

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 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. 99-0378-CR

STATE OF WISCONSIN

**COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRIAN W. SHAW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Brian Shaw appeals an amended judgment of conviction sentencing him to eighteen months in prison. The issues are: (1) whether Shaw's due process rights were violated when the trial court changed his sentence from eighteen months in the county jail to eighteen months

in prison; and (2) whether the trial court violated the double jeopardy clause when it changed Shaw's sentence. We affirm.

¶2 Shaw was sentenced to eighteen months in the county jail with work release privileges. He filed a notice of intent to pursue postconviction relief and sought release on bond pending appeal. At the bond hearing, the trial court realized that its initial sentence was invalid because a sentence to the county jail may not exceed twelve months. *See § 973.02, STATS.* The trial court changed Shaw's sentence to eighteen months in prison, characterizing its action as "correcting an error of law," not as a resentencing.

¶3 Shaw argues that the trial court violated his due process rights in resentencing him without notice and a meaningful opportunity to prepare and be heard.

¶4 There is no dispute that Shaw's initial sentence was invalid. Because the initial sentence was invalid, the trial court had to resentence Shaw. *See State v. Upchurch*, 101 Wis.2d 329, 333-34, 305 N.W.2d 57, 60 (1981) (where a lawful sentence is not imposed in the first instance, the defendant must be resented in a new proceeding before the trial court). In so doing, the trial court may rely in part on the record of the first sentencing hearing. *See State v. Martin*, 121 Wis.2d 670, 688, 360 N.W.2d 43, 52 (1985).

¶5 Although the trial court specifically stated that it was "not resentencing [Shaw]," the trial court did, in fact, impose a new sentence on him. When the trial court did so, both Shaw and his attorney were present. Shaw's attorney argued, in an admittedly abbreviated manner, that Shaw should not be sentenced to imprisonment because "[a]t the sentencing hearing, the State said he shouldn't go to prison," and "the Court said he shouldn't go to prison." After

hearing this, the trial court explained, “It was the Court’s intention to incarcerate him for a period of 18 months,” and, therefore, “[i]f I cannot incarcerate him for a period of 18 months in the La Crosse County Jail, then I will incarcerate him in the Wisconsin State Prison system.”

¶6 In sum, Shaw was present when he was resentenced, as was his attorney. Shaw’s attorney briefly argued on his behalf. The trial court then explained its reasons for imposing the new sentence, relying on the original sentencing hearing and its intent to punish Shaw by incarcerating him for eighteen months. Based on this record, we conclude that Shaw was accorded due process during his sentencing. *Cf. State v. Amos*, 153 Wis.2d 257, 281, 450 N.W.2d 503, 512 (Ct. App. 1989) (a defendant’s due process rights are violated where the trial court resentsences the defendant without allowing the defendant’s arguments to be heard on the record before the court).

¶7 Shaw also argues that his due process rights were violated when he was resentenced because a sentence to the prison system is a form of increased punishment. Shaw contends that the sentence increases his punishment because it strips him of work-release privileges and removes him from his family and community.

¶8 The trial court may increase a sentence where the initial sentence is invalid, but “must state its grounds for increasing the sentence.” *Martin*, 121 Wis.2d at 686-87, 360 N.W.2d at 51. The supreme court explained that the court’s ““reasons must be based upon a desire to implement the original dispositional scheme as manifested by the record in the first sentencing proceeding.”” *Id.* at 687, 360 N.W.2d at 52 (citation omitted).

¶9 If the sentence to the prison system rather than the county jail is a form of increased punishment, an issue we need not decide, under *Martin* there was no double jeopardy violation. The trial court explained that the new sentence implemented its original intent to incarcerate Shaw for eighteen months.

By the Court.—Judgment affirmed.

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

