STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,
Plaintiff- Respondent

vs.

Appeal No. 2015AP001118 CR

Case No. 2013CF003971

ANTHONY R. OWENS,
Defendant- Appellant



**ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. JEFFREY A. WAGNER, PRESIDING**

# BRIEF OF DEFENDANT- APPELLANT

Esther Cohen Lee
Attorney for Defendant- Appellant
State Bar No. 1002354

Hall, Burce and Olson, S.C.
759 N. Milwaukee St., #410
Milwaukee, WI 53202

Tel. No. (414) 273-2001

## TABLE OF CONTENTS

## TABLE OF CONTENTS OF APPENDIX

## TABLE OF AUTHORITIES

## STATEMENT OF ISSUES PRESENTED

1. Q. Did the Circuit Court err in receiving into evidence the statements allegedly made by the victim at the scene as dying declarations since the victim had not shown that he believed he had been mortally wounded and that his death was imminent when he made the statements and, therefore, did they fail to satisfy the requirements for that exception to the hearsay rule?

   A. The Circuit Court answered no.

2. Q. Had there been insufficient evidence adduced at the trial to establish the defendant's guilt, beyond a reasonable doubt, of Reckless Homicide in the second degree and Possession of a Firearm by a felon and, therefore, should the Court have granted the defense counsel's motion to dismiss these two Counts against him?

   A. The Circuit Court answered no.

3. Q. Was the defendant's total sentence of 53 years, with 39 years of initial confinement and 14 years of extended supervision unduly harsh and severe and did it constitute an erroneous exercise of the Court's sentencing discretion?

   A. The Circuit Court answered no.

## STATEMENT OF ORAL ARGUMENT AND PUBLICATION

It is not requested that this appeal be published and oral arguments are not necessary because the issues in this matter may be decided on established principles of law in the State of Wisconsin.

## STATEMENT OF THE CASE- PROCEDURAL

1. A Criminal Complaint was filed in this case on August 28, 2013 in the Circuit Court of Milwaukee County on August 28, 2013. It charged the defendant with Possession of a Firearm by a felon, repeater, on August 19, 2013 at 2211 W. Burnham Street, Milwaukee, Wisconsin. (Record R3, pp. 1-3; Appendix, pp. A1- A3).

2. The initial appearance was held on October 10, 2013, at which bail was set at $7,500. (R47, pp. 1-10). The preliminary hearing was held over a period of two days, October 21 and October 29, 2913. (R48, pp. 1-4; R 49, pp. 1-13). At the close of the hearing, the Court found probable cause to believe that a felony had been committed by the defendant and bound him over for trial.

3. The Information was not filed until November 22, 2013, charging both Possession of a Firearm by a felon, repeater, as Count 2, but adding the charge of Reckless Homicide in the first degree, use of a dangerous weapon, repeater, as Count 1. That charge alleged that the defendant had caused the death of JBP on August 19, 2013 at 2211 W. Burnham Street, Milwaukee, Wisconsin. (R6, pp. 1-2; App., pp. A4- A5).

4. The defendant was arraigned on the Information on November 22, 2013, at which he entered a plea of not guilty to both counts. (R50, pp. 1-6). On January 10, 2014, the defense filed Motions in Limine. (R8, pp. 1-3).

5. On January 24, 2014, the state filed a Motion to admit the statements of the victim under the dying declaration exception of the hearsay rule, as well as a Motion to allow the identification of the defendant as a gang member. (R10, pp. 1-11; App. pp. A6- A16). On February 10, 2014, the defense filed a Response to the State's Motion. (R10, pp. 1-3; App. pp. A17- A19).

6. On March 5, 2014, the state filed an Amended Information, charging the same two Counts as in the Information but adding that the defendant was party to a crime in regard to Count 1, charging Reckless Homicide in the first degree. (R11; pp. 1-2; App. pp. A20- A21).

7. On March 5, 2014, a Motion Hearing was held in the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Wagner, presiding, regarding the state's motion to admit the statements of the victim under the dying declaration of the hearsay rule and to admit evidence that the defendant had been a member of a gang. (R52, pp. 1- 29; App. pp. A22- A50). Officer Derek Kitts of the Milwaukee Police Department testified as to the circumstances under which he had questioned the victim and the victim's statements to him at the scene. The defense objected to the admission of the statements. However, the Court held that the statements were admissible as evidence at the trial. The Court also held that statements relating to the identification of the defendant by referring to his knick name, which included reference to his gang's name, would be admissible.

8. The case was called for trial on March 10, 2014 but adjourned because the state had not been able to procure a witness named Juiquin Pinchard, who was a cousin of the victim and who was present at the time of the incident. (R53, pp. 1-6). On March 14, 2014, Juiquin Pinchard appeared in Court and a material witness order was signed by the Court in regard to him. He was held on $10,000 bail. On March 20, Pinchard's deposition was taken in which he testified to the events that had allegedly occurred on May 28, 2011, during which his cousin had been shot and killed. (R56, pp. 1-81).

9. On April 11, 2104, defense counsel, Craig Johnson, moved to withdraw as counsel in the case, at the request of the defendant. The Court granted the motion, noting that the jury trial date was set for June 23, 2014. (R57, pp. 1-5). On April 23, 2014, Kristian Lindo,

Assistant Public Defender, appeared and indicated that he would be representing the defendant. (R58, pp. 1-4). On June 11, 2014, Mr. Lindo made a request for an adjournment of the trial. That request was granted and the trial date was set for August 11, 2014. (R59, pp. 1-5). A final pretrial conference was held on June 23, 2014. (R60, pp. 1-5).

10. On August 11, 2014, the jury trial in this matter commenced. Just before the trial was about to begin, the Court noted that two days before, he had received a letter from Attorney Kovac, requesting that he be substituted as counsel for the case but that he could not be present for the trial on August 11. The Court denied that request, stating that the trial was going to proceed as scheduled. At that point, Attorney Kovac appeared and indicated that the defendant wanted certain things investigated, including some phone call records. The Court indicated that the state would make the records available to the defense. The Court noted that Mr. Kovac had not filed a substitution of counsel notice, that there was no cause to delay the trial, and that it would not allow Mr. Kovac to be substituted as counsel. The trial then proceeded with Mr. Lindo as counsel.

