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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP173-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN A. ANDERSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief, Both
Entered in the Eau Claire County Circuit Court,
the Honorable Jon M. Theisen, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
ISSUE PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF THE FACTS AND CASE	1
ARGUMENT	4
I. The Circuit Court Erroneously Exercised Its Discretion at Sentencing When It Imposed Lifetime Supervision without Making or Explaining the Statutorily-Required Determinations. The Requirements of <i>Gallion</i> Should Apply to this Exercise of Discretion.....	4
A. For certain statutory offenses, including the offense to which Mr. Anderson pled no contest, a circuit court has discretion at sentencing to impose lifetime supervision.....	4
B. Wisconsin Statute § 939.615(2) requires a sentencing court to determine whether lifetime supervision is necessary to protect the public. The requirements of <i>Gallion</i> should apply to this exercise of discretion.....	6
C. The circuit court erroneously exercised its discretion at sentencing when it imposed lifetime supervision without making or explaining the statutorily-required determination. The court's rationale in denying Mr. Anderson's postconviction motion did not remedy this error	10

CONCLUSION	13
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CASES CITED

<i>State ex rel. Kalal v. Circuit Court for Dane Cty.</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.....	7
<i>State v. Cherry</i> , 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393	9
<i>State v. Delgado</i> , 223 Wis. 2d 270, 588 N.W.2d 1 (1999)	6
<i>State v. Fuerst</i> , 181 Wis. 2d 903, 512 N.W.2d 243 (Ct. App. 1994).....	11
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197	6 passim
<i>State v. Helmbrecht</i> , 2017 WI App 5, 373 Wis. 2d 203, 801 N.W.2d 412	8, 9
<i>State v. Jackson</i> , 2012 WI App 76, 343 Wis. 2d 602, 819 N.W.2d 288	9
<i>State v. Ramel</i> , 2007 WI App 271, 306 Wis. 2d 654, 743 N.W.2d 502	10
<i>State v. Taylor</i> , 2006 WI 22, 289 Wis. 2d 34, 710 N.W.2d 466	11

STATUTES CITED

Wisconsin Statutes

939.615	1, 4
939.615(1)(b).....	5
939.615(2)	5 passim
939.615(2)(a).....	7
939.615(5)(a).....	5
939.615(5)(am).....	5
939.615(5)(b).....	6
939.615(7)	5
948.02(2)	1
948.07(1)	1
973.015(1m)(a)1	8
973.125	5

ISSUE PRESENTED

Did the circuit court erroneously exercise its discretion when it ordered Mr. Anderson to comply with lifetime supervision without (a) making the statutorily-mandated determinations and (b) explaining its rationale?

The circuit court had discretion to decide whether to require Mr. Anderson to comply with lifetime sex offender supervision. It ordered lifetime supervision, merely stating “Order lifetime supervision.” (56:66; App. 123). The circuit court then denied Mr. Anderson’s postconviction motion. (48; App. 107).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Anderson does not seek oral argument or publication. The briefs will adequately address the issue raised in this case.

STATEMENT OF THE FACTS AND CASE

The state charged Mr. Anderson with two counts of second degree sexual assault of a child in violation of Wis. Stat. § 948.02(2) and two counts of child enticement in violation of Wis. Stat. § 948.07(1). All four charges included notice that the state sought to place Mr. Anderson on lifetime supervision pursuant to Wis. Stat. § 939.615. (1). The charges arose from Mr. Anderson’s sexual relationship with a 15-year-old girl after a year of online contacts. (1:2; 56:20). Mr. Anderson and the victim met at motels in Eau Claire County and Clark County. They engaged in sexual activity. Mr. Anderson recorded some of their meetings. (1:3-4). The

state filed an information charging the same four offenses on April 21, 2016. (10).

Mr. Anderson pled no contest to one count of second degree sexual assault of a child on April 21, 2016. (21). At the plea hearing, there was significant confusion regarding the lifetime supervision. The guilty plea questionnaire listed the lifetime supervision as a “mandatory minimum penalty” that the “judge must impose.” (11). The circuit court asked “Oh, like so like lifetime probation? It’s not just registry?” (55:8). Mr. Anderson told the circuit court that he thought it was just the registry and the circuit court stated it believed lifetime supervision might include GPS monitoring and restrictions on where Mr. Anderson could go. The circuit court also explained that lifetime supervision “probably puts a red flag” on a potential 980 commitment. (55:8-9).

In light of the confusion, the court allowed Mr. Anderson time to confer with his attorney. Mr. Anderson and his counsel conducted an off the record discussion that included a review of the statutes. After this break, Mr. Anderson told the court that he understood lifetime supervision and its implications. (55:10-12).

