STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP001943-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMMIE L. BLOUNT,

Defendant-Appellant.

On Appeal from an Order Denying Postconviction Relief and a Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Maureen M. Martinez, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Did the circuit court erroneously exercise its discretion when it denied Mr. Blount's postconviction motion for sentence modification?

The circuit court did not address whether a new factor had been established, but denied the motion because it determined a sentence modification wasn't warranted.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication is likely unwarranted, as the issues presented can be decided on the basis of well-established law.

STATEMENT OF FACTS

While incarcerated because he was unable to post bond in another case, Racine County Case No. 20CF329, Mr. Blount was charged in this case with one count of felony stalking, domestic abuse, as party to a crime, for alleged communications with his ex-girlfriend. (2). As part of a plea deal, the state reduced the stalking charge to three counts of disorderly conduct, each with the domestic abuse enhancer and agreed to recommend concurrent time on the two files. (48:2-3). Mr. Blount accepted the offer and entered a guilty plea to the three disorderly conduct charges in this case as well as a guilty plea to

a recklessly endangering safety charge in 20CF329. (48:7).

At sentencing on both cases, the court reviewed the *Gallion*[1] factors and Mr. Blount's needs. (69:23-27). After imposing a four-year prison sentence consisting of two years confinement followed by two years extended supervision in 20CF329, the court sentenced Mr. Blount to 90 days on each disorderly conduct count which were to run consecutively to each other, but stayed and imposed these sentences in favor of a three year probationary period. (69:27; App. 7). After the sentence was meted out, the prosecutor asked if the probationary period in this case was to be consecutive or concurrent to the sentence in 20CF329. (69:29; App. 9). The court responded "it will be concurrent with his ES, but then it [will] last farther than his ES. Its one more year than his ES is going to go. Because his ES will be two years." (69:29; App. 9).

The prosecutor pointed out to the court that it was not legal to make a probation term concurrent to just the extended supervision portion of the sentence. (69:29; App. 9). Conceding this was true, the court reimposed the three years probation term, this time making it consecutive to the entire sentence in 20CF329. (69:30; App. 9). The effect of this change was to give Mr. Blount five years of supervision following the confinement portion of his sentence in 20CF329, rather than the three it had originally deemed appropriate.

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[1] *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197

Mr. Blount brought a postconviction motion requesting sentence modification arguing the court erroneously exercised its discretion when it increased the supervision period by two years without explaining why that was warranted and also the court unknowingly overlooked a sentence structure that would have achieved the global sentence of two years confinement followed three years supervision that it had originally deemed appropriate under *Gallion.*[2] (55). The circuit court denied the motion. (58).

ARGUMENT

The circuit court erroneously exercised its discretion when it denied Mr. Blount's motion for sentence modification based on a new factor.

The facts and procedural histories of crimes involved in this case are not important because the issue at the heart of this appeal boils down to the simple question: can a court increase the length of a global sentence that it had deemed appropriate under *Gallion* when no new aggravating facts were presented that would justify the increase? The answer must be no. Here, the court increased the length of supervision simply because it misunderstood the law governing sentence structure. This was an erroneous exercise of discretion and because the court failed to

[2] Mr. Blount also raised a sentence modification claim based on a new factor related to 20CF329. He does not renew that claim on appeal.

consider or impose an alternative sentence structure that would have achieved the original sentencing goal, alternative structures were unknowingly overlooked. A modification to reflect the goals of the original sentence is warranted.

A. Governing law.

A court has inherent authority to modify a sentence, but it may not modify a sentence based on second thoughts and reflection alone. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 72, 797 N.W.2d 828, 838. A defendant seeking a sentence modification must demonstrate, by clear and convincing evidence, that there is a new factor to justify the modification. *Id.*, ¶36. A new factor is:

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Harbor, 333 Wis. 2d 53, ¶40 (quoting *bol v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). If the defendant meets that standard, the circuit court must then determine, in its discretion, whether the new factor justifies sentence modification. *Id.,* ¶37.

Whether a fact or set of facts presented by the defendant constitutes a "new factor" is a question of law. *Id.,* ¶33. This Court reviews questions of law independently of the determinations rendered by lower courts. *Id.* The determination of whether a new factor warrants sentence modification is reviewed for erroneous exercise of discretion. *Id*.

B. Mr. Blount presented a new factor.

After considering the *Gallion* factors, including protection of the community, punishment of the defendant, and rehabilitation of the defendant, and applying these factors to Mr. Blount, the circuit court exercised its discretion and globally determined that Mr. Blount should be supervised for three years following his confinement time. (69:23-27). In order to achieve the global sentencing goal of three years supervision after confinement, the court made the probation sentence in this case concurrent to the two years extended supervision time in 20CF329. (69:29). The court was specific: "it is concurrent with his ES, but then it [will] last farther than his ES [on 20CF329]. Its one more year than his ES…." (69:29).

