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**DISTRICT II**

June 30, 2021

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You are hereby notified that the Court has entered the following opinion and order:

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2019AP2366-CR

State of Wisconsin v. Thomas H.L. Barfell (L.C. #2017CF368)

Before Neubauer, C.J., Gundrum and Davis, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Thomas H.L. Barfell appeals a judgment of conviction entered following the revocation of his probation and an order denying his postconviction motion for resentencing. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> For the reasons that follow, we affirm.

Barfell pled no contest to delivering a small amount of marijuana (about fifty-dollars' worth) to a confidential informant. The State had agreed to dismiss the repeater enhancer and recommend probation. At sentencing, the circuit court found that the offense was relatively minor, stating "we're not talking big drugs by any stretch of the imagination." However, the court also acknowledged that Barfell was a "repeat customer" with a lengthy criminal record. It withheld sentence in favor of a two-year term of probation and imposed but stayed six months of conditional jail time.

Less than one month after Barfell was placed on probation, he tested positive for a variety of illegal drugs and absconded from supervision. He was arrested after police responded to a complaint that two people were openly using drugs in the drive-thru line of a McDonald's restaurant. Barfell was the passenger and police saw him try to hide a bag of marijuana. Barfell again tested positive for multiple drugs and admitted to absconding and frequent drug use. His probation was revoked.

Barfell's sentencing after revocation was held in front of the same circuit court judge who presided at his original sentencing. Pointing out that Barfell had "at least 13" prior convictions and that his supervision had been revoked several times in prior cases, the State recommended the maximum sentence. Though the court acknowledged that it needed to consider the seriousness of the offense, the defendant's character, and protection of the public, it made no further comment on

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

the offense severity. Regarding Barfell's character, the court remarked that "when I'm trying to search the file, the Revocation Summary, for any redeeming qualities, I really can't find any." The court explained that Barfell "keeps on doing the same thing over and over," and that "every single supervision he was previously put on he was revoked[,] such that "putting him on probation and expecting a different result, that would be insanity." With regard to protecting the public, the court determined that Barfell's history "shows he's going to continue to do this stuff." For this reason, the circuit court believed protection of the public was "paramount" and needed to be accomplished by incarcerating Barfell. It imposed the maximum bifurcated sentence, with eighteen months of initial confinement followed by eighteen months of extended supervision.

Barfell, by postconviction counsel, moved for resentencing. He argued that the circuit court erroneously exercised its discretion at his sentencing after revocation by failing to consider the seriousness of the offense. The postconviction court acknowledged that it did not discuss offense severity at Barfell's sentencing after revocation, but denied the motion, explaining that it had explicitly considered this factor at Barfell's original sentencing. The court stated: "We cannot look at the sentencing after revocation in a bottle. We need to look at the entire case here."

On appeal, Barfell maintains that the circuit court erroneously exercised its discretion by failing to explicitly consider the gravity of his offense at the sentencing after revocation. According to Barfell, this runs afoul of *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, which instructs that a sentencing court must "specify the objectives of the sentence on the record," as well as "identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision." *Id.*, ¶¶40, 43.

The State disagrees, pointing to case law establishing that when the same judge presides over the original sentencing and the sentencing after revocation, the second hearing is treated as an extension of the first. *See State v. Wegner*, 2000 WI App 231, 239 Wis. 2d 96, 619 N.W.2d 289. In *Wegner*, this Court held that “when the same judge presides at the sentencing after revocation and the original sentencing, the judge does not have to restate the reasons supporting the original sentencing.” *Id.*, ¶9. This is because “the trial court should be able to rely upon the entire record, including the previous comments at the first sentencing.” *Id.* Additionally, “it would be a mismanagement of judicial resources to require a court to go back to square one when sentencing after revocation.” *Id.* Courts must therefore “review the two sentencing proceedings on a global basis, treating the latter sentencing as a continuum of the first.” *Id.*, ¶7.

We agree with the State that under *Wegner*, the circuit court properly treated Barfell’s sentencing after revocation “as a continuum of the first.” *Id.* The same judge had presided over Barfell’s original sentencing only months earlier, and explicitly discussed the severity of the offense, finding that it was not serious. It therefore gave Barfell the benefit of the doubt and placed him on probation despite his lengthy criminal record and history of revocations. At the sentencing after revocation, the court explicitly considered Barfell’s character and the need to protect the public. Viewing the proceedings globally, the court determined that despite the mitigated nature of the offense, a prison sentence was necessary due to Barfell’s poor character, extensive criminal history, and the need to protect the public. In light of the enormous discretion afforded the sentencing court in deciding how much weight to accord each sentencing factor, *see State v. Fisher*, 2005 WI App 175, ¶20, 285 Wis. 2d 433, 702 N.W.2d 56, the court properly exercised its discretion in sentencing Barfell to prison after the revocation of his probation.

We reject Barfell’s assertion that *Gallion* somehow altered the viability of *Wegner* or that the cases are incompatible. First, in *State v. Brown*, 2006 WI 131, 298 Wis. 2d 37, 725 N.W.2d 262, a case decided after *Gallion*, the Wisconsin Supreme Court cited *Wegner* with approval in the context of a reconfinement hearing held after the revocation of extended supervision. *Brown*, 298 Wis. 2d 37, ¶21 (“Treating the reconfinement hearing as a continuum of the sentencing hearing is logical when the same judge is presiding over both the original sentencing hearing and the reconfinement hearing.”). Second, while *Gallion* requires sentencing courts to more explicitly state the reasons for their decisions, neither this Court nor the Wisconsin Supreme Court has suggested that this affects *Wegner*’s directive to view an original sentencing and a sentencing after revocation as a continuum. *Gallion* sets forth what courts must say at a sentencing hearing, while *Wegner* instructs that the “sentencing hearing” consists of both the original sentencing and the sentencing after revocation. These two holdings, both of which are binding law, are fully compatible.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*