When explaining the maximum penalties to Mr. Anderson, the circuit court at first noted that lifetime supervision “doesn’t seem discretionary.” (55:13). The circuit court then stated that it was “not sure what that implication is there for the judge. The judge may.” (55:13). The state explained that the judge had discretion. The circuit court then told Mr. Anderson that it could add lifetime supervision and Mr. Anderson said “that’s what I was understanding when me and my lawyer just discussed it.” (55:13).

The case proceeded to a sentencing hearing on July 5, 2016. (56). The state asked the court to impose lifetime

supervision while defense counsel argued that it was not necessary. (56:28, 43).

The presentence investigation report listed Mr. Anderson's prior criminal offenses. None of those offenses involved sexual assault charges with the exception of Clark County convictions involving the same victim during the same time period. (15:6). There were also uncharged allegations of sexual assault in Indiana involving Mr. Anderson's daughter, although Mr. Anderson's probation officer in Indiana stated that "under her supervision, there were no concerns regarding any sexual deviancy." (15:7-8).

The circuit court imposed 12 years of initial confinement and 15 years of extended supervision. (21; App. 101). All the circuit court said about lifetime supervision was: "Order lifetime supervision." (56:66; App. 123). The court offered no explanation at sentencing for its decision to impose lifetime registration. *See generally* (56; App. 112).

Mr. Anderson filed a postconviction motion asking the circuit court to vacate the imposition of lifetime supervision because it misused its discretion when it failed to explain why lifetime supervision was necessary to protect the public. (26:14-15).¹

The circuit court denied Mr. Anderson's postconviction motion in a written order following an evidentiary hearing. (57, 48; App. 107). The court did not offer any additional rationale at the postconviction hearing or in its written order; rather, it explained that its sentencing rationale was sufficient. (48:4; App. 110). The court

¹ The postconviction motion alleged several other grounds for relief, including plea withdrawal. Mr. Anderson is not pursuing these additional claims in this appeal.

acknowledged that it did not provide specific reasoning for imposing lifetime supervision “The defendant apparently seeks a direct line between facts and lifetime supervision. The Court did not give such a direct line.” (48:4; App. 110). Instead of explicitly addressing lifetime supervision, the court reasoned that “the Court noted important facts supporting its conclusion that lifetime supervision is appropriate in the interest of protecting the public.” (48:4; App. 110).

Citing to its statements at sentencing regarding Mr. Anderson’s credibility and the seriousness of the charge, the court held that “while the Court may not have given a direct line between the facts and ‘lifetime supervision,’ the Court clearly stated reasoning and facts making a record to support its conclusion that lifetime supervision should be ordered.” (48:5; App. 111).

Mr. Anderson now appeals from the judgment of conviction and the order denying postconviction relief.

ARGUMENT

I. The Circuit Court Erroneously Exercised Its Discretion at Sentencing When It Imposed Lifetime Supervision without Making or Explaining the Statutorily-Required Determinations. The Requirements of *Gallion* Should Apply to this Exercise of Discretion.

A. For certain statutory offenses, including the offense to which Mr. Anderson pled no contest, a circuit court has discretion at sentencing to impose lifetime supervision.

Wisconsin Statute § 939.615 sets out a court’s authority at sentencing to impose lifetime supervision for certain individuals convicted of sex offenses.

If a person is convicted of a “serious sex offense”² including the second degree sexual assault of a child in Mr. Anderson’s case, the court “may in addition to sentencing” impose lifetime supervision “if notice concerning lifetime supervision was given to the person under s. 973.125 and if the court determines that lifetime supervision of the person is necessary to protect the public.” Wis. Stat. § 939.615(2).

Lifetime registration places significant restrictions on an individual. This supervision subjects the person “to the control of the department under conditions set by the court and regulations established by the department that are necessary to protect the public and promote the rehabilitation of the person placed on lifetime supervision.” Wis. Stat. § 939.615(5)(a). This statutory language is broad and gives the department wide-ranging control over the individual for his lifetime.

This control includes the ability to take the person into custody “if the department has reasonable grounds to believe that the person has violated a condition or regulation of lifetime supervision.” Wis. Stat. § 939.615(5)(am). The person can be held in custody “as long as is reasonably necessary” for the department to investigate. Wis. Stat. § 939.615(5)(am). The department may refer the person for further prosecution that could result in a felony conviction. Wis. Stat. § 939.615(7).

A person under lifetime supervision is also subject to pay a “fee” to “partially reimburse the department for the costs of providing supervision and services.” Wis. Stat.

² Wisconsin Statute § 939.615(1)(b) defines “serious sex offense” as a violation, or the solicitation, conspiracy or attempt to commit a violation of several delineated statutes.

§ 939.615(5)(b). This fee could be imposed for the person's lifetime.

It is in the context of this lifetime of control that the court must make a determination of whether such control is necessary to protect the public.

- B. Wisconsin Statute § 939.615(2) requires a sentencing court to determine whether lifetime supervision is necessary to protect the public. The requirements of *Gallion* should apply to this exercise of discretion.

