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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2018AP002222-CR
Circuit Court No. 2017CM2797

Dominique M. Anwar,

Defendant-Appellant.

ON APPEAL FROM A JUDGEMENT OF CONVICTION
ENTERED IN 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

REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

I. The Trial Court Erred in Denying Ms. Anwar’s Post Conviction Motion Arguing that the Sentencing Hearing Violated Her Procedural Due Process Right to be Sentenced in a Fair Manner.

Criminal defendants possess a due process right to be sentenced in a fair manner. The due process clauses of 5th and 14th Amendments provide that no person shall be deprived of life, liberty, or property without due process. “Substantive” due process prevents the government from engaging in conduct that “shocks the conscience.” *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)). “Procedural” due process, on the other hand, is concerned with the manner in which the government takes away property, life, or liberty. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The law is clear: even when substantive due process passes scrutiny, meaning that the government properly deprived a person of life, liberty, or property, the mechanism or manner by which the government deprives the person of their life, liberty, or property must *still be implemented in a fair manner. Id.*

The right to be sentenced in a fair manner is a claim that is separate and distinct from the right to be sentenced on reliable and accurate information. In its brief, the State confuses the two ideas when it argues that the defendant must demonstrate first, that there existed inaccurate information, and second, that the sentencing court relied upon that

information. (State’s Br. 5).¹ Simply, the issue the State frames is not before the appellate court. Rather, the issue before the appellate court is whether the sentencing by ambush violated Ms. Anwar’s procedural due right to be sentenced in a fair manner. No doubt, the government was entitled to sentence Ms. Anwar, but the claim is that the sentencing took place in an unfair manner and that the unfair manner of sentencing does not comply with the requirements of procedural due process.

In *Gardner v. Florida*, 430 U.S. 349, 358 (1977) the Supreme Court was clear. “[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . . The defendant has a legitimate interest *in the character of the procedure which leads to the imposition of the sentence* even if he may have no right to object to a particular result of the sentencing process.” *Gardner*, 440 U.S. at 358 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521-523 (1968)). *State v. Skaff*, 152 Wis. 2d 48 (Ct. App. 1989) extended *Gardner’s* broad proclamation to all offenses, not just to non-capital offense cases. This means that during sentencing hearings in Wisconsin, criminal defendants possess an interest in the procedure that leads to the imposition of a sentence, even if they have no legal objection to the sentence they receive. This interest in a fair sentencing procedure is violated when a defendant hears statements—for the first time—that were gathered during a confidential investigation. This is the epitome of sentencing by ambush, which is plainly unfair.

Wisconsin has long done away with trials by ambush. *See Carlson Heating, Inc. v. Onchuck*, 104 Wis. 2d 175, 180 (Ct. App. 1981). During sentencing it is not only common for the prosecutor to go over the defendant’s record, the facts of

¹ Although the defense argued such a claim in its post conviction motion to the sentencing court (R15: 5-8), the defense abandoned this claim at the appellate level.

the offense, and any aggravating or mitigating circumstances. Indeed, it is even proper and required for the sentencing court to consider these factors as they relate to the *Gallion* factors. *State v. Gallion*, 2004 WI 42. However, what is not common and also simply unfair to the defendant is to use confidential statements from a CHIPS investigation where the defendant had no knowledge of the statement's existence. This ambush at sentencing is no different than the evils *Skaff* and Gardner sought to remedy.

In this case, Ms. Anwar's procedural due process right to be sentenced in a fair manner was violated by the State's use of her six-year-old child's statements that were gathered in a confidential CHIPS investigation. The State used the confidential CHIPS investigation in a manner consistent with a confidential PSI. When conducting a PSI, it is not uncommon for the writer to interview the defendant, victim, and other members of the community or persons who are close or related to the defendant. In a CHIPS investigation it is not uncommon to interview those close to the child, including parents, teachers, religious, or even other children in the family. Just as a PSI is designed to help educate the court about the needs of a defendant by interviewing those close to the defendant, the purpose of the CHIPS investigation is to educate the children's court about the needs of the child and whether the child can be adequately protected.

Modern day law requires that defendant's be provided with a copy of the PSI prior to sentencing. That way the defendant can clarify, correct, or explain any inaccuracies. Likewise, if the State intends to introduce third party statements from a CHIPS investigation that the defendant is not aware of, the State should disclose these statements to the defendant *prior to sentencing* in order to allow the defendant to clarify, correct, or explain any inaccuracies. Only then is

the sentencing hearing conducted in a fair manner consistent with the demands of due process.

In situations where the State uses a confidential CHIPS investigation at sentencing without first providing the portions it intends to use, the CHIPS investigation is rendered into a quasi PSI. The defendant is ambushed at sentencing. As *Gardner* and *Skaff* instruct, defendants possess a legitimate interest in the character of the procedure that leads to their sentence. Ms. Anwar cares deeply about the unfair manner in which she was sentenced, even if the sentence imposed by the court was ultimately legal. Because the sentencing hearing was conducted by ambush, i.e. in an unfair manner that violates due process, this Court should reverse the trial court, vacate the sentence imposed, and remand to the sentencing court for a new sentencing hearing.

Conclusion

This Court therefore should reverse the decision of the trial court denying the defendant's Post Conviction Motion asking for a new sentencing based upon her procedural due process right to be sentenced in a fair manner.

Dated at Milwaukee, Wisconsin this 22nd day of April, 2019.

Respectfully submitted,

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Certification of Form & Length

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13-point type and the length of the brief is 1071 words.

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Certification of Electronic Brief

Pursuant to Rule 809.19(12)(f), I hereby certify
that the text of the electronic copy of the brief is
identical to the text of the paper copy of the brief.

Signed: _____,
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