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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2019 AP 836 CR

EDWARD L. BODY, SR.,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF and SUPPLEMENTAL APPENDIX

APPEALED FROM
KENOSHA COUNTY CIRCUIT COURT,
CASE NO. 17 CM 1162
THE HON. BRUCE E. SCHROEDER, PRESIDING

KAY & KAY LAW FIRM
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I. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS SENTENCING DISCRETION WHEN IT RELIED ON IMPROPER FACTORS AT SENTENCING.

When a circuit court "actually relies on clearly irrelevant or improper factors," it erroneously exercises its sentencing discretion." *State v. Harris*, 2010 WI 79, ¶ 66, 326 Wis.2d 685 (2010). A defendant must prove by clear and convincing evidence that the sentencing court actually relied on improper factors. *State v. Alexander*, 2015 WI 6, ¶ 17, 360 Wis. 2d 292, 304 (2015).

A. IMPROPER FACTOR.

The State argues that the sentencing court properly relied upon factors that Body has argued are improper. [State's Br. at 8]. The State argues that the court may consider uncharged and unproven offenses when sentencing citing *Grant* and *Gayton*. [State's Br. at10]; *Grant v. State*, 73 Wis.2d 441 (1976); *State v. Gayton*, 2016 WI 58, 370 Wis.2d 264. However, *Grant* does not state this language nor stand for this concept. *Grant* is about considering evidence entered that was not objected to. *Id*. at 445-446. Trial counsel in this case objected to the consideration of these factors on multiple occasions. [R. 53-10-22].

Gayton does have that language, but does not stand for that concept either. *Gayton* stands for consideration of nationality at sentencing being an improper factor. *State v. Gayton*, 2016 WI 58, 370 Wis.2d 264, at ¶25. The language is quoted from Frey, which involves charges from allegations made by a daughter, that were relevant because they come from the same action as

the case in question, dismissed in a plea deal. *Id*. at ¶ 71 (citing *State v. Frey*, 2012 WI 99, 343 Wis.2d 358, at ¶47.

In this case, the allegations come from an unreliable source who is a known liar about these types of charges. [R. 32-2]. Furthermore, unlike *Frey*, there is no connection between charges dismissed in a plea deal. Ms. May's allegations are unproven, uncharged, and completely irrelevant to these proceedings. The revocation packet was improperly used because material in the revocation packet relied upon did not fit into any of the sentencing criteria, and the revocation packet consisted of inadmissible hearsay evidence.

i. Gender.

The State argues that the sentencing court did not rely upon gender as a factor at sentencing. [State's Br. at 11]. The State does not dispute the fact that gender is an improper factor. [State's Br. at 11]. However, the State argues that the court did not rely on gender comparing this case to *Harris*. [State's Br. at 12]. The Court in *Harris* used phrases like "you guys," "these women," and "baby mama" when it articulated that it commonly saw unemployed and uneducated fathers coming to court. [State's Br. at 12]. The Court in *Harris* held that these phrases did not implicate race. *State v. Harris*, 2010 WI 79, 326 Wis. 2d 685, at ¶ 5

Not only is this case not about race, which is not directly referenced in questionable phrases by the *Harris* Court, but the statements made by the sentencing court in this case show clear disfavor for men unlike the *Harris* Court. *Id*. at ¶8-9.

In this case, this uncharged and unsubstantiated allegation is automatically an improper factor on the basis of gender. Body is asked about his domestic violence history with women. [R. 53-13]. Body is outlandishly asked:

> What do you think other men think of someone who slaps a woman around? What do you think I think right now? "[R. 53-10].

Because the court uses the improper factor of gender, the court has actually relied on this improper factor. *Harris,* 2010 WI at ¶ 66.

ii. Sentencing Criteria.

The State argues that the uncharged and unproven allegations were properly considered at sentencing. [State's Br. at 14]. In an attempt to bolster its point, the State cites *Mosley*, *McQuay*, *Elias*, and *Grant* again. [State's Br. at 15]. However, there are key differences in this case which distinguishes it from those other cases.

In *Mosley*, it was held that the sentencing court did not abuse its discretion because the defendant did not properly challenge the accuracy of the statements considered. *State v. Mosley*, 201 Wis.2d 36, 46 (Wis. App. 1996). In this case, trial counsel constantly challenged the accuracy and use of improper statements. [R. 53-10-22].

In *McQuay*, there was an illegal agreement to withhold relevant and pertinent information from the sentencing judge. The information withheld was also relevant and connected to the charges. *State v. McQuay*, 154 Wis.2d 116, 118-125 (Wis. 1990). In this case, there is no illegal agreement to withhold information, merely improper factors that are not relevant or in any way connected to the charges. [R. 53-16; R. 45-2].

