STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2023AP2055

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

ANTHONY JOHN VALDEZ,
Defendant-Appellant.

Appeal of a Final Decision and Order Filed October 17, 2023, Denying Defendant-Appellant's Motion for Postconviction Relief, the Honorable David Swanson Presiding, in Milwaukee Co. Cir. Ct. Case No. 21CF135

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Introduction

The State's brief poses four arguments in opposition to Valdez's appeal: (1) Valdez forfeited those parts of his argument that challenged the sentencing court's reliance on irrelevant crime data because he did not reference that data in his postconviction motion (17, 19-20); (2) in any event, despite referring to that data, the sentencing court did not rely on that crime rate data to set Valdez's sentence (20-21); (3) the lengthy sentences in other vehicular homicide cases that the sentencing court did refer to were more relevant than the more lenient, comparison sentences that Valdez offered (21-25); and (4) the sentencing court was not biased against Valdez when it relied on a presumptive, 20-to-30-year range of imprisonment in such cases, as the starting point for its eventual sentence of Valdez (25-29). This reply addresses each of the State's arguments.

II. Valdez did not forfeit his right on appeal to highlight the irrelevant crime rate data to which the sentencing court had referred when it articulated its views on appropriate vehicular homicide sentences.

Valdez did not forfeit for appeal any of his arguments that the sentencing court had relied on improper sentencing factors. His appeal, like his postconviction motion, has focused on the misinformation, of all types and examples, on which the sentencing court relied to calculate Valdez's eight-year sentence: an irrelevant, presumptive 20-to-30-year-range *and* irrelevant crime data.

Valdez's postconviction motion (at 14) relied on, and quoted at length from, *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491 to argue that the sentencing court denied him due process of law. The

Travis court emphasized how the "framework for sentencing" had been "thrown off" because of misinformation the sentencing court had considered. It expressly mentioned that a due process violation is avoided only so long as the sentencing "court goes through a rational procedure of selecting a sentence *based on relevant considerations and accurate information."* 2013 WI 38, at ¶80. (Emphasis added).

Valdez asserted in his postconviction motion (R. 71 at 17) that he "was denied due process of law" because "the objective facts show the [sentencing] judge's perception was seriously wrong." To support that position Valdez pointed to the facts that Judge Borowski had "predetermined before sentencing that Valdez should receive a prison sentence and [he] perceived that he should take account of "comparable cases" and used a "norm" of sentences ranging from 20 to 30 years confinement." Those were the facts to which Valdez pointed.

Now, while Valdez has reasserted and raised again the issue that Judge Borowski denied him due process at sentencing, Valdez has added additional facts about the irrelevant crime data on which Judge Borowski had relied. Valdez has also noted on appeal that this occurred without the defense having any advance notice that such irrelevant crime data would fuel his sentencing considerations, contrary to *State v. Skaff,* 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989) .

> I just heard that I think there were, approximately, 70 people killed in driving accidents last year in 2021. The year before that in 2020, there were almost a 100 people killed in Milwaukee County, if I recall correctly. That's at the same time where two years in a row we set an all-time high for homicides in Milwaukee. Two years in row we set records for non-fatal shootings, and auto theft rate is three or four times what it was just a few years ago. In fact, last year in 2021 there were more autos stolen in Milwaukee than Chicago. This community is being inundated with crime. Life in Milwaukee County is more dangerous now than it was five years ago. That's not hyperbole. That's not speculation. That's an objective fact.

(R. 55 at 21-22).

Valdez's appeal, by including Judge Borowski's veering references to increasing crime rates for all forms of homicide, for nonfatal shootings, and for auto thefts, does not raise issues that depart in any meaningful fashion from his argument, both in the circuit court and here, that he was sentenced based on irrelevant and inaccurate facts. Because the framework for his sentencing was thrown off by those considerations, Valdez was deprived of due process. These supposed "objective fact" references to rising crime rates, for various categories of offenses had nothing to do with Valdez.

