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

REPLY BRIEF

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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."

The State's response fails to appreciate the difference between not giving any *consideration* to a sentencing factor and not giving any *weight* to the factor once considered. Both the Wisconsin Supreme Court and the Wisconsin legislature have made it mandatory for a sentencing court to "consider" the "gravity of the offense" when determining a sentence. *State v. Harris*, 2010 WI 79, ¶ 28, 326 Wis. 2d 685, 698, 786 N.W.2d 409, 415 ("[c]ircuit courts must consider … the gravity of the offense"); Wis. Stat. § 973.017(2)(ag) (the sentencing court "shall consider … the gravity of the offense[.]") This reflects the long-standing principle that the punishment ought to fit the crime. Other factors, such as the defendant's character, may in the end outweigh the seriousness of the defendant's conduct. But the court must at least do the weighing.

The supreme court and the legislature have also said quite plainly that this consideration must be

made on the record so that it is subject to meaningful review. That is, 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); Wis. Stat. § 973.017(10m)(a). ("The court shall state the reasons for its sentencing decision and … shall do so in open court and on the record.")

The State first responds to this authority by arguing that "Bolstad reads *Gallion* and his cited authority too rigidly." State Br. at 13. However, the courts and the parties are bound by supreme court decisions, *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246, 256 (1997), and the court has plainly said that a sentencing court "must consider … the gravity of the offense" and its "rationale must … be set forth on the record." That state offers no argument or authority for the proposition that the court's use of the word "must" was directory rather than mandatory. Similarly, "the word "shall" in a statute is presumed to be mandatory[,]" and the State gives no reason to rebut the presumption here. *State v. Stenklyft*, 2005 WI 71, ¶ 33, 281 Wis. 2d 484, 508–09, 697 N.W.2d 769, 781. Indeed, the State simply ignores the existence of the statutes altogether, failing to cite or otherwise reference them in its brief.

The State next argues that "there is nothing to show that the circuit court actually failed to consider the gravity of Bolstad's criminal conduct as he now alleges." (State Br. at 13). This turns the standard on its head, wrongly suggesting that it is Bolstad's burden to make a record of the court's considerations during sentencing. On the contrary, as discussed above, both the legislature and the supreme court have placed the burden on the sentencing court to put its considerations on the record.

The reasons for this requirement are twofold. First, sentencing decision "cannot be reviewed by the appellate courts unless the reasons for decisions can be examined." *Gallion*, 2004 WI 42, ¶ 38. For instance, suppose the sentencing court here *did* consider the gravity of Bolstad's offense in crafting his sentence, but misunderstood the facts of the case. The court's sentence would violate Bolstad's due process right to be sentenced based on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 185, 717 N.W.2d 1, 3. However, Bolstad would have no way of establishing this constitutional violation because the court failed to explain on the record the basis for its decision.

Second, explaining the rationale for a sentencing decision on the record allows the decision to "be understood by the people." *Gallion*, 2004 WI 42, ¶ 38. Judges, like all governmental officials in our democracy, are ultimately accountable to the people. The people have a right to know whether their judges' decisions are reflecting the values of the

public, but they cannot do so unless judges explain their decisions on the record. Requiring sentencing judges to explain their view of the gravity of a given offense helps ensure that the judge's values matches public values.

The State next asserts there is no "unyielding rule that a circuit court must orally and methodically articulate the three *Gallion* factors at each sentencing hearing, describe how the perceived facts fit each *Gallion* factor, and affirmatively declare that a specific *Gallion* factor drove its sentence." (State Br. at 13). Bolstad has not articulated such a rule either. Instead, Bolstad's brief again simply argues that the sentencing court "must consider" the *Gallion* factors and then "must explain" its rationale on the record. There may be more than one way to meet these requirements. However, where, as here, the court made *no* record that it considered the gravity of Bolstad's offense, the requirements have not been met.

The State follows up with a non-sequitur, arguing that the lack of the rule it articulated is demonstrated by court precedent holding that "[t]he weight given each of these factors lies within the trial court's discretion, and the court may base the sentence *on any or all of them*." (State Br. at 13) (*quoting State v. Odom*, 2006 WI App 145, ¶ 7, 294 Wis. 2d 844, 720 N.W.2d 695) (emphasis and bracketing added by the State).

However, the State is confusing the court's *obligation* to consider a factor on the record with the court's *discretion* to determine the appropriate weight once considered. Failing to weigh an item is not the same as determining that the item has no weight. It is one thing to disagree with the number that appears on a bathroom scale; it's another to refuse to step on the scale altogether. Courts have the discretion to determine the appropriate weight of a sentencing factor. They do not have the discretion to refuse to weigh the factor altogether. Certainly, if a sentencing judge expressly declared "I am not considering the gravity of the offense during sentencing," the judge would be avowedly applying the wrong legal standard and thus erroneously exercising his or her discretion. "A circuit court erroneously exercises its discretion if it applies an improper legal standard[.]" *State v. Jackson*, 2014 WI 4, ¶ 43, 352 Wis. 2d 249, 272, 841 N.W.2d 791, 802 (citation and quotation marks omitted).

