

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2005AP18-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 TIMONTHY
DUGAN PRESIDING, AND DENIAL OF
POSTCONVICTION RELIEF, HONORABLE JOHN
SIEFERT PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The state argues that Brandon E. Jones waived appellate review of the argument that *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (Wis. 1971) and *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 (Wis. 2004) apply by not asking the circuit court to apply these cases at the time of reconfinement. State's Brief at

2. Similarly, the state argues that Mr. Jones waived appellate review of the issue of whether the court was required to review the sentencing transcript and presentence investigation report because he did not raise the issue at reconfinement. State's Brief at 11. The state further argues that *Gallion* does not apply to the instant case. State's Brief at 2-7. For the reasons stated below and the reasons stated in his Brief and Appendix, the state is wrong.

Finally, the state argues that the court had no obligation to review the original sentencing transcript and presentence report in reconfining Mr. Jones. State's Brief at 9-11. For the reasons stated in Mr. Jones' Brief and Appendix, the state is wrong.

Each of these arguments lack merit and should be rejected by this court.

I. BRANDON JONES NEVER WAIVED ANY OF THE ARGUMENTS HE RAISED IN HIS BRIEF IN CHIEF.

Mr. Jones sufficiently preserved each of the arguments in his brief when he filed a Rule 809.30 postconviction motion and memoranda in support of that motion on December 8, 2004 seeking an order resentencing him or an order modifying his sentence. (R23:1; A.App 104) In that motion, Mr. Jones argued that he was entitled to relief because the trial court did not comply with *Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 (Wis. 2004) and *State v. Reynolds*, 2002 WI App 15, 249 Wis. 2d 798, 643 N.W.2d 165 (Ct. App. 2002). (R23:1; A.App 104)

The trial court did not deny Mr. Jones' postconviction motion on the grounds that he waived the argument.

Rather, in denying Mr. Jones' postconviction motion, the trial court, the Honorable Judge John Siefert presiding, said: "[t]he court has reviewed the reconfinement hearing transcript in this case and finds that the sentencing court gave ample reasons for reconfining the defendant for two years." (R24; A.App. 111) Additionally, the trial court found that *Reynolds* pertains only to sentencing defendants after revocation of probation and was not applicable to the instant case. (R23; A.App. 112)

Mr. Jones did not waive his objection to the reconfining court's failure to apply *State v. Gallion* or *State v. Reynolds*. It makes no difference whether the issue is raised immediately after sentence is imposed at reconfinement or at the time of the postconviction motion. In either event, the remedy is resentencing before a judge who properly applies *Gallion* and *Reynolds*. By raising this issue of the applicability of *Gallion* and *Reynolds* at the appropriate time, Mr. Jones did nothing to prevent this remedy.

Regardless, this court has the authority to address the merits of a defendant's claim despite the defendant's failure to object or dispute information relied upon at sentencing. *State v. Johnson*, 158 Wis. 2d 458, 468-471, 463 N.W.2d 352 (Ct. App. 1990). "Indeed, despite the failure to object, a defendant may be entitled to resentencing if the sentence was 'affected by a trial court's reliance on an improper factor'; we may 'ignore the waiver.'" *State v. Groth*, 2002 WI App 299 ¶ 25, 258 Wis. 2d 889, 655 N.W.2d 163 citing *State v. Leitner*, 2001 WI App 172 ¶¶39, 41,42, 247 Wis. 2d 195, 633 N.W.2d 207 *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341.

II. *GALLION* APPLIES TO THE INSTANT CASE

The state argues that *Gallion* does not apply to reconfinement hearings because reconfinement is not a

sentencing. In support of its contention, the state argues three things: first, that Mr. Jones' sole support for the argument that *Gallion* and *McCleary* apply is *State v. Swiams*, 2004 WI App 217, 277 Wis. 2d 400, 690 N.W.2d 452; second, that the language in *Swiams* regarding the applicability of *Gallion* to reconfinement hearings post "truth-in-sentencing" is dictum and should be ignored; and finally, that the transfer of duty to reconfine defendants after revocation of extended supervision from the Division of Hearings and Appeals to the circuit court was not meant by the legislature to convert reconfinement hearings into sentencings. State's Brief at 2-7. The state is incorrect on each account.

A. *Gallion* Applies Because it is a Reinvigoration of *McCleary*.

The state argues that the "sole support" for Mr. Jones' argument that *Gallion* and *McCleary* apply is *State v. Swiams*, 2004 WI App 217, 277 Wis. 2d 400, 690 N.W.2d 452. State's Brief at 3. This is incorrect. *Gallion* is a reinvigoration of *McCleary*, the seminal sentencing case. Appellant's Brief at 7-9. Because *Gallion* does not impose new standards of appellate review, its restatement of *McCleary* applies. *Id.* See also *Gallion* 2004 WI App 217 ¶ 2 ("[W]e reinvigorate the *McCleary* directive that the exercise of sentencing discretion must be set forth on the record."), ¶ 4 ("The principles [of *McCleary*] are as true today as when they first appeared."). At no point does Mr. Jones argue that *Gallion* is applicable to this case solely through this court's decision in *Swiams*.

As a result, the state's extensive argument that *Gallion* is inapplicable as a result of *Swiams* should be rejected. *Gallion* applies to the instant case because it is a restatement of *McCleary* and the principles of *McCleary* have always applied.