Hence, Valdez appealed, as *State v. Harris*, 2010 WI 79, ¶66, 326 Wis. 2d 685, 712-13, 786 N.W.2d 409, 422, says he may, because the circuit court erroneously exercised its sentencing discretion when it "actually relie[d] on clearly irrelevant or improper factors." By adding more facts to his argument that Judge Borowski relied on improper and irrelevant sentencing factors, Valdez was only elaborating on the main argument he raised below. See, *State v. Tung*, 408 Wis. 2d 544, 560 n.9, 993 N.W.2d 706, 714 (Ct. App. 2023) ("On appeal, Tung elaborates on the argument made in the postconviction stage . . . [and] the law and argument at issue are substantially the same. . . . . [W]e conclude it is not forfeited as a new argument on appeal.").

Valdez did not forfeit these added factual points to the same argument he had made below. Instead, these factual points relate directly to the same claim that Valdez made in his postconviction motion: his sentence was influenced by improper factors.

Indeed, because the State and the defense on appeal have relied on many of the same cases authorities (e.g., *Harris, Tiepelman, Travis*) to make their arguments. There is even less reason to find that the defense had forfeited an argument. *See*, *Brown Cty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 42, 307 N.W.2d 247, 250 (1981).

Lastly, *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612, which the State primarily relies upon to make its argument for forfeiture, explained that "forfeiture is the failure to make the timely assertion of a right." But Valdez has continuously asserted his due process right to be sentenced based on accurate and relevant facts.

III. The sentencing court did not say anything to disavow its errant views when it sentenced Valdez.

The State contends (15, 21) that the record shows Judge Borowski properly considered the three *Gallion/McCleary* factors to set Valdez's sentence: the gravity of the offense, the character of the offender, and the need to protect the public.

Yet for the State and Judge Swanson to say that, because Judge Borowski considered those three sentencing factors, he therefore did not rely on improper factors, misses the point. Judge Borowski may have followed the *Gallion/McClear* script. But that does not negate his reliance on improper and inaccurate facts. Valdez has shown that Judge Borowski gave "explicit attention" to matters that were irrelevant and prejudicial to his sentence. *See, State v. Coffee*, 2020 WI 1, ¶38, 389 Wis. 2d 627, 650, 937 N.W.2d 579, 590 ("A circuit court actually relies on incorrect information when it gives "'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'") (citing *State v. Tiepelman*, 2006 WI 66, ¶14, 291 Wis. 2d 179, 717 N.W.2d 1). An improper sentencing factor is one "totally irrelevant or immaterial" to the sentencing decision. *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980). The State cannot convincingly argue that Valdez did not show that Judge Borowski relied on inaccurate and irrelevant facts when his very words in the record gave "explicit attention" to those facts.

Even if Judge Borowski had explicitly retracted his errant references to a presumptive vehicular homicide sentencing norm or

wholly unrelated increases in other crime rates, it would not establish that he did not rely on facts which he explicitly mentioned. *See*, *State v. Groth*, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 908-11, 655 N.W.2d 163, 172-73 ("We recognize that "[a] postconviction court's assertion of non-reliance on allegedly inaccurate sentencing information is not dispositive [and] we may independently review the record to determine the existence of any such reliance." (Internal citation omitted). Valdez met the *Coffee/Tiepelman* requirement, by showing that Judge Borowski gave explicit attention and mention to improper and irrelevant facts.

The State's argument is particularly weak given that Judge Borowski never said that he was disregarding that information. He did not state that he was disavowing that information by the time he reached his final sentence decision. He did not say he was retracting his earlier comments.

Because Valdez's case was reassigned to Judge Swanson for postconviction proceedings, Judge Borowski could not contend that his explicit references to irrelevant and inaccurate facts did not affect his sentencing judgment. *Cf.*, *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The circuit court has an additional opportunity to explain its sentence when challenged by postconviction motion.) Had Judge Borowski reviewed and approved how he handled Valdez's sentencing, the State might have a better argument. But the State cannot point to any express disavowal by Judge Borowski that he did not rely on inaccurate and irrelevant data. *Cf.,* *State v. Schael,* 131 Wis.2d 405, 414, 388 N.W.2d 641, 645 (Ct. App. 1986) (sentencing court's disavowal of any reliance on improper factors is persuasive).

