STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1506-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANGELA L. STATEN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFERY A. WAGNER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the postconviction court erroneously exercise its discretion in denying Defendant-Appellant Angela L. Staten's request for sentence modification based on her co-actors' shorter sentences?

The postconviction court determined that sentence modification was not justified under the circumstances.

This Court should affirm.

2. Did the postconviction court erroneously exercise its discretion in denying Angela Staten's request for resentencing based on the sentencing court's deviation from the State's recommendations on counts four and five?

The postconviction court determined that neither sentence modification nor resentencing were justified under the circumstances.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues may be resolved by applying well-established legal principles to the facts.

INTRODUCTION

Staten and her two sisters were convicted of numerous felonies as part of an extensive tax fraud scheme that defrauded the State of Wisconsin out of more than $234,390. Staten was sentenced to 14 years of initial confinement followed by 14 years of extended supervision. Staten now seeks a sentence modification, arguing that her sentence is improperly disparate with that of her sisters, and that the sentencing judge arbitrarily deviated from the State's recommendation on counts four and five. But Staten's motion

was properly denied because Staten was not similarly situated to her sisters. Further, the sentencing decision as a whole was adequately justified because the court explained why Staten needed prison time as opposed to probation. Because the postconviction court soundly exercised its discretion, this Court should affirm.

STATEMENT OF THE CASE

In 2016, Staten was charged with 40 felonies related to a tax fraud conspiracy. (R. 1:1–17.) The charges against Staten were enhanced because she was a repeater, having been convicted of at least one felony during the five-year period immediately preceding the commission of this offense. (R. 1.) Staten's two sisters, Sharon and Tawanda, were also involved. (R. 1:17.) Staten and her sisters filed over 2000 fraudulent income tax returns and fraudulent homestead credit claims with Wisconsin Department of Revenue (WDOR). (R. 1:17.) The complaint against Staten indicated that her boyfriend, Anthony Coleman, who was incarcerated at the time, gave Staten the names and social security numbers of fellow inmates. (R. 1:17.) And prison telephone calls show that Coleman and Staten "extensively discussed using inmates' identities to file fraudulent income tax returns." (R. 1:17.) Coleman eventually self-reported these crimes to prison officials. (R. 1:17.)

The evidence against Staten included six fraudulent income tax returns that were filed from Staten's computer, and numerous other tax returns that were filed from internet protocol addresses circumstantially linked to Staten. (R. 1:17.) Police also executed a search warrant of Staten's residence and found Internal Revenue Service letters addressed to seven different people, and a WDOR letter addressed to an eighth person. (R. 1:17.) When police arrested Staten, they also found handwritten notes in her purse that listed six State of Wisconsin and State of Mississippi

prisoners' names, dates of birth, and social security numbers. (R. 1:17–18.) These same prisoner identities were used to file fraudulent income tax returns with the Wisconsin DOR. (R. 1:17.)

Angela ultimately pled guilty to 5 of the 40 felony counts. (R. 26:1.) Pursuant to the plea agreement, the other counts were ordered dismissed but read-in. (R. 26:3–5.)

At sentencing, the State recommended 10 years of initial confinement followed by 10 years of extended supervision. (R. 62:3–4.) On counts one and two, the State recommended bifurcated sentences of eight years, with four years of initial confinement and four years of extended supervision as to each count, consecutive. (R. 62:3–4.) On count three, the State recommended a bifurcated sentence of four years, with two years of initial confinement and two years of extended supervision, consecutive to counts one and two. (R. 62:3–4.) And for counts four and five, the State asked for a consecutive period of probation, with two stayed bifurcated four-year sentences. (R. 62:4.)

The sentencing court considered the State's recommendation and then addressed Staten's crimes and criminal history. The court noted that Staten had 20 prior convictions, and had "significant aggravating factors of having a number of prior convictions," including pending cases in other counties. (R. 62:28.) The sentencing judge found that her tax fraud was "an elaborate scheme, very sophisticated to defraud the taxpayers of the state of Wisconsin, by using multiple identities and different ways in order to gain profits." (R. 62:25.) The court went on to explain that it "does tailor a sentence that fits the particular circumstances of the case and the individual characteristics of the person that's before the Court." (R. 62:26.) It said that "the aggravating factors are so enormous in this case that it calls out for and cries for a prison sentence in the state institution." (R. 62:26.)

