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STATE OF WISCONSIN
SUPREME COURT

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Appeal No. 2020AP742-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

LISA RENA LANTZ,
Defendant-Appellant-Petitioner.

ON APPEAL FROM THE FEBRUARY 22, 2017, JUDGMENT OF CONVICTION AND THE MARCH 23, 2020, ORDER DENYING LANTZ'S WIS. STAT. § (RULE) 809.30 POSTCONVICTION MOTION,
THE HONORABLE JOHN P. ZAKOWSKI, PRESIDING.
BROWN COUNTY CASE NUMBER 2016CF482

PETITION FOR REVIEW

Respectfully submitted by:
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First issue: Multiplicity problem in Lantz's sentences

Background

Lantz was prosecuted for her involvement in a long-running drug conspiracy. The State charged her with a single count of conspiring to deliver more than fifty grams of meth and two separate counts of soliciting the delivery of meth from her coconspirator. It is undisputed that (1) the solicitations occurred during the meth conspiracy's charging period and (2) the person from whom Lantz solicited meth was her coconspirator in the meth conspiracy. Lantz was convicted and consecutively sentenced for the conspiracy and the two solicitations. On appeal, she challenged the State's ability to punish her for both the conspiracy and solicitations.

Both the circuit court and the court of appeals concluded that there was no multiplicity problem.

This Court should reverse.

Issue

Whether Lantz's solicitation sentences violate the constitutional prohibition against multiple punishments and should be vacated because the overarching conspiracy incorporated her two solicitations?

Second issue: Erroneous exercise of sentencing discretion

Background

Lantz argued on appeal that the sentencing court erred by not ensuring that her term of imprisonment was the minimum necessary to satisfy its sentencing objectives.

The circuit court and court of appeals both concluded that no error had occurred. This Court should reverse.

Issue

Whether Lantz's twenty-seven-year term of imprisonment was an erroneous exercise of the sentencing court's discretion where, among other things, the court rejected mitigating facts in Lantz's background and inaccurately characterized Lantz as being unable to be drug-free when she had been for years?

STATEMENT OF CRITERIA FOR REVIEW

Lantz challenges the constitutionality of her having been sentenced both for conspiring to deliver drugs and soliciting the delivery of drugs for her later conspiratorial delivery. Whether Lantz's sentences violate her constitutional rights is a real and significant question of federal and state constitutional law, warranting this Court's review. Wis. Stat. § (Rule) 809.62(1r)(a).

Additionally, Lantz seeks this Court's review to clarify what is required for an appellate court to decide that a person's sentence is in excess of the minimum amount of custody necessary to effectuate the sentencing court's stated goals. That question is not factual in nature, but rather one of law, that is likely to recur because sentencing in criminal cases happens throughout the state daily. Wis. Stat. § (Rule) 809.62(1r)(c)3. This Court's review is appropriate. *Id.*

STATEMENT OF THE CASE

Lisa Lantz, by her own admission, was a member of a conspiracy that delivered a large amount of methamphetamine to Brown County. Lantz's admitted involvement in that conspiracy lasted from September 1, 2015, to March 22, 2016. (R.121:2). Throughout that time, she had a buyer/seller relationship with Bill Yang, a more senior member of the conspiracy. (R.40:3, R.11:15.) Lantz would purchase meth from Yang with the purpose of reselling it. (*Id.*) Absent that buyer/seller relationship and the affiliated procurement of meth from Yang, Lantz would not

have been part of the meth distribution conspiracy for which she was convicted and sentenced. (*See* R.123:10; P-Ap 50.)

Lantz challenged on appeal the State's ability to punish her both for conspiring with Yang to deliver meth and—as part of that very conspiracy—for twice soliciting Yang to deliver meth for her resale. *State v. Lantz*, 2020AP742-CR, slip op. ¶1, (Wis. Ct. App. July 27, 2021); (P-Ap 2-3). Her appeal was about whether the Legislature allows multiple punishments for acts that variously constitute separate drug crimes. *Id.* The key question was whether Lantz could be punished multiple times for the overarching conspiracy to deliver drugs *and* individual acts of solicited delivery that occurred as part of the conspiracy. *See id.*; *(see also* Lantz's 1st Br. at 18-27).

The State argued, and the court of appeals accepted, that Lantz's solicitations were different in fact from her conspiratorial acts. *Lantz*, 2020AP742, ¶¶ 13-16; (P-Ap 9-10). To reach that conclusion, the court of appeals reasoned that the prosecution had enough drug weight to sustain its conspiracy charge even if the weight of the drugs that Lantz solicited was subtracted from the aggregate, conspiratorial weight. *Id.* In other words, because Lantz conspired to sell more than 50 grams of meth even omitting the weight of the drugs that she was charged with soliciting from her coconspirator, the conspiracy and the solicitation were different in fact. *See id.*

That reasoning holds together well but for the fact that prosecution presented testimony at Lantz's sentencing hearing wherein a sworn law enforcement officer told the circuit court that Lantz's solicitations were demonstrably part of her conspiratorial acts.

