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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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.

In certain circumstances, the circuit court may “in addition to sentencing” impose lifetime supervision “if the court determines” that lifetime supervision is necessary to protect the public. Wis. Stat. § 939.615(2).

The statutory language clearly sets out that the court must make two distinct findings: the length of the sentence and “in addition” a determination that lifetime supervision is necessary.

All the circuit court in Mr. Anderson’s case said at sentencing was: “Order lifetime supervision.” (56:66; App. 123).

The state argues that as long as the court mentions protection of the public sometime during the sentencing hearing it need not address the lifetime supervision component. Instead, the necessity for lifetime supervision can be implied. (State’s Brief at 10-11). The state submits that a “theme” suffices; a defendant can be ordered to register for the rest of his life if the court touched on the protection of the public in its “theme.” (State’s Brief at 11).

More must be required. A term of incarceration followed by extended supervision is different from lifetime supervision and requires different analysis. To subject an individual to significant lifetime restrictions and control the court must state its reasoning on the record. Otherwise, a

person could be taken into custody “as long as is reasonably necessary” (Wis. Stat. § 939.615(5)(am)), subjected to a felony prosecution (Wis. Stat. § 939.615(7)) and ordered to pay fees for the rest of his life (Wis. Stat. § 939.615(5)(b)) on the basis of an implied “theme” within the circuit court’s sentencing remarks.

The state tries to reframe Mr. Anderson’s argument as asking this court to require the sentencing court to “re-apply” the *Gallion* (*State v. Gallion*, 2004 WI 42, ¶ 37, 270 Wis. 2d 535, 678 N.W.2d 197) factors to the lifetime supervision question. (State’s Brief at 13). This isn’t a question of re-applying the *Gallion* factors. Instead, it is a matter of the court applying the *Gallion* factors independent from its sentencing reasoning. There are two very different issues before the court: (1) what is the appropriate length of incarceration and extended supervision; and (2) is subjecting the defendant to supervision for the rest of his life necessary to protect the public. The contexts and consequences are very different. A certain amount of time in prison and supervision may be necessary to protect the public. Once that sentence is completed, the court needs to ask the question: in order to further protect the public, does the defendant need to be under supervision until death?

The circuit court’s statements at postconviction do not remedy its error. 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).

The state argues the circuit court “reiterated” its decision at postconviction. (State’s Brief at 11-12). The problem is that the circuit court’s statement at sentencing failed to address why lifetime supervision was necessary. A

reiteration of the inadequate reasoning cannot remedy the error. That is akin to a circuit court misstating the maximum penalty and attempting to remedy its error by again misstating the maximum penalty at postconviction.

The state's attempts to distinguish *State v. Helmbrecht*, 2017 WI App 5, 373 Wis. 2d 203, 891 N.W.2d 412 also fail. (State's Brief at 14-15). *Helmbrecht* involved the specific factors related to expungement. The state argues that *Helmbrecht* is inapplicable because before imposing sentence and before imposing lifetime supervision the court must consider "protection of the public." Unlike the unique factors in expungement, in this case there need not be a separate process of reasoning because "protection of the public" is the same factor in both contexts. (State's Brief at 14).

Again, this argument completely ignores the significant differences between a sentence and the imposition of lifetime supervision. The court had no statutory authority to impose a term of incarceration or extended supervision that lasted until Mr. Anderson's death. The court did have the authority to impose lifetime supervision. However, the court could only take this second step if it explained why such a harsh consequence beyond the sentence was necessary to protect the public. Why wasn't the term of extended supervision sufficient to protect the public? The circuit court never answered this question because it never explained why it chose to impose lifetime supervision.

Lifetime supervision is an onerous requirement. Requiring a circuit court to explain why it is ordering a person to be supervised for the rest of his life is not an onerous requirement.

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. This was an erroneous exercise of discretion.

CONCLUSION

For these reasons, as well as those set forth in the brief-in-chief, 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 21st day of June, 2019.

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 895 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 21st day of June, 2019.

Signed:

SUSAN E. ALESIA
Assistant State Public Defender