11. The trial continued before the Hon. Jeffrey A. Wagner, presiding, with Grant Huebner, Assistant District Attorney, representing the state, and Kristian Lindo, Assistant Public Defender, representing the defendant. The trial continued until August 13, 2014, at which time the jury rendered its verdicts. It found the defendant guilty of both Counts. The Court ordered a presentence investigation to be conducted.

12. On October 10, 2014, the defendant appeared in the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Wagner, presiding. (R68, pp. 1-24; App. pp. A51—A74). The state was represented by Mark Williams, Assistant District Attorney, and the defendant was represented by Mr. Lindo. The Court noted that it had received the presentence investigation

report and Mr. Lindo noted certain errors in the report. Mr. Williams, who had not been the trial attorney for the state, indicated that the state was recommending a sentence, for Count 1, of 48 years, with 38 years of initial confinement and 10 years of extended supervision. He also indicated that the state was recommending a sentence of 8 years for Count 2, with 4 years of initial confinement and 4 years of extended supervision, to run consecutively. He also noted that there were restitution requests made by two people who had been involved in the incident in the amount of $6,980.05.

13. The Court sentenced the defendant to 45 years for Count 1, with 35 years of initial confinement and 10 years of extended supervision. The Court also sentenced the defendant to 8 years for Count 2, with 4 years of initial confinement and 4 years of extended supervision, to run consecutively. It also ordered restitution to be paid in the amount of $6,980.05. A Written Explanation of Determinate Sentence, dated October 10, 2014, was filed. (R33, p. 1; App. p. A75). A Judgment of Conviction was also filed on October 10, 2014. (R37, pp. 1-2; App. pp. A76- A77).

14. A Notice of Intent to pursue Postconviction Relief was filed on October 17, 2014. (R39; p. 1; App. p. A78). An Order Appointing Counsel was filed on November 11, 2014, appointing Esther Cohen Lee as appellate counsel to handle the appeal.

15. On May 15, 2015, a Postconviction Motion to Vacate the Defendant's Convictions or, in the alternative, to Vacate his Sentences and Resentence him was filed in the Circuit Court of Milwaukee County. (R41, pp. 1-24; App. pp. A79- A102). A packet containing the relevant Exhibits was also filed. (R42, pp. 1-69). Since the Postconviction Motion was in excess of 20 pages, a Motion for permission to file the Postconviction Motion in excess of 20 pages was also filed. (R43, pp. 1-2).

16. On May 22, 2015, the Circuit Court of Milwaukee County issued a Decision and Order granting the request to file the Motion in excess of 20 pages. However, it also denied the Postconviction Motion. (R44, pp. 1-2; App. pp. A103- A104).

17. A Notice of Appeal, dated June 1, 2015, was duly filed on behalf of the defendant. (R45, p. 1; App. A105). On June 4, 2015, an Order Appointing Counsel was filed, appointing Esther Cohen Lee to represent the defendant in the Court of Appeals. (R---; App. p. A106).

## STATEMENT OF THE CASE- FACTUAL

### A. The Events Leading up to the Altercation

At the trial of this matter, the victim's cousin, Juiquin Pinkard, testified to the events that led up to the shooting of the victim, JBP. He testified that at one time, the defendant and Christina Deberry were a couple and that they had a son together. (R65, p. 44). At the time of the incident, the son was four years old. (R65, p. 19). Eventually, Christina and the defendant broke up and eventually, Christina began to go with Juiquin. Christina stated that they had gone together about two years before this incident. (R65, p. 24).

On August 19, 2013, Christina said, she had been at her mother's house, about two blocks from the scene of this incident. She said that at one point, Juiquin had called her and told her that the defendant had had "words" with him over the telephone. (R65, p. 25). After she had received that call from Juiquin, she said, she went over to the house of James Lane at 2211 W. Burnham Street in Milwaukee. Lane is the uncle of both Juiquin and the victim, JBP. (R65, p. 42). Christina said that she had driven to Lane's house in her red car and that after she had parked it, she had walked over to where Juiquin was standing. She said that she was standing with her brother, Jeffrey Rimmer, and a long-time friend, Edgar Maisonet. (R65, p. 27).

Edgar testified that he had grown up in the area where Juiquin, the victim, and the defendant lived, in the area of 21st Street. (R64, p. 91). He said that the defendant was known by the nickname, "Ant". (R64, p. 88). He said that on August 19, 2013, he had been driving his truck in the area of Burnham and 22nd Street when he saw Juiquin, who flagged him down. (R64, p. 94).

## B. The Shooting of the Victim, JMP

There was a great deal of conflicting testimony about what happened after Juiquin had flagged down Edgar. Juiquin testified that after he had flagged down Edgar, he talked to Edgar about having a fight with the defendant. (R65, p. 44). Juiquin said that he told Edgar that he had heard some things about "bad blood" between the defendant and him. He said that he told Edgar to call the defendant and tell him that they should have a fist fight and then shake hands and that then it would be all over with. (R65, p. 45).

Juiquin and Edgar were then standing next to Edgar's truck on the corner of 22nd and Burnham. While they were standing there, Juiquin said, Edgar called the defendant and told him that he and Juiquin should have a fist fight with each other.

Juiquin said that when Edgar called the defendant and told him about the fist fight, the defendant told him that he did not want to go over to that area and that, instead, Juiquin should go to the area of 21st Street and Scott Street. (R65, p. 46). Juiquin, however, said that he told Edgar that he would not go over to that area and that he wanted the defendant to go to the area where he and Edgar were located. At first, Juiquin said, the defendant said no but that then he called Edgar back and said that he would go over there. (R65, p. 47). Shortly after that call, Juiquin said, the defendant called him and said, "come out here, I'm out here." (R65, p. 49).

