STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2018AP002222-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DOMINIQUE M. ANWAR,

Defendant-Appellant.

On Appeal From a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Thomas Wolfgram, Presiding, and From the Decision and Order Denying Post Conviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Cynthia M. Davis, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

I. Whether the Court properly sentenced the appellant after the State introduced third party statements at sentencing. This appeal follows a post-conviction court ruling that the sentence was proper.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On Wednesday, August 9, 2017, Dominque Anwar, the appellant, left her apartment at approximately 3:00 a.m. leaving her then-two-year-old child, KM, behind. (R1:1-2). Anwar went to the house of a family member a short walk away to aid in the resolution of a dispute and then fell asleep at that residence. *Id*. While Anwar was gone, her apartment building caught fire and the Milwaukee Fire Department responded and began evacuating the residents of the building. *Id*. The Fire Department located KM by himself in the apartment adjacent to the source of the fire and rescued him. *Id*. Police were called to the scene and responded at approximately 4:36 a.m. *Id*. The responding officers called Anwar's phone five times. *Id*. Anwar answered on the third call and was directed to return to the apartment immediately. *Id*. Anwar arrived at approximately 5:30 a.m. *Id*.

This incident was subsequently charged as Milwaukee County Court Case 17CM2797 as one count of Child Neglect in violation of Wis. Stats. § 948.21(1)(a). *Id*. On November 27, 2017, Anwar entered a guilty plea to the sole count, and a judgment of conviction was entered. (R50:8). On December 20, 2017, a sentencing hearing was conducted before the Honorable Thomas R. Wolfgram. (R51:1). The State appeared by Assistant District Attorney Molly Schmidt. *Id*. Anwar appeared personally and was represented by Attorney Prashant Dayal. *Id*.

At sentencing, the State made reference to the statements of Anwar's older child. (R51:5). The State offered statements from that child that Anwar would "leave him and his brother home pretty often, that she would do so to go to Potawatomi and

lose all their money." *Id*. The State also noted "that the six year old also talked about his mom having dope in the house and cooking it into cookies and brownies" as a basis for recommending an alcohol or other drug assessment. (R51:7). The State reported that it had received information from an attendant children's court action that, in that action, Anwar "continue[d] to show no remorse and make excuses" which the State believed "indicate[d] that there [wa]s a need for some up-front condition time, something to emphasize to Miss Anwar just how criminal this behavior was and the risk if she's not successful on probation". (R51:6). Ultimately, the State requested thirty days of condition time. *Id*.

Defense counsel did not offer a response to the six year old's statements, or those of the children's court attendant, instead commenting on Anwars's remorse and on details of her character such as her degree in Early Child Intervention. (R51:10). Defense opposed condition time. (R51:11).

The Court sentenced Anwar to nine months in the House of Corrections, imposed but stayed, for twenty-four months of probation. Among the conditions of Anwar's probation, the court ordered that she serve thirty days of condition time allowing release for work and visits with her child. (R51:14-16). The Court agreed that Anwar would be eligible for expunction at the close of her probation if she served the twenty-four months successfully. (R51:17-18). The Court noted that Anwar's "child could have been killed…the child is two years old. It's incredibly inappropriate to leave him for any period of time." (R51:13-14). The Court noted that:

> This isn't the kind of decision that is just inappropriate. It's totally wrong. And it's something that never should have even occurred to a parent who has a two-year-old child. That concerns me deeply. I mean, if there is a case that qualifies as neglect this is it. And I'm disturbed about the other statements concerning the six year old as well…If you got a degree in child intervention that indicates some concern, but that training I'm assuming should have helped you make an appropriate decision here. I mean, I can't think of a single excuse for what you've done…I appreciate your attorney's recommendation, but I just can't accept that. It would so unduly depreciate the seriousness of what's occurred here, and it'd be really just be abrogating my

> responsibility as sentencing judge in this case. Nothing but the maximum is appropriate.

(R51:13-14).

The Court made one commend in reference to the outside statements offered by the State: "I'm disturbed about the other statements concerning the six year old as well." *Id*. With respect to the condition of upfront time, the court noted:

> I know this is her first offense, but it's such a serious offense, and it's so dangerous for this child that I think a period of incarceration is necessary to punish the inappropriateness and dangerousness of what she's done. Quite frankly I think what the State suggested is appropriate. I'll order that she spend thirty days in the House of Correction as a condition of her probation.