Namely, at sentencing, the prosecution presented the sworn testimony of a Brown County Drug Task Force investigator, Brian Messerschmidt. (R.123:5; P-Ap 45.) Messerschmidt testified at length about the drug trafficking conspiracy with

which Lantz was affiliated and her role in it. (*See, e.g., id.*:9-10; P-Ap 49-50.) Messerschmidt explained that Lantz served "as a middler and supplier to lower level customers." (*Id.*:10; P-Ap 50.) He explained that evidence existed showing "the ongoing buyer/seller relationship between Lantz and Yang and their coordination to further the [drug trafficking organization] and the distribution of methamphetamine." (*Id.*)

As proof that Lantz was conspiring with Yang to deliver meth, the prosecutor questioned Messerschmidt about specific communications between the two that police had intercepted. (*Id.*:23, 25-27; P-Ap 63, 65-67.) Messerschmidt testified that the back-and-forth exchanges between Lantz and Yang were "significant . . . in establishing what type of role [Lantz] had *in this conspiracy*." (*Id.*:23; P-Ap 63 (emphasis added).)

In one such exchange, Lantz told Yang that she needed him to bring her meth because she had customers waiting. (*Id.*) "[T]hat call, specifically," occurred on "February 27th, 2016" and is one of the solicitations that Lantz challenged on appeal as multiplicitous with her conspiracy conviction. (*Id.*:27; P-Ap 67; *see also* R.6:2, 9-10 (same communication quoted in complaint).) The criminal complaint summarizes another exchange between Lantz and Yang occurring on March 13, 2016. (R.6:10-11.) In that one, Lantz again asked Yang to bring her meth because she had sold half of what she previously obtained from him. (*Id.*) That March 13th exchange is the basis of the other solicitation that Lantz challenged on appeal as multiplicitous. (*Id.*:2, 10-11.) As Messerschmidt's testimony clearly demonstrates, Lantz's solicitations were an integral part of her conspiracy with Yang to deliver meth.

However, the court of appeals ignored that testimony. *Lantz*, 2020AP742, ¶¶14-15; (P-Ap 9-10). Indeed, despite Lantz's having specifically quoted Messerschmidt's

testimony and argued about its effect on the State's factual sameness argument (Reply Br. at 6-7), the court of appeals did not even mention it in its decision. Instead, the court of appeals reasoned away any factual sameness claim based on the proposition that (1) Lantz was prosecuted for conspiring to delivery more than 50 grams and (2) even setting aside the solicited delivery weights, Lantz still sold more than 50 grams. *Id.* And thus, Lantz's solicitations were not factually the same as her conspiratorial acts. *Id.*

In addition to challenging the constitutionality of her sentence, Lantz also challenged the circuit court's discretionary decision to impose an aggregate, twenty-seven-year term of imprisonment. *Id.* ¶36; (P-Ap 19-20). She argued that the sentencing court erroneously exercised its discretion by disregarding mitigating information and erroneously stating that she had been unable to go drug free. *Id.* For those errors, argued Lantz, her sentence did not reflect the minimum period of confinement necessary to satisfy the court's sentencing goals. *Id.* The court of appeals determined that the sentencing court had not erred. *Id.* ¶44.

The petition follows.

ARGUMENT

I. This Court should grant review to decide whether a conspiracy to deliver drugs ceases when the threshold weight of the drugs alleged to have been conspiratorially delivered is reached or whether the conspiracy persists, despite the charged amount having been delivered.

A. Due process is violated where, against the will of the legislature, an individual is punished multiple times for the same act.

Both the Fifth Amendment to the United States Constitution and our Wisconsin Constitution protect an individual from twice being placed in jeopardy for a single offense. U.S. Const. Amend. V; Wis. Const. Art. I, § 8; *State v. Ziegler*, 2012 WI 73, ¶59, 342 Wis.2d 256, 816 N.W.2d 238. Double jeopardy protects individuals in three

circumstances: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense. *State v. Sauceda*, 168 Wis.2d 486, 492, 485 N.W.2d 1 (1992). The challenge raised here involves multiple punishments for the same offense, or multiplicity. *State v. Grayson*, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992) (multiple convictions and punishments arising from a single criminal act are impermissible).

