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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2020AP62-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. LE BLANC,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief,
Entered in the Kenosha County Circuit Court,
the Honorable Jason A. Rossel, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Is Le Blanc entitled to resentencing when he was originally sentenced to an illegal term of extended supervision?

   The circuit court answered no.

2. Did the circuit court erroneously exercise its discretion at sentencing when it concluded Le Blanc's belief that consensual extramarital sex is not sinful made him an extreme risk to the public?

   The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Le Blanc does not request publication because this case involves the application of established case law. Le Blanc anticipates the briefs will fully address the issues and therefore does not request oral argument.

STATEMENT OF THE CASE

Le Blanc pleaded guilty to one count of using a computer to facilitate a child sex crime, in violation of Wis. Stat. § 948.075(1r), a Class C Felony. (52). The criminal complaint alleged Le Blanc had engaged in sexting with a 15-year-old friend of his daughter's and had arranged a meeting with the intent of engaging in sexual activity with her. (1). Police intercepted the meeting and arrested Le Blanc. (1).

After Le Blanc entered his plea, a Presentence Investigation Report was ordered in preparation for the sentencing hearing. (52:11). At the time of sentencing, Le Blanc was a 43 year-old man with no prior criminal record. (17:6). He had a high-school diploma and a strong work history, being continuously employed for at least the 10 years prior to his arrest. (17:11, 12). He took responsibility for his criminal behavior, stating it was "horrible" and that he was "embarrassed and ashamed." (17:15). He described himself as "an idiot" and stated "I don't blame [the victim]. I blame myself." (17:4).

Because of the sexual nature of the crime, the PSI writer questioned Le Blanc about his attitudes towards sex. (17:13-14). Le Blanc disclosed his sexual history, including the fact that he had engaged in extramarital sex during his 17-year marriage. (17:13). Mr. Le Blanc explained that while he was employed as a truck driver he sought out sexual encounters with men or women he met on Grindr,

Tinder, or Plenty-of-Fish.[1] (17:14). When asked to explain his attitude towards sex he stated, "I don't think it's sinful. I don't believe you have to be married to have sex." (17:14).

In the conclusions and summary portion of the PSI, the PSI writer stated:

> It should also be noted that the defendant reports that his current occupation is over-the-road CDL semi-driving with travel to the surrounding state of Illinois, where the defendant resided prior to the arrest. The defendant told this writer that he would often use hook up applications such as "Grinder", "Tinder", and "Plenty of Fish" to engage in sexual encounters with random individuals while staying in hotels due to his CDL truck driving route. This writer believes that this occupation and lifestyle subjects the public to an extreme amount of unnecessary risk in multiple state jurisdictions.

(17:21).

The PSI recommended an 11-14 year sentence, with 6-8 years of initial confinement followed by 5-6 years of extended supervision. (17:22). The state recommended an initial confinement of 10 years and offered no specific recommendation regarding

[1] Tinder and Plenty-of-Fish are internet dating and social networking platforms. *See* www.tinder.com and www.pos.com. Grindr is a social networking site geared towards bi, trans, and queer people, and similarly prohibits use by minors. *See* www.grindr.com. All these sites have prohibitions against a minor's use.

extended supervision. (54:6, 8). The defense recommended the mandatory minimum confinement, 5 years, also followed by an undetermined period of extended supervision. (54:8).

During the sentencing hearing, the circuit court explained

> And the difficulty that I have in this, and I don't want to make comment that – about a religious belief, but I think the PSI writer kind of, correctly, when considering your character – I mean, you don't have a prior record. You did enter a plea. You didn't require the State to bring this to trial, or for the child to testify, and I recognize that. And I do recognize that as, in a way, taking responsibility, but the one thing that I noticed was, and this is page 14, when asked to explain his attitude towards sex he said, "I don't think it's sinful. I don't believe you that you have to be married to have sex." He talks about some of the behaviors that he engaged in during – when you were married.
>
> I think the probation agent, I think really hits the proverbial nail on the head when she says at the bottom of page 21,... "This writer believes that this occupation and lifestyle"-- in lifestyle she's referring to your attitudes towards sex and prior situations, "that this occupation and lifestyle subjects the public to an extreme amount of unnecessary risk in multiple state jurisdictions."

(54:14).

