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COURT OF APPEALS

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.

REPLY BREIF OF DEFENDANT-APPELLANT

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I. A Change to the Structure of a Sentence Postconviction Entitles a Defendant to a Resentencing Hearing.

Under the plain and unambiguous language of Wis. Stat. § 973.13, commutation without further proceedings is permitted – and required – *only* in cases "where the court imposes a maximum penalty." Wis. Stat. § 973.13. Under Wisconsin law, "maximum penalty" – a sentencing term of art appearing on the standard plea questionnaire and waiver of rights form (CR-227) and which must be communicated to the defendant in every single plea case in the State of Wisconsin – means the maximum term of imprisonment.[1] *State v. Taylor,* 2013 WI 34, ¶91, n.5, 347 Wis. 2d 30, 829 N.W.2d 482 (quotations omitted) (Prosser, J. concurring) (explaining the maximum penalty need not reference "the component parts of the sentence of the bifurcated sentence"); *see also id.,*¶42, n.12. Under the plain and unambiguous words of Wis. Stat. § 973.13, if the court does not impose a sentence in excess of the maximum penalty

[1] *State v. Finley*, 2016 WI 63, 370 Wis. 2d 402, 882 N.W.761 (2016) (Attachment A: Glossary) provides a glossary of sentencing terms of art. Imprisonment "refers to both parts of a bifurcated sentence." *Id.,* (Attachment A, at item 2). The glossary also provides a collection of cases using variations of the term "maximum penalty," which universally means both the confinement and supervision portions of the sentence. *Id.,* ¶4, n.4 and (Attachment A, at item 4).

– *i.e.* the maximum term of imprisonment – the statute does not apply. *See Finley,* 370 Wis. 2d. 402*,* ¶74 (although a plea withdrawal case, the holding that "Wis. Stat. § 973.13 does not provide a remedy …[where] the sentence initially imposed … did not exceed the maximum statutory penalty" is sound law).

The state's attempt to say that Wis. Stat. § 973.13 addresses the component parts of a sentence reads language into the statute that is not there. (State's Br. at 7, 8-9). *State v. Holloway,* 202 Wis. 2d 694, 698, 551 N.W.2d 841 (Wis. App. 1996) (Wis. Stat. § 973.13 "is more remarkable for what it does not say than what it does."). Wisconsin Stat. § 973.13 references only the maximum penalty and says nothing about the structure of a bifurcated sentence or how the statute might separately apply to excessive terms of initial confinement or extended supervision.

If the legislature wanted Wis. Stat. § 973.13 to apply to individual component parts of the sentence, then it would have said so. For example, the attempt statute, Wis. Stat. § 939.32, has long referred to "the maximum penalty." See *e.g.* Wis. Stat. § 939.32 (1999-00) (and prior). After Truth-in-Sentencing, the legislature added a section to specifically address how the term "maximum penalty" applied to the different component parts of a bifurcated sentence. Wis. Stat. § 939.32(1g); 2001 Wis. Act. 109. On the other hand, the legislature has not added a section to Wis. Stat. § 973.13 to explain how this statute would address

each of the component parts of a bifurcated sentence or any other indication that the term "maximum penalty" should take on a different meaning in light of Truth-in-Sentencing.

And this makes sense. *State v. Volk,* 2002 WI App 274, ¶48, 258 Wis. 2d 584, 654 N.W.2d 24, and *State v. Kleven,* 2005 WI App 66, ¶¶19-31, 280 Wis. 2d 468, 696 N.W.2d 226, the only two cases addressing how a change to a component part of a sentence affects the overall sentence structure, both conclude a court cannot alter one component part of the sentence postconviction without revisiting the entire sentence structure in a resentencing hearing. To hold otherwise would ignore the fact that the two component parts of a bifurcated sentence "form a symbiotic relationship with the length of one necessarily influencing the length of the other and the overall length of the bifurcated sentence…." *Volk*, 258 Wis. 2d 584, ¶48; *Kleven*, 280 Wis. 2d 468, ¶31. These holdings also comport with *State v. Holloway,* 202 Wis. 2d 694, 700, which also held that when the structure of a sentence is altered postconviction, resentencing is "the proper method of correcting a sentencing error."