In *Elias*, like *Frey*, there was a plea agreement with dismissed related charges. *Elias v. State*, 93 Wis.2d 278, 280-281 (Wis. 1980). There is no plea agreement dismissing charges for acts done to Ms. Mays, merely improper factors that are not relevant or connected in any way to the charges. [R. 53-16; R. 45-2].

The differences between these cases, the already discussed *Grant* and *Gayton*, and this case are staggering. Furthermore, this uncharged and unsubstantiated allegation does not fit into any of the sentencing criteria. "When sentencing a defendant, a circuit court should base its sentence on the following factors: (1) the gravity of the offense, (2) the character of the offender, and (3) the need to protect the public. *Alexander*, 2015 WI at ¶ 18.

This uncharged allegation is an improper factor under the gravity of offense criteria because there is no charged offense to consider. Likewise, this is an improper factor under the character of the offender criteria. Although the Court reviewed and discussed Body's criminal history, its main focus was on this uncharged allegation. The court questioned and made reference to this allegation ***on at least four separate occasions*** during sentencing. [R. 53-10-22]. The State does not challenge that this factor was used, merely that it was not improper. [State's Br. at 14].

Lastly, this is an improper factor under the need to protect the public criteria. Uncharged allegations do not equate to and cannot be relied on as factual background for sentencing purposes. Despite this, the court has relied on these uncharged and unsubstantiated claims from an unreliable source. Accordingly, the court's reliance on this uncharged allegation constitutes an improper factor under the two-step test set forth in *Alexander.*

iii. Hearsay.

The State argues that the revocation packet falls under the public records and reports exception to the hearsay rule. [State's Br. at 18]. The State cites this exception from *Downs*. [State's Br. at 18]. *Downs* is an unpublished decision.

An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority except to support a claim of res judicata, collateral estoppel or law of the case. Wis. Stat.§ 809.23(3). When a party cites an unpublished opinion, they must file and serve a copy of the opinion with the brief or other paper in which the opinion is cited. Wis. Stat.§ 809.23(3)(c).

The State failed to cite the unpublished opinion in an acceptable way, failed to file the unpublished opinion, and failed to serve a copy of the opinion. Furthermore, attached is the *Downs* opinion, in which, the opinion does not state that a revocation packet falls under the public records and reports exception to the hearsay rule. *State v. Downs*, 2000 WI App. 161, 238 Wis.2d 93.[attached]. Downs actually held that a commonly used Pre-sentence Investigation Report (PSI) could contain admittable hearsay to help understand the opinion of an expert in the PSI. *Id*. at ¶10.

Hearsay evidence is allowed in revocation hearings. *Prellwitz v. Schmidt*, 73 Wis.2d 35, 242 N.W.2d 277 (1975). However, hearsay evidence should not be considered for the sentencing of a disorderly conduct charge. Wis. Stat. Sec. 908.03 lists every exception to the hearsay rule, but there is not an exception that allows admittance to these uncharged and unsubstantiated

allegations held in the revocation packet. Wis. Stat. § 908.03. Because it contains hearsay evidence, the revocation packet should never have been filed with the court.

iv. Incorrect Evidence.

The Court in this case cited *State v. Alexander*, holding that the defense has failed to prove judicial reliance on inaccurate information. [R. 45-1]. The Court reasons that the defendant must prove that the information relied upon is in fact inaccurate. [R. 45-1].

It has recently come to Body's attention that along with all of these improper factors relied upon, the court also relied upon incorrect facts. In two letters from Body to Atty. Kay, the first dated October 3, 2019 and the second postmarked October 4, 2019, Body pointed out that two charges mentioned and relied upon by the court were not charges filed against him. [Supp. App. 164 to 169].

As the court began to voice the reason for Body's sentence, the court reflected on his "past charges" stating that there was a case on April 18, where Body supposedly grabbed a girl's shirt and pushed her against the wall in front of her children (Kenosha County Case No. 18CF0433). [R.53 at 6]. The court also stated that on January 30, 2017, that damage was done to a victim's car by Body (Kenosha County Case No. 17CM0133). [R.53 at 6]. Neither of those charges were filed against Body Sr. A simple CCAP search shows that those charges were both filed against Body's son, Edward L. Body Jr. in Kenosha County Case Nos. 17CM0133 and 18CF0433. [Supp. App. 170].

Body can now definitively show that the information relied upon by the court was inaccurate. Body is entitled to re-sentencing under *Alexander* for reliance upon inaccurate information.

