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STATE OF WISCONSIN, COURT OF APPEALS
DISTRICT II

For Official Use:

STATE OF WISCONSIN,

Plaintiff/Respondent,

v.

ZACKERY J. OLSON,

Defendant/Appellant. Case No.: 2023AP000369

ON APPEAL FROM THE SENTENCE IMPOSED BY THE HONORABLE
JENNIFER DOROW, PRESIDING
Circuit Court Case No. 21CM1454.

BRIEF OF DEFENDANT-APPELLANT

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<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.6,7,8
<i>State v. Rios</i> , 2022 WI App 13, 401 Wis. 2d 195, 973 N.W.2d 177
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<i>State v. Williams</i> , 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373.7

Wisconsin Statutes

Wisconsin Statute §813.125(4).5
Wisconsin Statute §939.62(1)(a).5
Wisconsin Statute §946.49(1)(b).5

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because the arguments of the parties are adequately presented in the briefs.

STATEMENT OF THE ISSUES

- II. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN SENTENCING OLSON TO PRISON AND NOT PLACING HIM ON PROBATION.

STATEMENT OF THE FACTS

Olson was alleged to have sent text messages to Victim A on December 29, 2020 during the time period when an injunction was in placed prohibiting him from contacting her. R2 at 2. Victim A did not recognize the phone number the messages were sent from, but told officers that she thought Olson had sent the messages. *Id.* The content of the messages suggested that Victims A and B had contacted Olson and the sender was accusing them of contacting him and asking them to stop. *Id.* Victim B also claimed that she received a message from an unknown number on December 24, 2020 while she was at Victim A's residence. *Id.* Victim B further stated that she had received a second text message on December 31, 2020 that again asked that she stopped contacting the sender. *Id.* This text was also from an unknown number. *Id.*

During the course of the police investigation, Detective Janke determined, through records obtained by subpoena, that the numbers the texts were sent from were sent through an app known as Burner. *Id.* Further investigation indicated that the person who the underlying number was registered to was Tracy Yochum, who is Olson's mother. *Id.*

STATEMENT OF THE CASE

On August 20, 2021, Olson was charged in a two count complaint alleging Violation of Injunction - Harassment, Repeater under Wis. Stats. §813.125(4) and §939.62(1)(a), the later as a result of three convictions on February 5, 2018 in Waukesha County Case Number 2017CM1820.

Along with the above, Olson was charged in Waukesha County Case Number 21CF1360 with one count of Felony Bail Jumping, Repeater under Wis. Stats. §946.49(1)(b) and §939.62(1)(a) due to the above, as well as, a pending felony matter in Fond du Lac County. A second count was also charged as Violation of Temporary Restraining Order - Harassment, Repeater under Wi. Stats. §813.125(3) and §939.62(1)(a).

On September 13, 2022, the court held a jury trial on the two cases charged above. As a result of the trial, Olson was found not guilty of the two counts in 21CF1360 and found guilty of the two counts in 21CM1454.

On November 9, 2022 Olson was sentenced by the court on each count, to be served consecutively, to 15 months - broken down to 12 months of initial confinement and 3 months of extended supervision.

STANDARD OF REVIEW

The standard of review for sentencing is well established in Wisconsin. Appellate review is “limited to determining if discretion was erroneously exercised.” *State v. Gallion*, 2004 WI 42 ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

Argument

III. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN SENTENCING OLSON TO PRISON AND NOT PLACING HIM ON PROBATION.

To begin, Wisconsin courts must consider three primary factors in imposing sentences on defendants. The three primary factors are: (1) protection of the public; (2) the gravity of the offense; and (3) the defendant's character. *State v. Williams*, 2018 WI 59, ¶46, 381 Wis. 2d 661, 912 N.W.2d 373 (see also *Gallion*, 270 Wis. 2d 535, ¶40).

In addition to the above, the "court may also consider the following secondary factors: (1) past record of criminal offenses; (2) history of undesirable pattern of behavior; (3) the defendant's personality, character, and social traits; (4) results of a presentence investigation; (5) whether the crime was of a vicious or aggravated nature; (6) degree of defendant's culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, educational background, and employment history; (9) whether the defendant shows remorse, repentance, or cooperativeness; (10) need for rehabilitative control; (11) rights of the public; and (12) length of pretrial detention." *State v. Rios*, 2022 WI App 13, ¶12, 401 Wis. 2d 195, 973 N.W.2d 17 (citing *Harris v. State*, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977)).

