COURT OF APPEALS
DECISION
DATED AND FILED

February 29, 2000

Cornelia G. Clark
Acting 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* WIS. STAT. § 808.10 and RULE 809.62.

No.   99-2604-CR

STATE OF WISCONSIN                                    IN COURT OF APPEALS
                                                                      DISTRICT I

STATE OF WISCONSIN,

        PLAINTIFF-RESPONDENT,

    V.

PERCY RAY MORGAN,

        DEFENDANT-APPELLANT.

        APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

        ¶1     WEDEMEYER, P.J.[1] Percy Ray Morgan appeals from an order denying his postconviction motion seeking resentencing.  He claims that the sentence he received was contrary to WIS. STAT. § 973.15.  Because the sentence imposed did not violate WIS. STAT. § 973.15, this court affirms.

_____
        [1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

## I.  BACKGROUND

¶2     On September 10, 1997, Morgan was arrested for stealing $152.04 worth of merchandise from Pet World.  He was charged with one count of retail theft and habitual criminality.  At the time of the retail theft, Morgan was on probation relating to a 1994 conviction for receiving stolen property.

¶3     Morgan entered a guilty plea and was sentenced to a three-year prison term, which was imposed and stayed, and he was placed on probation for two years.  A condition of the probation was that Morgan would serve six months in the House of Correction, consecutive to any other sentence.

¶4     In June 1999, Morgan's probation was revoked.  In September 1999, he filed a motion seeking resentencing, arguing that the sentence imposed was illegal and contrary to WIS. STAT. § 973.15.  The trial court denied the motion. Morgan now appeals.

## II.  DISCUSSION

¶5     Morgan appears to argue that the six-month House of Correction incarceration was contrary to WIS. STAT. § 973.15 because the statute prohibits a court from ordering that a sentence be served consecutive to jail time imposed as a condition of probation.  This court rejects Morgan's contention.

¶6     WISCONSIN STAT. § 973.15 provides in pertinent part:

> **(2)**(a) Except as provided in par. (b), the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously.
>
> (b) The court may not impose a sentence to the intensive sanctions program consecutive to any other

> sentence. The court may not impose a sentence to the intensive sanctions program concurrent with a sentence imposing imprisonment, except that the court may impose a sentence to the program concurrent with an imposed and stayed imprisonment sentence or with a prison sentence for which the offender has been released on extended supervision or parole. The court may impose concurrent intensive sanctions program sentences. The court may impose an intensive sanctions program sentence concurrent to probation. The court may impose any sentence for an escape from a sentence to the intensive sanctions program concurrent with the sentence to the intensive sanctions program.

The sentence imposed in this case does not violate any part of this statute. The sentence consisted of a stayed three-year prison sentence; a two-year probation; and a six-month House of Correction term consecutive to any other sentence. Morgan complains that a revocation of his 1994 probation triggered a previously imposed and stayed nine-month prison term, which made the six-month House of Correction condition of his probation illegal. This court does not agree. Morgan's 1994 conviction resulted in a sentence of a prison term, imposed and stayed in favor of probation. Accordingly, that sentence was one which was previously imposed.

¶7     This issue was addressed in *State v. Thompson*, 208 Wis. 2d 253, 256, 559 N.W.2d 917 (Ct. App. 1997). This court concluded that the plain meaning of WIS. STAT. § 973.15 authorizes the trial court to impose a sentence in a case consecutive to a previously imposed and stayed sentence, even if the defendant is placed on probation, and even if probation will be, but has not yet been, revoked. *See id.* "The key statutory language states: 'the court ... may provide that any such sentence be ... consecutive to any other sentence imposed at the same time or previously.'" *Id.*

¶8 As in *Thompson*, the trial court in the instant case ordered that the sentence in Morgan's retail theft case run consecutively to any previously imposed sentence. The 1994 conviction involved a sentence that was previously imposed. Thus, Morgan's claim that the six-month House of Correction consecutive sentence was illegal is without merit. The statute permits the structure imposed here.

¶9 Morgan also cites *State v. Maron*, 214 Wis. 2d 384, 571 N.W.2d 454 (Ct. App. 1997) in support of his position. In *Maron*, this court concluded that WIS. STAT. § 973.15 does not give the trial court the authority to impose a sentence to be served consecutively to jail time currently being served as a condition of probation in another case. *See id.* at 386. Morgan's case, however, is distinguishable from *Maron*. Morgan's sentence was ordered to be served consecutive to *any other sentence* and Morgan's 1994 sentence was *imposed and stayed*. In *Maron*, two key factors for this court were that the earlier sentence was *not imposed* and that the new sentence was ordered to be served consecutive to *his probation*. *See id.* at 394-95. WISCONSIN STAT. 973.15 permits the trial court to impose consecutive sentences to "any other sentence." The statute does not permit tacking a consecutive sentence on to a period of probation.

¶10 Accordingly, Morgan's reliance on *Maron* is misplaced. His argument that the sentence imposed in the retail theft case violated the statute and was illegal is without merit.

> *By the Court.*—Order affirmed.

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