counts consecutive **Total:** 10 IC, 8

Postconviction Proceedings

Angela filed a postconviction motion seeking sentence modification. (*see generally* 52). As grounds, she argued that the sentence disparity was arbitrary and rendered her own sentence unduly harsh. (52:8).[6] The motion also requested sentence modification or resentencing based on the circuit court's arbitrary imposition of a bifurcated prison sentence after its initial imposition of a probation term on Counts 4 and 5. (52:14).

The motion with attachments was 161 pages. The circuit court denied the motion in its entirety the day after it was filed. (*see generally* 53; App. 199).

In denying the motion for sentence modification based on disparate sentences, the court relied on the number of counts to which Angela pled guilty, the fact that she had pending cases at the time of sentencing, and her increased exposure, as its basis for sentencing her to a longer prison term than her sisters. (53:2-3; App. 200-01).

In denying the motion for sentence modification or resentencing due to the court's changing its imposition of probation to a prison term on Counts 4 and 5, the court concluded that, "[t]he court perceives no erroneous exercise of sentencing discretion for the reasons set forth on the record." (53:3; App. 201)

[6] Angela also argued that her sisters' sentences constituted a new factor justifying sentence modification. (52:8). That argument is not advanced on appeal.

This appeal follows.

ARGUMENT

I. The disparity between the sentence imposed on Angela Staten and her two co-defendant sisters by the same court for the same tax fraud scheme is arbitrary and renders her sentence harsh and excessive. The court erred by denying the motion for sentence modification.

A. Standard of review.

"Equality of treatment under the Fourteenth [A]mendment in respect to sentencing does not destroy the individualization of sentencing to fit the individual," but it does require "substantially the same sentence for persons having substantially the same case histories." *Jung v. State*, 32 Wis. 2d 541, 553, 145 N.W.2d 684, 690 (1966). "[S]imilarly situated offenders should receive similar sentences," and a sentence disparity can support a finding of an unduly harsh sentence. *State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990), *citing* Wis. Adm. Code sec. SC 1.01(2)(d).

The burden is on defendant to show that a disparity in sentences between her and a codefendant is "arbitrary or based upon considerations not pertinent to proper sentencing." *State v. Perez,* 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992); *see also Ocanas v. State*, 70 Wis. 2d 179, 187, 233 N.W.2d

457 (1975)(the court found that denial of equal protection occurs where the disparity is "arbitrary or based upon considerations not pertinent to proper sentencing discretion"). Disparity is "not improper if the individual sentences are based upon individual culpability and the need for rehabilitation." *State v. Toliver*, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994).

On appeal, review is limited to determining whether sentencing discretion was erroneously exercised. *State v. Gallion,* 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

B. The circuit court arbitrarily imposed significantly more confinement time on Angela than on her similarly-situated sisters and arbitrarily deemed her ineligible for SAP.

Despite the State and the sentencing court's emphasis on equal culpability for all three sisters in this tax-fraud scheme, the trial court drastically exceeded the State's recommendation only in sentencing Angela. The court also granted Sharon and Tawanda SAP eligibility but denied this same opportunity for Angela. These disparities were arbitrary, rendering Angela's sentence harsh and excessive, and sentence modification is appropriate.

For purposes of sentencing, Angela, Sharon, and Tawanda Staten were similarly situated. Both the State and sentencing court emphasized equal culpability, and at no point did the sentencing court

apportion different levels of blame or responsibility on the sisters, and it specifically rejected Tawanda's attempt to minimize her culpability as related to her sisters, instead reiterating its view that "you're basically in the same position as the other two" and that the sisters were "jointly responsible." (*see* 52:156-57; App. 193-94).

In fact, the criminal complaints suggest that Angela may have been responsible for fewer fraudulent tax return filings and less overall monetary damage than her two sisters. Investigators found *hundreds* of names in multiple notebooks amongst the Tawanda's and Sharon's property. (52:29-30, 53, 55-78, 107, 135; App. 145, 172). In contrast, the State only alleged that investigators found seven envelopes in Angela's home, recordings of her discussing fewer than ten individuals on jail calls, and a purse that contained six prisoner identities, "various Foodshares … cards," and handwritten notes of "several" identities. (*See generally* 1). In addition, of a total of $234,390 in damages originally alleged, the State alleged only that Angela was responsible for losses "far in excess of $10,000," while Sharon was linked to losses in excess of $50,000, and Tawanda $89,298. (1:48; 52:54, 97).[7]

[7] The record does not explain why the State charged more counts in Angela's case than it did her two sisters given the disparity in evidence found related to each woman. For example, according to Sharon's complaint, there were "three hundred income tax returns and fraudulent homestead (cont.)

