COURT OF APPEALS DECISION DATED AND FILED

July 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2863-CR **Cir. Ct. No. 2013CM702**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG C. MEIER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] Craig Meier appeals an order of the circuit court denying his postconviction motion to commute two imposed and stayed

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 52.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

sentences, pursuant to WIS. STAT. § 973.13, that Meier argues are excessive. Meier argues that the court unlawfully imposed two sentences in jail, both of which conflict with the rule that jail sentences cannot exceed one year. I conclude that the court's oral pronouncement of the sentences was ambiguous on the topic of jail time, the written judgment failed to clarify that ambiguity, and the full record demonstrates that the court intended to impose prison, and not jail, sentences. Therefore, the court properly denied the motion and corrected the judgment against Meier to reflect bifurcated imposed and stayed prison sentences. Accordingly, I affirm.

BACKGROUND

¶2 The criminal complaint filed against Meier alleged that he entered his elderly mother's apartment without her permission while he was extremely intoxicated. The complaint charged Meier with one count of criminal trespass to dwelling, domestic abuse, one count of disorderly conduct, domestic abuse, and two counts of misdemeanor bail jumping, all as a repeat offender under WIS. STAT. § 939.62(1)(a).

¶3 Meier reached a plea agreement with the State under which he agreed to plead to one count of criminal trespass as a repeater and one count of bail jumping as a repeater, and the State would move to dismiss the disorderly conduct charge and the second count of bail jumping. At Meier's sentencing hearing, the circuit court accurately explained that the maximum penalty for each individual offense, as increased by the repeater enhancements, was "$10,000 in fines and two years as to each," amounting to a total of "$20,000 in fines and up to four years of incarceration."

¶4 The prosecutor and counsel for Meier joined in recommending probation with no recommendation for any conditional incarceration or for any imposed and stayed incarceration. The court questioned this recommendation, asking the prosecutor, who had just recited an extensive criminal history for Meier, "So why is this a good plan?" The prosecutor responded in part, "Clearly, going to prison, going to jail[,] doesn't stop this conduct. Perhaps with a probation agent who can monitor someone who absolutely, from his criminal history, has little regard for the laws of our state, I think that's why the recommendation [for straight probation] is before the Court."

¶5 The court expressed the view that the joint recommendation represented "tortured reasoning all the way around here." The court stated its view that "the choice" for the prosecution "was not between time served and probation, but was between four years and nine months of incarceration and everything in between," suggesting that the State should have recommended at least the potential for incarceration.[2] The court further expressed the view that Meier had not been deterred by past criminal sanctions, and, thus, an extended period of incarceration would be an appropriate solution to address his conduct:

> I think that every day that you're locked up is a day that you're not going to be drinking. Every day that you're locked up is a day that someone's not going to get hurt, that you're not going to be stealing something. Granted, it is a short amount of time overall that you're facing with the manner by which they reduce sentences.

[2] The reason the court referred to "four years *and nine months*" is that there was a separate disorderly conduct conviction before the court, arising from an earlier incident. The court imposed and stayed "nine months in jail" for this separate conviction. Meier does not challenge this separate sentence on appeal.

The court found that the criminal trespass charge, as well as the bail jumping charge, represented "aggravated" offenses, due to "the vulnerability of [Meier's] mother and the extensive criminal record that [Meier had] and the circumstances as set forth in that Complaint."

¶6 The court sentenced Meier to "two years in jail" on the trespass charge and "18 months of incarceration" on the bail jumping charge, with these sentences to run consecutively. However, the court stayed these sentences and imposed two years of probation, on the conditions that Meier undergo substance abuse treatment, not possess any intoxicants, and not violate the law. The court explained that the threat of revocation and the imposition of the sentences should be "the incentive you [Meier] need" for rehabilitative purposes.

¶7 Consistent with the court's oral pronouncements, the judgment of conviction stated that the site for the imposed and stayed sentences would be "Local jail," and further indicated that the imposed and stayed sentences for the criminal trespass and bail jumping convictions were two years and eighteen months, respectively, as Class A misdemeanors subject to repeater status under WIS. STAT. § 939.62(1)(a).

¶8 Meier filed a post-conviction motion for an order commuting his sentences, pointing to the discrepancy between the lengths of the stayed jail terms and the proscribed one-year limit in WIS. STAT. § 973.02 for time served in a jail facility. On the grounds that the court imposed "local jail" sentences, Meier requested that the court commute each pursuant to WIS. STAT. § 973.13 to a term of one year.