Staten was the first of the three sisters to be sentenced. (*Compare* R. 62 (transcript of Angela's sentencing date February 9, 2016, sentencing) *with* A-App. 136–62 (transcript of Sharon's February 25, 2016, sentencing) *and* A-App. 163–97 (transcript of Tawanda's April 19, 2016, sentencing).) Sharon and Tawanda were charged with 16 and 28 counts, respectively, and each pled guilty to three counts. (A-App. 136; 163); (Staten's Br. 6.)

The sentencing court sentenced Staten to 5 bifurcated sentences, for a total of 14 years of initial confinement followed by 14 years of extended supervision. (R. 26:2.) On counts one and two, the court sentenced Staten to bifurcated sentences of eight years, with four years of initial confinement and four years of extended supervision as to each count, consecutive. (R. 62:30.)[1] On counts three through five, the court sentenced Staten to bifurcated sentences of four years, with two years of initial confinement and two years of extended supervision, consecutive to each other and to the other counts. (R. 62:30–31.)

As to count five, the court initially stayed a sentence of two years of initial confinement followed by two years of extended supervision and placed Staten on three years of probation. (R. 62:31.) But, after discussing Staten's habitual criminality, the court explained that the probation term on count five was not appropriate and he imposed the four-year bifurcated sentence. (R. 62:33.) In discussing conditions of probation, the court reasoned that probation would not be appropriate given her habitual criminality and failures on supervision in the past: "I mean why—what is she going to learn now? She's habitual. What is she going to learn now [that] she hasn't learned in the past." (R. 62:32.)

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[1] The sentencing court later commuted the sentences for counts one and two, reducing the extended supervision time from four years to three years. (R. 30–31.)

The court then counted its sentences: "So she'll be doing four, eight, ten, twelve years of ES, with an additional four years hanging over her head on consecutive probation. While she'll be doing eight -- twelve years in." (R. 62:32.) The court then explained that it did not believe this to be sufficient: "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." (R. 62:33.) It therefore explained that it did not wish to stay its sentence on Count 5: "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." (R. 62:33.)

The court made clear that it did not believe probation would be appropriate: "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." (R. 62.33.) The court also noted that Staten committed these crimes while incarcerated on home release. (R. 62:28.)

Angela filed a petition for determination of eligibility for the substance abuse program (SAP). (R. 41.) The circuit court denied Angela's petition because she filed it pro se while represented by counsel. (R. 42.)

Then, in 2018, Angela filed a postconviction motion for sentence modification or resentencing. (R. 52.) In her motion, Angela argued that the sentencing court abused its discretion by sentencing her to a harsher sentence than her sisters. (R. 52.) Angela also argued that the sentencing court arbitrarily, without sufficient explanation, decided to change her sentence on count five from three years of probation to two year confinement and two years extended supervision on each count. (R. 52:17.)

The postconviction court denied Staten's motion, finding that Staten was not similarly situated with her sisters, and that, based on the reasoning in the record, the court did not erroneously exercise its discretion in rejecting the State's recommendation for probation. (R. 53:3.)

This appeal followed.

STANDARD OF REVIEW

This Court reviews a circuit court's conclusion that a sentence it imposed was not unduly harsh for an exercise of discretion. *State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). A circuit court exercises its discretion at sentencing, and appellate review is limited to determining if the court's discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

ARGUMENT

I. The postconviction court properly denied Staten's motion for sentence modification because Staten was not similarly situated to her sisters.

A. A mere disparity in sentences among co-actors does not warrant modification.

Wisconsin recognizes the importance of "individualized sentencing." *State v. Gallion*, 2004 WI 42, ¶ 48, 270 Wis. 2d 535, 678 N.W.2d 197. Defendants do not receive the same punishment simply because they are convicted of the same offense. Rather, they are to be "sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy." *McCleary v. State*, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971).

In order to establish that a sentencing disparity is improper, a defendant must show that the circuit court "based

its determination upon factors not proper in or irrelevant to sentencing, or was influenced by motives inconsistent with impartiality." *Jung v. State*, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966). In other words, to show that a sentence is improperly disparate with that of a similarly-situated co-defendant, a defendant must establish "that the disparity in sentences was arbitrary or based on considerations not pertinent to proper sentencing." *State v. Perez*, 170 Wis. 2d 130, 487 N.W.2d 630 (Ct. App. 1992). A sentence given to a similarly-situated defendant is relevant, but not controlling. *See State v. Giebel,* 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). "A mere disparity between the sentences of co-defendants 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).