It is true, as the circuit court found postconviction, that Angela faced more overall prison exposure for the charged offenses partly due to the impact of her prior felon her repeater status, compared with her sisters' prior misdemeanor. However, the different repeater statuses did not meaningfully reflect the similarities in the sisters' criminal histories. Wisconsin's habitual criminality statute requires that for the four-year added exposure to apply (as in Angela's case), an offender needs to have been convicted of a felony during the five years *prior to the commission* of the instant offense. Wis. Stat. §§ 939.62(1)(b), (2). An offender faces only an additional two years exposure per count if the priors are three misdemeanors. *Id.* All three women were certainly felons within the five years *prior to the charging* of these cases in 2015; Sharon was convicted of felony substantial battery with intent to cause bodily harm in October 2011, and Tawanda was convicted of felony retail theft in May 2014.[8] However, these did not technically occur *prior to the commission* of the instant offenses, and the two

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credit claims … filed using tax filer identities from [her] fraud notes." (52:32). And in Tawanda's case, "two hundred five fraulent income tax returns and fraudulent homestead credit claims were filed using combinations of" employee and employer identities that were found amongst the "hundreds of stolen identities" in her home.

[8] *State v. Sharon Staten*, Milwaukee County Case 11CF804, and *State v. Tawanda L. Staten*, Waukesha County Case 13CF1426.

women fortuitously avoided the more severe enhancer penalty.

All three women had a long-standing background of repeated thefts. Angela's twenty priors dated back to 1997, with the State noting at sentencing that "every year or every other year, since 1997, we have convictions […] So we see an unbroken pattern, lifestyle, criminal lifestyle much of which is focused on theft." (62:14; 21:4-5; App. 114). However, the State described Sharon's criminal history in much the same manner: "[t]he defendant has 15 prior criminal convictions[.] What her criminal record reflects is basically, since 1997, every year or every other year she's been convicted of crimes. She's a habitual criminal in every sense of the word. Mostly, these crimes were petty thefts, retail thefts. She's lived her life violating the law." (52:106; App. 144). Similarly, at Tawanda's sentencing: "[t]he State has laid out in its sentencing memorandum a pattern of theft after theft after theft dating back from 1999 to present, and unbroken stretch of theft after theft. Acts of deceptive acts[sic] of dishonesty." (52:137).

Both Angela and Tawanda had open cases at the time they were sentenced. Angela had two pending felony bail jumpings, one misdemeanor theft, and two counts of misdemeanor retail theft.[9] And, Tawanda was charged with a felony case while on

[9] *See* CCAP records for Racine Co. Case 12CF916, Walworth Co. Cases 14CF235 and 14CF488.

bond for allegedly going "to a boyfriend's house, father of her children" and deflating his tires, fleeing from police, and returning an hour later to throw a brick through the same truck's window. (52:138; App. 175). [10]

All three sisters were engaged in other criminal activity during the time the tax fraud scheme was alleged to have occurred. Angela was serving an electronic monitoring sentence January 2010-May 2010 for a misdemeanor retail theft.[11] (1:19). Similarly, Sharon was in custody January 12- May 2012 for a substantial battery conviction.[12] (52:39). Tawanda was convicted of felony retail theft in 2013, not long after the incidents of fraud occurred, and was serving that sentence at the time she was sentenced for this case.[13] (52:130; App. 167).

Given the relatively equal culpability of the three sisters in this tax fraud scheme and their similar criminal histories, the disparity in the sentences the same court imposed and the disparity in the sentencing court's decision to either accept or reject the State's static sentence recommendation was arbitrary. The court's decision to deny SAP for

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[10] *See* CCAP record for Milwaukee Co. Case 16CF636.

[11] *See* CCAP record for Milwaukee Co. Case 07CM6675.

[12] *See* CCAP record for Milwaukee Co. Case 11CF804.

[13] *See* CCAP record for Waukesha Co. Case 13CF1426.

