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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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The significant sentence disparity between Angela and her sisters is arbitrary and renders her sentence unduly harsh.

In denying a claim of disparate sentences between co-defendants in a sexual assault case, this Court emphasized that "[t]he sentencing court expressed no desire for parity between [the co-defendants'] sentences" and instead "the court individualized Toliver's sentence based on the relevant factors." 187 Wis.2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994).

Here, the apparent understanding was that the Staten sisters were equally culpable and that the resolution warranted uniformity in punishment. That was reflected in the State's recommendation of 10 years initial confinement for all three women and its assertion that doing so would be "consistent with an evenhanded application of justice." (52:134-136). At each sentencing, the State and the court referred to the sisters collectively, stating "these defendants," (62:9; 52:108), "the sisters were" (52:156), and "you and your sisters" (52:157). The court rejected attempts by one sister to minimize her culpability, instead reiterating its view that they all were "jointly responsible." (52:156-57). There was no discussion of the differences between the women or their respective roles—only emphasis on the similarities. If

the court rationally contemplated differences between the three women in order to ultimately conclude that Angela deserved a substantially harsher sentence, then that discernment is not reflected in the court's sentencing remarks. (*see generally* 62; 52:98-161).

If anything, Angela's demonstrated role was less aggravated than her sisters. Investigators found *hundreds* of names in multiple notebooks in both Tawanda and Sharon's properties. (52:29-30, 53, 55-78, 107, 135). In contrast, investigators found only seven envelopes in Angela's home, recordings of her discussing fewer than ten individuals, and a purse that contained six prisoner identities, "various Foodshares … cards," and handwritten notes of "several" identities. (*See generally* 1). The State also alleged more damages attributable to the other two and a Department of Revenue investigator in this case confirmed the disparity in direct evidence between Angela and that of her two sisters. (1:48; 52:6, 54, 97).

The State argues that Angela means to "suggest[] that the sentencing court was required to discuss her sisters' sentences when it ordered hers," which it correctly notes would have been an impossibility given that Angela was sentenced first. (State's Response, 9). This is not what Angela means to suggest at all. The order in which co-actors are sentenced should not determine whether what is ultimately imposed constitutes a denial of equal protection and an unduly harsh sentence. A disparate

sentences claim necessarily will, at least at times, require retrospective analysis.

Angela has never denied that there are differences between her and her sisters.[1] But the State is essentially advocating that this Court interpret "similarly situated"[2] to mean "exactly the same." Ultimately, the parties in all three actions expressed a desire for parity, Angela accepted responsibility first and arguably was less involved, but nonetheless received a significantly harsher sentence than her sisters. 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[3] for Angela alone, was arbitrary[4] and rendered an unduly harsh sentence.

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[1] Initial Brief, 4-6, 11

[2] *See State v. Ralph*, 156 Wis. 2d 433, 456 N.W.2d 657 (Ct. App. 1990).

[3] Wisconsin Substance Abuse Program, Wis. Stat. § 302.05.

[4] *See State v. Perez,* 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992).

A. This Court should not, as the State suggests, disregard the sentencing court's unambiguous explanation for rejecting probation on Counts 4 and 5. [5]

At sentencing, the State recommended probation on Count 4. (62:2-3). In response, the court said:

> As to Count 4, 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.

(62:31, *emphasis added*).

The State also suggested probation for Count 5. (62:2-3). After first accepting that recommendation (62:31), the court did an about-face and said:

> 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*.

[5] Upon review, Angela acknowledges the State's position that resentencing on all counts is the appropriate remedy as to this issue. (State's Response, 14, citing *State v. Sherman,* 2008 WI App 57, 310 Wis. 2d 248, 750 N.W.2d 500).

> So the Court's just going to make it four years; two years in, two years out.

(62:33, *emphasis added*).

When confronted with Angela's claim that this was an erroneous exercise of discretion, the sentencing court doubled-down, offered no additional explanation for its decision to decline probation on Counts 4 and 5, and said:

> The court perceives no erroneous exercise of sentencing discretion for the reasons set forth on the record.

(53:3). As explained above, that unambiguous reason for imposing a bifurcated prison sentence on Counts 4 and 5 was that the court thought Angela already had enough extended supervision on Counts 1-3. (62:31-33).

"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." *State v. McCleary,* 49 Wis. 2d 263, 276, 182 N.W. 2d 512 (1971). Additionally, sentencing courts are 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." *State v. Gallion*, 2004 WI 42, ¶ 44, 720 Wis.2d 535, 678 N.W.2d 197. The court's explicit stated purpose for not imposing probation on

Counts 4 and 5, that there was "sufficient" extended supervision on the other counts, does not comply with either of these principles.

Not only was the court's rationale inconsistent with the sentencing requirements under *McCleary* and *Gallion,* but it was also illogical. 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 community supervision.