B. Staten has not met her burden of showing that the postconviction court's decision was arbitrary or based on improper factors.

Staten's motion was properly denied because she has not shown that the disparity between her sentence and those of her sisters was arbitrary or based on improper considerations. In fact, the record shows that the postconviction court soundly exercised its discretion in finding that Staten's sentence was not arbitrarily disparate with those of her sisters, because they were not similarly situated based on their respective criminal histories and total prison exposure for the crimes at issue.

Staten was charged with 40 counts, while her sisters Sharon and Tawanda were charged with 16 and 28 counts, respectively. (R. 1); (Staten's Br. 6.) Staten pled guilty to five counts, while her sisters each only pled guilty to three counts. (R. 31; 53:2.) And the charges against Staten were enhanced because she was a repeater, having been

convicted of at least one felony during the five year period immediately preceding the commission of this offense. (R. 1; 31.)[2]

At sentencing, the judge considered Staten's extensive criminal history and noted that she had 20 previous convictions. (R. 62:14.) The court also noted that Staten was committing these crimes while incarcerated on home release for another crime. (R. 62:28.) And the court described the aggravating factors in this case as "enormous," and noted that they justify prison time. (R. 62:26.) Further, the sentencing transcript shows that the court felt that prison time was necessary to protect the community from Staten's ongoing criminal behavior, and the court did not feel that Staten would benefit from additional programming. (R. 62:27–29.)

Despite the difference in criminal history and overall prison exposure, Staten argues that she was similarly situated to her sisters, and that the criminal complaint suggests that she may have been responsible for fewer fraudulent returns and less overall monetary damages than her sisters. (Staten's Br. 15.) Staten notes that her sisters both had previous convictions and open cases at the time of sentencing in this case. (Staten's Br. 17.) But neither sister had as many previous convictions as Staten. (Staten's Br. 17; R. 62:14.) Additionally, it was Staten who was getting the names and personal information of inmates from her boyfriend, Coleman. (R. 1.) And, in the end, the State charged Staten with more crimes, thus increasing her overall prison exposure beyond that of her sisters. (R. 1.)

Staten also argues that the State and sentencing court both viewed all three sisters as similarly situated. (Staten's Br. 14–15.) But this argument is merely based on general

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[2] Tawanda Staten also had a repeater enhancer, but it was for a misdemeanor, not a felony, resulting in a shorter enhancement. (*See* A-App. 163–97.)

comments made at Tawanda's sentencing hearing. (Staten's Br. 14–15.) And the fact that the sentencing court *later* told Tawanda that she was, "basically in the same position as the other two" does not satisfy Staten's burden to show that the sentencing court in her case was arbitrary or based her sentence on considerations not pertinent to proper sentencing. (A-App. 194.) The sentencing court based Staten's sentence on her criminal history and the overall number of counts she was charged with, and pled to, in this case. (R. 53:2; 62:26.)

Staten's argument suggests that the sentencing court was required to discuss her sisters' sentences when it ordered hers. But Staten was the first of the three sisters to be sentenced, so the court could not have known of a disparity in sentences, let alone justify it. (R. 62; *see also* A-App. 136–97.)

Finally, Staten argues that her sentence is unduly harsh given that there was more evidence against her sisters. (Staten's Br. 15.) Specifically, Staten claims that law enforcement found more notebooks of names in Sharon and Tawanda's custody. (Staten's Br. 5.) But while all three sisters were involved in the fraud, each participated in different ways. The complaint against Staten indicates that they not only found notes and other physical evidence of fraud in her possession, but law enforcement actually tracked fraudulently filed returns to her computer. (R. 1:17.) Staten was also the one who coordinated with Coleman to obtain identities. (R. 1:17.) And, based on this evidence, Staten was charged with many more counts than her sisters. (R. 1.)

Staten had more past convictions than her sisters, she was charged with more counts than her sisters in this case, and she ultimately pled guilty to more counts than her sisters. She was not similarly situated to her sisters and the court based its sentence on her own history and behavior. Based on the record, Staten cannot show that the sentencing court

erroneously its discretion in finding that its sentencing decision was not unduly harsh.