Angela, but grant it for Sharon and Tawanda, was similarly arbitrary.

In denying Angela's motion for sentence modification, the circuit court said that the three were not equally culpable due to the different number of counts, overall exposure, and pending criminal cases. (53:2-3). The court said "[t]he defendant was not similarly situated, and the court took that into account when it sentenced her." (53:3).

The sentencing court, in now claiming its decision to exceed the State's recommendation and deny SAP in only Angela's case, is trying to retroactively justify an unreasonable disparity in treatment by citing to a reliance on differences between the three women. However, there is no indication of this reliance or rationale during any of the three women's sentencing hearings. If the court rationally contemplated differences between the three women and ultimately conclude that Angela deserved a substantially higher sentence with no earned release programming eligibility, that discernment is nowhere in the court's colloquy. (*see generally* 62; 52:98-161; App. 101, 136-61). "The sentencing judge should be required in every case to state his reasons for selecting the particular sentence imposed. Normally, this should be done for the record in the presence of the defendant at the time of sentence." *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971). This Court cannot review the unspoken rationale underlying a sentence, especially when that rationale

is contradicted by the sentencing record. Given the absence of any justification on the record, and the fact that its postconviction claim of reliance contradicts the court's prior stated emphasis on equal culpability, this Court should disregard the sentencing court's after-the-fact justifications for the sentence disparity. *See State v. Travis,* 2013 WI 38, ¶ 48, 347 Wis. 2d 142, 832 N.W.2d 491 (the Wisconsin Supreme Court rejected a circuit court's "after-the-fact assertion of non-reliance" on inaccurate information where the record clearly demonstrated reliance).

The circuit court's decision to exceed the State's recommendation solely in sentencing Angela and its imposition of 14 years of initial confinement, while subsequently sentencing her sisters to only 10 years of initial confinement, as well as its decision to deny SAP for Angela alone, was arbitrary. The disparity rendered an unduly harsh sentence and the circuit court abused its discretion in denying Angela's motion for sentence modification.

II. The sentencing court erroneously exercised its discretion when it imposed bifurcated prison terms instead of probation on Counts 4 and 5.

A. Standard of Review

While sentencing judges are afforded discretion in sentencing, it must be "exercised on a rational and explainable basis." *McCleary*, 49 Wis. 2d at 276. A trial court abuses its discretion when it "fails to state

the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one factor in the face of other contravening factors." *State v. Steele*, 2001 WI App 160, ¶ 10, 246 Wis. 2d 744, 632 N.W.2d 112 (internal citations omitted).

"The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. *McCleary,* 49 Wis. 2d at 276. And "[p]robation should be the sentence unless the sentencing court finds that:

> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
>
> (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed."

State v. Gallion, 2004 WI 42, ¶ 25, 270 Wis. 2d 535, 678 N.W.2d 197.

Where a sentencing court erroneously exercises its discretion at sentencing, sentence modification or resentencing is appropriate. *see State v. Brown*, 2006 WI 131, ¶ 41, 298 Wis. 2d 37, 725 N.W.2d 262, *citing McCleary*, 49 Wis. 2d at 277-78.

B. The court erred in denying probation on two counts because it determined Angela had "sufficient" extended supervision on the remaining three counts.

The court's outright rejection of the State's probation recommendation for Count 4 in favor of a bifurcated confinement sentence, and its decision to make an about-face by imposing probation and then converting it to another consecutive bifurcated confinement sentence on Count 5, was an erroneous exercise of discretion. It was not only arbitrary, but it contradicted the court's stated goal of not imposing excessive supervision time.

Here, the State recommended a sentence of 10 years initial confinement in Angela's case, comprised of 10 years of initial confinement on Counts 1-3, and consecutive probation with imposed and stayed prison on Counts 4 and 5. (62:2-3; App. 102-03). The sentencing court accepted the State's proposal on Counts 1, 2, and 3. (62:30; App. 130). Then, as to Count 4, the sentencing court said:

> I don't think you really need so much of a probation [sentence] because of the consecutive sentences as to the ES. The Court's going to impose four years consecutive; two years of confinement and two years of extended supervision.