The problem with Juiquin's testimony is that when Edgar testified at the trial, he denied that any of that happened. Edgar testified that after Juiquin had flagged him down, he had left the area in his truck for about one-half hour and that he had then returned to the area. When he returned, he said, Juiquin and JBP were both there. (R64, p. 95). He denied that Juiquin had told him to call the defendant to tell him that he wanted to have a fist fight with him. (R64, p. 105). He also denied that he had been acting as a mediator between Juiquin and the defendant. (R64,

p. 107). He further denied that the defendant had agreed to fight with Juiquin. He also denied that he had ever said anything like that to the police. (R64, p. 107).

The state then called Detective Patrick Pajot as a witness to impeach Edgar's testimony, even though Edgar had been called as a witness for the state. Pajot testified that on August 22, 2014, Edgar had been arrested and charged with obstructing justice because he kept giving inconsistent versions of what happened. (R65, p. 13). Pajot testified that Edgar had told him, on August 23, 2014, while he had been in custody on the obstructing justice charge, that while he had been driving in the area of Burnham and 23rd Street on August 19, 2014, Juiquin had flagged him down.

Pajot said that Edgar told him that Juiquin then asked Edgar to call the defendant and tell him to come to that area to fight. Pajot also said that Edgar had told him that he was acting as the mediator between Juiquin and the defendant. (R65, p. 8). Finally, Pajot testified that Edgar had told him that the defendant had called him on his cell phone about five to ten minutes before the incident had begun and that the defendant had told him he was on his way over to that area. (R65, p. 9).

In regard to the incident itself, Juiquin testified that when the defendant called him and told him to come out and that he was there, he had been standing in back of Edgar's truck on 22nd Street. Juiquin also said that Christina, her brother, Jeffrey, James Warfield (known as Dinkes), Edgar and JBP were all there with him. (R65, p. 49). He said that it was hot outside and that there were a lot of other people in the area too. (R65, p. 49).

Juiquin said that when he walked around the corner of 22nd Street and Burnham, he did not see the defendant at first but then he saw him across the street, in front of the house that was across the street from Lane's house. (R65, p. 50). When he saw the defendant, Juiquin said, he

took his shirt off because he wanted the defendant to know that he did not have a gun and that he just wanted to fight. (R65, p. 54).

Juiquin said that he then walked directly in front of Lane's house and that when he first saw the defendant, the defendant was walking down the street with two other men. (R65, p. 50). He said that he also saw a man walking on the same side of the street as Lane's house and that he was walking slowly with his head down. (R65, p. 50). When Juaquin saw that man, he said, he turned to JBP, who was standing next to him, and said, "Watch dude." (R65, p. 51).

Then, Juiquin said, he saw the defendant across the street but he could only see the upper half of him at first because there were cars parked in front of him. He also said that he saw two other men with him. (R65, p. 52). By that point, Juiquin said, he himself was standing in the street. (R65, p. 53). When Juiquin saw the defendant's upper half, he said, he could see that the defendant had a gun out. (R65, p. 53). As soon as he saw the gun, he said, he yelled, "gun, gun, he got a gun." Then, Juiquin said, the defendant started shooting. (R65, p. 55). He said that he may have seen another one of the men with a gun but that he could not be sure. (R65, p. 57).

Juiquin said that when he saw the defendant with the gun, the defendant did not have the gun pointed directly in front of him but instead at a diagonal in front of him. (R65, p. 58). When the defendant raised his gun, Juiquin said, he was not sure that he had it pointed at him but when he heard the shots being fired, he just took off running. (R65, p. 58). At that point, Juiquin said, he saw JBP shoot a gun towards the defendant and the other two men. (R65, p. 58). Juiquin insisted that he did not know that JBP had had a gun on him at that time. And he insisted that he had no reason to believe that he had had a gun on him before the incident. (R65, p. 55).

## C. Inconsistencies in the Testimony of the Prosecution Witnesses

Some of the testimony given by Juiquin, however, had not been true. On March 20, 2014, Juiquin had been taken into custody as a material witness and had been required to give a sworn deposition in open court before he could be released. He testified at the deposition that ten minutes before the incident, JBP had asked to see the hat that he had been wearing and that JBP had snatched the hat off of his head. When Juiquin grabbed the hat back, he said, he noticed that there was an outline on the shirt of JBP which he believed to be the outline of a gun. (R56, pp. 50, 53).

In any case, Juiquin testified at the trial that he had seen the defendant and two other men walk towards him across the street. (R65, p. 56). However, at the deposition, he testified that there had been only one other person with the defendant- a man with dreadlocks. (R56, pp. 29, 30). At the trial, Juiquin admitted that prior to the trial, he had watched a video of the incident which had shown that there had actually been two men with the defendant. He said that it could not been seen on the video who the men had been and he did not recognize the two men. (R65, p. 66).

There was yet another large inconsistency in the testimony of the state's witnesses. One of the men who had been standing with Juiquin and JBP at the start of this incident was James Warfield, another cousin of theirs. Warfield had been called by the state to corroborate Juiquin's testimony but in the end, he had given such false testimony that the state felt obliged to call a police officer who had interviewed him after the incident to impeach his testimony.

Warfield testified at the trial that at the time of the incident, he lived in the home of his father, James Long, at 2206 Burnham. He said that he had been in the bathroom, shaving, when he heard an argument. (R64, p. 101). When he went downstairs, he said, he heard someone

saying, "This is Ant doing this to you all." Then, he said, he heard gunshots. (R64, p. 102). He then ran outside, he said, and saw a man with dreadlocks and a "caramel complexion" and a black hoodie and another man standing at the hood of a car. (R64, p. 104). He said he saw the defendant squatting down in front of a red car. (R64, p. 109).

Warfield also testified that he saw JBP leave the sidewalk area and walk onto the street. He said that he also saw JBP trading gunfire with these other men. (R63, p. 105). Then, he said, he saw JBP lying on the street. (R63, p. 106). He said that he had seen the defendant start shooting a gun before JBP fell onto the street. (R63, p. 117). He also said that when he saw the defendant, the defendant was on the other side of the street, ducking down by a parked car. (R63, p. 118).

