



**DANE COUNTY CIRCUIT COURT
BRANCH 14**

Judge John D. Hyland

Dane County Courthouse, Room 7107
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August 20, 2021

Brett Healy, President
MacIver Institute for Public Policy
10 East Doty Street, Suite 800
Madison, WI 53703

Dear Mr. Healy:

I am the presiding judge for the criminal courts division in Dane County. I am writing in regard to the article titled 'Perspective' authored by Dan O'Donnell about the death of a Chicago police officer. I, too, am saddened by the tragic death of Officer French. I write to you because, despite the efforts of Mr. O'Donnell to blame the judicial system or a specific judge, Officer French's death was not the result of decisions made by my colleague, Dane County Circuit Court Judge Ellen Berz. Despite having a law degree himself, Mr. O'Donnell's opinion piece significantly misrepresents the court record and the law. As a result, the piece, and its publication, does a disservice to Judge Berz, the criminal justice system and, ultimately, Officer French, who swore an oath to uphold the law and died in service to it.

I am requesting that you print this letter or at least some form of a correction. I also ask that in the future you carefully consider publishing any piece, whether opinion or not, which is critical of a circuit court's decision without the author first investigating and reporting the basis for the decision. This piece, and sadly too many others, either misrepresent the official court record or are based upon little to no investigation into the reasoning for the court's decision.

The latter point is proven by the title of the article, which may have been an editorial decision, and not directly contributed by the author. "Dan O'Donnell explains how a Dane County Circuit Court judge's inexplicably lenient sentence set in motion the events that led to the death of Chicago Police officer Ella French" This piece was published by your organization on August 11.

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The sentence at issue in Mr. O'Donnell's piece was not "inexplicably" lenient. Any impression that it was is a result of the author's failure to investigate - and not the fault of the judge at sentencing. At the hearing Judge Berz would have explained the reasons for her sentencing decision because it was her obligation to do so. Judges are required by the law to explain the sentences we hand down. Mr. O'Donnell could have taken a number of steps to find out the reasons given for the sentence. Instead he chose to criticize the judge and the sentence, without any basis in fact, and without accurately setting out the record.

Had Mr. O'Donnell examined the court record, or accurately relayed its contents, he would have seen and reported that after taking Eric Morgan's plea, Judge Berz ordered a pre-sentence investigation. Had Mr. O'Donnell sought to find out what this means, he would have learned that a PSI, as we call it, is an investigation conducted by a probation agent. The agent reviews the court record, interviews victims, interviews the defendant, and gathers information about the personal history of the defendant from all aspects, including prior adult criminal history, if any, history within the corrections system, if any, educational, employment, AODA, family and residential history, among other areas. The investigation results in a lengthy report about the crime and the victim and, especially, the defendant.

At sentencing, Judge Berz, and the attorneys, had the benefit of all of that information. Mr. O'Donnell would not have been able to read the report, as they are confidential. But the fact a PSI was ordered and a report filed was contained in the publicly available court record. Any lawyer with experience will tell you that a PSI is only ordered in serious felony cases.

Before writing about the case and the sentence to which he objects, Mr. O'Donnell could have accessed the record which details the explanations for the 'inexplicably lenient' sentence. The attorneys and Judge Berz would have explained the reasons for sentencing recommendations and, ultimately, the reasons for the sentence. This was all transcribed by the official court reporter. Anyone, including a person who wishes to opine about a judge's decision, can pay for and read that transcript. Mr. O'Donnell could have done this. I know he did not because the court record does not contain the transcript.

I also reasonably suspect that he did not personally attend Mr. Morgan's sentencing hearing, as he would have had no reason to do so in 2019. Yet, he felt it appropriate to opine that Judge Berz failed the community in 2021 by not taking Mr. Morgan off the streets in 2019, without knowing a single reason why she made that decision.

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I also have to point out that Mr. O'Donnell is only faulting the judicial branch for the resolution of Mr. Morgan's case. Again, had he read the court file - or at least had he been honest in authoring his 'perspective' - he would have more information to convey and, perhaps, more 'blame' to spread around.

