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STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT IV
Case No. 2021AP000049 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY L. BOLSTAD,

Defendant-Appellant.

Appeal of a Judgment of Conviction Entered
in La Crosse County Circuit Court,
the Hon. Gloria L. Doyle, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

Whether the sentencing court erroneously exercised its discretion when it (1) failed to address the underlying criminal conduct or the “gravity of the offense” at either the defendant’s initial sentencing hearing or at the sentencing after revocation hearing, and (2) imposed the five-year maximum term of initial confinement without explaining why it was “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.

The circuit court denied a postconviction motion raising these issues.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant would welcome oral argument to address any factual or legal issues raised by the parties. The court’s opinion may warrant publication, as this is a rare instance of the circuit court erroneously exercising its discretion during sentencing.

STATEMENT OF THE CASE

I. Introduction

Defendant-Appellant Randy Bolstad is a schizophrenic with a long history of mental health and substance abuse issues. The underlying incident here occurred in 2016, when he allegedly threatened to hit his nephew with a baseball bat unless his nephew gave him money. Bolstad told the arresting officer that he only was trying to get his nephew to play baseball with him and his famous “friend,” Tony Danza. Bolstad entered an *Alford* plea to attempted robbery and was placed on probation. He was later revoked when he called 911 from inside a locked bathroom in an apartment building, claiming that he was being chased, and was found by the authorities with methamphetamines in his pocket.

At the sentencing after revocation hearing the court imposed the maximum amount of initial confinement, five years. At no point during the hearing, or during the initial sentencing for that matter, did the court make any mention of the criminal conduct for which Bolstad was being sentenced, *i.e.* the 2016 incident between Bolstad and his nephew. The court contravened the clear admonition from the Wisconsin Supreme Court that “[c]ircuit courts must consider ... the gravity of the offense” when determining the length of a defendant’s sentence. *State v. Harris*, 2010 WI 79, ¶ 28, 326 Wis. 2d 685, 698, 786 N.W.2d 409, 415. Indeed, at no point at either hearing did the court

even acknowledge that it must consider “the gravity of the offense.”

In addition, the court made no explanation for why the five-year maximum term of initial confinement also happened to be the “minimum amount of custody or confinement which is consistent with the” appropriate sentencing considerations. *State v. Gallion*, 2004 WI 42, ¶ 44, 270 Wis. 2d 535, 560, 678 N.W.2d 197, 208. The court erroneously exercised its discretion, and Bolstad is entitled to a new sentencing after revocation hearing.

II. Background

A. The Criminal Complaint

According to the criminal complaint, on October 18, 2016, Arthur¹ reported to the police that his uncle, Bolstad, had threatened to hit him with a baseball bat. (R. 4:2). Specifically, earlier that evening Arthur was leaving his residence when he encountered Bolstad on his front porch. (*Id.*) Bolstad said that he would hit Arthur with the bat unless Arthur gave Bolstad all of his money. (*Id.*) Arthur ignored Bolstad and walked past him off of the porch. (*Id.*) Bolstad swung the bat in the air – not at Arthur – and said that he would damage Arthur’s vehicle if he did not give him money. (*Id.*) When Arthur threatened to call the police, Bolstad got on his bicycle and rode away. (*Id.*)

¹ The victim is referred to by a pseudonym to protect his privacy.

Arthur told the police that this was the first time Bolstad had ever threatened him. (R. 4:2). In addition, Arthur said that Bolstad appeared to be under the influence of a narcotic or “messed up.” (*Id.*)

Police found Bolstad and took him into custody later that evening. (R. 4:2). Bolstad denied threatening Arthur or asking him for money, because he knew Arthur was broke. (R. 4:3). He explained that he had gone to his sister’s house to find Arthur so the two could play baseball “with [Bolstad] and a famous friend of his in town, Tony Danza.” (*Id.*)²

The criminal complaint, filed on October 21, 2016, charged Bolstad with attempted armed robbery with threat of force, a Class C Felony, Wis. Stat. § 943.32(1)(b), as a repeater. (R. 4:1).