The court went on to say "[b]ecause of that risk, to be blunt, the [c]ourt's sentence is primarily to protect the public." (54:15). The court then exceeded all recommendations and imposed a sentence of 35 years imprisonment comprised of 15 years initial confinement and 20 years of extended supervision. (54:15).

The 35-year bifurcated sentence imposed was five years less than the maximum penalty allowed. Wis. Stat. § 939.50(3)(c) (penalties for a Class C felony are not to exceed 40 years imprisonment). This sentence was erroneous, however, because the extended supervision portion of the sentence was five years in excess of the legal maximum for a Class C felony. Wis. Stat. § 973.01(2)(d)(2) (extended supervision period for a Class C felony may not exceed 15 years). A few months after the sentencing hearing, the Department of Corrections wrote a letter to the circuit court, asking it to review the judgment of conviction because the term of extended supervision was five years in excess of the statutory maximum. (43).

In response to the DOC letter, the circuit court held a brief hearing in which it commuted the term of extended supervision to 15 years. (55:2). The amended judgment of conviction reflected a sentence of 30 years in the state prison system with 15 years initial confinement and 15 years extended supervision. (20).

LeBlanc brought a postconviction motion alleging that resentencing, not commutation, was the correct remedy for the illegal term of supervision and also, that resentencing was required because the court had erroneously exercised its discretion at sentencing when it concluded that Le Blanc's attitude towards extramarital sex – that it is not sinful – made him an extreme risk to the public.[2] (57) The circuit court denied the motion on both claims. (58)

This appeal follows.

ARGUMENT

Le Blanc is entitled to resentencing because while the circuit court sentenced Le Blanc to a legal term of imprisonment, the sentence was comprised of an improper structuring of the component parts. Resentencing, not a commutation of illegal portion of the extended supervision portion of the sentence, is the appropriate remedy for this error.

In addition, resentencing is required because the circuit court erroneously exercised its discretion when it concluded that Le Blanc "subjects the public to an extreme amount of unnecessary risk" because of his belief that consensual extramarital sex is not sinful. Le Blanc has a constitutional right to this

[2] LeBlanc also alleged the court had erroneously required him to register as a sex offender for life. The court granted relief on this claim and again amended the judgment of conviction so that it required Le Blanc to register as a sex offender for a period of 15 years only. (56:2)

belief and furthermore it is unreasonable to conclude that holding this belief puts the public at risk.

I. Le Blanc Is Entitled to Resentencing Because the Court Originally Sentenced Him to an Illegal Term of Extended Supervision.

At issue in this case is whether Wis. Stat. § 973.13's directive that any sentence in excess of the maximum "shall stand commuted" governs situations where the total imprisonment is within the statutory maximums, but a component part of the sentence exceeds statutory guidelines. Statutory interpretation is a question of law, which is interpreted *de novo. State v. Hemp,* 214 WI 129, pp12, 359 Wis. 2d 320, 856 N.W.2d 811.

Wisconsin Statute § 973.13 provides "In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings." Wisconsin Stat. § 973.13 does not provide a remedy however, when the sentence initially imposed does not exceed the maximum statutory penalty. *See State v. Finley*, 2016 WI 63, ¶74, 370 Wis. 2d 402, 882 N.W.2d 761. The original term of imprisonment imposed in this case was five years less than the maximum; Wis. Stat. § 973.13 does not apply.

Specifically addressing whether resentencing or commutation is the proper remedy when there is an

illegal extended supervision portion of a bifurcated sentence, this court has repeatedly held that resentencing is required. *State v. Volk*, 2002 WI App 274, ¶48, 258 Wis. 2d 584, 654 N.W.2d 24; *State v. Kleven,* 2005 WI App 66, ¶¶19-31, 280 Wis. 2d 468, 696 N.W.2d 226. In *Volk*, the sentencing court used a sentencing enhancer to increase both the term of initial confinement and the term of extended supervision. *Id.,* ¶2. Wisconsin Stat. § 973.01(2)(c) however, prohibits using an enhancer to increase the term of extended supervision. Thus, like the case here, the term of extended supervision portion was in excess of the maximum. *Id.,* ¶¶28-29, 35-36.

