

05-0018

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT I

Case No. 05-0018-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRANDON E. JONES,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM THE ORDER OF
RECONFINEMENT AFTER REVOCATION OF
EXTENDED SUPERVISION ENTERED IN
MILWAUKEE COUNTY, HONORABLE TIMOTHY
DUGAN PRESIDING, AND DENIAL OF
POSTCONVICTION RELIEF, HONORABLE JOHN
SIEFERT PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the trial court erroneously exercise its discretion when it failed to provide reasons for the particular length of reconfinement it imposed?

The trial court answered: No.

2. Did the trial court err when it reconfined Mr. Jones without first reviewing the original sentencing transcript, presentence investigation report or the Department of Corrections' court memo?

The trial court answered: No. Judge Seifert ruled that the requirements of *State v. Reynolds*, 2002 WI App 15, 249 Wis. 2d 798, 643 N.W.2d 165 (Ct. App. 2002), pertain only to a sentencing after revocation of probation, and not reconfinement hearings. (24:2)

POSITION ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant Brandon E. Jones does not request oral argument because this written brief fully meets the issues presented on appeal. Publication of this decision may be warranted to fully explain the obligations of the trial court at reconfinement hearings where the judge conducting the reconfinement hearing is different than the judge who presided at the original sentencing hearing.

STATEMENT OF THE CASE

On February 9, 2001, a complaint was filed charging Mr. Jones with one count of manufacturing/delivering a controlled substance – tetrahydrocannabinols (marijuana), contrary to sec. 961.41(1)(h)1, Stat. (2) Mr. Jones waived preliminary hearing on February 14, 2001, (6) and an information was filed with the same charge as the complaint. (5)

Mr. Jones entered a plea of guilty before the trial court, the Honorable Judge Jacqueline D. Schellinger presiding, on April 2, 2001. (7) A Pre-Sentence Investigation report was ordered on May 30, 2001. (8) Judge Schelling sentenced Mr. Jones on July 20, 2001 to 14 months initial confinement and 24 months extended

supervision. (9) (27:14) On March 10, 2004 the Department of Corrections filed a notice of violation and Mr. Jones waived his right to a revocation hearing. (15)

A revocation order and warrant was filed and Mr. Jones' case was assigned to Judge Timothy Dugan for a reconfinement hearing. (16) The hearing was held April 23, 2004 and Mr. Jones, represented by Attorney Lori Schmitz, was ordered reconfinement in prison for two years. (18) (28:10)

Mr. Jones timely filed a Notice of Intent to Pursue Postconviction Relief. (21) He filed a postconviction motion on December 8, 2004 seeking resentencing or a modification of his reconfinement sentence. (23) The trial court, the Honorable John Seifert presiding, denied his request the next day. (24) Mr. Jones timely filed a Notice of Appeal (25) and appeals from the order for reconfinement and the denial of his postconviction motion

STATEMENT OF FACTS

On April 22, 2004, Mr. Jones pleaded guilty to one count of delivery of a controlled substance – tetrahydrocannabinols (marijuana) (500 grams or less). (7) Pursuant to plea negotiations, the state recommended 14 months of initial confinement followed by 24 months of extended supervision, which the court followed. (27:14)

In fashioning its sentence, Judge Schellinger reviewed the Pre-Sentence Investigation report, which she acknowledged was “fairly comprehensive,” (27:4) and listened to Mr. Jones’ extensive statements. (27:9-12). The court noted that the purpose of sentencing was to protect the public. (27:12) “And in that regard, we need to recognize the severity of the offense, as well as both aggravating and mitigating factors that tend, that

attends to the offense and the defendant as a human being.” (27:12)

Judge Schellinger commented on Mr. Jones’ history of taking responsibility, his history on supervision and his willingness to take responsibility in the instant case. (27:13-14) The court acknowledged that the Department of Corrections’ recommendation was higher than that of the District Attorney, but decided to follow the lower of the two recommendations because Mr. Jones “came to justice early[.]” (27:14)

The Department of Corrections filed a notice of violation on March 10, 2004 and Mr. Jones waived his right to a revocation hearing. (15) A reconfinement hearing was held April 23, 2004 and Mr. Jones was represented by counsel.

Mr. Jones was revoked for behavior that occurred between August 2003 and January 2004. (27:2) The Department of Corrections recommended reconfining Mr. Jones for seven months and six days. (27:3) The state, however, recommended that Mr. Jones be confined for the entire two years available. (27:3) The state based its recommendation on the violations alleged by the Department of Corrections in its memo. (27:3-4).