¶9 The court denied Meier's motion and, instead, amended the judgment of conviction so that the sentences are to be served within the

"Wisconsin Prison system, consistent with [WIS. STAT.] § 973.02," instead of a jail facility. The court also imposed bifurcated sentences, still to be served consecutively: eighteen months' initial confinement and six months of extended supervision for the trespassing conviction and 13.5 months' initial confinement and 4.5 months of extended supervision for the bail jumping conviction. The court stated that imposing bifurcated prison terms for the stayed sentences was consistent with the "intent of the court at the time of sentencing that the defendant have the maximum incentive to rehabilitate himself and face the maximum penalty if unsuccessful." The court explained that Meier "was sentenced under the Habitual Criminality penalty enhancer, [WIS. STAT.] § 939.62(1)(a), which provides that 'a maximum term of ***imprisonment*** *that is one year or less* may be increased to not more than 2 years'" and that the statute under which Meier was sentenced does not "use the words 'jail sentence.'" (Emphasis in original.) Meier now appeals.

DISCUSSION

¶10 Meier argues that the court's sentence was unambiguous on the question of where he was to serve his sentence: "Local jail." Therefore, Meier argues, the court erred when, in response to the postconviction motion, it changed the location of the stayed sentences from local jail to state prison. Instead, Meier contends, the court should have commuted each sentence to the one-year maximum term allowed for jail sentences under WIS. STAT. § 973.02, so that the sentences would be consistent with the law.

¶11 The State responds that the court's oral pronouncement, in itself, was ambiguous on the jail versus prison topic, because the court simultaneously: (1) used the terms "jail" and "incarceration" but not "prison" in imposition of

Meier's sentences; (2) found that each of these offenses was "aggravated"; and (3) sentenced Meier to greater than one-year terms. However, the State argues that the full record demonstrates that the court intended to impose prison sentences, and, therefore, the court had authority to correct this ambiguity in the judgment to reflect its sentencing intent. For the following reasons, I agree with the State.

¶12 When an oral pronouncement of a sentence is ambiguous, "the intent of the sentencing judge controls the determination of the terms of a sentence." ***State v. Brown***, 150 Wis. 2d 636, 641-42, 443 N.W.2d 19 (Ct. App. 1989). Appellate courts must examine the written judgment as well as the "record as a whole" in order to determine the circuit court's sentencing intent. ***Id.***; *see also* ***State v. Oglesby***, 2006 WI App 95, ¶21, 292 Wis. 2d 716, 715 N.W.2d 727 (courts "look to the full record … in determining the trial court's sentencing intent" in cases of ambiguity). "A search for the trial court's sentencing intent will always depend on the particular facts of the particular case." ***Oglesby***, 292 Wis. 2d 716, ¶34.

¶13 Under this analysis, the first question is whether the sentencing court's oral pronouncement was ambiguous on the question at issue here, namely, whether the court sentenced Meier to jail or prison. The determination of whether an oral pronouncement is ambiguous follows the principles of statutory construction and asks whether the sentence is capable of being understood by "reasonably well-informed persons in two or more different ways." ***Id.***, ¶19.

¶14 As summarized above, the court at sentencing explained that the maximum exposure on each enhanced misdemeanor was two years and called the offenses "aggravated." The court then sentenced Meier to two years on the

trespass conviction and eighteen months on the bail jumping conviction. However, in doing so, the court referred to the first sentence as being spent "in jail" and the second as being "incarceration," and failed to bifurcate either sentence, as is required for any prison sentence.

¶15 I conclude that these contradictory statements create ambiguity on the topic of jail versus prison. The terms of the sentences imposed, albeit it with one reference to "jail," are inconsistent with the maximum length of a county jail term of one year under WIS. STAT. § 973.02, but they are consistent with the maximum length of imprisonment of two years for a repeat offender guilty of a Class A misdemeanor under WIS. STAT. § 939.62(1)(a). Further, the circuit court's determination that Meier's conduct constituted aggravated offenses and the court's criticism of the State's recommendation may be viewed as inconsistent with a single-year jail term. Based on these inconsistent signals, a reasonably well-informed person could interpret the court to have intended either to sentence Meier to terms in jail that were mistakenly in excess of the maximum jail terms pursuant to § 973.02, or to have mistakenly used the term "jail" when sentencing Meier to terms in prison consistent with § 939.62(1)(a).