The problem with Warfield's testimony is that it was completely contradicted by the story he had told the police right after the incident. His testimony at the trial was so incredible that immediately after he had testified, the state felt compelled to call as a witness Officer Michael Walisiewicz, who had taken the statement from Warfield, in order to impeach Warfield, even though he had been the state's own witness. Walisiewicz testified that after the incident, Warfield had told him that he had not come down the stairs of his house until after he had heard the gunshots. (R63, p. 121).

When he got outside, Walisiwicz said that Warfield told him he had seen JBP lying in the middle of the street and that he had seen two people running. (R63, p. 122). He also told him that one of the two men who he had seen running had dreadlocks and that the other man was shorter, wearing dark clothing. (R63, p. 124).

Walisiewicz said that Warfield never told him that he had seem JBP with a gun or that he had seen JBP engage in a gunfight. (R63, pp. 123, 125). He also said that Warfield had never

said that he had seen anyone shooting or that he had heard a man say, "This is Ant doing this to you." (R63, p. 129). In other words, as shown by Officer Walisiewicz' testimony, Warfield's trial testimony was a complete falsification and in no way corroborated Juiquin's trial testimony.

**D. The Circumstances Surrounding the Statements Made by the Victim at the Scene**

Once JBP had fallen, Juiquin testified that he had run around the corner but that he had then turned back to the scene. He said that he ran over to JBP and that JBP was saying that he could not breathe. (R65, p. 75). He said that he and someone else picked up JBP from the middle of the street and took him over to the area of Christina's red car. (R65, p. 75).

Officer Derrick Kitts, who was on bicycle patrol, was the first officer to arrive at the scene. He testified twice about his encounter with the victim who was lying on the sidewalk. He testified at the hearing that was held on March 5, 201 regarding the issue of whether the victim's statements should be received as a dying declaration and he testified at the trial.

At the hearing, Kitts testified that when he had gone over to the victim, he noticed that he had been shot in the chest and was pale and gasping for breath. (R52, p. 7; App. p. A28). He said that he asked the victim if he could speak to him and that the victim had nodded yes. The victim kept closing his eyes and seemed to go in and out of consciousness, he said. (R52, p. 8; App. p. A29). Kitts said that he kept yelling at the victim and tapping his shoulders and chest to try to arouse him. Kitts said that he told the victim "something to the effect, don't die on me, to wake up, and look at me." (R52, p. 9; App. p. A30).

Then, Kitts said, he asked him, "Who shot you?" Kitt said the victim mumbled something he could not understand. (R52, p. 9; App. p. A30). Then, Kitts said, he asked him that again and leaned closer to him. That time, he said, he heard the victim say, "Anthony." (R52, p. 9; App. p.

A30). Then, Kitts said, the victim began to lose consciousness and he aroused him again. This time, Kitts said, he asked him whether he knew the street name for Anthony and at that point, the victim said, "Lil Ant". (R52, p. 9; App. p. A30).

Officer Arzaga was nearby and overheard what the victim had said. Arzaga was familiar with the names of the gangs in Milwaukee and he asked the victim, "LF Lil Ant?", the LF meaning the La Familia street gang. (R52, p. 10; App. p. A31). The victim answered, "no", and then he said "Two One", meaning the 21st Street gang. (R52, p. 10; App. p. A31). At the trial, in order not to bring in the issue of gangs, it was stipulated that the defendant was known as "2-1 Lil Ant" but that no reference would be made as to the meaning of "2-1". (R62, p. 23).

During this time, Kitts said, the victim's condition was getting progressively worse and he was gasping for air. After that , the EMT's arrived and took over the life saving measures. (R52, p. 11; App. p. A32). After the victim had been placed in the ambulance, he died in the ambulance on the way to the hospital. (R63, p. 30).

## E. The Medical and Ballistics Evidence

Dr. Brian Linert conducted the autopsy on the victim and found that he had died of a gunshot wound to the chest and abdomen. (R65, p. 102). The victim was found to have a blood alcohol level of .09 and also had marijuana in his system. (R65, pp. 102-103).

The ballistics expert, Erik Gunderson, testified that three guns had been used in this incident- one .40 caliber Smith and Wessen and two 9 millimeter weapons. (R65, pp. 48, 69). He said that the ballistic evidence did not show who had done the shooting or who had begun the shooting. (R63, p. 91).

The firearm examiner, Mike Simonson, also testified that the ballistics evidence had not shown who had fired the guns that had been used nor where the persons who had used them had been standing. (R64, p. 66, pp. 11-12). He noted that three guns had been used but that the only gun that had been recovered had been the .40 caliber Smith and Wesson handgun. (R64, p. 66). In his closing argument, the prosecutor stated that that gun had been the one that had been used by the victim. (R66, p. 35). The other two guns had never been recovered.

## F. The Verdicts and Sentencing

On August 3, 2014, the jury rendered its verdicts, finding the defendant guilty of both Reckless Homicide in the first degree and Possession of a Firearm by a felon. (R67, pp. 2-3).

The sentencing hearing was held on October 10, 2014, the Hon. Jeffrey A. Wagner, presiding. For some reason, Mark Williams, Assistant District Attorney, represented the state at the hearing rather than Mr. Huebner. The defendant was represented by Mr. Lindo. The Court noted that it had received the presentence report.

The state recommended a sentence of 48 years for his conviction for Reckless Homicide in the first degree, with 38 years of initial confinement and 10 years of extended supervision. It also recommended that the defendant be sentenced to 8 years for his conviction for Possession of a Firearm by a felon, with 4 years of initial confinement and 4 years of extended supervision, with the two sentences to run consecutively. (R68, pp. 3-4; App. pp. A53-54).

In pronouncing the sentences, the Court set forth its reasons for the sentences. The Court noted that Juiquin had gone there to participate in a fist fight and that instead, the defendant had brought weapons to the fight. (R68, p. 19; App. p. A69). The Court also noted that the defendant had a lengthy criminal record and that his life had been consumed with the use of

drugs and taking things from others. (R68, p. 20; App. p. A70). The Court noted that based on his record, his limited acknowledgment of the gravity of his actions, and his continued use of alcohol and marijuana, he was at a high risk to reoffend. (R68, p. 20, App. p. A70).