B. The February 22, 2017 Plea and Sentencing Hearing.

On February 22, 2017, the court heard two cases involving Bolstad, a plea and sentencing in this case and a sentence-after-revocation in a 2015 case, *State v. Bolstad*, La Crosse County Case no. 2015-CF-762. (R. 47).

In the 2015 case, a police officer ordered Bolstad to stop riding a bicycle because Bolstad did

² Bolstad was likely referencing the actor Tony Danza, of *Taxi* and *Who’s the Boss?* fame, who was born in Brooklyn, New York, in 1951. https://en.wikipedia.org/wiki/Tony_Danza. According to the complaint, Mr. Bolstad was born in 1974 (R. 4:1), and as discussed below, is schizophrenic.

not have the proper equipment. (R. 47:19-20). When Bolstad tried to bicycle away, the officer tackled Bolstad, injuring himself in the process. (*Id.*) The DOC initially sought to revoke Bolstad's probation in the 2015 case as a result of the 2016 incident involving Bolstad's nephew, but agreed that Bolstad could participate in a substance abuse program as an alternative to revocation. (R. 47:20-21). However, Bolstad was rejected from the program due to his mental health issues, and he was revoked as a consequence. (*Id.*)

With respect to the 2016 case at issue here, Bolstad entered an "*Alford*" plea to an amended charge of attempted robbery with threat of force, a class E felony, Wis. Stat. § 943.32(1)(b). *North Carolina v. Alford*, 400 U.S. 25 (1970). That is, Bolstad entered a no contest plea while maintaining his actual innocence to the charge. (47:3-5). During the plea colloquy, the court observed that Bolstad was receiving treatment for a mental illness or disorder. (R. 47:8).

Bolstad's counsel elaborated that Bolstad has been struggling with schizophrenia and is in fact on Social Security disability because of his condition. (R. 47:21). Counsel also related that Bolstad had been participating in a "dual diagnosis" program while in jail, addressing both his mental health and substance abuse issues. (*Id.*)

The court first addressed Bolstad's sentence after revocation in the 2015 case. The court observed

that when Bolstad first appeared in court, it was clear that Bolstad “needs help” the court could not “understand what [Bolstad was] saying. He’s got pressured speech...he’s not currently on his medications....I do recognize that mental illness is a big part of the problems you face[.]” (R. 47:24). Nevertheless, the court reasoned that “I don’t think it’s fair to expect that there would be no further consequence for your bad behavior.” (*Id.* at 25). The court then sentenced Bolstad to two years of prison, composed of one year of initial confinement and one year of extended supervision. (*Id.*)

The court then turned to the instant matter, and stated the following:

As to 16-CF-794, the Court will follow the joint recommendation and the statement of negotiated plea. I will withhold sentence in that case and place Mr. Bolstad on probation for a period of three years. In that case there will be costs of \$518 with no further fine and he will pay the \$518 as one of the conditions of successfully completing probation. The other conditions in 16-CF-794 will be that he undergo the AODA assessment, follow through with the treatment directives, neither possess or consume illegal substances without a valid prescription. Do not be present where illegal substances are used or distributed. Submit to random testing to ensure sobriety. No contact in that case with [Arthur], and other Court and agent conditions, as deemed necessary by the Department of Corrections.

(R. 47:26; App. 102). The court did not make any comments regarding the underlying offense, *i.e.* the attempted robbery.

C. March 13, 2019 Sentencing After Revocation Hearing.

In late 2018, the Department of Corrections sought to revoke Bolstad's probation. After a hearing, an administrative law judge found that the DOC had substantiated some of the alleged probation violations; namely, that Bolstad had failed to report to a scheduled visit with his probation officer, and three days later was found in possession of methamphetamines and drug paraphernalia. (R. 19:13-14).