Mr. Jones submitted a letter of recommendation to the court for consideration, which explained that he was a very hard worker. (27:5-6) Mr. Jones did not challenge revocation. (27:6) He obtained a high school diploma and an associate’s degree in auto detailing while he was on extended supervision (27:7) Mr. Jones requested the court weigh these positive aspects of his time on extended supervision against the negative aspects, and requested that the court impose House of Correction time, allowing him to continue to work (27:7). Mr. Jones acknowledged his poor decision-making and asked the court to consider his progress. (28:7-8)

In reconfining Mr. Jones to the maximum, the court acknowledged only Mr. Jones “abysmal” conduct on supervision. (27:9) The court interpreted this conduct to reveal that Mr. Jones would only be rehabilitated if he was in a structured confined setting. (27:10)

It just seems that the defendant is unwilling to be supervised in the community. And unfortunately what that reflects in that if he’s going to rehabilitate himself, it’s going to have to be done in a structured confined setting.

And to that extend, the court then is going to order that the defendant be reconfined for a period of two years. (27:10)

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION BECAUSE IT FAILED TO PROVIDE REASONS FOR IMPOSING THE MAXIMUM AMOUNT OF RECONFINEMENT

Trial courts wholly control the amount of time a defendant will spend in confinement and under supervision, and recognizing such, the Wisconsin Supreme Court recently emphasized the long-held principles of *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (Wis. 1971), requiring the importance of the trial court’s explanation of a particular sentence. *See State v. Gallion*, 2004 WI 42 ¶ 28, 270 Wis. 2d 535, 678 N.W.2d 197 (Wis. 2004).

In the instant case, the trial court adequately failed to explain the reasons for confining Mr. Jones to the maximum amount of prison allowable. The court did not acknowledge why it was not following the Department of Corrections’ recommendation of seven months, six days, nor did it acknowledge any of the comments made by Mr. Jones or his counsel. (28:9-10)

A. Standard of Review

In reviewing the trial court's sentence, this court examines the reasons given by the trial court in imposing sentence. *Rosado v. State*, 70 Wis. 2d 280, 289, 234 N.W.2d 69 (1975). "Ordinarily, sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an abuse of that discretion." *State v. J.E.B.*, 161 Wis. 2d 655, 661, 469 N.W.2d 192 (Ct. App. 1991), *citing State v. Roubik*, 137 Wis. 2d 301, 310, 404 N.W.2d 69 (1975).

"[T]he exercise of discretion is not the equivalent of unfettered decision-making." *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). To be upheld on appeal, a discretionary act "must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." *Id.* Moreover, "a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." *Id.*

While the trial court has "great latitude" in sentencing a defendant, the court's discretion must be exercised with reference to established criteria, specifically the character of the offender, the gravity of the offense, and the protection of the public. *J.E.B.*, 161 Wis. 2d at 662. The court in *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), explained that the philosophy of modern criminal law is that the particular sentence fit the individual defendant and fit the particular circumstances of the offense. "It is not the philosophy of modern criminal law that the punishment fit the crime alone and that for every violation of a particular statute there be an identical sanction." *Id.* at 271.

B. Mr. Jones was Entitled to an Explanation of the Trial Court's Reasons for Reconfining Him for the Maximum

The Wisconsin Supreme Court recently found that the principles of *State v. Gallion* 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 (Wis. 2004), apply to reconfinement hearings. *State v. Swaims*, 2004 WI App 217, 690 N.W.2d 452 (October 19, 2004). In denying Mr. Jones' postconviction motion, the trial court found that *Swaims* was inapplicable because it is not retroactive to decisions held prior to October 19, 2004,¹ and so consequently, that the principles of *Gallion* did not apply to the instant case. (24:1)

The *Gallion* court made it clear that it was not imposing new standards of appellate review for sentences, but that it was taking the opportunity to stress the importance of *McCleary* given the advent of truth-in-sentencing. 2004 WI App ¶ 4. "[W]e reinvigorate the *McCleary* directive that the exercise of sentencing discretion must be set forth on the record." *Id. See also Gallion* at ¶ 24 ("these requirements of 'detailing the reasons for selecting the particular sentence imposed' and a sentence calling for the 'minimum amount of custody or confinement' are not new under Wisconsin law.") (citations omitted)

McCleary has long been held to be the seminal sentencing case. Its principles "are as true today as when they first appeared..." *Gallion*, at ¶ 2. As a result, the principles of *McCleary*, as restated by *Gallion*, apply.

Case law and statutes have long emphasized the need for a court to adequately explain a sentence. The seminal case on topic is *McCleary v. State*, in which the court found that the exercise of sentencing discretion by the trial court must be set forth on the record. *McCleary* 49 Wis. 2d 263, 277 (1971). "Discretion is not

¹ Mr. Jones reconfinement hearing was held April 23, 2004.

synonymous with decision-making. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” *Id.*

The legislature codified the essence of *McCleary* in Wis. Stat. § 973.017(10m). “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).