For that reason, the Court concluded that a prison sentence was warranted. (R68, p. 21; App. p. A71). The Court also noted that a long prison sentence was necessary as a punitive measure, based on his criminal history and because of his callous attitude toward human life. (R68, p. 23; App. p. A73). The Court then sentenced the defendant to a bifurcated sentence of 45 years in regard to the defendant's conviction for Reckless Homicide in the first degree, with 35 years of initial confinement and 10 years of extended supervision. (R68, p. 23; App. p. A73).

The Court also sentenced him to a bifurcated sentence of 8 years for his conviction for Possession of a Firearm by a felon, with 4 years of initial confinement and 4 years of extended supervision. The Court further ordered the two sentences to run consecutively. (R68, p. 23, App. p. A73). The total sentence was, therefore, 53 years. A Judgment of Conviction was filed on October 10, 2014. (R37, pp. 1-2; App. pp. A76- A77).

## POINT I

**THE CIRCUIT COURT ERRED IN RECEIVING INTO EVIDENCE THE STATEMENTS ALLEGEDLY MADE BY THE VICTIM AT THE SCENE AS DYING DECLARATIONS SINCE THE VICTIM HAD NOT SHOWN THAT HE BELIEVED HE HAD BEEN MORTALLY WOUNDED AND THAT HIS DEATH WAS IMMINENT WHEN HE MADE THE STATEMENTS AND, THEREFORE, THEY DID NOT SATISFY THE REQUIRMENTS FOR THAT EXCEPTION TO THE HEARSAY RULE.**

A dying declaration is defined in §908.045(3) as, "A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death." Such a declaration is hersay because it is made by a witness who is unavailable to testify at trial due to death. §908.04(1)(d).

It is also hearsay because it is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." §908.01(3). Such a declaration has been deemed by statute not to be excluded by the hearsay rule. §908.045.

In 1930, the Wisconsin Supreme Court, in *Oehler v. State,* 202 Wis.2d 530, 534, set forth the rule, based on the rule stated in Wigmore on Evidence, that, "Statements of the victim of a homicide cannot be received as a dying declaration unless they are made in belief of impending death." The Court further held that, "such belief, however, may be inferred not only from the statement of the deceased that he so believed, but from the nature of the wound and the fact that death did in fact follow shortly after the statement was made." Id. at 534.

Again, in 1939, the Court, in *Schlesk v. State*, 232 Wis.2d 510,518, held that it is also important that the witness, who was a female in that case, be sufficiently conscious at the time the statements had been made that she understood the questions put to her and that she could intelligently answer them. Id. at 518. In that case, the witness had told her doctor that she knew

that she was very sick and that she was about to die. The Court held that the witness' statements were admissible as dying declarations. Id. at 519.

More recently, the Court of Appeals more clearly defined statements that could be considered dying declarations in *State v. Beauchamp*, 2010 WI App 42, 324 Wis. 2d 162, 781 N.W.2d 254. *Beauchamp* dealt with both the constitutional and statutory aspects of dying declarations. The Court noted that the Confrontation Clause of the Sixth Amendment of the United States Constitution and Article I, §7 of the Constitution of the State of Wisconsin, "guarantee criminal defendants the right to confront witnesses against them." Id. at 171. The Court, citing *Giles v. California,* 554 U.S. 353, 358, 128 S. Ct. 2678, 2682 (2008), held that the constitutional right of confrontation does not apply "where an exception to the confrontation right was recognized at the time of the founding of the Republic." Id. at 172. The Court noted that at common law, "declarations made by a speaker who was both on the brink and *aware* that he was dying "were admissible testimonial statements even though they were unconfronted." Id. at 172.

In *Beauchamp*, the witness had been shot five times and told the EMT's who had been treating him that he knew he was about to die and he begged them not to let him die. Id. at 167. He told the EMT's at the scene and in the ambulance on the way to the hospital that the name of the person who had shot him was "Marvin". He also gave a police officer that name when the officer asked him at the hospital who had shot him. He died shortly after that. Id. at 169. The Court of Appeals, affirming the decision of the Circuit Court, held that, in light of all of the circumstances in the case, the witness' statements were admissible as dying declarations. Id. at 171.

In this case, after holding a hearing to determine the admissibility of the victim's statements to Officer Derek Kitt as dying declarations, defense counsel argued that there had not been any testimony in the record to show that the victim believed that he was about to die when he made those statements about "Lil Al" having been the person who had shot him. Therefore, he argued, the statements were inadmissible hearsay. Specifically, defense counsel, Mr. Johnson, argued that the declarant has to be under the "belief that they're about to die, to put it bluntly." He continued:

> There's nothing in this record that would lead someone to believe that Mr. P. had that belief at the time he made these statements. Its true he had been shot, it's true that he was injured, and it's true that the police officer was telling him to stay conscious and to provide information with who shot him.
>
> But there was no statement from any medical person, any medical personnel or even EMT- trained personnel that he was badly injured, that he was in any way mortally injured.
>
> The only statement that was made by the police officer to Mr. P. before the objectionable statements were made is that he looked pale. And that apparently later he was told he needed to stay with him, stay with us, or words to that effect. But there's no statement by Mr. P. ( R52, p. 21; App. p. A42).

When the Court stated, "There doesn't have to be, does there?", Mr. Johnson answered, "There doesn't have to be a statement, but there has to be some evidence that he believed that he was in danger of dying. That's the whole idea behind dying declarations." (R52, pp. 21-22; App. pp. A42-A43). He further argued that, "The standard is there has to be a belief of imminent death. And there's no evidence that that standard has been met here." (R52, p. 22; App. P. A43).

In the end, the Court held that when the officer arrived at the scene, he noticed that the victim had been shot and that he "apparently had trouble breathing. He was gasping for air. His eyes had closed multiple times." (R52, p. 23; App. p. A44). The Court noted that the officer had

tried to arouse the victim but had been unsuccessful. The Court also noted that the officer had gotten some responses from the victim as to "who may have committed the alleged offense." (R52, pp. 23-24; App. pp. A44- A45). The Court also said that the officer had stated that the victim had gone "in and out of consciousness at the time that the statement was made", that "there was obviously a significant injury", that first aid had been attempted, and that the victim looked pale. (R52, p. 24; App. p. A45).