(R51:16).

On July 30, 2018, Anwar filed a post-conviction motion arguing that her right to due process had been violated by the State's use of the six-year-old child's statements and she was entitled to be resentenced. (R15:11). Anwar argued that the State had not given prior notice that it intended to rely upon the six-year-old's statements at sentencing, which deprived her of the right to a fair hearing and the right to be sentenced on accurate information. The State, responded on two fronts, first noting that the only third party information provided to the Court was read into the record in open court instead of being kept confidential. Second, the State noted that the information provided was within the scope of information that was appropriate to consider at sentencing under State v. Prineas, 2009 WI App 28; 316 Wis. 2d 414; 766 N.W.2d 206. Prineas also holds that evidence of a pattern of behavior that was read into the record but not known to the defendant prior to sentencing was appropriate for the Court to consider at sentencing. *Id*. at ¶26-28; 434.

The State also noted in a footnote in its response, noted that the sentencing district attorney had specifically relied upon a CHIPS petition which would have been turned over to Anwar as she was one of the parties to that proceeding. (R29:2, citing to Wis. Stat. § 48.21(3)(b).

The post-conviction court denied Anwar's motion, noting that Anwar had failed to meet her burden as to whether the sentencing court had actually relied upon the State's information. (R36:3). The post-conviction court noted that the sentencing court articulated a basis for its sentence that was based upon the facts of the incident, rather than on the State's offer of the statements of the six-year old. The post-conviction court noted that Anwar relied upon State v. Skaff, 152 Wis. 2d 48; 447 N.W.2d 84 (Ct. App. 1989) but found that case readily distinguishable because this case did not concern a document produced for the express purposes of sentencing and it did not concern information kept secret from Anwar. (R36:3). The post-conviction court noted that the sentencing court was well within its discretion to sentence the Anwar as it did.

This appeal follows.

STANDARD OF REVIEW

A defendant who asks for resentencing because the court relied on inaccurate information must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. State v. Lechner, 217 Wis. 2d 392, 419; 576 N.W.2d 912 (1998) (quoting State v. Johnson, 158 Wis. 2d 458, 468; 463 N.W. 2d 352 (Ct. App. 1990)(abrogated on other grounds)). Once actual reliance of inaccurate information is shown, the burden then shifts to the state to prove the error was harmless. State v. Tiepelman, 2006 WI 66, 291 Wis. 2d 179; 717 N.W.2d 1.

ARGUMENT

I. The Court Followed Due Process When it Sentenced Anwar

Anwar asks for resentencing because, she contends, the sentencing court relied on inaccurate information. To succeed in her petition, Anwar must show that first, the information relied upon by the sentencing court was inaccurate and second, that the sentencing court actually relied on it. Anwar has done neither.

Anwar is specifically troubled by the statements of her six-year-old son which the State provided at sentencing:

> There is another child by this defendant who was six years old at the time this investigation began….his statements were provided as part of the basis for the CHIPS case, and it's my understanding that the six year old told investigators that his mother would leave him and his brother home pretty often, that she would do so to go to Potawatomi and lose all their money, was the statement of the six year old.
>
> Miss Anwar, in statements as to the ongoing case manager working in the CHIPS action, also acknowledged that she left the children home alone in the past…The case manager who's working with her at the children's court matter was concerned that Miss Anwar doesn't seem to show much remorse for what happened, that she continues to excuse this behavior, and has, in fact, made comments like 'plenty of people leave their children home alone to run to the store.'
>
> …the six year old also talked about his mom having dope in the house and cooking it into cookies and brownies.

(R51:5-7).

Anwar contends that the State introducing these statements into the record is comparable to the situation in State v. Skaff, 152 Wis. 2d 48; 447 N.W.2d 84 (Ct. App. 1989). In Skaff, a PSI was generated for the purposes of sentencing, but that document remained confidential from both the State and the defendant and was solely accessibly the sentencing court which became an issue when it was discovered that confidential PSI contained inaccurate information. *Id*. That situation is readily distinguishable from the present one.

First, the statements at issue in Skaff were never presented to the defendant. Not before sentencing, not during sentencing, and not after sentencing. In the case of Anwar, the statements introduced by the State at sentencing were read into the open record. (R51:5-7). Anwar had ample warning that the State had these statements available before the time of sentencing, and had every opportunity to refute, contest, explain, or otherwise oppose them when both defense counsel and Anwar herself made their statements at sentencing following the State's remarks.