The plain language of the statute, the requirements of lifetime supervision, and this court's related case law all reflect that a circuit court must conduct an exercise of discretion specific to lifetime supervision—an exercise beyond the standard consideration of sentencing factors applicable in every criminal case—and that *State v. Gallion*, 2004 WI 42, ¶ 37, 270 Wis. 2d 535, 678 N.W.2d 197, should apply to this exercise of discretion.

While deference is given to a circuit court's exercise of its discretion at sentencing, the exercise of discretion “contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards.” *State v. Delgado*, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999).

As such, the record created by the circuit court in exercising this discretion “must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.” *State v. Delgado*, 223 Wis. 2d at 281. A circuit court must do more than state “magic words.” *State v. Gallion*, 2004 WI 42, ¶ 37.

The plain language of the lifetime supervision statute requires two particular considerations when a court imposes discretionary supervision compliance. Mr. Anderson does not contest that proper notice was provided. Therefore, what is at issue is the second requirement: that lifetime supervision was necessary to protect the public. Wis. Stat. § 939.615(2).

There can be no dispute that the imposition of lifetime supervision is discretionary and not mandatory. The statute also clearly separates sentencing from the imposition of lifetime supervision with the language “in *addition to* sentencing.” Wis. Stat. § 939.615(2)(a)(emphasis added). Statutory interpretation begins with the plain language of the statute, which is given “its common, ordinary, and accepted meaning.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. If the language of a statute is clear and unambiguous, the statute is applied according to its plain meaning and further interpretation is unnecessary. *Id.* at ¶ 46. Thus a circuit court has two distinct duties at sentencing when lifetime supervision is available: (1) exercise its discretion when imposing sentence and (2) exercise discretion when imposing lifetime supervision “in addition to sentencing.”

Further, the onerous restrictions and obligations lifetime supervision places on the person require a separate analysis before imposition. As discussed above, a person on lifetime supervision can be taken into custody for “as long as is reasonably necessary;” can be charged with a felony if there is a violation and charged a fee to reimburse the department for costs associated with the supervision. And, obviously, the person is subject to these rules for the rest of his life.

Ordering lifetime supervision imposes a significant, heavy burden on an individual that lasts far beyond the original sentence and, if not complied with, carries the

possibility of additional criminal charges. Given the significance of a court's decision to impose this requirement, and the plain "in addition to" language of the statute, the requirements of *Gallion* must apply to this important exercise of discretion.

This court has extended the rationale of *Gallion* to other components of a court's exercise of discretion at sentencing beyond the sentence itself. In *State v. Helmbrecht*, 2017 WI App 5, 373 Wis. 2d 203, 891 N.W.2d 412, this court held that *Gallion* applies to a court's decision of whether to make a defendant's conviction eligible for expungement.

Wisconsin's expungement statute provides if the person was under twenty-five at the time of the offense and the conviction has a maximum sentence of six years in prison or less, "the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition." Wis. Stat. § 973.015(1m)(a)1.

The structure and language of the expungement statute thus parallels the structure and language of the lifetime supervision statute: if the conviction falls within statutorily-limited parameters (there, age of the offender and maximum prison sentence; here, the statutory offense), the court "may" order it "if the court determines" specific criteria are met (there, (a) the person will benefit and (b) society will not be harmed; here, it would be in the interest of public protection to have the person submit to lifetime supervision. Compare Wis. Stat. § 973.015(1m)(a)1 with Wis. Stat. § 939.615(2)(emphasis added).

In *Helmbrecht* the defendant argued that *Gallion* should apply to the statutorily-mandated expungement determinations, and that those criteria require a court to

consider “specific factors unique to expungement.” 2017 WI App 5, ¶ 9. This court concluded that the expungement statute “clearly contemplates the exercise of discretion and puts forth two factors for the sentencing court to utilize in exercising that discretion.” *Id.*, ¶ 11.

This court held that when assessing whether to grant expungement, “the sentencing court should set forth in the record the facts it considered and the rationale underlying its decision for deciding whether to grant or deny expungement.” *Id.*, ¶ 12.

Importantly, this court held that a sentencing court must do more than repeat the statutorily-mandated determinations:

Thus, in exercising discretion, the sentencing court must do something more than simply state whether a defendant will benefit from expungement and that society will or will not be harmed. We have repeatedly held that the utterance of “magic words” is not the equivalent of providing a logical rationale. Rather, the sentencing record should reflect the process of reasoning articulated in *Gallion*.