More specifically, the ALJ found that Bolstad locked himself in to a bathroom in an apartment building, called 911, and claimed that people were after him. (R. 19:14). A police officer went to the bathroom, and had a maintenance man unlock the bathroom door. (*Id.*) The officer testified at the revocation hearing that Bolstad was "paranoid, nervous, appeared scared and was sweating," and that the officer had found methamphetamines and a syringe in Bolstad's possession. (*Id.*)

The sentencing after revocation hearing was held on March 13, 2019. Bolstad's counsel reviewed Bolstad's mental health and substance abuse needs, and how he had attempted to address them in the past. Counsel noted that in prior cases Bolstad had been found not guilty due to a mental disease or defect, and had spent 16 months at the Mendota Mental Health Institute as a result. (R. 48:11-13). According to counsel, the DOC did not offer Bolstad

an AODA assessment. (*Id.*) In addition, while on probation, Bolstad successfully completed a 9-month program at the Wisconsin Resource Center focused on his mental health needs. (19:6). Bolstad had no known violations and reported to his mental health appointments up until he missed the October 12, 2018 appointment. (*Id.*)

Bolstad's attorney informed the court that as an alternative to revocation Bolstad had applied to participate in the DOR's dual diagnosis program that would have addressed both his substance abuse and mental health issues. (R. 48:11-13). However, because of a pending criminal case, he was not allowed to participate at the time. The criminal case was resolved prior to the SAR.

After the sentencing arguments and Bolstad's allocution, the court made its sentencing decision. The court's comments are reproduced in full below:

So Mr. Bolstad, this isn't really a happy day for me because two years ago on February 22nd of 2017, we had your plea and sentencing in this hearing, and, you know, we had sort of the reverse discussion, right? Mr. Bolstad, you can't keep going like this, Mr. Bolstad, you need to, you know, take some responsibility for your actions, Mr. Bolstad, you have these conditions. Do an AODA assessment, comply with the recommendations. Don't drink any alcohol or take controlled substances. Do random testing, don't go anywhere where drugs are used, don't contact the victim. Do anything else your PO tells you to do and pay your court costs and supervision fees. All you had to do is stay in the

community was follow the rules for three years. No prison time.

So at that time the Court really believed that despite your sort of lack of accountability, your lack of willingness to take responsibility for your actions. You could work with the Department of Corrections for three years and never have to go to prison, okay? So today when I look at the case, I have to honestly say, you cannot be managed in this community. You -- I think the Department of Corrections gave it a good run.

You can't blame the Department of Corrections that you did nothing, okay? You can get a sponsor on your own, you can go to counseling on your own, you can find your own healthy support system, you can engage in prosocial activities. You can go fishing instead of committing new crimes, you can, you know, volunteer at a homeless shelter, volunteer at a food pantry, or do a lot of other things to keep yourself out of trouble and you can seek your own mental health. You are not helpless, okay? You have the ability to help yourself, okay?

And I say that because when you get out of prison, you are going to have to do those things again. You don't get a baby sitter, especially when you rejected the Department of Corrections' help, okay?

There's no more baby sitters, there is no more, we'll hold your hand while you do everything. You are going to have to, you know, become a little better at being an adult.

At this point, you can't be managed in the community. We tried that on probation. You had, you know, 89 days credit back then and now you are up to 559 days credit because you have been

incarcerated for so long during this probationary period.

I think the Department of Corrections looked at this, looked at everything else possible to do with you and decided there weren't any alternatives, so, I am left with sentencing you on the crime that I sentenced you on two years ago. At that time I thought you could be managed in the community. You have proven you cannot. So, I am going to sentence you to seven years in the Wisconsin State Prison System, five years of initial confinement and two years of extended supervision time.

I recognize the State was asking for more than that on extended supervision, but, frankly, I can only hope that you are a better candidate when you are released than you are right now for -- you have been previously for extended supervision. In other words, working with the Department of Corrections.