Notably, if the sentence structure is not altered by a change to the sentence postconviction, resentencing is not required. *State v. Church,* 2003 WI 74, ¶26, 262 Wis. 2d 678, 665 N.W.2d 141. *Church* held that the vacation of an identical, multiplitious probation sentence did not affect the controlling 13-year prison sentence in a multi-count

case. *Id.* Because the overall sentence structure was not altered, resentencing was not required. *Id.,* ¶¶4, 26. *Church* has no bearing on the instant case because this case is a single-count case in which the postconviction change to the sentence *did* alter the sentence structure of that single count.

The state argues that the circuit court "implicitly" concluded that the new sentence structure was just as appropriate for Le Blanc as the original sentence structure when it denied Le Blanc's request for resentencing. (State's Br. at 7). But sentences are not implicit and the term of the confinement portion and supervision portion of a bifurcated sentence are not arbitrary numbers. The circuit court is required to "explain how the sentence's component parts promote the sentencing objectives." *State v. Gallion*, 2002 WI App 265, ¶46, 258 Wis. 2d 473, 653 N.W.2d 284. The court "shall explain why its duration and terms of extended supervision should be expected to advance the objectives." *Id.,* ¶45. The court did not do so with regard to the new sentence in this case.

Lastly, it is undisputed that the court may not impose a term of supervision longer than that authorized by Wis. Stat. § 973.01(2)(d)(2); the term of supervision must be reduced to at least the amount allowed under the statute. It may be, as the state points out, that a defendant would be satisfied with a commutation of an excessive term of extended supervision. (State's Br. at 7). If this were the case, the defendant would not request a resentencing

hearing and would thereby waive his/her right to resentencing. *See State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 670, 761 N.W.2d 612, ("waiver is the intentional relinquishment or abandonment of a known right.") (quotation omitted). But that is not what happened here. In this case, Le Blanc requested resentencing and under *Volk*, *Kleven* and *Gallion,* he is entitled to a full resentencing hearing.

Le Blanc's request for resentencing is significant. In *Holloway*, for example, resentencing was appropriate in part because the prosecutor had requested it. *Holloway,* 202 Wis. 2d 694, 702. This court distinguished the situation in *Holloway* from other cases in which a resentencing hearing did not occur by the fact that resentencing had not been requested in the other cases. *Id.* It would be unfair if requests for resentencing after a change in the sentence structure were honored only when the state was doing the requesting, but not when the defendant did so.

Le Blanc is entitled to and has requested further sentencing proceedings. This court should remand for resentencing.

II. The Sentencing Court Relied on an Improper Factor and the Reliance Was Not Harmless.

A. Clarification of legal framework

Le Blanc agrees that when a defendant alleges that a sentencing court erroneously exercised its

discretion on the grounds that it relied on an improper factor, as he has done in this case, the defendant must prove, by clear and convincing evidence: (1) that the factor was improper; and (2) that the circuit court actually relied on the factor in formulating the sentence. *State v. Alexander*, 2015 WI 6, ¶18, 360 Wis. 2d 292, 305, 858 N.W.2d 662; *State v. Harris,* 2010 WI 79, ¶32, 326 Wis. 2d 685, 786 N.W.2d 409 (both explaining that the framework for analyzing erroneous sentencing discretion based on an improper factor is the same as that based on a claim of inaccurate information, citing *State v. Tiepelman,* 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1).

But there is no "independent review doctrine" in inaccurate/improper information cases, and the state's discussion of this doctrine is inapposite. (State's Br. 14, 17). "The fact that other information *might* have justified the sentence, independent of the [improper] information, is irrelevant when the court has relied on [improper] information as *part* of the basis of the sentence." *State v. Travis,* 2013 WI 38, ¶47, 347 Wis. 2d 142, 832 N.W.2d 491 (emphasis original, citation omitted). The cases cited by the state offer no assistance on how to analyze a sentence if the court has erroneously exercised its discretion by relying on an improper factor. *State v. Lechner,* 217 Wis. 2d 392, 576 N.W.2d 912 (1998), and *State v. Alexander,* 2015 WI 6, 360 Wis. 2d 292, 858 N.W.2d 662, both determined the circuit court had not relied on the improper/inaccurate information and therefore

there was no erroneous exercise of discretion. Furthermore, the quoted language from *Lechner* regarding the reviewing court searching the record to sustain the sentence comes from *State v. McCleary*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971), a case in which the circuit court pronounced the sentence without exhibiting any exercise of discretion at all, a completely different situation from one where the court bases part of the sentence on an improper factor. And lastly, *State v. Pittman,* 174 Wis. 2d 255, 496 N.W.2d 74 (1993), has nothing to do with sentencing errors at all, much less errors based on inaccurate or improper factors. The independent review doctrine is not applicable in this case.