(22:31; App. 131). And as to Count 5, the court initially imposed probation and just as the sentencing hearing was concluding, did an about-face:

> You know what? After thinking about it for a second – or since the sentencing has been going on, I don't think probation is really appropriate because she's on ES.
>
> So on that last count, on Count 5, the Court's going to strike that last sentence because she'll have a sufficient amount of ES time.
>
> So the Court's just going to make it four years; two years in, two years out.
>
> The Court's not going to change the amount. The Court's not going to stay that. And that will run consecutive to anything else that she's serving. So there's no probation.

(62:33; App. 133).

While the court may have forgone six years of probation because it thought it had imposed "sufficient" extended supervision on other counts, it fashioned a solution that not only added four more years of initial confinement, but also add *another* four years of extended supervision. [14]

There was no minimum amount of years that the sentencing court was required to divvy up between supervision and prison confinement. It could

[14] Under the recommendation, the two probation terms would have run concurrently as a single 6 year probation sentence. *State v. Schwebke*, 2001 WI App 99, ¶ 29, 242 Wis. 2d 585627 N.W.2d 213, *aff'd*, 2002 WI 55, ¶ 29, 253 Wis. 2d 1, 644 N.W.2d 666.

certainly believe a defendant had received enough outside supervision years without in turn deciding it necessarily had to impose more initial confinement time (again, while still also adding additional extended supervision). It might have made the probation terms concurrent to the prison terms on Counts 1-3. It might have adjusted the sentences on Counts 1-3 so as to avoid adding additional supervision or confinement time. A court must sentence a defendant to the minimum amount of confinement time consistent with permissible sentencing considerations. *McCleary*, 49 Wis. 2d at 276. Here, the court did not cite any proper consideration for the increased actual confinement.

Courts are also required to impose probation unless doing so is contrary to the protection of the public, treatment would be best offered in a confined setting, or unless probation would "unduly depreciate the seriousness of the offense." *Gallion*, ¶ 25. The sentencing court's rationale does not reflect these required considerations in its imposition of additional confinement time on Counts 4 and 5. Instead, its sentencing remarks reflect an irrational reasoning which ultimately ended in the court imposing more confinement time simply because it believed that the sentence it had already imposed on Counts 1-3 contained "sufficient" community supervision time. As if that was not illogical enough, it also imposed additional extended supervision time because it believed that the sentence it had already imposed on Counts 1-3 contained "sufficient" community supervision time. As such, the imposition of

confinement in lieu of probation on both Count 4 and Count 5 was an erroneous exercise of discretion.

As to Count 5 particularly, the sentencing court granted probation, only to take it back suddenly because it thought about it "for a second." (62:33; App. 133). It increased Angela's confinement time by another two years after only brief reflection, and without articulating any proper basis for the increase. Such an arbitrary increase in time goes against the nature of sentencing, and the requirement that any sentence is well-reasoned, rational, and explained. *See also State v. North,* 91 Wis. 2d 507, 511, 283 N.W.2d 457 (Ct. App. 1979), abrogated on other grounds by *State v. Gruetzmacher,* 2004 WI 55, 271 Wis. 2d 585, 679 N.W.2d 533 (the Court stated that "logic dictates that if a trial court is precluded from decreasing a sentence on mere reflection, it should be precluded from increasing sentences for the same reason"); *see also State v. Leonard*, 39 Wis. 2d 461, 473, 159 N.W.2d 577, 583 (1968)(similarly, at a resentencing, a trial court must "affirmatively state[…] its grounds in the record for increasing the sentence.")[15]

[15] While it is Angela's position that forgoing probation on both Counts 4 and 5 was an erroneous exercise of discretion, this Court could also find that the circuit court erroneously exercised its discretion as to Count 5, but not Count 4.

CONCLUSION

For the reasons stated, this Court should reverse the denial of the motion for sentence modification based on sentence disparity. In addition, this Court should also reverse the denial of the motion for sentence modification or alternatively resentencing, as to Counts 4 and 5 based on the sentencing court's erroneous exercise of discretion.

As to Issues I and II, Angela requests this Court remand and direct the circuit court to grant the same relief: that Counts 4 and 5 be ran concurrently to Counts 1-3. An alternative requested relief as to Issue II is to remand the case to the circuit court and direct resentencing on Counts 4 and 5.

Dated this 8th day of October, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,505 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of October, 2018.

Signed:

ERIN K. DEELEY
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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 and with appropriate references to the record.

Dated this 8th day of October, 2018.

Signed:

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APPENDIX

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