This department -- I'm sorry. This judgment of conviction will indicate that you are entitled to 559 days credit. And the conditions of extended supervision will be that you cooperate with the Department of Corrections, do an alcohol and other drug assessment, comply with any follow ups around that, consume no alcohol or controlled substances, subject yourself to random testing through the Department of Corrections, not be in any locations where drugs are being used or sold. We will continue the no contact with Arthur and continue at that time your payment of court costs and any Department of Corrections' supervision fees.

(R. 48:18-21; App. 104-107).

The five years of initial confinement ordered by the court was the maximum amount of confinement that could be ordered, as Bolstad had been convicted of attempting a Class E felony. Wis. Stat. §§ 939.32, 943.32, and 973.01.

D. Postconviction matters

Bolstad timely filed a notice of intent to seek postconviction relief. After extensions to allow a change in postconviction counsel and to conduct postconviction investigations, Bolstad filed a motion for postconviction relief on September 14, 2020. (R. 45). The court issued a decision denying the motion on December 17, 2020. (R. 46; App. 110-112).

The court's order and additional facts germane to the motion are discussed in context below.

ARGUMENT

I. The court erroneously exercised its discretion when it sentenced Bolstad to the maximum amount of initial confinement without addressing the underlying facts of the criminal charge or explaining why it was the minimum amount of confinement necessary to meet the court’s sentencing goals.

A. The court erroneously failed to consider the “gravity of the offense.”

A basic function of a sentencing court is to ensure that the punishment fits the crime. “The principle that a punishment should be proportionate to the crime is deeply rooted[.]” *Solem v. Helm*, 463 U.S. 277, 284 (1983). As the Wisconsin Supreme Court once put it, “it is essential that a sentencing court consider the nature of the particular crime, *i.e.*, the degree of culpability—distinguishable from the bare-bones legal elements of it[.]” *McCleary v. State*, 49 Wis. 2d 263, 271, 182 N.W.2d 512, 517 (1971).

For this reason, the Wisconsin Supreme Court has repeatedly admonished sentencing courts that they “must consider ... the gravity of the offense,” among other factors, when calculating a defendant’s sentence. *See, e.g., State v. Pico*, 2018 WI 66, ¶ 50 & n. 16, 382 Wis. 2d 273, 310, 914 N.W.2d 95, 113; *State v. Williams*, 2018 WI 59, ¶ 46, 381 Wis. 2d 661, 691, 912 N.W.2d 373, 387; *State v. Salas Gayton*, 2016 WI 58, ¶ 22, 370 Wis. 2d 264, 286–87,

882 N.W.2d 459, 470. This obligation applies during an initial sentencing as well as a sentencing after a revocation of probation. *State v. Wegner*, 2000 WI App 231, ¶ 7 & n. 1, 239 Wis. 2d 96, 101, 619 N.W.2d 289, 291. The statutes likewise make this consideration mandatory, providing that the sentencing court “shall consider ... the gravity of the offense” when issuing its sentencing decision. Wis. Stat. § 973.017(2)(ag).

The Wisconsin Supreme Court has also explained that the sentencing court’s “rationale must ... be set forth on the record” because the sentencing “decision will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined.” *State v. Gallion*, 2004 WI 42, ¶ 38, 270 Wis. 2d 535, 560, 678 N.W.2d 197, 208 (quotation marks and citation omitted). This obligation is also codified by statute. “The court shall state the reasons for its sentencing decision and ... shall do so in open court and on the record.” Wis. Stat. § 973.017(10m)(a).

Here, the circuit court did not acknowledge, during either the initial sentencing or the sentencing after revocation, its duty to consider the “gravity of the offense” (or some similar phrase) when calculating Bolstad’s sentence. Nor did the court make any comments at either hearing about the seriousness of Bolstad’s offense. In fact, the court made no comments about Bolstad’s criminal conduct whatsoever.