After holding the period of extended supervision was in excess of the maximum, the court of appeals addressed whether the remedy for the error should be commutation of the excessive term of extended supervision under Wis. Stat. § 973.13 or hold a resentencing hearing. *Volk* held resentencing is the proper remedy:

> [A] sentence under the truth-in-sentencing law consists of a term of confinement and a term of extended supervision. These two components form a symbiotic relationship with the length of one necessarily influencing the length of the other and the overall length of the bifurcated sentence. Although the sentencing court imposes two discrete terms—one of confinement and one of extended supervision—it remains that the end product is but a single sentence. When a crucial component of … a [bifurcated] sentence is overturned, it is proper and necessary for the sentencing court to revisit the entire question. If

> we held otherwise and simply confirmed the term of confinement and commuted the extended supervision to five years pursuant to Wis. Stat. § 973.13, we would produce a sentence based on mathematics, rather than an individualized sentence based on "the facts of the particular case and the characteristics of the individual defendant." *Id.*, ¶48 (quoted source omitted).

This court adopted the same approach in *Kleven*, 280 Wis. 2d 468, ¶¶19-31. Based on the rationale explained in *Volk* (and quoted above), the court in *Kleven* ordered resentencing where the sentencing court properly allocated additional time to the confinement portion of a sentence but failed to impose a term of extended supervision equal to at least 25% of the term of confinement. *Id.; see also* Wis. Stat. § 973.01(d) (requiring terms of extended supervision to be at least 25% of the overall sentence). Rather than commuting illegal portion of the sentence, the court held resentencing was required. *Kleven*, 280 Wis. 2d 468, ¶¶19-31.

Further, "resentencing is generally the proper method of correcting a sentencing error." *State v. Holloway,* 202 Wis. 2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996). Even in instances where Wis. Stat. § 973.13 does apply, a party may request resentencing after commutation to "address other components or conditions of the sentence." *Id.* at 698. In *Holloway,* for example, it was discovered postconviction that the defendant's 3-year concurrent sentences on three misdemeanor were each in excess of the maximum penalty allowed. *Id.* at 696.

Pursuant to Wis. Stat. § 973.13, the sentences were commuted to 9 months each. However, the state then requested a resentencing hearing because, it argued, the commutation impacted the sentence structure. *Id.* at 701-02. At resentencing, the concurrent 9-month sentences were made consecutive to one another. *Id.* at 696. *Holloway* upheld the new sentences, holding that resentencing was appropriate where the structure of the original sentence was affected by commutation and because one of the parties (the state) had requested it. *Id.* at 701-02.

The circuit court's commutation of the extended supervision portion of the sentence in this case altered the component parts of the sentence imposed and did remedy the sentencing error. The component parts of the original sentence created a 3:4 ratio between the confinement portion of the sentence and the extended supervision portion of the sentence. The amended sentence has a 1:1 ratio between component parts. Because of the "symbiotic relationship [of] the length of one [component of the sentence] necessarily influencing the length of the other" any commutation should preserve this ratio. *Volk*, 258 Wis. 2d 584, ¶48. Thus, if the extended supervision is commuted to 15 years, the confinement portion should be commuted to 11.25 years to preserve the 3:4 ratio between the component parts of the sentence.

But, a simple commutation of parts of a sentence is "a sentence based on mathematics, rather than an individualized sentence based on the facts of the particular case and the characteristics of the

individual defendant" and is therefore inappropriate. *Id.* (citations and quotations omitted). The proper remedy for the error here, as requested by Le Blanc, is resentencing, not a modification of the length of one component of the bifurcated sentence. Resentencing is required.

II. Le Blanc Is Entitled to Resentencing Because the Circuit Court Erroneously Exercised Its Discretion When It Concluded Le Blanc's Belief That Consensual Extramarital Sex Is Not Sinful Made Him a Risk to the Public.

The circuit court relied on an improper factor when assessing Le Blanc's dangerousness – his belief that extramarital sex is not sinful. This was improper because a court may not hold the defendant's lack of religious convictions against him and also, importantly, because these beliefs do not make Le Blanc, or anyone, dangerous. The court therefore erroneously exercised its discretion when it determined significant confinement was required to protect the public from Le Blanc.