But Chapter 973 does not allow probation to run concurrently with only the extended supervision portion of another sentence. *See* Wis. Stat. § 973.09(1)(a). When the illegality of the sentence imposed was pointed out, the court could have altered the sentence structure so that the global sentence would remain two years confinement followed by three years supervision. For example, it could have imposed a one-year probation sentence consecutive to the

prison sentence in 20CF329, as Mr. Blount proposed in his post-conviction motion. (55:10). In this way, the global sentence on the two files would have remained two years confinement followed by three years supervision.

The sentencing court did not do this or any other alteration that would have achieved the sentence it had originally deemed appropriate under *Gallion*. Instead, by making the three year probation term consecutive to the entire term of imprisonment in 20CF329, the court added two years to its original term of supervision. Because the court could have legally achieved the sentence it had originally deemed appropriate with an alternative sentence structure, the court unknowingly overlooked that a different sentence structure would achieved the stated goal of the global sentence.

Postconviction, the circuit court did not address whether or how alternative sentence structures might have achieved the original sentencing goals, or whether they were unknowingly overlooked. This Court should find, in its *de novo* review, that at least one alternative sentence structure did exist and the court's silence on how this sentence structure might have achieved its stated goal of two years confinement followed by three years supervision demonstrates that it was unknowingly overlooked.

C. The new factor warrants modification.

Our supreme court has 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); *see also State v. Bolstad,* 2021 WI App 81, ¶27, —— Wis. 2d ——, —— N.W.2d ——— . 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 court properly exercised its discretion when it meted out the original sentence. The court reviewed the PSI and the parties' recommendations, listened to arguments of counsel, heard from Mr. Blount's family members and provided Mr. Blount with an opportunity for allocution. (69:23-24). The court reviewed the severity of the crimes involved and appropriately set forth its rational on the record when it imposed the global sentence consisting of two years confinement followed by three years supervision. (69:23-27).

When the circuit court subsequently increased the length of supervision from three to five years, however, it erroneously exercised its discretion. After considering the appropriate factors, the court had been explicit that the term of probation should last "one more year than his ES…." (69:29). The court did not

explain why the goal of three years total supervision became inadequate once the prosecutor pointed out that probation could not be concurrent to only the extended supervision portion of a term of imprisonment. And there is no reason that justifies this increase. The only thing that had changed was the court's understanding of the legal impermissibly of the sentence structure it had imposed, not the gravity of the offense, Mr. Blount's rehabilitative needs or any other factor that suggested Mr. Blount required a longer term of supervision.

Though not as extreme as incarceration, supervision through the criminal justice system is a deprivation of liberty. *See* Wis. Stat. § 973.10 ("[i]mposition of probation shall have the effect of placing the defendant in the custody of the department"). Supervisees are required to follow rules and regulations that directly affect the manner in which they live. *See State v. Tarrell,* 74 Wis. 2d 647, 654, 247 N.W.2d 696, (1976) (*abrogated on other grounds*). Supervisees are subjected to a relaxation of their constitutional protections, and the department is entitled to supervise and scrutinize all that they do. *Id.* As such, though the liberty interest at stake may be less than confinement, *Gallion's* call for the "minimum amount of custody … which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant" is equally relevant when deciding the appropriate term of supervision. *Gallion*, 270 Wis. 2d 535, ¶44 (*quoting State v. McCleary*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)). Here, the court determined the

minimum term of supervision consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant was three years following his confinement.

Postconviction, the court stated that the second sentence it imposed was a "valid sentence." (62:9; App. 9). The judge highlighted the gravity of the offense by reading into the record a message between Mr. Blount and his ex-girlfriend that formed the basis for one of the disorderly conduct convictions, emphasizing the foul language and unattractive tone. (62:6-7; App. 5-6). But the court was aware of this factual basis for the crime when it stated the original goal of three years supervision. Similarly, the postconviction court noted that five years of supervision was appropriate because Mr. Blount would then receive corrections assistance to help him achieve his goal of attending culinary school. (62:7; App. 6). But again, the court was aware of this goal when it determined that three years supervision was sufficient to assist Mr. Blount in his rehabilitation. (69:19).

That the court felt the new sentence was justified merely demonstrates that upon reflection, it had second thoughts about the original sentence. This does not create a legal basis on which a court may change a sentence imposed and this alone warrants sentence modification. *Harbor,* 333 Wis. 2d 53, ¶40; *see Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850, 854 (1979) (noting a court's inherent authority to modify a sentence when there has been an erroneous exercise of discretion). That the court denied

Mr. Blount's request to reinstate the original sentencing goals given this legal error demonstrates that the court again erroneously exercised its discretion. Because discretion was properly exercised when the court determined three years of supervision following confinement adequately met Mr. Blount's and the public's needs, sentence modification to reflect the original sentencing goals is warranted.

CONCLUSION

For the reasons stated in this brief, Mr. Blount respectfully requests that this Court vacate his sentence and remand to the circuit court with directions to modify the sentence such that the original global sentence of two years confinement followed by three years supervision is achieved.

Dated this 28th day of January, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2077 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or 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 one or more initials or other appropriate pseudonym or designation 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 28th day of January, 2022.

Signed:
Electronically signed by
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