At the initial sentencing hearing, the court simply announced that it would be adopting the joint recommendation for probation. (R. 47:26; App. 102). The court did not make any reference to its obligation to consider the “gravity of the offense,” and made no mention of the incident between Bolstad and his nephew.

At the sentencing after revocation hearing, the court made numerous comments about how Bolstad did not “follow the rules,” how he is not entitled to a “babysitter,” and how he “can’t be managed in the community.” However, the court at no point made any comments about Bolstad’s underlying offense, or the reason for why he was revoked. (R. 48:18-21; App. 104-107). The court made no explanation for how the gravity of Bolstad’s offense was a factor in the sentence meted out.

The court’s sentencing analysis was a far cry from those most recently approved by the Wisconsin Supreme Court. For instance, in one case the court had this to say about the sentencing court’s explanation for its sentence:

Remarking that it could not “say enough about the seriousness of these offenses,” the circuit court explained that it was “giv[ing] the greatest amount of weight” to that factor. The circuit court discussed in detail Pal’s actions in the hours and days after the accident which, in the circuit court’s view, demonstrated Pal’s lack of remorse and failure to take responsibility for his actions.

State v. Pal, 2017 WI 44, ¶ 33, 374 Wis. 2d 759, 778-79, 893 N.W.2d 848, 858. *See also State v. Counihan*, 2020 WI 12, ¶ 50, 390 Wis. 2d 172, 193-94, 938 N.W.2d 530, 540 (Sentencing court “appropriately focused on the nature and gravity of the offense[.]”); *Williams*, 2018 WI 59, ¶ 48 (Sentencing court addressed “the serious nature of the crime[.]”); *State v. Herrmann*, 2015 WI 84, ¶ 61, 364 Wis. 2d 336, 362, 867 N.W.2d 772, 785 (“the judge’s statements addressed the seriousness of the crime”). *State v. Ninham*, 2011 WI 33, ¶ 30, 333 Wis. 2d 335, 352, 797 N.W.2d 451, 460 (“the circuit court regarded the gravity of the offense as ‘beyond description’ and indisputably ‘horrific.’”) Tellingly, Bolstad has been unable to locate a single published case where the sentencing court did not at least discuss the underlying offense.

If the court had properly considered the gravity of Bolstad’s offense, it would have observed that Bolstad’s “degree of culpability” was much lower than in the typical attempted robbery. *McCleary*, 49 Wis. 2d at 271. Bolstad was clearly being affected by his schizophrenia and/or drug addiction: his nephew, the victim, told police that Bolstad appeared “messed up,” and Bolstad told police a fantastical story about meeting up with Tony Danza to play baseball. (R. 4:2-3). His nephew was clear that Bolstad did not wave the baseball bat at him, he just waved it in the air. (*Id.*) And Bolstad simply rode his bicycle away when his nephew did not give him any money. (*Id.*)

Sentencing is a discretionary decision, but that discretion is limited by the “proper legal standards.” *State v. Taylor*, 2006 WI 22, ¶ 17, 289 Wis. 2d 34, 44, 710 N.W.2d 466, 472 (quoting *McCleary*, 49 Wis. 2d at 277). Here, the sentencing court did not apply the “proper legal standards.” The court failed to carry out its duty, imposed both by statute and by supreme court precedent, to “consider ... the gravity of the offense.” The court erroneously exercised its discretion, and Bolstad is entitled to a new sentencing after revocation hearing.

B. The court erroneously failed to consider the minimum amount of confinement necessary to meet its sentencing goals.

Recognizing that incarceration is the ultimate deprivation of liberty, the supreme court has mandated that “[i]n 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.’” *Gallion*, 2004 WI 42, ¶ 44 (quoting *McCleary*, 49 Wis.2d at 276).

Here, however, the court seemed to take an all-or-nothing approach to Bolstad’s sentence, handing him the maximum amount of confinement because he could not abide by the terms of probation:

I think the Department of Corrections looked at this, looked at everything else possible to do with you and decided there weren't any alternatives, so, I am left with sentencing you on the crime

that I sentenced you on two years ago. At that time I thought you could be managed in the community. You have proven you cannot. So, I am going to sentence you to seven years in the Wisconsin State Prison System, five years of initial confinement and two years of extended supervision time.