¶16 Meier argues that all of the following show that the court's oral pronouncement unambiguously imposed jail sentences: The court never mentioned "prison," specifically used the term "jail," did not bifurcate the sentences as required by WIS. STAT. § 973.01, and did not refer to any treatment programs which would be consistent with prison sentences. However, for the following reasons and based on the entire record, including the court's subsequent explanation, I conclude that the court intended to impose prison sentences.

¶17 When, as here, there is ambiguity in the oral pronouncement of sentencing, the written judgment of conviction may be used to clarify that ambiguity. ***Brown***, 150 Wis. 2d at 641. Meier argues that any ambiguity in the oral pronouncement is clarified by the written judgment, which stated that his sentence was to be served in "Local jail." Use of the term "Local jail" in the written judgment of conviction, however, does not resolve the ambiguity in circuit court's oral pronouncement. The written judgment retains the conflict between imposing a sentence in "jail" and a term greater than one year, simply repeating the oral pronouncement. Thus, the judgment does not resolve the ambiguity in the oral pronouncement.

¶18 However, there is strong record evidence of the court's intent regarding its ambiguous sentence. In response to Meier's motion for postconviction relief, the court explained that its intent at sentencing was to give Meier "the maximum incentive to rehabilitate himself and face the maximum penalty if unsuccessful," consistent with a prison term of 31.5 months. This conclusion is bolstered by the circuit court's statements during the sentencing hearing, as detailed above. *See* ***Oglesby***, 292 Wis. 2d 716, ¶33.

¶19 Meier argues that I cannot rely on the court's later explanation to determine the court's intentions at sentencing. Citing ***State v. Perry***, 136 Wis. 2d 92, 113-14, 401 N.W.2d 748 (1987), Meier contends that such an after-the-fact explanation, regardless of its apparent sincerity or accuracy, has no value when it conflicts with the unambiguous meaning of the oral pronouncement at sentencing and the judgment of conviction. However, ***Perry*** does not apply in this context because, as this court has previously explained in interpreting ***Perry***, ***Perry*** "speaks only to the situation where an unambiguous oral pronouncement conflicts with an equally clear statement of the sentence in the written judgment." ***Brown***,

150 Wis. 2d at 641. As explained above, the oral pronouncement and written judgment here are both ambiguous, so the "intent of the sentencing judge controls the determination of the terms of a sentence." *See* ***id.*** at 642. Meier presents no legal support, other than his citation to ***Perry***, for the proposition that the full record cannot include the court's later order for purposes of this appeal.

¶20 The final issue is whether the court properly amended the sentences to include bifurcated prison terms. Meier argues that the proper remedy is contained in WIS. STAT. § 973.13, and that the court must void the excess portions of both sentences and commute each of them to a maximum jail term of one year. The State responds that the circuit court was authorized to exercise its authority in response to the motion to correct the stayed imprisonment terms to become bifurcated prison terms consistent with its sentencing intent. I conclude that the circuit court applied a proper remedy to its own error by bifurcating the stayed sentences on the amended judgment of conviction, consistent with WIS. STAT. § 973.01, without lengthening the stayed sentences reflected on the original judgment of conviction.

¶21 Circuit courts have the inherent power "'to correct formal or clerical errors or an illegal sentence … at any time.'" ***Krueger v. State***, 86 Wis. 2d 435, 442, 272 N.W.2d 847 (1979) (quoted source omitted). Where an imposed sentence is ambiguous but the intent of the sentencing court is clear, the court is authorized to "clarify[] and reimpose[]" the sentence as originally intended. ***Id.*** at 442-43. The circuit court here did just that. It appropriately reimposed and stayed sentences of the same length, consistent with its original intent, with the correction that the location in which they are to be served is state prison, not local jail.

¶22 Meier cites to several cases to support his claim that, because "[t]he unambiguous intent of the sentencing court … was to set imposed-and-stayed jail terms[,] … the circuit court had no authority to later, months after sentencing, convert [Meier's] jail terms to bifurcated prison terms." This authority is unavailing for the reasons we have already explained. The oral pronouncement and written judgment imposing and staying the sentences were ambiguous, while the record as a whole demonstrates a clear intent to impose stayed sentences in state prison. None of the cited cases support Meier's argument on the facts here, where the court did not increase the length of Meier's incarceration as stated in the original sentences and the sentences were stayed. As in ***Krueger***, the court here was authorized "to clarify the meaning of its original sentence" so that the stayed sentences imposed are consistent with its intent at the time of sentencing. 86 Wis. 2d at 443.

CONCLUSION

¶23 For these reasons, I affirm the decision of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.