B. ACTUAL RELIANCE

When assessing whether the sentencing court actually relied on an improper factor, a circuit court "must articulate the basis for the sentence imposed." *Alexander*, 2015 WI at ¶ 20. "We review the circuit court's articulation of its basis for sentencing in the context of the entire sentencing transcript to determine whether the court gave 'explicit attention' to an improper factor, and whether the improper factor 'formed part of the basis for the sentence.' *Id.* Sentencing courts actually rely on an improper factor when the defendant would have been sentenced differently without consideration of and reliance on the improper factor. *Alexander*, 2015 WI at ¶ 27.

The court's stated reasoning for this sentence was based on Body's "long involvement with the law" and "persistent involvement with aggressive behavior with women." [R. 53-16]. When listing Body's "long involvement with the law," the court discusses the charges against Body's son Edward L. Body Jr. [R.53 at 6]. Therefore, the court relied upon these incorrect charges ***by its own admission,*** and imposed a sentence far more severe than it would have without said reliance. Because this issue was recognized and added late, Body does not object to granting the State additional time to file a response.

The court, ***by its own admission***, relied on the improper revocation packet as part of the basis for its sentence. "It is within my right to rely on the information in this [revocation packet] which makes that allegation." [R. 53-

16].The State also does not contest that the court relied on the revocation packet. [State's Br. at 18] Thus, the court actually relied on this improper factor, and as a result, imposed a sentence far more severe than it would have without said reliance. Accordingly, Body is entitled to re-sentencing because the court erroneously exercised its sentencing discretion.

II. THE TRIAL COURT'S IMPOSED SENTENCE WAS UNDULY HARSH BECAUSE IT WAS FOUR TIMES LONGER THAN THE JOINT RECOMMENDATION OF THE STATE AND DEPARTMENT OF CORRECTIONS.

A defendant can seek modification of an imposed sentence in two ways: (1) the sentence is "unduly harsh" or (2) there is a "new factor." *State v. Noll*, 2002 WI App. 273, ¶ 9, 258 Wis.2d 573, 653 N.W.2d 895; *State v. Macemon*, 113 Wis.2d 662, 668, 335 N.W.2d 402 (1983). A sentence is unduly harsh when it is "too severe" or "unconscionable." *Noll*, 2002 WI App. 273, ¶ 9; *Macemon*, 113 Wis.2d at 668.

A. DISFAVOR.

The State argues that the sentencing court properly exercised its discretion in sentencing Body. [State's Br. at 21]. The State further argues that this is the case because the sentence is within the statutory range. [State's Br. at 22]. Body admits that the sentence is within the statutory range, but it was unreasonable and unjustifiable for the Court to sentence Body to one year in the county jail for violating the conditions of his bond because the sentence was more than four times the joint recommendation by the State and the Department of Corrections. The record clearly demonstrates that the Court disfavored Body at sentencing when it stated, "what do you think other men

think of someone who slaps a woman around? What do you think I think right now?" [R. 53-10].

The record also clearly demonstrates that this disfavor, relied upon from uncharged and unproven allegations, formed part of the basis for this unduly harsh sentence when it stated. "it is within my right to rely on the information in this [revocation packet] which makes that allegation." [R. 53-16].
2; R. 42].

The State and the Department of Corrections most likely recommended only ninety days is because of the strong questions about the credibility of Ms. Mays. However, the Court clearly showed disfavor and relied upon this improper factor resulting in a sentence that was four times longer than the joint recommendation for a simple disorderly conduct violation.

CONCLUSION

The trial court erred in denying Body's motion for post-conviction relief. The trial court erred in denying Body's Motion for Re-sentencing or Sentence Re-modification because the court asked outlandish questions and actually relied on the improper factors of uncharged and unsubstantiated allegations, and incorrect facts for sentencing. In addition, the trial court erred in finding that the sentence was unduly harsh despite the Court sentencing four times as long as the joint recommendations of the State and Department of Corrections due to these uncharged and unsubstantiated charges.

The defendant respectfully requests this Court grant an Order remanding this case for a Re-sentencing Hearing or Sentencing Modification.

Dated this 9th day of October, 2019.

Respectfully submitted:

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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 and appendix produced with a proportional serif font.

The length of this brief is 2,366 words.

Signed:

s/ TIMOTHY T. KAY

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CERTIFICATION OF ELECTRONIC FILING OF BRIEF

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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.

Dated this 9th day of October, 2019.

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s/ TIMOTHY T. KAY

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SUPPLEMENTAL APPENDIX INDEX

APP. NO.

CERTIFICATION OF SUPPLEMENTAL 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 Wis. Stat. § 809.12(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 Wis. Stat. § 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 person, 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.

Signed:

s/ TIMOTHY T. KAY

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CERTIFICATION OF MAILING

I certify that this brief was deposited in the U.S. mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on OCTOBER 9, 2019. I further certify that the brief was correctly addressed and postage was pre-paid.

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