II. The sentencing court did not erroneously exercise its discretion in imposing bifurcated prison terms on counts four and five.

A. A circuit court has broad discretion at sentencing.

Circuit courts retain considerable discretion at sentencing. *Gallion*, 270 Wis. 2d 535, ¶ 17. And appeals courts follow a strong, consistent policy against interfering in a trial court's sentencing discretion. *Id.* ¶ 18. A sentencing court is presumed to have acted reasonably in passing sentence, and the defendant has the burden of showing an unreasonable or unjustifiable basis in the record for the sentence. *Elias v. State*, 93 Wis. 2d 278, 281–82, 286 N.W.2d 559 (1980).

At sentencing, the court must consider and "identify the general objectives of greatest importance." *Gallion*, 270 Wis. 2d 535, ¶¶ 25, 41. The court must also "describe the facts relevant to these objectives" and "explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives." *Id.* ¶ 42. But the trial court is not required to specify the weight it assigned each sentencing factor or how each factor translated to a certain number of years. *State v. Fisher*, 2005 WI App 175, ¶¶ 21–22, 285 Wis. 2d 433, 702 N.W.2d 56.

Stated differently, a sentencing court is only required to generally explain its exercise of discretion. *Gallion*, 270 Wis. 2d 535, ¶ 49. The sentencing court does not need to explain "for instance, the difference between sentences of 15 and 17 years." *Id.* Rather, the exercise of discretion must be explained as to the sentence as a whole. *Id.*

Finally, while probation should be considered as the first alternative, it should not be the disposition if

"confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or it would unduly depreciate the seriousness of the offense." *Gallion*, 270 Wis. 2d 535, ¶ 44.

B. The circuit court properly explained its reasoning for the sentences it imposed on counts four and five.

The sentencing court properly exercised its sentencing discretion when it deviated from the State's recommendation as to counts four and five. And simply because the sentencing court disagreed with the State as to whether probation was appropriate does not render its sentences arbitrary.

On counts four and five, the court sentenced Staten to bifurcated sentences of four years, with two years of initial confinement and two years of extended supervision. (R. 62:30–31.) The court initially stayed the bifurcated sentence on count five and placed Staten on three years of probation. (R. 62:30.) But the court then decided that the probation term on count five was not appropriate, and it imposed the four-year bifurcated sentence. (R. 62:33.) Staten is not entitled to any relief due to this change because the revised sentence was well explained and supported by the record.

First, the sentencing court was not required to explain and justify its mere change of course as to count five, it was only required to justify and explain the need for the final sentence on that count. *See Gallion*, 270 Wis. 2d 535, ¶ 49. And the record shows that the court made it clear why probation was inappropriate in this case. The court expressly stated that, "quite frankly, the aggravating factors are so enormous in this case that it calls out for and cries for a prison sentence in the state institution." (R. 62:26.) And the court went on to explain that "[t]his is certainly a prison case. To do otherwise would depreciate the seriousness of the offense."

(R. 62:26.) The sentencing court also noted that Staten had "significant aggravating factors of having a number of prior convictions," including pending cases in other counties. (R. 62:28.) And the court explained that Staten needed prison time because she had a history of poor performance on probation. (R. 62:33.) The court noted that Staten committed these crimes while incarcerated on home release. (R. 62:28.) By imposing the sentence as to count five, all the court did was reject the State's recommendation for probation. And the court's reasoning for that decision is well supported by the record.

Staten's arguments on this issue are unpersuasive. She attempts to split this issue into two arguments, claiming that the sentence for count four was arbitrary because the court deviated from the State's recommendation, and claiming that the sentence for count five is arbitrary because the court changed its mind about imposing probation. (Staten's Br. 22–25.) But these two arguments really relate to the same claim, because when the sentencing court changed its mind about probation as to count five, it was really just making that sentence consistent with the sentence for count four, and rejecting probation as to both. (R. 62:30–35.) So, the relevant question is whether the sentencing court erroneously exercised its discretion when it deviated from the State's recommendation for probation. And, as discussed above, the sentencing court adequately justified both the sentence as a whole, and specifically why probation was inappropriate. (R. 62:26–28.)