Rather, if this court determines that Le Blanc establishes that there was an improper factor and that the court relied on the improper factor, the burden shifts to the state, as beneficiary of the error, to prove the error was harmless. *Alexander,* 360 Wis. 2d 292, ¶18.

B. Consideration of Le Blanc's view that extramarital sex is not sinful was an improper factor.

The consideration of Le Blanc's views on extramarital sex was improper. Le Blanc believed that sex outside of marriage is not a sin. Sin is defined as "an action, thought, or way of behaving that is wrong according to religious laws." See *e.g.* https://www.macmillandictionary.com/us/dictionary/american/sin_1 *visited* 8/1/20). By proclaiming he did

not believe extramarital sex was sinful, Le Blanc was asserting his constitutionally protected right to be free from religion.

Even if not religious, however, it is still improper to hold a defendant's view that adultery is not wrong against him at sentencing. There is an insufficient nexus between possessing this belief and the conclusion that individuals who possess the belief are dangerous. Le Blanc's marital status and faithfulness to his marriage are irrelevant to a determination of whether the public is safe when he is in the community.

The state argues this belief amounted to Le Blanc's willingness to commit "felony adultery," which can be extrapolated to show that Le Blanc has a willingness to break the law. (State's Br. at 19). But this is an unreasonable extrapolation because the crime of adultery is unique in law in that it is commonly understood that individuals are not prosecuted for violating it. Indeed, because the statute explicitly states it is not designed to regulate sexual behaviors of consenting adults, it fallacious to suggest that a stated intent not to adhere is indicative of an individual's propensity for criminality. Wis. Stat. § 944.01.

It is also disingenuous to cite *In re Commitment of Burris,* 2004 WI 91, 273 Wis. 2d 294, 682 N.W.2d 812, for the proposition that the commission of adultery is viewed as a "major transgression." (State's Br. at 19). The defendant in

Burris was not only a convicted sex offender and sexually violent person under ch. 980, but also he committed many violations of his term of supervision, including a specific no contact order with woman who happened to be married. *Id.* The adulterous status of his prohibited sex acts with this woman had absolutely no bearing on the analysis in that case.

If this court holds that the belief that extramarital sex is not sinful, or even not wrong, is a legitimate factor on which to base an increase of a sentence, it would authorize the augmentation of sentences for an entire class of people who are not dangerous. Simply possessing non-traditional beliefs regarding the parameters of sex and marriage – and even acting in conformity with those beliefs – does not make an individual dangerous. Unless the process of sexual exploration involves criminal or otherwise abusive, concerning, or disrespectful acts, whether it occurs within the bounds of marriage is irrelevant to sentencing. This court should hold that views on the morality or religiosity of extramarital sex are an improper sentencing factor.

C. The court relied on the improper factor.

A court has relied on an improper factor if it (1) gave "explicit attention" to the factor; and (2) the improper factor "formed part of the basis for the sentence." *Alexander,* 360 Wis. 2d 292, ¶29. The court explicitly said it was Le Blanc's "attitudes towards sex" – a direct reference to Le Blanc's statement that extramarital sex was not sinful – that

put the public at an extreme amount of risk. (54:13-14; App. 104-105). The fact that the court also said "prior situations" does not eliminate the fact that it based the dangerousness conclusion at least in part on Le Blanc's attitudes towards sex, and in particular on his belief that extramarital sex is not sinful.

When looking at the sentencing transcript as a whole, this citation to Le Blanc's statement to the PSI writer is the only thing the court identified as an aggravating factor. The court began its sentencing remarks by discussing the nature of the crime and the importance of protecting children under 18 from sexual contact. (54:11-12; App. 102-03). This discussion was neutral, simply a statement of the fact that the legislature had identified the importance of protecting children from sex and had enacted laws accordingly. (54:11-12; App. 102-03).