"The weight given to each factor is within the circuit court's discretion." *Id.* (citing *State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984)).

A circuit court must do more than simply utter facts, it must show that its discretion was exercised. *McCleary v. State*, 49 Wis. 2d 263, 280-81, 182 N.W.2d 512 (1971). "Discretion is not synonymous with decision-making, Rather, the term contemplates a process of reasoning." *Id.* at 277.

The appellate court must "closely scrutinize the record to ensure that 'discretion was in fact exercised and the basis of that exercise of discretion [is] set forth.'" *Gallion*, 270 Wis. 2d 535, ¶4 (quoting *McCleary*, 49 Wis. 2d at 277).

In Olson's case, the circuit court put great weight on what it deemed to be Olson's character at the time of sentencing. In essence, Olson was punished for exercising his right to trial and for maintaining his innocence.

Olson proceeded to a jury trial in his case, as was his absolute right to do. Throughout the case he maintained his innocence to the alleged crimes that he was accused of. In fact, as a result of trial, Olson was found not guilty of both counts set forth in Waukesha County Case Number 21CF1360. Specifically, he was found not guilty of felony bail jumping and of violating a temporary injunction.

At the time of his sentencing, after trial, Olson continued to maintain that he did not commit the crimes of which he was accused. The trial court, however, used that against him in sentencing him to a consecutive prison sentence.

How can a defendant maintain his right to innocence and exercise his right to trial and then be punished for exercising those rights? At sentencing the trial court specifically stated to Olson that his lack of remorse was paramount in its sentencing of him. R92 at 36. Would it not be disingenuous for Olson to maintain his innocence, put on his defense at trial, be found not guilty of two of the four counts charged against him and then suddenly at sentencing apologize for committing the crimes a jury convicted him of? This is not a case where Olson plead to an agreed upon resolution to minimize his exposure or take advantage of a plea deal. The court gave Olson the opportunity to speak at sentencing and he exercised that right. He offered to the court an explanation for his actions which were consistent with his right to trial that he was not guilty of the charges. The trial court then used this against him and sentenced him to consecutive prison terms on the two enhanced misdemeanors he was convicted of.

In addition to the above, the trial court also used the alleged facts of a new case charged against him in Fond du Lac County in sentencing him to prison. To be clear, the Fond du Lac County case referenced at sentencing had been charged mere days before Olson's sentencing. Olson had not even been served with a summons and complaint in that matter and had no idea as to the crimes he was alleged to have committed. Victim B specifically referenced this new case in her statement to the trial court at sentencing. R92 at 7. This was the first time Olson heard what he supposedly did to be charged in a new case. Despite the trial court stating that it didn't need to consider the facts in the new case in reaching its conclusions for sentencing Olson, it is apparent from the trial court's comments that it did consider that new case and the allegations contained therein. Olson acknowledges that the trial court will allow victims to speak freely, the discussion of this case and the trial court's consideration of it should not have been used against Olson at sentencing.

Olson also understand that the trial court had options in sentencing him. For example, the trial court could have sentenced him to concurrent prison time and extended supervision. Instead, because of the above the trial court sentenced him to consecutive prison terms. The trial court's

refusal to sentence Olson to probation instead of prison demonstrates the trial court's reliance on the above argument as it relates to the Fond du Lac case and what the trial court deemed as Olson's refusal to accept responsibility for his actions.

Conclusion

For the herein stated arguments, Olson respectfully requests that the Court find that the circuit court erred in erroneously exercised its discretion in sentencing him to consecutive orison terms.

Submitted this 23rd day of October, 2023.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: Courier New - 12, 10 characters per inch; double-spaced; a 1.5 inch margin on the left side and 1 inch margins on all other sides.

The length of this brief is 15 pages.

Submitted this 23rd day of October, 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of 809.19(12) Wis. Stats.

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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Submitted this 23rd day of October, 2023.

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APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 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 with appropriate references to the record.

Submitted this 23rd day of October, 2023.

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