Wisconsin has long recognized that a criminal sentence is a discretionary decision that necessarily takes into account a multitude of factors. *See, e.g., McCleary v. State*, 49 Wis. 2d 263, 280–81, 182 N.W.2d 512 (1971). "In each case, the sentence imposed shall call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *State v.*

Gallion, 2004 WI 42, ¶44, 270 Wis. 2d 535, 560, 678 N.W.2d 197, 208. A sentencing court is required "[to] explain how the sentence's component parts promote the sentencing objectives" and must explain, on the record, "by reference to the relevant facts and factors" why the sentence is appropriate. *Id.,* ¶46. This requirement "produce[s] sentences that can be more easily reviewed for a proper exercise of discretion." *Id*.

Review of a sentencing decision is limited to determining if discretion was erroneously exercised. *State v. Harris,* 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409 (quotations omitted). The erroneous exercise of sentencing discretion includes "(1) failure to state on the record the relevant and material factors which influenced the court's decision; (2) reliance upon factors which are totally irrelevant or immaterial to the type of decision to be made; and (3) too much weight given to one factor on the face of other contravening considerations." *State v. Hall*, 2002 WI App 108, ¶9, 255 Wis. 2d 662, 671–72, 648 N.W.2d 41, 45 (quotation marks, citations, and brackets omitted); *see also State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis.2d 179, 717 N.W.2d 1. Discretionary acts are sustained if the circuit court uses "a demonstrative rational process, [and] reache[s] a conclusion that a reasonable judge could reach." *State v. Firebaugh*, 2011 WI App 154, ¶5, 337 Wis. 2d 670, 807 N.W.2d 245. The defendant bears the burden of showing the circuit court erroneously exercised its discretion. *Harris,* 326 Wis. 2d 685, ¶30.

Here, the circuit court adopted the PSI writer's conclusion that Le Blanc's "attitude towards sex and prior situations" … "'subjects the public to an extreme amount of unnecessary risk.'" (54:14). Apart from LeBlanc's belief that extramarital sex is not sinful however, the court did not identify any other factors that made Le Blanc dangerous. And there do not appear to be any. Le Blanc had no past criminal record. (21:6). He supported his family and paid child support. (21:12). He had residential stability, positive associates and peers, full time employment, and was a high school graduate. (21:17).

When explaining his attitude towards sex, Le Blanc said nothing about being attracted to minors and had no inappropriate history related to minors. He had no history of sexual assaults, prostitution or other sexually abusive conduct. He did not have a diagnosis of any kind of sexual disorder or clinically deviant behaviors. There was no pattern of suggestive or manipulative behavior toward children or other vulnerable persons.

The circuit court acknowledged Le Blanc committed his crime while in the throes of depression, just after the dissolution of his 17-year marriage. (54:14). As a result of the depression, Le Blanc began experimenting with methadone for the first time in his life and was admittedly high when he committed the crime. (54:14). But, according to the court, it was not the crime itself, nor Le Blanc's recent drug use that made him dangerous. It was his

statement that he had engaged in consensual sex with men and women outside of his marriage and that he believed this was not a sin.

Postconviction, the circuit court did not disavow its statement that Le Blanc's views on extramarital sex made him a risk to the public. (56:11-14). Rather, the court explained that adultery was a crime in Wisconsin and the "legislature in passing laws does express a morality." (56:11). Le Blanc's views on extramarital sex were problematic because "he's expressing an attitude that he believes that a law in the State of Wisconsin should not be applied to him." (56:13). The court later stated that it "wasn't passing judgment on him in a religious sense" however, it reiterated that these views put the public at risk. (56:13).

The fact that adultery is a crime in the state of Wisconsin does not make Le Blanc's permissive views on extramarital sex relevant to the sentencing objectives in general or his dangerousness in particular. First, regardless of the court's statement that it was not "passing judgment on him in a religious sense," Le Blanc was asserting his right to be free from religion when he described his attitude toward sex. (56:13). In using the word "sin," which has strong religious connotations, Le Blanc was informing the PSI writer that he lacked a traditional religious belief that governs attitudes toward sex. He is entitled to hold these beliefs under the United States and Wisconsin constitutions and a court should not consider them at sentencing.

State v. Ninham, 2011 WI 33, ¶96, 333 Wis. 2d 335, 388, 797 N.W.2d 451; *State v. Fuerst,* 181 Wis. 2d 903, 911-12, 512 N.W.2d 243, 246 (Ct. App. 1994).