The State reduces Angela's argument as follows: (a) that she argues the sentence for Count 4 was arbitrary "because the court deviated from the State's recommendation," and (b) the sentence for Count 5 was arbitrary because "the court changed its mind about imposing probation." (State's Response, 12). But more precisely, it is Angela's position that the rejection of probation and imposition of a bifurcated prison sentence on *both* Counts 4 and 5 was an erroneous exercise of discretion for the same reason: because the Court only sentenced in that manner because it decided it had already imposed sufficient extended supervision on Counts 1-3. The about-face as to Count 5 was additionally erroneous in that the sentencing court stripped away the probation and increased the confinement time by yet another two years after only brief reflection, "for a

second" as it were, and without a proper basis. (62:33).[6]

The State claims that the sentencing court rejected probation on Counts 4 and 5 because it found the aggravating factors to be "so enormous in this case that it calls out for and cries for a prison sentence in the state institution." (62:26; State's Response, 11). The remark that the State is relying on was indeed made at the outset of the court's sentencing remarks, but it was made in reference to a general intent to impose prison and not about specific structure or individual counts. This case was clearly a prison case, as is reflected in the plea negotiations. But the court's recognition of that fact does not necessarily mean that the rationale behind its imposition of prison specifically on Counts 4 and 5 was an appropriate exercise of discretion.

The State also claims the sentencing court said in discussing the appropriateness of probation, "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[?]" (State's Response, 4, 13). This has been taken out of context. The remark had nothing to do with the court's probation consideration. Instead, it was made during the court's required early release program eligibility

[6] It is for that reason that, while it is Angela's position that forgoing probation on Counts 4 and 5 was an erroneous exercise of discretion, this Court could also find that the circuit court erroneously exercised its discretion only on Count 5. Either way, Angela requests resentencing.

determination under Wis. Stat. § 973.01(3g). The exchange is as follows, and occurred after the court's initial sentence pronouncement on all counts, but before it changed Count 5:

> **Court**: … And as to conditions of probation, you're to pay any and all restitution. You're to involve yourself in any type of treatment programs to be determined by the department. You're to pay any and all restitution that hasn't been paid.
>
> Was there any other specific conditions?
>
> **State**: Nothing that the state is requesting, no.
>
> **Court**: Seek and maintain employment. Counsel, you'll advise her of her post-conviction relief. She's to report to the Department of Corrections prison system. Counsel, you'll advise her of her post-conviction relief.
>
> **Trial Counsel**: I have.
>
> As far as eligibility for the therapy?
>
> **Court**: 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[?]
>
> **Trial Counsel**: I don't know specifically what programs she would have done. I think – and I didn't look up the dispositions of these, but I would suspect that a bunch of them would have been shorter stints in terms of incarceration time.

> **Court**: What's the state's position?
>
> **State**: I agree with the Court's perspective. She's a habitual criminal. I don't see—really any benefit. She needs to be removed from society is the point of the sentence, I think.
>
> **Court**: I'm not going to grant that because of her prior convictions and the magnitude of the loss here to the state.

(62:31-32). This is indisputably a conversation about early release programming, and not the appropriateness of probation on Count 5. The parties use the term "programs," the court says "I'm not going to grant that" in clear reference to its obligations under Wis. Stat. § 973.01(3g), and there is no other early release programming determination made during the sentencing. If the court was indeed discussing probation and not early release program eligibility, the State was then arguing *against* probation and therefore against its own recommendation. (31).

Finally, the State emphasized in its response that the court was "not required to specify the weight it assigned each sentencing factor" and that it must only explain its exercise of discretion as to the entire sentence, citing *Gallion* and *State v. Fisher*, 2015 WI App 175, 285 Wis. 2d 433, 702 N.W.2d 56. (State's Response, 10, 11, 12, 13).

The Wisconsin Supreme Court in *Gallion* recognized that along with the requirement of an "on-the-record explanation" and a "rational and

explainable" exercise of discretion, courts should not be held to "mathematical precision" in explaining a sentence. *Gallion,* 270 Wis.2d 535, ¶ 49. Similarly in *Fisher,* cited by the State, this Court took defendant to be arguing that the sentencing court "should have explained with specificity the comparative weight it ascribed to each factor and exactly how these factors translated into a specific number of years." 285 Wis. 2d 433, ¶ 21. This Court found that a defendant is not "entitled to this degree of specificity." *Id.,* ¶ 22.

The issue in Angela's case is not that the sentencing court *failed* to provide a degree of specificity as to why it was rejecting probation on Counts 4 and 5, a degree of specificity that the Courts in *Gallion* and *Fisher* disavowed. The issue is that the court *was indeed quite specific,* and its stated specific basis for rejecting probation and imposing consecutive initial confinement and extended supervision on Counts 4 and 5 was arbitrary and irrational.

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 reverse the denial of the motion for resentencing based on the sentencing court's erroneous exercise of discretion.

Dated this 17th day of December, 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 2,123 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 17th day of December, 2018.

Signed:

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