Staten also tries to argue that the sentencing court was required to explain its decision specifically to impose a bifurcated sentence, in lieu of an imposed and stayed sentence with probation, as to counts four and five. But this argument ignores that fact that the sentencing court's exercise of discretion must only be explained as to the sentences as a whole. *Gallion*, 270 Wis. 2d 535, ¶ 49. And while probation

should be considered as the first alternative, it should not be the disposition if "confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or it would unduly depreciate the seriousness of the offense." *Gallion*, 270 Wis. 2d 535, ¶ 44. Here, the court made it clear that probation would depreciate the seriousness of the offense, Staten had a history of poor performance on probation, and the public needed protection from her criminality. (R. 62:25–28.)

Finally, Staten argues that the sentencing court's decision to reject probation is erroneous because its comments suggest that it rejected probation on counts four and five solely because the court felt Staten had a sufficient period of extended supervision. (Staten's Br. 23.) And Staten thinks that reasoning defies logic. But Staten's argument fails to acknowledge that the court spent a lot of time explaining why it thought incarceration was important. (R. 62:25–28; *see, e.g.* R. 62:26 ("This is certainly a prison case.")) And although the sentencing court did mention the periods of extended supervision when discussing the sentences for counts four and five, it also discussed numerous other factors, including protection of the public, her past performance on probation, and the seriousness of her offenses. (R. 62:25–28.) The trial court is not required to specify the weight it assigned each sentencing factor. *Fisher*, 285 Wis. 2d 433, ¶¶ 21–22. Here, the sentencing court talked through the primary sentencing objectives and relevant facts as it set forth the sentences for each count. And in the end, after discussing Staten's poor performance on probation and with programming, the court ultimately found that probation was not appropriate given the circumstances. (R. 62:33.)

Staten is not entitled to resentencing because the sentence as a whole was adequately justified in this case. Staten also argues for sentence modification based on her *Gallion* challenge, but modification is not a proper remedy

where a defendant alleges an erroneous exercise of discretion in violation of *Gallion*.

Rather, though no error occurred, if it did, resentencing would be the appropriate remedy. *See, e.g. State v. Ziegler*, 2006 WI App 49, ¶ 17, 289 Wis. 2d 594, 712 N.W.2d 76 (rejecting a request for resentencing based on *Gallion* challenge); *State v. Mursal*, 2013 WI App 125, ¶ 27, 351 Wis. 2d 180, 839 N.W.2d 173 ("because the trial court properly exercised its discretion in sentencing Mursal, we conclude that Mursal is not entitled to resentencing"). Staten's only support for sentence modification as a remedy for a *Gallion* violation is a citation to *State v. Brown*, 2006 WI 131, ¶ 41, 298 Wis. 2d 37, 725 N.W.2d 262. (Staten's Br. 21.)

Brown, however, dealt with *reconfinement* hearings and what, if any, factors a court should consider in making a reconfinement determination. *Brown*, 298 Wis. 2d 37, ¶ 41. *Brown* in no way held that sentence modification is an appropriate remedy for a court's failure to comport with *Gallion* at sentencing. And though this Court has recognized that it, at times, has incorrectly "mixed resentencing and sentencing modification" language, thereby "muddl[ing] the linguistic and legal waters," *State v. Wood*, 2007 WI App 190, ¶¶ 9–10, 305 Wis. 2d 133, 738 N.W.2d 81, a failure to comport with *Gallion* is properly addressed through resentencing.

Lastly, without development, Staten also claims that this Court could remand for resentencing on only counts four and five. While the State maintains that Staten is not entitled to any relief, if the Court disagrees, the State believes that the case would need to be remanded for resentencing on all counts. Indeed, the circuit court imposed an overall scheme of consecutive prison sentences for Staten based on all of the five counts. Thus, if error occurred, the appropriate remedy would be resentencing on all counts. *See, e.g. State v. Sherman*, 2008 WI App 57, ¶ 11, 310 Wis. 2d 248, 750 N.W.2d 500 (concluding that resentencing would be unnecessary where court erred in

imposition of one sentence among *concurrent* sentences, because the "overall sentencing structure remained intact," and contrasting that situation with cases involving *consecutive* sentences where resentencing is appropriate because the change in one "disrupted" the overall "sentencing intent").

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 4th day of December, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,120 words.

Dated this 4th day of December, 2018.

_____
ABIGAIL C. S. POTTS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 4th day of December, 2018.

_____
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