When assessing a multiple-punishment claim, or multiplicity, courts use a two-prong test. *Ziegler*, 2012 WI 73, ¶60. First, a court considers whether the charged offenses were identical in law and fact under the "elements-only" test. *Id.* (*citing Blockburger v. United States*, 284 U.S. 209, 304 (1932)). Second, the court considers whether the legislature authorized cumulative punishments. *Id* ¶¶61-62 (citations omitted). If the offenses are identical in law and fact under the first prong, there is a presumption that the legislature did not intend for cumulative punishments at the second prong. *Id* ¶61 (citations omitted). If the offenses are not identical under the first prong, the burden is on the challenger at the second prong to show that the legislature did not authorize cumulative punishments. *Id* ¶62 (citations omitted); *State v. Davison*, 2003 WI 89, ¶45, 263 Wis.2d 145, 666 N.W.2d 1. If under this later scenario a defendant's multiple sentences are not same in law and fact, but "contravene the will of the legislature," it does not violate the double jeopardy clause, but an individual's constitutional right to due process. *Ziegler*, 2012 WI 73, ¶62; *Davison*, 2003 WI 89, ¶46; U.S. Const. Amends. V, XIV; Wis. Const. Art. I, § 8.

B. Reviewing Lantz's case will clarify whether the court of appeals rightly reasoned that her drug delivery conspiracy ended for factual sameness purposes once the charged weight had been reached.

Lantz attacks the two sentences that she received for solicitation to deliver meth on two specific dates (February 27, 2016, and March 13, 2016), when she was sentenced to the significantly more punitive offense that aggregated all her activity over a six-month period (more than 50 grams of methamphetamine), from September 1, 2015, to March 22, 2016. (R.11:1-4, R.22:1-3). As the State's evidence at sentencing showed, Lantz's solicitations were part of her conspiracy. Similarly, in the probable cause section of the criminal complaint, the State relied the facts relating to the solicitation as direct evidence of Lantz's larger conspiracy. (R.11:1-18).

However, in rejecting Lantz's multiplicity argument, the court of appeals reasoned that her solicitations were not the same in fact as her conspiracy. The court of appeals noted that even if Lantz's solicitations were taken out of the equation, the weight of conspired deliveries exceeded the amount necessary to sustain a conviction on the conspiracy charge. *Lantz*, 2020AP742, ¶15; (P-Ap. 10). According to the court of appeals, because Lantz had conspired to deliver in excess of 50 grams of meth *before* she solicited the delivery of more meth, the acts underlying her solicitation were different in time than her conspiratorial acts. *Id.* The court of appeals simply disregarded the State's chosen charging period for the conspiracy, and instead interpreted the conspiracy as ending once Lantz had conspiratorially sold an amount of meth sufficient to satisfy proof of the conspiracy. *See id.*

Likewise, the court of appeals found Lantz's solicitations different in fact from her conspiracy because she had to "ma[k]e deliberate decisions to obtain additional

methamphetamine and to advise Yang to deliver such methamphetamine to her." *Id.* ¶16; (P-Ap 10). Thus, reasoned the court of appeals, Lantz's solicitations were factually separable from her conspiratorial acts "because [they] involved new and additional decisions beyond her decisions already made during the preexisting conspiracy." *Id.*

But how can Lantz have conspired with Yang to deliver the meth that he delivered to her without simultaneously deciding that she would solicit him to deliver meth to her for delivery? The solicitations are not outside the conspiracy's charging period; they happened during it. The solicitations involved the very same drugs that the conspiracy delivered; it is not as though Lantz delivered meth and solicited heroin. And, again, when given the opportunity, the State's own witness Messerschmidt pointed to evidence of Lantz's solicitation as demonstrative of her role in the conspiracy. The only sensible explanation is that the court of appeals again hung its hat on the proposition that once Lantz had conspiratorially delivered the charged weight, her subsequent actions were factually apart from the conspiracy.

In other words, the court of appeals' decision stands for the proposition that once a conspirator has delivered a sufficient amount of drugs to satisfy the subsequently charged weight, the conspiracy becomes factually distinct from later acts undertaken in furtherance of the conspiracy.

However, it makes little sense to assess a conspiracy's course based on a prosecutor's after-the-fact, discretionary charging decision regarding the weight of drugs for which the conspiracy will be held accountable. Basing the course of a conspiracy on a prosecutor's charging decision makes the prosecutor—and not the conspirators—responsible for determining when the conspiracy ends. Furthermore, as in Lantz's case, the Legislature has set by weight an upper limit on prosecutorial

discretion for delivering drugs. *See, e.g.,* Wis. Stat. § 961.41(1m)(e)4. Indeed, Lantz's prosecutor *did* charge her with conspiratorially delivering the maximum weight allowable under the statutes. *Compare id.* with (R.22.) But merely because Lantz's overall conspiracy delivered more than fifty grams of meth does not mean that one can, by intellectual sleight of hand, disregard the conspiratorial acts that occurred after she reached that threshold. Undoubtedly, her conspiracy continued for so long as she was delivering drugs with her coconspirators. After all, the statutes penalized Lantz's conspiracy to deliver *any* amount of drugs in excess of fifty grams.

