STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP266-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. BREHM,

Defendant-Appellant.

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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ON APPEAL FROM MILWAUKEE COUNTY CIRCUIT COURT, BRANCH 42,
CASE NO. 18CF003239
THE HONORABLE DAVID A. HANSHER, PRESIDING

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### I. The State is incorrect in arguing that the plain language of Wis. Stat. § 941.29(4m)(a) requires the court to impose the mandatory minimum period of confinement without the possibility of it being stayed because the statute is unclear and ambiguous whether the sentence can be stayed.

The State is incorrect in arguing that the plain language of Wis. Stat. § 941.29(4m)(a) requires the court to impose the mandatory minimum period of confinement without the possibility of it being stayed because the statute is unclear and ambiguous whether the sentence can be stayed. The State argued that Wis. Stat. § 941.29(4m)(a) is clear and unambiguous that a "person convicted of being a felon in possession of a firearm must be sentenced to a bifurcated sentence which by definition includes a period of initial confinement." State's Brief at 13. However, Wis. Stat. § 941.29(4m)(a) does not address whether the sentence can be stayed. This creates ambiguity.

In this context, Wis. Stat. § 941.29(4m)(a) is ambiguous because it is being understood differently by the State and Brehm. A "statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *State ex rel. Kalal v. Circuit Court for Dane Cty.*,

2004 WI 58, ¶ 47, 271 Wis. 2d 633, 664, 681 N.W.2d 110. Here, it is ambiguous whether the trial court may stay the three (3) years of initial confinement. The State is arguing that the court cannot stay the initial confinement. However, Brehm is arguing that the court can stay the initial confinement because of Wis. Stat. § 973.09(1)(a). In light of Wis. Stat. § 973.09(1)(a), Wis. Stat. § 941.29(4m)(a) is ambiguous because it is being understood differently by the State and Brehm.

The State's analysis of the plain meaning does not consider harmonizing Wis. Stat. § 941.29(4m)(a) and Wis. Stat. § 973.09(1)(a). The trial court has the authority to stay Brehm's initial confinement sentence because the court must read Wis. Stat. § 941.29(4m)(a) in harmony with Wis. Stat. § 973.09(1)(a). When two or more statutes are involved, the court seeks to construe them so that they are harmonious. *State v. Hemp*, 2014 WI 129, ¶ 29, 359 Wis. 2d 320, 338, 856 N.W.2d 811. If the court reads "the initial confinement portion of the bifurcated sentence imposed on the person shall not be less than 3 years" as not permitting the initial confinement to be stayed, then it is in conflict with Wis. Stat. § 973.09(1)(a)– which permits the initial confinement to be stayed. Instead, to

avoid conflict, the court must read Wis. Stat. § 941.29(4m)(a) to include the trial court's authority to stay sentences.

The phrase "the confinement portion of the bifurcated sentence imposed on the person shall be not less than 3 years" has meaning[1] but it does not authorize the sentencing court to violate Wis. Stat. § 973.09(1)(a). For both statutes to be read in harmony, the court must acknowledge that the sentencing court is required to impose a three-year period of initial confinement, but that the sentencing court may also stay that initial confinement.

## II. The State is incorrect in arguing that the rule of lenity does not apply because there is ambiguity in the statutes.

The State is incorrect in arguing that the rule of lenity does not apply because there is ambiguity in the statutes. The State argues that there is no ambiguity in Wis. Stat. § 941.29(4m)(a). State's Brief at 16. However, there is ambiguity because the State is not considering Wis. Stat. § 973.09(1)(a)—which permits the sentencing court to stay the sentence.

[1] Statutes are read "to give reasonable effect to every word, in order to avoid surplusage." Kalal, 2004 WI 58, ¶ 46.

The State is relying on Wis. Stat. § 941.29(4m)(a), which requires a minimum initial confinement period of three years. However, Brehm is relying on Wis. Stat. § 973.09(1)(a), which permits a sentencing court to stay its sentence. The rule of lenity provides that when doubt exists as to the meaning of a criminal statute, a court should interpret the statute in favor of the accused. *State v. Guarnero*, 2015 WI 72, ¶ 26, 363 Wis. 2d 857, 872, 867 N.W.2d 400. Therefore, applying the rule of lenity, this court should interpret the statutes in favor of the accused, Brehm.

## III. The State is incorrect in arguing that the mandatory minimum period of initial confinement without the possibly of it being stayed is constitutional.