Second, the defendant in Skaff was shown to have been sentenced based upon the inaccurate information contained in his PSI. In this case, the rationale for the imposed sentence, which was articulated by the court, was based solely in the facts of the case. The sentencing court did not discuss the statements made by the six year old outside of one comment: "I'm disturbed about the other statements concerning the six year old as well." (R51:14). State v. Lechner, 217 Wis. 2d 392, 419; 576 N.W.2d 912 (1998) requires that the defendant show that the sentencing court relied on inaccurate information. The sentencing court in this case based its sentence upon the seriousness of Anwar's conduct. The court remarked to Anwar:

> your child could have been killed. I mean, the child [was] two years old. It's incredibly inappropriate to leave him unsupervised for any period of time. And, you know, this demonstrates what everyone hopes will never happen, but that is that the child's placed in actual danger. There was a fire in this apartment building and you weren't there to protect the child…This isn't the kind of decision that's just inappropriate. It's totally wrong. And it's something that should never have even occurred to a parent who has a two-year-old child. That concerns me deeply. I mean, if there is a case that qualifies as neglect, this is it… And I'm disturbed about the statement concerning the six year old as well….I can't think of a single excuse for what you've done….I appreciate your attorney's recommendation, but I just can't accept that. It would so unduly depreciate the seriousness of what's occurred here, and it'd really just be abrogating my responsibility as a sentencing judge in this case. Nothing but the maximum is appropriate.
>
> (R51:13-14)

When the court ordered condition time, it noted, "I think a period of incarceration is necessary to punish the inappropriateness and dangerousness of what she's done". (R51:16). Of the approximate four pages of transcript devoted to the court's sentencing comments, one sentence is devoted to the six year old's statements. The court repeatedly placed emphasis on the danger of a leaving two-year-old child home alone, the court made no explicit mention of the six year old child's comments. The court made no mention of Anwar's alleged pattern of behavior and the court did not make any mention of Anwar allegedly cooking dope into cookies and brownies. There was no showing by Anwar that the

court relied upon the six year old's statements in fashioning its sentence.

Third, unlike the case in Skaff, Anwar has never shown that the statements offered by the State are, in fact, incorrect. In Skaff, the Court relied upon a series of prior convictions which had been incorrectly counted by the author of the confidential PSI. Skaff at 52. In this case, Anwar has offered the testimony of persons which the Post-Conviction Court noted were not in a position to know whether the statements in question are actually inaccurate. (R36:4). Had the Court actually relied upon those statements by the six year old, and the statements of Anwar herself as reported by the Children's Court attendant, there is no evidence that the statements were actually inaccurate. In the absence of such a showing, it is proper for the Court to consider accurate statements concerning a defendant's pattern of behavior, even when the allegations are not charged or even resulted in acquittal. Prineas, quoting State v. Leitner, 2002 WI 77, ¶42; 253 Wis. 2d 449; 646 N.W.2d 341. Such information is not just proper, "[s]entencing courts are *obliged* to acquire full knowledge of the character and behavior pattern of a defendant before imposing a sentence. " (Emphasis added.) *Id*. Because the offered statements of the six year old were indicative of a pattern of behavior, the Court would have used them properly if it did indeed rely on them.

Next, Anwar cites to Gardner v. Florida, 430 U.S. 349 (1977). Similar to the situation in Skaff, the defendant in Gardner was sentenced based upon a PSI which was not disclosed to either party and was not entered into the appellate record. For the reasons above, Gardner is also readily distinguishable from the present situation.

Finally, Anwar claims that they were not aware of the statements the State intended to use and because he had then just become aware of them at the time of sentencing, this constituted an "ambush" on the part of the State which the defense did not have time to contest. At no point in the record did Anwar or defense counsel state they needed more time to prepare their remarks. Nor did Anwar or her counsel remark that they were surprised by the statements read into the record by the State.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the sentence imposed by the Sentencing Court and deny the appellants petition for resentencing.

Dated this _____ day of April, 2019.

Respectfully submitted,

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_____
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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 word count of this brief is 2,601.

_____ _____
Date Elaine Fehrs
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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 s. 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.

_____ _____

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