To be sure, notwithstanding a defendant's constitutional right to refrain from holding religious convictions, a court may consider a defendant's religious beliefs at sentencing when a "reliable nexus exists between the defendant's criminal conduct and the defendant's religious beliefs." *Id.* at 913. As an example, "it would be permissible for a court sentencing a defendant convicted of drug offenses to consider the defendant's religious practices as a factor at sentencing if those religious practices involve the use of illegal drugs." *Id.* at 913.

Here, there is no reliable nexus between having consensual extramarital sex with adults and attempting to have sex with a child. Even if it were true that Le Blanc's belief that extramarital sex was not a sin "pushed the norms of sexuality" it is not reasonable to conclude, as the circuit court did that Le Blanc's past sexual choices resulted in the commission of the crime in this case. (56:13). Many people engage in extramarital sex and/or homosexual sex with consenting adults, even while married to someone else, but it does not follow that these people or the fact they have engaged in these acts create an increased risk for committing a sex crime against children or otherwise put the public at risk. Most people who have extramarital sex or homosexual sex do not go on to have sex with a child.

The fact that the prohibition against adultery is codified in Wis. Stat. § 944.16 does not insulate it from its religious origins or make Le Blanc's expression that adultery is not sinful an appropriate factor to consider at sentencing. Sexual activity and its boundaries are rooted in religion, with most Christian sects disapproving of nonmarital sex. *See* Posner, Richard A., *Sex and Reason,* 37–69 (1992); *Grossman v. S. Shore Pub. Sch. Dist*., 507 F.3d 1097, 1100 (7th Cir. 2007). Adultery statutes no longer exist in a majority of states and those that do have been subject to a variety of constitutional challenges. *See e.g.* Cohen, Andrew D., *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605, 644 (2010). Further, this court has acknowledged that "adultery is no longer prosecuted as a crime" in Wisconsin. *State v. Richard G.B.*, 2003 WI App 13, ¶16, 259 Wis. 2d 730, 742, 656 N.W.2d 469.

Wisconsin Stat. § 944.01 expressly states the intent of the Ch. 944 is "not [to] regulate the private sexual activity of consenting adults." Violation of the adultery statute is not a transgression against public peace and safety; rather it a "transgression against the marriage relation which relation the law endeavors to protect." *State v. Brooks*, 215 Wis. 134, 135, 254 N.W. 374, (1934). The state's interest in protecting the marriage relationship however, does not make Le Blanc dangerous. He was not fathering children outside of marriage, nor had he abandoned his financial obligations to his wife and daughter.

(21:12). The fact that his marriage fell apart, perhaps due to his adulterous ways, does not make him dangerous to the public.

To the extent the court considered homosexual sex outside the "norms," thereby creating a risk to the public, this in and of itself is an erroneous consideration. While homosexual sex is practiced only by a minority of persons, it is a constitutionally protected act. *Lawrence v. Texas*, 539 U.S. 558, 578, (2003) ("right to liberty under the Due Process Clause gives … the full right to engage in private [sexual] conduct without government intervention"). This conduct would not be constitutionally protected if these "lifestyle choices" created a risk to the public. (56:13).

Le Blanc committed a serious crime – so serious that the legislature made it one of the few crimes with a mandatory minimum. Wis. Stat. § 939.617(1) (requiring 5 years minimum confinement). The circuit court tripled the mandatory confinement stating it was doing so "primarily to protect the public." (54:14). But the only factor identified by the court that created a risk to the public was Le Blanc's beliefs that extramarital sex was not a sin. It is not reasonable to conclude that possessing this belief – or even engaging in adulterous acts – puts the public at risk. As result, tripling the mandatory minimum is not the "minimum amount of custody consistent with the protection of the public." *Gallion*, 2004 WI 42, ¶44.

The court based the sentence structure on irrelevant, immaterial information and thereby erroneously exercised its discretion. Resentencing is required.

CONCLUSION

For the reasons stated, Christopher W. Le Blanc respectfully requests that the remand to the circuit court with instructions to conduct a resentencing hearing before a different judge.

Dated and filed by U.S. mail this 30th day of April, 2020.

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 3,884 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 and filed by U.S. mail this 30th day of April, 2020.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender

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 one or more initials or other appropriate pseudonym or designation 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 and filed by U.S. mail this 30th day of April, 2020.

Signed:

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A P P E N D I X

INDE X
TO
APPENDIX