

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-3233-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROMONDO D. SEYMOUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL B. TORPHY, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Romondo Seymour appeals from the amended judgment of conviction entered against him on remand from this court. The issue is whether the circuit court should have resentenced Seymour on all the counts for which he was convicted, when his sentence on three counts was reversed and

remanded. We conclude that the circuit court did not exercise its discretion when it resentenced Seymour, and therefore remand.

Seymour was convicted of two counts of possessing a firearm as a felon, and four counts of drug possession. He was charged as a repeat offender on all charges. In addition, a weapons enhancer was added to three of the drug charges. The circuit court sentenced him to a total of fifty-five years in prison. Seymour appealed.

We affirmed the convictions in part but reversed and remanded only on the portion of the drug charges that included the weapons enhancer. We concluded that the State had not proven that Seymour had used or threatened to use a weapon. *See State v. Seymour*, Case No. 93-2242-CR, unpublished slip op. (Ct. App. April 4, 1996). Our remand direction stated: “On remand, the State may elect whether to conduct a retrial solely on the issue whether Seymour committed the three predicate drug offenses while possessing a dangerous weapon. If the State elects not to retry Seymour, the trial court shall resentence Seymour without considering the weapons enhancer.” *Id.* at 9. The State elected not to retry Seymour and so the circuit court resentenced him.

All the parties to the resentencing apparently took our instruction to mean that the court was to resentence Seymour only on the three counts. While defense counsel argued that the court should resentence Seymour on all six counts, he appears to have conceded that the circuit court had been directed to resentence only on the three counts involving the weapons enhancer. The circuit court refused to consider all six counts, concluding that we had directed that Seymour be resentenced only on the three counts. Seymour once again appeals, asserting that he should have been resentenced on all six counts.

Sentencing is a matter committed to the trial court's discretion. *See State v. Mosley*, 201 Wis.2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996). We should not restrict the discretionary authority of the circuit court at resentencing when the underlying premise of an original sentence no longer exists. *See State v. Holloway*, 202 Wis.2d 694, 700, 551 N.W.2d 841, 844 (Ct. App. 1996). When a defendant is convicted and sentenced for multiple offenses, and one conviction and sentence is vacated because it is multiplicitous, the validity of all sentences is implicated and resentencing on the remaining convictions is permissible. *See State v. Sinks*, 168 Wis.2d 245, 255, 483 N.W.2d 286, 290 (Ct. App. 1992). "Consequently, the trial court has the inherent power to resentence, but it need not exercise that power. Thus, we conclude that resentencing is within the trial court's discretion." *Id.* While *Sinks* involved a sentence that was vacated because it was multiplicitous, we see no reason why this reasoning should not apply in this situation as well.

Therefore, the question of whether to resentence Seymour on all six counts was within the circuit court's discretion. The circuit court did not exercise that discretion, because it concluded that we had directed it to resentence only on three counts. Therefore, we reverse and remand to the circuit court with directions to exercise its discretion when resentencing Seymour, and in so doing, it may resentence Seymour for all six convictions or only for three convictions..

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