The Court concluded that, "And the nature and extent of those wounds certainly was a circumstance for this court to consider." It noted that in *Beauchamp,* the Court had held that, "Belief of an impending death may be made to appear from what the injured person said or from the nature and extent of the wounds inflicted being obviously such that he must have felt or known that he could not survive." (R52, p. 25; App. p. A46). Based upon the entire record in the case, the Court held that it believed that "the declaration by the deceased falls under that exception to the hearsay rule and is admissible as such." (R52, p. 25; App. p. A46).

In the Postconviction Motion, it was noted that in order to be admissible as an exception to the hearsay rule, §908.045(6) requires that all statements that would otherwise by considered hearsay must have "guarantees of trustworthiness". It was argued that the problem with the Court's ruling in this case was that the victim's statements could not be considered sufficiently trustworthy because the victim had neither indicated that he knew he was about to die or that he understood the serious nature of his wound and that he knew he could not survive.

Another factor in this case was that there had been no evidence to prove, beyond a reasonable doubt, that it had been the defendant who had actually shot the victim. As the prosecutor himself stated in his closing arguments, although the state could prove that it had been a 9 millimeter gun that had been used to shoot the victim, the state could not prove which of the

two 9 millimeter guns used in the incident had shot the victim. Further, he said, that "we may never know that." (R66, p. 39). In other words, there was no evidence to establish the trustworthiness of the victim's statements.

In its Decision and Order, denying the Postconviction Motion, the Court held that, for the reasons set forth in the state's motion and brief, filed January 24, 2014, it was standing by the oral ruling it had made at the hearing that had been held on March 5, 2014. (R44, p. 2; App. p. A104). The state's motion and brief, citing *Beauchamp,* had argued that the victim's statements had been dying declarations and that their receipt into evidence had not violated the Confrontation Clause.

However, as it was argued in the Postconviction Motion, by admitting the victim's statements as dying declarations, the Court had denied the defendant of his constitutional right to confrontation. The only reason that dying declarations are considered to be sufficiently trustworthy to allow a jury to consider them is because of the ancient belief that a dying person would not accuse someone falsely if he knew he was about to die. If that element is missing, then the statements may not properly be considered trustworthy. Since the jury was bound to accept the victim's statements as being the most important evidence of the defendant's guilt in the case, it had been essential that the statements be shown to have been made by a person who believed he was about to die when he made them.

In fact, in all of the cases involving rulings that the victim's statements had been dying declarations, there had been evidence that the victim had made some sort of statement or given some indication that he knew that his wounds were serious enough that he believed he was about to die. Since there was no such evidence in this case, the Circuit Court erred in ruling that the

statements were admissible at the jury trial and by admitting them at the trial. The defendant, therefore, is entitled to have his convictions reversed and a new trial ordered.

## POINT II

**THERE WAS INSUFFICEINT CREDIBLE EVIDENCE ADDUCED AT THE TRIAL TO ESTABLISH THE DEFENDANT'S GUILT, BEYOND A REASONABLE DOUBT, OF RECKLESS HOMICIDE IN THE SECOND DEGREE AND POSSESSION OF A FIREARM BY A FELON, AND, THEREFORE, THE COURT SHOULD HAVE GRANTED THE DEFENSE COUNSEL'S MOTION TO DISMISS THESE TWO COUNTS AGAINST HIM.**

The basic rule regarding the standard of review to determine the sufficiency of the evidence to sustain a conviction was set forth by the Wisconsin Supreme Court in *State v. Poellinger,* 153, Wis.2d 493 (1990). The Court held that the standard of review in both direct and circumstantial evidence cases is whether, viewing the evidence in the light most favorable to the state, it is "so insufficient in probative value and force that it can be said, as a matter of law, that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." Id. at 501.

The Court also held that, in regard to the determination of the credibility of the witnesses who testified at a jury trial, it is the "function of the jury to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved." Id. at 503. The Court continued, "The jury can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence." Id. at 503.

Therefore, the standard of review upon appeal, the Court held, is whether the court "can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true " that it could find the defendant guilty beyond a reasonable doubt." Id. at 501.

The Court also held that, in regard to the determination of the credibility of the witnesses who testified at a jury trial, it is the "function of the jury to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved." Id. at 503. The Court

continued, "The jury can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence." Id. at 503.

Therefore, the standard of review upon appeal, the Court held, is whether the court "can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true" that it could find the defendant guilty beyond a reasonable doubt." Id. at 504. The Court further held that it is the function of the jury "to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 506. Finally, the Court held that, "In viewing the evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, within bounds of reason, reject that inference which is consistent with the innocence of the accused." Id. at 506.

The Court reaffirmed the standard of review for the sufficiency of evidence set forth in *Poellinger* in *State v. Smith*, 2012 WI 91, 342 Wis.2d 710,728, 817 N.W.2d 410. The Court also held that in making its determination, the jury is entitled to view all of the evidence "as a whole". The Court held that, "The rational juror would take into account the entire picture presented by the evidence in ascertaining guilt or innocence. Such a jury would not find any single piece of evidence determinative, but would rather consider the evidence in the aggregate." Id. at 732.

It was argued in the Postconviction Motion that, viewing the evidence in the light most favorable to the state and viewing the evidence as a whole, no jury, acting reasonably could have found that the defendant had been guilty beyond a reasonable doubt of the crimes charge. There were not only conflicting stories given by the state's witnesses, many of these witnesses had given such incredible evidence, under oath before the jury, that the state felt compelled to call police officers to impeach their testimony. And, as set forth above, even the statement made by

the victim to a police officer before he died, which should not have been heard at all by the jurors, were untrustworthy.

The witnesses who testified at the trial that they had been at the scene of the incident and had seen some of things that had happened were, in order of their testimony, James Warfield, Edgar Maisonet, Christina Deberry, and Juiquin Pinkard.