The *McCleary* court also held that the discretion exercised by the sentencing judge “must be exercised on a rational and explainable basis.” *Id.* at 276. “In all Anglo-American jurisprudence a principle obligation of the judge is to explain the reasons for his actions. His decisions will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined.” *Id.* at 280. For a sentence to be valid, then, “a statement by the trial judge detailing his reasons for selecting the particular sentence imposed” is required. *Id.* at 281.

The *McCleary* court further explained that “[t]he sentence 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. *See also State v. Setagord*, 211 Wis. 2d 397, 416, 565 N.W.2d 506 (1997), *State v. Borrell*, 167 Wis. 2d 749, 764, 482 N.W.2d 883 (1992) and *State v. Krueger*, 119 Wis. 2d 327, 336-337, 351 N.W.2d 738 (1984).

Every sentence must impose the minimum custody consistent with the primary sentencing factors. *State v. Hall*, 2002 WI 108 ¶ 9, 255 Wis. 2d 662, 648 N.W.2d 21 (Wis. App. 2002). Each criminal defendant “has a constitutional right to have the relevant and material

factors which influence a sentencing explained on the record by the trial court.” *Id.* at ¶ 21. . This constitutional right was violated when the court did not explain how its sentence comported with the minimum-custody standard.

In reconfining Mr. Jones to the maximum, the court acknowledged only Mr. Jones “abysmal” conduct on supervision. (27:9) The court interpreted this conduct to reveal that Mr. Jones would only be rehabilitated if he was in a structured confined setting. (27:10)

McCleary held that “...it would have been appropriate for the trial judge to make a statement indicating why a near-maximum sentence conformed to sentencing standards ... that the custody imposed was the minimum consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.” 49 Wis. 2d at 284, n.3. Mr. Jones was sentenced to the maximum and, as such, is entitled to the explanation the *McCleary* court demands.

The court did not acknowledge the statements of Mr. Jones or of his attorney. The court acknowledged the Department’s seven-month recommendation, but did not comment on Mr. Jones’ recommendation (27:9). The court failed to state any reasons at all for sentencing Mr. Jones to the maximum, rather than the Department’s recommendation.

The only factor the reconfining court took into consideration was Mr. Jones’ violations of his supervision. (27:9-10) The court did not acknowledge any of the positive factors of Mr. Jones’ behavior, and consequently, did not weigh the negative against the positive in any fashion in sentencing him.

II. THE SENTENCE IMPOSED AT MR. JONES' RECONFINEMENT HEARING WAS ILLEGAL BECAUSE IT WAS BASED ON INADEQUATE SENTENCING INFORMATION

A. Standard of Review

There is a consistent and strong policy against interference with the discretion of the trial court in passing sentence. *State v. Paske*, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991). This policy is based on the trial court's great advantage in considering the facts relative to sentencing as well as the demeanor of the defendant. *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

Deference is a cornerstone of sentencing law precisely because of the trial court's "vaunted opportunity" to evaluate credibility and demeanor. *See McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). The trial judge is best placed to determine sentence based on the "nature of the particular crime i.e. the degree of culpability – distinguishable from the barebones legal elements of it – and the personality of the criminal." *See Id.* at 271.

Normally, a trial court's sentence is reviewed for an erroneous exercise of discretion. *See Paske*, 163 Wis. 2d at 61-62. Whether Judge Dugan erred by reconfining Mr. Jones to the maximum without reviewing essential trial and sentencing materials, is a question of law this court should determine *de novo*.

B. Judge Dugan had an Obligation to Review the Original Sentencing Transcript and Presentence Report

Judge Dugan did not have the opportunity to evaluate the credibility and demeanor of Mr. Jones

because he did not review the presentence investigation report, or the transcript from the original sentencing hearing. The record is unclear about whether or not Judge Dugan read even the lengthy memo filed by the Department of Corrections.

In denying Mr. Jones postconviction motion, Judge Seifert found that “[t]he defendant’s contention that the court failed to review the court memo from the Department of Corrections is belied by the record and Judge Dugan’s reference to the actual contents of the memo in his sentencing remarks.” (24:2) However, the record does not support this contention. It is true that Judge Dugan acknowledged some of the contents of the memo; however, the violations of supervision noted by Judge Dugan could have just as easily been gleaned from the Notice of Violation filed by the Department (15) and not the memoranda.

Judge Dugan heard no testimony and arguably relied only on the allegations in the Notice of Violation in reconfining Mr. Jones. The court did not acknowledge either counsel’s sentencing arguments nor did it specifically acknowledge the Department of Corrections’ court memo.