The State is incorrect in arguing that the mandatory minimum period of initial confinement without the possibly of it being stayed is constitutional. The State argues that the Wis. Stat. § 941.29(4m)(a) fairly applies to Brehm's actions. State's Brief at 18. However, the record reflects that the sentencing court disagrees that the Wis. Stat. § 941.29(4m)(a) fairly applies to Brehm's actions. At the sentencing hearing when Brehm raised the issue that Wis. Stat. § 941.29(4m)(a) is silent in regards to it be stayed, the Judge stated "I'd like to do it, but I think the word 'shall' in reading the statute ties my hand...

And if there was any type of hearing, I would probably testify against it, if there would have been a hearing. But I think my hands are tied." (R. 46:12-13).

## IV. The State is incorrect in arguing that the sentencing court did not rely on an improper factor.

The State is incorrect in arguing that the sentencing court did not rely on an improper factor. The two-step framework to determine whether a circuit court erroneously exercised its sentencing discretion based on an improper factor requires that a "defendant must prove that: (1) information was inaccurate, and (2) the court actually relied on the inaccurate information in the sentencing." *State v. Alexander*, 2015 WI 6, ¶ 18, 360 Wis. 2d 292, 305, 858 N.W.2d 662.

First, the State argues that the sentencing court's belief that he could not stay the sentence was correct. However, the sentencing court was incorrect because he was authorized to stay that portion of the sentence, as permitted by Wis. Stat. § 973.09(1)(a).

Second, the State admits in Footnote 5 of the State's Brief that that the sentencing court actually relied on this information. States Brief at 20.

## V. The State is incorrect in arguing that Brehm's trial counsel did not provide ineffective assistance of counsel when he failed to request a PSI report.

The State is incorrect in arguing that Brehm's trial counsel did not provide ineffective assistance of counsel when he failed to request a PSI report. The State argues that Brehm has not demonstrated that trial counsel performed deficiently. However, trial counsel's performance was deficient. Trial counsel's performance was deficient because a reasonable attorney would request a PSI in a felony case where substantial prison time is involved. Not requesting a PSI for a felony conviction of a defendant who is facing substantial prison time is outside the range of professional competent assistance. A PSI is free to public defender clients and trial counsel had nothing to lose by requesting it.

Trial counsel was prejudicial because but for the trial counsel's inaction to order a PSI, the defendant could have received a more favorable sentence that reflected his mental health and other mitigating factors highlighted in the PSI.

## VI. The State is incorrect in arguing that Brehm's trial counsel did not provide ineffective assistance of counsel when he failed to enter evidence of Brehm's non-possession of a firearm.

The State is incorrect in arguing that Brehm's trial counsel did not provide ineffective assistance of counsel when he failed to enter evidence of Brehm's non-possession of a firearm. Brehm was not the owner of the gun that fired, and trial counsel was aware of that. Brehm has admitted to shooting a gun into the air in an interview, but during that time, Brehm had provided a dangerously high intoxication level of 0.71 on a Breathalyzer test. (R. 1:1). Brehm even stated that he did not fully remember everything that happened that day at sentencing. (R. 46:21). Despite all of this information that Brehm may not have possessed a firearm, trial counsel failed to provide any evidence to the court showing non-possession.

## VII. The State is incorrect in arguing that Brehm's trial counsel did not provide ineffective assistance of counsel when he failed to advise Brehm not to make statements to his detriment.

The State is incorrect in arguing that Brehm's trial counsel did not provide ineffective assistance of counsel when he failed to advise Brehm not to make statements to his detriment. Trial counsel was ineffective because Brehm made statements to his detriment at sentencing. (R. 46:21). Trial

counsel should have advised him against every statement after the initial interview. The gun did not belong to Brehm, and Brehm himself did not fully remember what happened. Because trial counsel failed to advise Brehm of his rights and to not make a statement to his detriment, trial counsel was ineffective.

## CONCLUSION

WHEREFORE, for the reasons stated above, the defendant respectfully requests that this case be remanded for resentencing or plea withdrawal.

Dated this 13th day of October, 2020.

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 1470 words.

Dated this 13th day of October, 2020.

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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 13th day of October, 2020.

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## CERTIFICATION OF MAILING

I certify 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 13, 2020. I further certify that the brief was correctly addressed, and postage was pre-paid.

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