**1. The testimony of James Warfield**

James Warfield had testified, under oath, that he had gone downstairs in his house (Lane's house) before the shooting had begun and had heard someone say, "This is Ant doing this to you all." Then, he said, he heard gunshots and when he went outside, he saw a man with dreadlocks and another man standing near the hood of a car. (R64,. 104). He said that he also saw the defendant squatting in front of a red car and that he then saw JBP walk onto the street, trading gunfire with these men. (R64, p. 105). He also said that he saw the defendant shooting before JBP fell to the ground. (R64, p. 117).

Warfield's testimony, however, had been completely false, as the state itself pointed out by calling Officer Walisiewicz to testify about the statement that Warfield had given to him shortly after the incident. The officer said that Warfield had told him that he had not come downstairs until he had heard gunshots and that when he went outside, he had seen JBP lying in the street. (R63, p. 121).

He also told the officer that he had seen two people running- one with dreadlocks and the other wearing dark clothing. (R63. p. 124). The officer never told him that he had ever seen JBP with a gun or that he had seen him shooting. He also said Warfield had never told him he had seen anyone running. (R63, pp. 123, 125). Finally, the officer said that Warfield never told him

that he had heard anyone make any remark about this being "Ant" doing this. (R63, p. 129). Warfield's testimony at the trial, then, had to be completely discounted as being an absolute lie.

**2.The Testimony of Edgar Maisonet**

Edgar Maisonet also gave completely false testimony as shown by the fact that after he had testified, under oath, the state once again felt compelled to call a police officer to testify about the statement that Edgar had given to him after the incident. When Edgar testified at the trial, he completely denied that Juiquin had called him to tell him he wanted to have a fist fight with the defendant and he denied that he had been the mediator between the two of them. He also denied that the defendant had agreed to fight with Juiquin. (R64, pp. 105, 107).

The state felt compelled to impeach that testimony by calling Officer Pajot to testify about the statement that Edgar had given to him while he had been in custody, having been arrested for obstruction of justice for giving contradictory stories to the police. The officer testified that Edgar had told him that Juiquin had asked him to call the defendant to tell him that he wanted him to come to that area for a fight and that he, Edgar, was acting as a mediator between Juiquin and the defendant. (R65, p. 8).

The officer also said that Edgar had told him that the defendant had called him five to ten minutes before the incident to tell him that he was on his way over to that area. (R65, p. 9). Once again, Edgar's trial testimony had to be discounted as an absolute lie.

**3. The Testimony of Christina Deberry**

Christina Deberry did not at all implicate the defendant in this incident. She testified that Juiquin had called her while she was at her mother's house, saying that he and the defendant had had "words" over the phone. She then stated that she had driven over to Lane's house in her red car and that when she got there, she had stood next to Edgar. (R65, p. 27). While she was

standing there, she said, she heard Edgar get a telephone call but she did not know who it was from or what was said. (R65, p. 30). After that call, she said, she left the area and as she was going home, she heard gunshots. She said that she did not look back to see what happened. (R65, p. 31). Her testimony, then, did not establish that the defendant had been at the scene or that he had participated in any shooting.

**4. The Testimony of Juiquin Pinkard**

Juiquin Pinkard testified at the trial that he had seen the defendant walking down the street with two men and that another man was walking on the same side of the street as Lane's house. (R65, p. 56). He said that he had seen the defendant across the street but that he had only seen half of him, with the other half of him hidden by some parked cars. (R65, p. 52). He also said that when he saw the defendant, the defendant had a gun out. (R65, p. 53). When he saw the gun, he said, he yelled that the defendant had a gun and yelled, "gun, gun, he got a gun". Then, Juiquin said, the defendant started shooting. (R65, p. 55). He insisted that he did not know that JBP had gun on him. (R65, p. 55).

However, in the deposition that he gave before trial, Juiquin had given a different story as to several aspects of his testimony which showed that his trial testimony was untrustworthy. He testified at the deposition before trial that about ten minutes before the incident, he had become aware that JBP had a gun on him. He said that when JBP had grabbed his hat and he had grabbed it back, he had seen the outline of a gun on the shirt of JBP. (R56, pp. 31-32). Juiquin, then, was fully aware that JBP had been armed with a gun when the incident had begun and his testimony to the contrary at the trial was a complete lie.

Further, when Juiquin testified at the deposition, he admitted that he had only seen one man walking with the defendant but that he had changed his story after he had had a chance to

view the video of the incident before the trial had begun. (R65, p. 64). Once he had seen that video, he said, he changed his story and stated that there had been two men walking with the defendant.

**5. The Overall Lack of Credible Evidence**

In denying the Postconviction Motion, the Circuit Court held that,"The jury was the finder of fact, and based on the evidence, the Court is satisfied that sufficient evidence exists to support the jury's verdict in this case." (R44, p. 2; App. p. A104).

Indeed, the rules require the jury to make determinations of the credibility of the witnesses. However, that determination must be within the bounds of reason. In this case, it was argued in the Postconviction Motion that due to the incredibility of two of the state's witnesses, James Warfield and Edgar Maisonet, as shown by the fact that the state felt compelled to impeach their trial testimony with law enforcement witnesses, and due to the untrustworthiness of the testimony of Juiquin Pinkard, as well as the untrustworthiness of the statements made by the victim to the police officer, the jury, acting reasonably, could not have found the defendant guilty beyond a reasonable doubt.

At the close of the trial, defense counsel moved to dismiss the two Counts as having been insufficient to establish guilt beyond a reasonable doubt. The Court denied the motion. (R66, p.4). For the reasons set forth herein, the Court erred in denying the motion at the close of the trial and in denying the Postconviction Motion made on that ground. The defendant was, therefore, entitled to have his convictions reversed and the charges dismissed.

## POINT III

**THE TOTAL SENTENCE OF THE DEFENDANT OF 53 YEARS WITH 39 YEARS OF INITIAL CONFINEMENT AND 14 YEARS OF EXTENDED SUPERVISION WAS UNDULY HARSH AND SEVERE AND CONSTITUTED AN ERRONEOUS EXERCISE OF THE COURT'S SENTENCING DISCRETION.**

In sentencing a defendant, the Court is required to take into account many factors, including the seriousness of the crime, the need to punish the defendant and the need to protect the public. However, the Court must also take into account the possibility that the defendant could be rehabilitated and to that end, must state on the record its reasons for believing that the amout of prison time imposed is necessary, in part, to rehabilitate him. In *McCleary v. State,* 49 Wis. 2d 263, 182 N.W. 2d 512 (1971), the Wisconsin Supreme Court set forth many of the factors that the Court is to take into account in making its sentencing determination and set forth the requirement that it state, on the record, its reasons for the sentence imposed.