Mr. Morgan was charged in Count 2 of the criminal complaint filed in Dane County Case No. 18 CF 1124. Count 2 charged Armed Robbery as a party to the crime. (A co-defendant was charged in Count 1.) Armed Robbery is a Class C felony, punishable by a maximum of fine of \$100,000, and a maximum of 40 years imprisonment, or both.

On April 1, 2019, the State, by an Assistant District Attorney, filed an Amended Information. That charging document maintained Count 2, and added Count 3, a charge of Theft from Person. This charge is a Class G felony, punishable by not more than 10 years imprisonment, and a fine of not more than \$25,000, or both. By law, the maximum length of incarceration in prison for a Class G felony is 5 years.

Mr. O'Donnell wrote that Mr. Morgan faced up to 50 years imprisonment. That was true at one time, but it was not true after the State moved to dismiss the Class C felony charged in Count 2. The motion to dismiss was made on April 1, 2019, the day of the plea hearing. The State and the defense agreed that the State would move to dismiss Count 2, and that Mr. Morgan would plead guilty to the Class G theft charged in Count 3. This all took place on the same day the Amended Information was filed. Upon the dismissal of Count 2, the maximum sentence available at sentencing was 10 years; not 50 years as claimed by Mr. O'Donnell.

As the court record shows, bringing a motion to dismiss the Class C felony count was not Judge Berz' decision. The State moved to dismiss that count as part of the agreement it reached with Mr. Morgan. (Unless the charge involves impaired driving, such dismissals are granted. The legislature requires a court to make findings on the record before granting dismissal of a drunk driving case. See, Wis. Stat. § 967.055.) Judge Berz granted the State's motion to dismiss and took Mr. Morgan's plea to the Class G felony. On a later date, at sentencing, she withheld sentence and placed Mr. Morgan on probation for three years.

In Wisconsin, at sentencing a judge is required to first consider placing the defendant on probation, as opposed to incarceration. The law requires that we first consider the least restrictive sentence. See, *State v. Bastian*, 54 Wis. 2d 240 (1972), and *State v. Gallion*, 2004 WI 42. We are required to keep a defendant in the community on probation unless to do so would unduly depreciate the gravity of the offense, fail to protect the public, or the defendant requires

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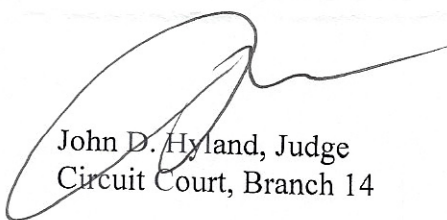
treatment best available through the prison system. Every sentencing judge must answer that question first.

Mr. Morgan was 20 years old at the time. He had no adult criminal record. Had Mr. O'Donnell conducted any investigation, he would have known and could have included these facts. Those facts did, I am certain, inform the judge's decision. When confronted with a 20 year old with no prior criminal history, convicted of the crime of theft from a person, it would take some extraordinary circumstances for a court to find that probation was not appropriate. I cannot speak to the precise reasons or finding of Judge Berz in this case, but I can state that she followed the law. Absent some extraordinary factor, withholding sentence and placing Mr. Morgan on probation fulfilled requirements set by statutory and case law.

One can disagree with any sentence; but to criticize it publicly one should first investigate and understand the law and the basis for the decision. Mr. O'Donnell failed to do this, so I request that you publish either this letter, or corrections to the piece as pointed out herein.

I also ask that you share this with the author. I know he has a law degree, so it is fair to assume he would be interested in accuracy when discussing legal issues. I also understand that Mr. O'Donnell and other media personalities who follow his pieces and/or your publications discussed this subject on the radio. I can only write to correct the record on what was published in your outlet. I would hope they would take steps on radio similar to those I am asking of you.

If you have any questions please contact me.



John D. Hyland, Judge
Circuit Court, Branch 14