The state also argues that *Gallion* is inapplicable, in part because it calls for the sentencing court to first examine whether probation is appropriate. State's Brief at 6. The state misreads *Gallion*. *Gallion* points out that "not new to our sentencing jurisprudence is the concept that probations should be considered as the first alternative." *Gallion*, 2004 WI 42 ¶ 25, 270 Wis. 2d 535, 678 N.W.2d 197, citing *Bastian v. State*, 54 Wis.2d 240, 248-49, n.1, 194 N.W.2d 687 (1972). The *Gallion* court made this observation in support of its reiteration of *McCleary* that each sentence should impose the minimum amount of custody, which may include probation. *McCleary*, 49 Wis. 2d at 276; *Gallion*, 2004 WI 42 ¶¶ 24-25. A judge sentencing a defendant who was revoked on probation must also comply with *Gallion*, even though it is unlikely that probation will be considered. As a result, the state's argument that it would be difficult for the trial court to apply *Gallion* for this reason is flawed.

Mr. Jones is entitled to an explanation for the sentence imposed by the trial court. *McCleary*, 49 Wis. 2d 263, 277 (1971); *State v. Hall*, 2002 WI App 108 ¶ 21, 255 Wis. 2d 662, 648 N.W.2d 21. Without such an explanation, meaningful appellate review is difficult. *McCleary*, 49 Wis. 2d at 280-281 ("decisions will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined"). This principle applies as logically to sentencing after revocation of extended supervision as to the original sentencing.

The sentencing court failed to set forth on the record the reasons for sentencing Mr. Jones to the maximum. The sentencing court failed to explain why the maximum sentence rather than that recommended by the state or Mr. Jones constitutes the least punishment necessary to fulfill the purposes of sentencing. Without any explanation from the trial court as to its reasons for the sentence it imposed, this court can only conclude that the trial court erroneously exercised its discretion in

sentencing Mr. Jones to the maximum. *See 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.”)

B. The Language in *Swiams* is not Dictum and a Reconfinement Hearing is a Sentencing Requiring the Applicability of *Gallion*

Gallion applies to the instant case because it is a reinvigoration of *McCleary*, not because of *Swiams*. If this court were to consider the state’s claim that *Gallion* does not apply to reconfinement hearings, it would find that it is without merit. Neither law nor logic allows a circuit court to reconfine a defendant without adequately articulating the reasons for the specified period of reconfinement on the record.

The state argues that *Swiams*’ holding that *Gallion* applies to reconfinement hearings is dictum, which this court does not have to follow. State’s Brief at 5. While the state is correct that the issue before the *Swiams* court was whether a defendant could challenge a reconfinement order through Rule 809.30, it short-shrifts the remainder of the decision by arguing that the court’s holding that *Gallion* applies to reconfinement hearings is dicta.

As the *Swiams* court pointed out: “[t]he core of the disagreement between *Swiams* and the State thus resolves to whether the reconfinement proceeding was a ‘sentencing.’” *Swiams*, 2004 WI App 217 ¶ 14, 277 Wis. 2d 400, 690 N.W.2d 452. As a result, the court carefully dissected the “conflicting meanings (that) Wisconsin law” has variously assigned the term “sentencing,” *id.* at ¶ 16, and decided that the appropriate meaning is contextual: “A neutral-principled analysis requires that we apply the meaning that is most congruent with ‘the purpose of the particular statute under consideration.’” *Id.* As a result

of this extensive analysis, the court found that a reconfinement hearing is the equivalent of a sentencing. *Id.* at ¶ 23.

The question of whether reconfinement is a sentence was at the heart of whether Rule 809.30 applies to reconfinement hearings. As a result the determination that *Gallion* applies to reconfinement hearings is not dicta.

C. The Legislature's Shift of Authority from the Department of Corrections to the Circuit Court is Further Support that Reconfinement is a Sentencing

The state argues that despite the legislature's transfer of authority from the Department of Corrections to the circuit court for sentencing after revocation of extended supervision, the legislature did not intend for the proceeding to become a full-blown sentencing hearing. State's Brief at 7. This is inaccurate.

The purpose of the reconfinement hearing is exactly the same as the original sentencing: how much of a given range of potential sentence should be imposed in a particular case. The legislature simply could have vested this authority with the Division of Hearings and Appeals, as it has done with the revocation of parole and limited judicial review to *certiorari*. The fact that it did not, choosing instead to vest the reconfinement decision in the courts and subject to the same postconviction review as the original sentence under Rule 809.30, indicates its intent that reconfinement decisions comply with the same procedural requirements as the original sentence.

CONCLUSION

For the reasons stated above, Mr. Jones 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, May 19, 2005.

Respectfully submitted,

BRANDON E. JONES, Defendant-Appellant.

HENAK LAW OFFICE, S.C.



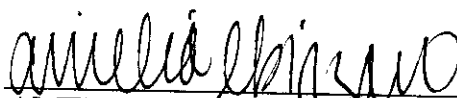
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CERTIFICATION

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 2,360 words.

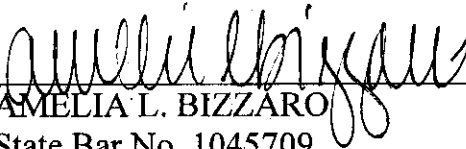


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CERTIFICATE OF MAILING

I hereby certify pursuant to Wisconsin Statutes (Rule) 809.80(4) that on the 19th day of May 2004, I caused ten copies of the Reply Brief of Defendant-Appellant to be mailed, properly addressed and postage pre-paid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.



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