The Court held that, "In light of the function of the law to deter similar acts by the defendant and others and to rehabilitate the individual defendant, it is essential that a sentencing court consider the nature of the particular crime… and the personality of the criminal." Id. at 272. The Court further held that, "The sentencing imposed in each case should 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." Id. at 276

In *State v. Gallion,* 2004 WI 42, 270 Wis.2d 535, 544, 678 N.W. 2d 197, the Court stated that in the wake of the truth in sentencing legislation, it was reaffirming the directives set forth in *McCleary* and noted that 973.017(10m) had codified that aspect of *McCleary* that required that, "The court shall state the reasons for its sentencing decision and … shall do so in open court and on the record." The Court once again stated that relevant factors to be discussed at the

sentencing, including "(1) the gravity of the offense, (2) the character and rehabilitative needs of Gallion, and (3) the need to protect the community." Id. at 547.

In this case, at the sentencing hearing, although the Court mentioned that the three goals of sentencing are punishment, deterrence and rehabilitation, it never stated why it felt it would take 53 years to rehabilitate the defendant, with 39 years of that to be spent in prison. It was argued in the Postconviction Motion that in *Gallion,* the Court noted that under the truth in sentencing statutes, since the sentencing Court would now make the sole determination as to the amount of time the defendant spent in prison and since the parole board is no longer in place to make a determination as to when the defendant has been rehabilitated, it is all the more important for the Court to discuss the issue of rehabilitation at the sentencing. Id. at 553.

It was also noted in the Postconviction Motion that the issue of rehabilitation is required to be discussed in the presentence investigation report prepared by the agent of the Department of Corrections. In *State v. Greve*, 2004 WI 69, 272 Wis.2d 444, 455, 681 N.W. 2d 479, the Court noted that one of the categories that the agent is required to set forth in the report, in accordance with Wis. Admin. Code DOC 328.27(3)(d), is a "tentative corrections plan, unless waived by the staff member's supervisor." In this case, although the agent had prepared an extensive presentence investigation report, she failed to state any corrections plan.

In this case, at the sentencing hearing, the Court noted that the factors it was taking into account were the nature of the offense, the defendant's character, and the rights of the victim and the community. (R68, p. 18; App. p. A68). The Court also set forth specific factors that it took into account including:

> And the court also takes into consideration any past record of criminal offenses, any history of undesirable behavior patterns, your personality, character, and social traits, the results of the presentence investigation which the court will make a part of the sentencing record, the vicious or

> aggravated nature of the offense, your degree of culpability, your age, educational background, employment history, your remorse and repence and cooperativeness, your need for close rehabilitative control and the rights of the public. (R68, p. 18; App. p. A68).

Having noted that rehabilitation of the defendant was a factor that the Court was required to take into account in making the sentencing determination, it was argued in the Postconviction Motion that the Court failed to state any reason why the extremely lengthy sentence was required to rehabilitate this 27 year old defendant.

The Court had noted that the defendant had ten convictions. Three of the convictions were when he was a juvenile – twice for driving a vehicle without the owner's consent and once for fleeing an officer during one of these incidents. Four of the convictions were for possession of marijuana and cocaine. (Presentence Investigation Report, p. 5). The only serious convictions were three convictions for the same incident in 2006 – for Possession of a Firearm by a felon, Carrying a Concealed Weapon and Possession of a Dangerous Weapon by a person under the age of 18. (PSI, p. 5).

In its Decision, denying the Postconviction Motion, the Court stated that the defendant had these ten convictions and adjudications and "have been given numerous opportunities to conform his conduct in the past." The Court described him as an "habitual criminal". (R44, p. 2; App. p. A104). The Court also stated that, "The court imposed a substantial sentence for the protection of the public, as well as for his own punishment and the deterrence of others." The Court concluded that, "It perceives no erroneous exercise of sentencing discretion and denies the defendant's request for modification or resentencing." (R44, p. 2; App. p. A104).

Even in its Decision, the Court failed to acknowledge that rehabilitation was a factor that it had been required to take into account. Never in its statements at the sentencing hearing or even in its statements in its Decision denying the Postconviction Motion had the Court set forth

its reasons on the record that it was necessary to sentence the defendant to 53 years in order to accomplish the sentencing goal of rehabilitation. For all of these reasons, the defendant is entitled to have his total sentence reversed and to be resentenced, with the goal of rehabilitation taken into account in the sentencing determination.

## CONCLUSION

The defendant respectfully requests his convictions for Reckless Homicide in the second degree and Possession of a Firearm by a felon by reversed and the charges dismissed. If the Court fails to dismiss the charges, the defendant respectfully requests that his convictions be reversed and that a new trial be ordered. In the alternative, if the Court fails to reverse the defendant's two convictions, he respectfully requests that his total sentence be reversed and that he be resentenced.

Dated: August 18, 2015
Milwaukee, Wisconsin

Esther Cohen Lee
Attorney for Defendant- Appellant
State Bar No 1002354

Hall, Burce and Olson, S.C.
759 N. Milwaukee Street, #410
Milwaukee, WI 53202

Tel: (414) 273-2001

## CERTIFICATION AS TO FORM AND LENGTH

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

The brief contains 9,854 words.

Dated: August 18, 2015

Esther Cohen Lee
Attorney for Defendant-Appellant

## CERTIFICATION AS TO COMPLIANCE WITH RULE 809.19(12)

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) Wis. Stats. 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 paper copies of this brief filed with the court and served on all opposing parties.

Dated: August 18, 2015

Esther Cohen Lee
Attorney for Defendant- Appellant
State Bar No. 1002354

Hall, Burce and Olson, S.C.
759 N. Milwaukee St. #410
Milwaukee, Wisconsin 53202

Tel. No. (414) 273-2001