Indeed, whenever the circuit court fails to apply statutorily enumerated factors, the court is failing to apply the correct legal standard and thus erroneously exercising its discretion. *LeMere v. LeMere*, 2003 WI 67, ¶4, 262 Wis. 2d 426, 431–32, 663 N.W.2d 789, 791. Similar to the sentencing statute, Wis. Stat. § 973.017(2), the marital property division statute includes "an explicit requirement that the circuit court consider all of the enumerated factors before altering the presumption of equal property division[.]" *LeMere*, 2003 WI 67, ¶ 17 (*citing* Wis. Stat. § 767.255(3)). The supreme court concluded

that the circuit court erroneously exercised its discretion when it deviated from the presumption of equal division after considering only one factor. *Id*. at ¶ 22.

Importantly, *LeMere* explicitly rejected the argument that the State makes here, that the court's discretion to give a factor no weight relieves the court from its statutory obligation to consider the factor at all:

> This is not to say that the circuit court is precluded from giving one statutory factor greater weight than another, or from concluding that some factors may not be applicable at all. Property division in divorce remains a discretionary decision of the circuit court, but the record must at least reflect the court's consideration of all applicable statutory factors before a reviewing court can conclude that the proper legal standard has been applied to overcome the presumptive equal property division under Wis. Stat. § 767.255(3). Circuit courts must subject requests for unequal division of property to the proper statutory rigor. The failure to do so is an erroneous exercise of discretion.

LeMere, 2003 WI 67, ¶ 24. Although *LeMere* involves a different statute, Bolstad knows no principled reason why statutory factors must be heeded when it comes to family law but not the criminal law.

In any event, the State is unable to cite any cases where the sentencing court simply failed to consider the gravity of the offense, either explicitly or impliedly.

The State instead argues that the court "based Bolstad's sentence after revocation on the need to protect the public, Bolstad's character, his criminal history, and his pattern of undesirable behavior in the community," and focuses on the allegations supporting this determination. (State's Br. at 13-15). This line of argument is wrongheaded for several reasons.

First, as discussed above, the circuit court erroneously exercised its discretion by *only* considering these factors, and by not also considering the "gravity of the offense," as required by statute and the supreme court. Thus, the fact that the court did consider other factors is immaterial to Bolstad's argument.

Second, many of the "facts" relied upon by the state were allegations in a revocation summary prepared by the department of corrections and were not referenced by the circuit court when issuing its decision. Thus, the State is speculating that the circuit court relied on those allegations when issuing Bolstad's sentence. And again, because the court did not state whether it was relying on those allegations, there is no way for Bolstad to determine whether the court's understanding of the allegations had been accurate.

Third, the conduct that the State points to amounted to little more than petty thefts and minor disturbances. Even the police officer injury the state alludes to was a result of the officer injuring himself

while tackling Bolstad for failing to stop riding his bicycle with faulty equipment. In addition, the State does not acknowledge the clear roles mental health and drug addiction have played in Bolstad's past behaviors.

Finally, the State attempts to turn Bolstad's argument into an argument about how the circuit court weighted the gravity of the offense factor, stating that "Bolstad contends that the circuit court should have allocated more weight to the gravity of the offense, which in his view, would have decreased his culpability in the court's eyes." (State Br. at 15, citing Bolstad Br. at 15). However, Bolstad instead is arguing that the circuit court erroneously exercised its discretion by not considering the gravity of the offense at all. And Bolstad simply illustrated the real-life impact of this error by observing that the circumstances of the offense and Bolstad's mental health suggest a lower than average degree of culpability for an attempted robbery.

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

"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." *Gallion*, 2004 WI 42, ¶ 44 (citations and quotation marks omitted). As Bolstad argued in his opening brief, the court handed Bolstad

the maximum amount of confinement – five years – without explaining why five years was the "minimum" necessary.

The State points to sentencing comments by the judge indicating that confinement was necessary because "Bolstad could not be managed in the community." (State Br. at 17). But the State cannot point to judicial comments explaining why five years confinement was the minimum necessary, because there were none. Indeed, in every sentencing after revocation, there is necessarily evidence that the defendant "could not be managed in the community." Otherwise, they would not have been revoked. That does not mean that in every case, the maximum amount of confinement is in order. The court has to explain *why* the amount of time to which the defendant is sentenced is the minimum amount necessary to meet the court's sentencing objectives. Here the court simply imposed the maximum amount of confinement available to the court. This was not a proper exercise of discretion.

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

The state does not dispute that because the circuit court's order on Bolstad's postconviction motion was issued after the Wis. Stat. § 809.30 deadlines, 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).

However, in this section concerning the legal effect of the circuit court's tardy order on the postconviction motion, the state seems to raise a new substantive argument in a parenthetical to a case cite. The last sentence of the State's brief is "*See State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992) (if circuit court's decision is supportable by the record, the court of appeals will not reverse even if circuit court gave the wrong reason—or no reason at all—for its decision.)"

If the State is suggesting that the court of appeals may uphold the sentencing by examining the record and "considering" the *Gallion* factors when the sentencing court has failed to do so, this argument is too undeveloped to be considered by the court. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

In any event, Bolstad knows of no case reaching such a holding. *Jenkins* involved an evidentiary issue, not sentencing. Indeed, if this court were to apply the *Gallion* factors in the first instance, than this court would be sentencing Bolstad. Clearly, sentencing is not a function of an appellate court. Instead, for the reasons stated above, the circuit court erroneously exercised its discretion when it failed to consider the gravity of Bolstad's offense.

CONCLUSION

For the reasons stated above and in his opening brief, Bolstad is entitled to a new sentencing hearing.

Dated this 28th day of May, 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 2,381 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, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 28th day of May, 2021.

Signed:

Electronically signed by Thomas B. Aquino
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