In discussing the severity of the offense, the court noted facts that indicated Le Blanc possessed the intent to have sex with the 15-year-old and that he took actions to do so, stating "I have no doubt what your intent was" and that if law enforcement had not intervened "we'd be here on a first-degree sexual assault of a child." (54:13; App. 104). But this discussion reveals nothing aggravating about the offense. Possessing the intent to have sexual contact with the minor and taking steps to act on that intent are elements of the offense, not aggravating factors. *See* Wis. Stat. § 948.075(1r); WIS JI-Criminal 2135.

The court also mentioned several mitigating factors, noting that Le Blanc's criminal conduct was "completely out of character," that Le Blanc took responsibility for his crime and that he did not make the minor suffer more by bringing the case to trial. (54:13-15; App. 104-05).

Indeed, the only aggravating factors were Le Blanc's "attitudes towards sex and prior situations." The fact that the court quoted Le Blanc's statement regarding extramarital sex in full shows it zeroed in on this statement as a basis to conclude Le Blanc was an extreme risk to the public. The prefacing of this conclusion with "I don't want to make a comment … about a religious belief but…" does not insulate the court from a finding of actual reliance on this improper factor. (54:13; App. 104). Contrary from distancing itself from the religious underpinnings of the comment, by mentioning religion, the court highlighted that it was the religious nature of Le Blanc's comment that caught the court's attention. Furthermore, the court went on to say that the sexual behaviors Le Blanc engaged in occurred "when [he was] married," reiterating that it was the extramarital nature of the sex acts that the court found undesirable. (54:13; App. 104).

In the state's view, there are aspects of Le Blanc's past sexual history in addition to the fact that he was practicing sex acts outside of marriage that made them undesirable. But the court did not identify what was undesirable about the behavior, apart from the fact that they occurred "while [he was]

married." (54:13-14; App. 104-05). And even if other aspects of Le Blanc's past sexual history evince a "pattern of undesirable behaviors" this is irrelevant to whether the court relied on Le Blanc's view that extramarital sex was sinful when formulating the sentence. *Travis,* 347 Wis. 2d 142, ¶47.

Lastly, the fact that the court said postconviction that it was not considering religious beliefs is not determinative of whether the court in fact relied on Le Blanc's comments regarding extramarital sex as a basis for the sentence. *Travis,* 347 Wis. 2d 142, ¶77 (a reviewing court is "not bound by the circuit court's retrospective review of its sentencing decision"). Furthermore, the court reiterated postconviction that irrespective of religion, it considered Le Blanc's belief that adultery was not sinful criminal in nature and "outside the norms of sexuality." (65:9-10; App. 116-117). In doing so, the court did not disavow its reliance on Le Blanc's view that extramarital sex is not sinful when it formulated the sentence. The court relied on this improper factor.

D. The state has not proved harmlessness.

An error is harmless if the "error did not affect the sentencing court's selection of the sentence imposed." *Travis,* 347 Wis. 2d 142, ¶69. To put it another way, the state, as beneficiary of the error, must prove that it is clear beyond a reasonable doubt that the same result would have occurred absent the error. *State v. Harvey,* 2002 WI 93, ¶48, n.14, 254

Wis. 2d 442, 647 N.W. 189 (quoting *Neder v. United States,* 527 U.S. 1 (1999)). The state has not met this high burden.

There is a reasonable probability that had Le Blanc not discussed his lack of religiosity in his views on sex, the circuit court would not have imposed a near maximum sentence. The court is charged with imposing the "minimum amount of custody consistent with the protection of the public." *Gallion*, 2004 WI 42, ¶44. Because the court issued such a severe sentence, tripling the mandatory confinement and giving an illegally excessive supervision term, it is reasonably possible that at least a portion of this harsh sentence is attributable to the court's determination that Le Blanc's view that extramarital sex is not sinful made him dangerous. It is reasonably possible that if the court had not considered this, Le Blanc would have received a lessor sentence.

Given the court's attention to this factor in combination with Le Blanc's lack of criminal record, lack of history of disrespectful or abusive strong work history, financial responsibility and general lack of aggravating factors, the state has not proven beyond a reasonable doubt that the sentence would have been the same absent the court's improper consideration.

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 5th day of August, 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 2,946 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 5th day of August, 2020.

Signed:

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