Judge Schellinger, on the other hand, had the opportunity to have contact with Mr. Jones on several occasions. (1:2-4) She presided over Mr. Jones’ guilty plea hearing. (1:2) She utilized a pre-sentence report and conducted a sentencing hearing at which Mr. Jones had an opportunity to speak. (27:3) (27:10-13)

Judge Dugan had a duty to review the sentencing transcript and presentence investigation before reconfining Mr. Jones. In *Denny v. State*, 47 Wis. 2d 541, 546, 178 N.W.2d 38 (1970) the Wisconsin Supreme Court stated that “on resentencing or sentencing after a new trial and when modifying a sentence under *Hayes v. State* (1970)[,]” the sentencing court “should have before

it the transcript of the original sentencing and the reasons for the sentencing should appear therein.” The Court also noted “the importance of a copy of the presentence investigation, when used by the trial judge, appearing in the record.” *Denny*, 47 Wis. 2d at 546)citing *Embry v. State*, 46 Wis. 2d 151, 174 N.W.2d 521 (1970).

The presentence investigation and transcript of the original sentencing are critical to reconfinement when the judge is new to the case. Just as a judge who did not preside over the trial, but who presides at sentencing has a duty to acquaint himself with the facts of the trial, the judge conducting the reconfinement hearing has the same duty. *See Pegalow v. State*, 20 Wis. 61 (1865) (“there might be some reason for saying that the judge who pronounced the sentence should be acquainted with the circumstances of the case as disclosed at trial, in order to award the proper degree of punishment”).

The obligation that the new judge reviews the entire record, including the transcript of any prior hearings, is sound public policy and good common sense. It provides that the court has all of the facts and necessary information required in fashioning a sentence in line with the principles of *McCleary*. It ensures that a defendant is sentenced based on the entire record, not a portion of it. It allows the court to create a sentence that weighs the factors the original court found persuasive in fashioning its sentence.

C. The Principles of *State v. Reynolds* and *State v. Wegner* Apply to this Case.

In *State v. Wegner*, the court found that when the original sentencing judge also presides at the sentencing after revocation, then the original sentencing reasons are implicitly adopted and the court does not have to reiterate its reasons. *Wegner*, 2000 WI App 231 ¶ 9, 239 Wis. 2d 96, 619 N.W.2d 289 (Wis. App. 2000). However, the court noted that the better practice would be for the court

to at least reference the prior sentencing. *Id.* . at note 3. “Like the appellate court, the trial court should be able to rely upon the entire record, *including the previous comments at the first sentencing.*” *Id.* at ¶ 9 . (citations omitted) (emphasis added).

But where a different judge sentences after revocation, “we have no basis for assuming that the second judge has acknowledged or adopted the reasoning of the first, absent either an explicit statement to that effect or a record otherwise demonstrating that that is so.” *State v. Reynolds*, 2002 WI App 15 ¶ 8, 249 Wis. 2d 798, 643 N.W.2d 165 (Ct. App. 2002). Like in *Reynolds*, the Department of Corrections court memo summarizes the case history, rather than provide a comprehensive study typical of a presentence investigation. *Id.* at ¶ 11. While it is clear that the sentencing court can take into consideration conduct that occurred after sentencing that may cast the defendant in a different light, *North Carolina v. Pearce*, 395 U.S. 711, 723, 89 S.Ct. 2072 (1969) (overruled on other grounds), in this case the record does not establish that the trial court reviewed comments made at the original sentencing or in the presentence investigation.

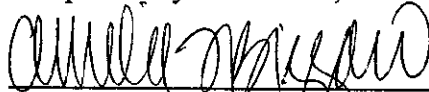
The instant case is similar to a sentencing after revocation. Mr. Jones’ voluntary revoked his extended supervision and was brought before the trial court for reconfinement. This is no different from a defendant who is revoked on probation and brought before the trial court for sentencing after revocation of probation. The trial court was not obligated to impose the maximum amount of time possible. A person revoked on extended supervision faces the possibility of being returned to prison for a portion of the period remaining on extended supervision. As a result, the trial court should be obligated to review the entire record, as required by *Reynolds* and *Wegner*, in order to make an informed decision about the amount of time a defendant returns to prison.

CONCLUSION

For the reasons stated above, Brandon Jones respectfully requests that the order for reconfinement after revocation of extended supervision be vacated and that he be resentenced or that the order denying postconviction relief be vacated to permit further proceedings.

Dated at Milwaukee, Wisconsin, this 29th day of March 2005.

Respectfully submitted,



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CERTIFICATION

I certify that this brief meets the form and length requirements of Wis. Stat. §§ (Rules) 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points and maximum 60 characters per line. The text is 13-point type and length of the brief is 4,238 words.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Amelia L. Bizzaro", is written over a horizontal line.

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