IV. The vehicular homicide case sentencing data provided by Valdez with his postconviction motion offered more relevant and accurate comparison data than the two sentences the sentencing court recalled it had imposed;

Valdez's data was a "new factor" that supported sentence modification.

The State argues that Valdez's argument for sentence modification should be rejected, as it was undeveloped (21-22, n 6). To do so, it sets up a straw man argument that Valdez had contended Judge Borowski's reliance on inaccurate information was a "new factor" to support modification. Valdez did not make that argument. Rather, Valdez contended that the comparative sentencing data in his postconviction motions exhibits presented the requisite "new factor" to support a sentence modification because it showed that Judge Borowski's presumptive, 20-to-30 sentencing norm was objectively wrong.

Valdez's postconviction motion described in detail the relevance of the comparable vehicular homicide case sentences in the attached exhibits. (R. 71: 10-12). The motion presented three pages of "new factor" argument under *Rosado*. Yet the State's brief at footnote 6 declares that Valdez's sentence modification argument was "undeveloped," and then declares that it would therefore not address the "new factor" issue. Ironically, it is the State that has now forfeited any argument in opposition to Valdez's discussion of how his comparative case data was a "new factor" warranting sentence modification.

The definition of a "new factor" as set forth in *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) includes 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 because, "even though it was then in existence, it was unknowingly overlooked by all of the parties." See also, *State v. Harbor*, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (reaffirming test set forth in *Rosado)*. The vehicular homicide case sentencing data that was attached as exhibits,

was in existence at the time of Valdez's sentence. But that information, which rebutted Judge Borowski's presumptive 20-to-30-year sentence range, was highly relevant, and it was unknowingly overlooked by the parties. (That could very well be due to the fact that, when Judge Borowski declared his presumptive starting point for sentencing at 20-to-30-years imprisonment, Attorney Tate was appointed counsel. Successor appointed counsel Roth would not have known what the judge had said because a transcript was not on file at that point.)

The State did not offer comparable data at Valdez's sentencing or at the postconviction stage. Importantly, the defense entirely neglected the submission of comparable case sentencings, and instead submitted a private investigator's presentence investigation report (R. 30) without any comparative sentencing data.

Valdez's postconviction motion was clear when it stated that the comparable case sentencing data which existed in his exhibits (R. 72-76) was a proper basis for sentence modification. His motion stated at 12:

> The above factual data about less severe sentences, even probationary sentences, being imposed in comparable cases provides a compelling argument for sentence modification or resentencing. Valdez will provide this Court at a hearing with new evidence (with certified copies court file information from the Barnes, Wollersheim and Otterly cases) that demonstrates how Judge Borowski's use of a sentencing norm for such cases ranging from 20 to 30 years initial confinement was substantially inaccurate. Stating again, under our case law, Valdez had a due process right to be sentenced based on true and correct information. State v. Tiepelman, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d. Judge Borowski's norm for sentencing was not true or correct. *Valdez has shown that a "new factor" exists under the applicable standards for sentence modification.* See generally, State v. Norton, 2001 WI App 245, ¶9, 248 Wis.2d 162, 635 N.W.2d 656. This supplies multiple reasons to either modify Valdez's sentence or to resentence him. *A new sentencing 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 sentencing. State v. Harbor, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.*

(Emphasis added.).

V. By relying on a presumptive, 20-to-30-year-range of imprisonment as the beginning point for its sentence

calculations and on irrelevant crime data, the court's sentencing decision was improperly skewed and biased against Valdez.

When Valdez's sentencing judge voiced an erroneous presumption on the record that the judicial "norm" for reckless homicide by driving sentences in Wisconsin ranged from twenty to thirty years in prison, the judge likely applied that "norm" to arrive at his eight-year prison sentence, so that the sentence was lengthier than it otherwise would have been.