Id., ¶ 13.³

The *Gallion* analysis has been applied in other areas as well. In *State v. Jackson* this court analyzed whether a circuit court erred in concluding that particular conduct was sexually

³ Prior to the 2014 law-change to the DNA surcharge statute, this court also held that *Gallion* applied to a court’s discretionary decision of whether to impose the DNA surcharge. *State v. Cherry*, 2008 WI App 80, ¶¶ 9-10, 312 Wis. 2d 203, 752 N.W.2d 393 (a court must do something more than “stating that it is imposing the DNA surcharge simply because it can”; it instead must “consider any and all factors to the case before it” and “set forth in the record the factors it considered and the rationale underlying its decision”).

motivated and exercised its discretion to require compliance with the sex offender registry. This court cited *Gallion* in explaining how it reviewed the circuit court's order. 2012 WI App 76, ¶ 7, 343 Wis. 2d 602, 819 N.W.2d 288 (citing *Gallion*, 2004 WI 42, ¶ 17).

Finally, in *State v. Ramel*, 2007 WI App 271, ¶¶14, 22-24, 306 Wis. 2d 654, 743 N.W.2d 502, this court held that the circuit court must have "some explanation of why the court imposes a fine" and that the circuit court's global sentencing remarks alone are insufficient.

The question of whether and how the public is protected by placing a defendant in jail or prison for particular lengths of time is different than the question of whether and how the public is protected by requiring that defendant be subjected to a lifetime of supervision. Therefore, the circuit court's global sentencing remarks alone are insufficient to explain why lifetime supervision specifically is necessary. This difference between the length of the sentence and the imposition of lifetime supervision requires the circuit court to undertake a separate analysis before it imposes lifetime supervision.

- C. The circuit court erroneously exercised its discretion at sentencing when it imposed lifetime supervision without making or explaining the statutorily-required determination. The court's rationale in denying Mr. Anderson's postconviction motion did not remedy this error.

The court's decision imposing lifetime registration in Mr. Anderson's case failed to satisfy *Gallion*. The court failed to both (1) make the statutorily-required determinations and (2) explain its rationale for those determinations.

Appellate review of a circuit court's sentencing discretion is limited to determining whether the circuit court erroneously exercised that discretion. *State v. Taylor*, 2006 WI 22, ¶ 17, 289 Wis. 2d 34, 710 N.W.2d 466.

All the circuit court said at sentencing was: "Order lifetime supervision." (56:66; App. 123). The circuit court failed to offer the process of reasoning required by *Gallion* as to whether it would be in the interest of public protection to subject Mr. Anderson to lifetime supervision.

The circuit court offered no process of reasoning to make clear why the court believed that it would be in the interest of public protection to subject Mr. Anderson in particular to lifetime supervision. This error was not remedied at postconviction. Mr. Anderson recognizes that a circuit court may further explain its sentencing rationales in addressing a postconviction motion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). But the circuit court here failed to do so.

In its order denying the postconviction motion, the circuit court conceded that it failed to give specific reasons at sentencing for imposing lifetime supervision "The defendant apparently seeks a direct line between facts and lifetime supervision. The Court did not give such a direct line." (48:4; App. 110). At postconviction, the circuit court did not provide any additional reasoning to support the imposition of lifetime supervision, instead merely referring back to its statements at sentencing regarding Mr. Anderson's credibility and the seriousness of the charge. (48:5; App. 111).

The circuit court's comments regarding Mr. Anderson's credibility and the seriousness of this offense do not satisfy *Gallion* with regard to its imposition of lifetime supervision. The circuit court made these comments when explaining its basis for imposing its sentence, not in

explaining why the lifetime supervision would be appropriate. The circuit court never explained how it believed requiring Mr. Anderson to be supervised for the rest of his life would serve to protect the community.

The circuit court's explanation fails as the basis for imposition of the lifetime supervision because it does not make clear how the court got from point A (the serious nature of the crime, Mr. Anderson's credibility) to point B (finding that it is in the interest of public protection to require Mr. Anderson to be subject to supervision for the rest of his life).

Lifetime supervision imposes financial burdens and broad constraints on an individual until his death. The court must explain on the record how and why these obligations and restrictions will protect the public. The failure to provide any explanation in Mr. Anderson's case was an erroneous exercise of discretion.

CONCLUSION

For these reasons, Mr. Anderson respectfully requests that this court reverse the circuit court's order denying his postconviction motion and either vacate the lifetime supervision order or remand this matter with an order that the circuit court exercise its discretion on whether to order lifetime supervision.

Dated this 25th day of March, 2019.

Respectfully submitted,

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CERTIFICATION AS TO 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 200 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 of body text. The length of the brief is 3,006 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 25th day of March, 2019.

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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 first names and last initials 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 25th day of March, 2019.

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APPENDIX

**I N D E X
T O
A P P E N D I X**

	Page
Judgment of Conviction (21).....	101-103
Amended Judgment of Conviction (49)	104-106
Decision and Order Denying Motion for Postconviction Relief (48).....	107-111
Oral Imposition of Sentence (Partial Transcript of July 5, 2016, Hearing)(56)	112-129