(R. 48:20).

Some length of confinement was in order, given that this was a sentence after revocation. However, the court made no effort to explain why five years – the maximum amount of confinement time allowed by statute – also just happened to be “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.” *Gallion*, 2004 WI 42, ¶ 44.

Indeed, Bolstad has significant rehabilitative needs, for both mental health and substance abuse issues. He was revoked from probation because he was going through some sort of crisis: he locked himself in a bathroom and called 911 because he believed people were chasing him, and when the police responded he was found with methamphetamines. (R. 19:14). There was no explanation for why this demonstrated that Bolstad needed to be warehoused for five years, instead of being placed on extended supervision and provided with mental health and substance abuse services. Similarly, there was no explanation for why the court ordered five years of custody, other than that

happened to be the maximum amount of confinement time the court could order.

In addition, while the court's frustration with Bolstad's inability to consistently follow through with his substance abuse and mental health treatment needs is understandable, the court failed to acknowledge Bolstad's successes, or the difficulties finding programs that would treat both of his issues.

Finally, there are other legal remedies, besides incarceration, for dealing with a person with mental health and substance abuse issues. Chapters 51, 54 & 55 of the Wisconsin statutes provide for the involuntary commitment, guardianship, and/or protective placement for persons with mental health and/or substance abuse issues.

The court erroneously exercised its discretion when it gave Bolstad a maximum sentence simply because he could not abide by his obligations to treat his mental health and substance abuse issues.

C. The circuit court's order on the post-conviction motion did not address the issues Bolstad raised in his motion.

The circuit court issued its order on Bolstad's postconviction motion on December 17, 2020, (R. 46; App. 110-112), more than 60 days after Bolstad filed the motion on September 14, 2020. (R. 45). Because Wis. Stat. § 809.30(2)(i) imposes a 60-day deadline to decide postconviction motions, when the circuit court fails to meet the deadline the court of appeals

considers the order a “nullity” but nonetheless retains jurisdiction to consider on appeal “the claimed sentencing errors.” *State v. Scherreiks*, 153 Wis. 2d 510, 516-517, 451 N.W.2d 759, 761 (Ct. App. 1989).

Even if the circuit court’s order was timely, a “reviewing court must independently review the record of the sentencing,” and not just rely on the sentencing court’s post hoc rationalizations. *State v. Travis*, 2013 WI 38, ¶48, 347 Wis. 2d 142, 164, 832 N.W.2d 491, 502. Still, it is worth noting that the circuit court’s order on Bolstad’s motion did not address the issues at hand.

The court began its analysis by declaring that “*State v. Wuensch*, 69 Wis. 2d 467, 480 [230 N.W.2d 665, 672 (1975)] guides the court. No sentence modification is appropriate unless the original sentence was unduly harsh or unconscionable.” (R. 46; App. 110). *Wuensch* is completely inapplicable. Bolstad was not arguing for sentence modification based on his sentencing being “unduly harsh or unconscionable.” As above, he argued that the court erroneously exercised its discretion when it did not consider the “gravity of the offense” or explain why five years of incarceration was the minimum amount of custody necessary to meet its sentencing goals. *Gallion*, 2004 WI 42, ¶ 44. And, once again, the court’s decision makes no reference to Bolstad’s actual crime in this case. Accordingly, the court’s order does not justify the sentence it imposed against Bolstad.

CONCLUSION

For the reasons stated above, Bolstad is entitled to a new sentencing hearing.

Dated this 29th day of March, 2021.

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 4,193 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 29th day of March, 2021.

Electronically signed by Thomas B. Aquino
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CERTIFICATION AS TO APPENDIX

I hereby certify that I have submitted an electronic copy of this appendix to brief, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 29th day of March, 2021.

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