This Court should grant review to discern the correctness of the court of appeals' reasoning that a drug delivery conspiracy ends for factual sameness purposes once the charged weight has been reached.

II. Review is warranted for this Court to flesh out how an appellate court is to assess whether an imposed sentence exceeds the minimum amount of custody necessary to effectuate sentencing court's stated goals.

A. A judge's discretion at sentencing is broad, but a sentence must impose only the minimum amount of custody necessary to effectuate applicable sentencing objectives.

Subject only to broad statutory ranges, the circuit courts largely control the amount of time a defendant will spend in confinement and under supervision. *Cunningham v. State*, 76 Wis. 2d 277, 282-83, 251 N.W.2d 65 (1977). A court's ability to exercise its discretion, while broad, does not mean unfettered decision-making. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981), *citing McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971). Instead, a discretionary act "must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." *Hartung*, 102 Wis.2d at 66. Moreover, "a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are

considered together for the purpose of achieving a reasoned and reasonable determination." *Id.*

In addition, there are guard rails for the court's discretion at sentencing specifically. Perhaps most important is the rule that for "each case, the sentence imposed shall 'call for the minimum amount of custody or confinement which is consistent'" with the sentencing objectives." *State v. Gallion*, 2004 WI 42, ¶¶41-43, 270 Wis.2d 535, 678 N.W.2d 197, *quoting McCleary*, 49 Wis.2d at 276. Accordingly, a circuit court's exercise of discretion must reflect a consideration of established criteria, including the character of the offender, the gravity of the offense, and the protection of the public. *Id.* ¶40. A court can exercise its discretion in how these factors are weighed, but the circuit court is nonetheless required to explain why the weight given to particular components of the sentence advance the specified objectives. *Id.* ¶¶41-43. Where the sentencing court's basis for the sentence is unreasonable or unjustified based on the record, the presumption of reasonableness is overcome, and resentencing should follow. *McCleary*, 49 Wis.2d at 278.

B. The mitigating information in Lantz's case demonstrates that a sentence of 27 years imprisonment was more than the minimum necessary to achieve the sentencing goals.

Lantz argued on appeal that the sentencing court erred by not ensuring that her term of imprisonment was the minimum necessary to satisfy its sentencing objectives. She averred that the sentencing court: (1) jumped the recommendations it was given, (2) focused on meth's pernicious impact in the community to the exclusion of its impact on her, (3) diminished or distorted mitigating information in her background, and (4) ordered consecutive sentences without adequate explanation. (Lantz's 1st Br. at 33-36.)

In sum, Lantz argued that the sentencing court erroneously exercised its discretion by failing to provide weight to the mitigating aspects of her background

concerning her abuse and long history of battling drug addiction, and if anything, considering it as an aggravating consequence. The sentencing court appeared to believe that Lantz was not capable of living a drug-free lifestyle, when in fact the DOC agent indicating she had done so, and for long periods of time. The sentencing court punished Lantz for her choices but appeared to disregard the mitigating impact on those actions because they were fueled by a relapse into meth use; even the court recognized that meth impacts cognitive functioning.

In rejecting Lantz's argument, the court of appeals wrote, "That the court imposed longer sentences than were recommended by the parties, gave less weight to Lantz's personal history and mitigating factors than she would have liked, and determined that Lantz could not remain drug free did not render the court's overall reasoning insufficient under governing legal standards." *Lantz*, 2020AP742, ¶44; (P-Ap 23).

This Court should review Lantz's case to flesh out how an appellate court is to assess whether an imposed sentence exceeds the minimum amount of custody necessary to effectuate sentencing court's stated goals.

CONCLUSION

For the aforementioned reasons, Lantz respectfully requests that this Court grant her petition for review.

Dated this 23rd day of August, 2021.

PINIX LAW, LLC
Attorneys for the Petitioner

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Matthew S. Pinix, SBN 1064368

CERTIFICATION

I certify that this petition conforms to the rules contained in Section 809.19(8)(b) and (c) for a petition produced using a 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, maximum of 60 characters per full line of body text. The length of this petition is 3,050 words.

I further certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 23rd day of August, 2021.

PINIX LAW, LLC
Attorneys for the Petitioner

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Matthew S. Pinix, SBN 1064368

CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 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 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 this 23rd day of August, 2021.

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