The State's brief (22) attempts to excuse Judge Borowski's biased starting point for his sentencing calculations by claiming that the judge could simply put blinders on when considering comparable case data. Despite acknowledging that the Wisconsin Supreme Court had "expressly endorsed" a sentencing court's consideration of information "about the distribution of cases similar to the case before it," citing *State v. Gallion*, 2004 WI 42, ¶ 47, 270 Wis. 2d 536, 78 N.W.23d 1, the State expresses confidence that it was sufficient that Judge Borowski plumbed his memory for only two of his recent sentencings, while throwing in an unsupported statistic that the "norm" in vehicular homicide cases is 20-to-30-years imprisonment. But nothing in *Gallion* suggests that such a parochial, two-case survey (especially when it is a survey of just two of the same judge's sentencings), when coupled with a groundless, grossly inflated "norm" is an acceptable examination of the "distribution" of similar cases.

The fact is that neither Judge Borowski nor the State presented any evidence to support the judge's assertion that reckless homicide driving cases were routinely getting 20-to-30-year sentences of imprisonment. Further, neither Judge Borowski nor the State explained why rising crime rates in non-fatal shooting and auto theft cases somehow properly informed the judge's sentencing discretion. At best, it seems that Judge

Borowski's logic was Valdez's sentence should deter others from engaging in non-fatal shootings and auto thefts, which makes no sense.

By relying on a presumptive, 20-to-30-year-range of imprisonment as the beginning point for its sentence calculations and on irrelevant crime data, the court's sentencing decision was improperly skewed and biased against Valdez. The fact that Judge Borowski eventually chose to impose a sentence that was lower than his stated "norm," did not show that his starting point was not distorted by his two-case survey and his concoction of a presumptive sentencing range – to a norm of 20 to 30 years. "[Y]ou know in situations where two people are killed in a driving homicide, I mean you're normally looking at a sentence in the 20 to 30-year range. Each case is different. Again, you know, but I know myself those have been sentences that I've imposed in very, very similar cases. . . ." (Transcript of Plea Hearing August 19, 2021, at 8).

Hard data, on the other hand, negated Judge Borowski's assertions. The sentencing examples and two Court Data Technologies surveys of CCAP data, with Valdez's motion for postconviction relief, undermined Judge Borowski's exaggerated "fact" statements as to the results in "most reckless driving cases" and as to "normal" sentences in driving homicide cases.

These erroneous factual assertions by Judge Borowski disclosed what inaccurate information he was relying on. "When the court's starting point is skewed a "reasonable probability" exists that its final sentence is skewed too." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014). Judge Borowski was unwilling to listen to any defense argument for a non-prison sentence; the judge made it plain to defense counsel that her sentencing argument options were far more limited: "I'm sure Ms. Tate is not going to suggest anything less than some sort of a prison sentence." (Transcript of Plea Hearing August 19, 2021, at 13).

All these statements in the transcripts of proceedings show that Judge Borowski gave "explicit attention" to inaccurate information.

CONCLUSION

Judge Borowski's errors should not have been excused merely by noting that he had intoned the *Gallion* factors, when his sentencing perspective was obviously skewed by his own, biased, comparable sentence survey and his unfounded position that the sentencing "norm" was a range of 20-to-30-years imprisonment. These were the erroneous sentencing standards to which Judge Borowski gave "explicit attention."

Also, the new, more widely distributed sentencing data that Valdez presented with his postconviction motion as a "new factor" should have caused Judge Swanson to set the matter for sentence modification to reduce Anthony Valdez's sentence. Accordingly, Anthony Valdez respectfully requests that his sentence be modified and reduced based on the accurate, objective facts, or that his sentence be vacated and set for resentencing before a judge other than Judges Borowski and Swanson.

Dated at Milwaukee, Wisconsin, July 12, 2024.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b), (bm) and (c). The length of the brief is 2,993 words.

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CERTIFICATE OF COMPLIANCE WITH RULE

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I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

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