

WISCONSIN SUPREME COURT
MONDAY, MARCH 14, 2016
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Dennis R. Cimpl and Judge Ellen R. Brostrom presiding.

2013AP646-CR

[State v. Salas Gayton](#)

This criminal case examines whether a sentencing court may rely on a defendant's illegal immigrant status as a factor in fashioning a sentence.

Some background: Leopoldo R. Salas Gayton was convicted after pleading no contest on one count of homicide by intoxicated use of a vehicle and one count of operating a motor vehicle without a license – causing death.

Gayton admitted that on Jan. 1, 2011, he drank at least 12 beers while driving around the Milwaukee metropolitan area, tossing the empty beer cans out of the window as he went.

Gayton turned onto an exit ramp and began driving the wrong way in the westbound lanes of I-94 in Milwaukee for approximately one mile. His vehicle scraped the side of a car that had pulled over to avoid a collision. Ultimately, he collided head-on into another vehicle, killing the 34-year-old mother who was driving it. A blood draw taken approximately two hours and 20 minutes after the collision showed that Gayton's blood alcohol concentration at the time of the test was still 0.145 percent.

Gayton had entered the United States illegally 14 years before the collision. He moved to Milwaukee approximately two years earlier. His attorney told the circuit court that he had "an almost completely clean criminal record." Gayton had a history of drug and alcohol use, but had apparently been sober for over three years. His drinking on Jan. 1, 2011, was allegedly caused by a disagreement he had with his girlfriend.

At Gayton's sentencing hearing, the circuit court gave a fairly extended sentencing statement. It listed the goals of the sentence as restitution, punishment, deterrence, and rehabilitation, although it acknowledged that it was not sure if the rehabilitation parts of extended supervision would occur because the court did not know if Gayton would be deported upon completion of his initial confinement.

The sentencing judge spoke at some length about the serious nature of the crime that had resulted in the death of a young woman. He also emphasized that there was a community need for deterrence, stating he had "seen too many young people killed" and "too many parents have come here and said they're tired of burying their kids."

The circuit court also focused some of its remarks on Gayton's history and his remorse for having killed the driver of the other vehicle and referenced Gayton's illegal entry into the country.

In discussing the conditions of Gayton's extended supervision, the circuit court ordered him to undergo a drug and alcohol assessment and to follow through with recommended treatment. In the course of discussing that topic the court noted:

"[Gayton] could have done that on his own, even as an illegal in this country [as] [t]here's plenty of places on the south side of Milwaukee that cater to Latinos that would help them with their drinking problems. He could have done that on his own. He didn't."

The circuit court concluded that Gayton's remorse was outweighed by the severity of his crime and that a prison sentence was necessary in order not to "unduly depreciate the seriousness of what [Gayton] did." The court ultimately sentenced Gayton to the maximum term of initial confinement of 15 years and required him to serve another seven years of extended supervision. The court also imposed a concurrent nine-month jail term on the count of driving without a license.

Gayton filed a motion for post-conviction relief, arguing that he should be able to withdraw his no contest plea because the court's recitation of the deportation warning did not follow the statute, and that he was entitled to resentencing because the circuit court had not adequately explained its sentencing rationale and had improperly relied on Gayton's immigration status. The circuit court denied the motion. (Judge Dennis R. Cimpl presided over the entry of the plea and sentencing; Judge Ellen R. Brostrom handled the post-conviction motion).

Gayton appealed, unsuccessfully challenging the circuit court's sentencing, among other issues. The Court of Appeals concluded that the circuit court had adequately explained its choice to impose the maximum 15 years of initial confinement and had considered the required, relevant factors in a reasonable way. Consequently, it found no abuse of discretion in the circuit court's sentencing statement.

Citing a series of cases decided by the U.S. Court of Appeals for the Seventh Circuit, the Court of Appeals stated that a sentencing court may not rely on a defendant's race, color or nationality in reaching a sentence, see United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986), but it may consider a defendant's immigration status as long as the sentencing judge does not make "unreasonably inflammatory, provocative, or disparaging" comments regarding that immigration status. See United States v. Flores-Olague, 717 F.3d 526, 535 (7th Cir. 2013); United States v. Tovar-Pina, 713 F.3d 1143, 1148 (7th Cir. 2013).

The Court of Appeals concluded that in this instance the sentencing judge "did not improperly rely on Gayton's status as an alien."

The Supreme Court has accepted the portion of Gayton's petition for review that asks whether it is proper for a sentencing judge to rely on a defendant's immigration status, and if not, whether such error automatically requires a resentencing or is subject to a harmless error analysis.