COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0884-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES BROWNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] James Brownson correctly states the law that a defendant sentenced to both the prison system and a county jail must serve all of the time imposed in the prison system. However, Brownson is not entitled to the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

benefit of the law for two reasons. First, at the time he was in the prison system, Brownson was enjoying a respite from the county jail sentence that he had requested. Second, Brownson's cold manipulation of the justice system precludes us from granting him any relief. Therefore, we affirm.

¶2 We need not repeat the underlying facts that led to Brownson's conviction on August 20, 1993, for three counts of violating WIS. ADMIN. CODE § ATCP 110.05(2)(d), governing home improvement contracts. Originally, the trial court withheld sentence and placed Brownson on probation for three years and imposed certain conditions of probation. Brownson's probation was revoked in 1994 because of his failure to comply with the conditions of probation imposed by the court and the rules of probation imposed by his agent to implement the trial court's order. Brownson returned to the trial court on September 26, 1994, for resentencing and received three consecutive six-month sentences to the county jail. The trial court also stayed Brownson's sentence pending appeal and released him on a signature bond. Brownson did not pursue postconviction relief until he filed a motion on April 25, 1995. The motion challenged the authority of the probation agent to impose the rules of probation implementing the court's condition of probation that Brownson not engage in noncommercial construction. No further action was taken until October 28, 1996, when new counsel for Brownson requested a hearing on the motion. The trial court denied the request and the motion, holding that the probation agent had the authority to impose the rules.

¶3 Brownson filed a notice of appeal on January 17, 1997. We remanded for a hearing to determine if the probation agent's rules conflicted with the trial court's condition of probation that Brownson limit his employment to

commercial construction activities.[2] The court conducted the required hearing on October 3, 1997, and after concluding that the agent's rules did not conflict with the court's condition of probation and that Brownson did not establish a manifest injustice to support withdrawal of his plea, the court reentered the judgment of conviction. The court also stayed the aggregate eighteen-month jail sentence pending appeal.

¶4 We affirmed the trial court in an opinion released April 15, 1998.[3] After Brownson's petition for review was denied, the trial court, on July 31, 1998, ordered Brownson to report to the county jail to begin serving his sentence. On August 14, 1998, counsel for Brownson successfully objected to the order because Brownson was in the custody of the department of corrections and was in the intensive sanctions program. The trial court issued an order on January 7, 1999, reciting that Brownson had been released from the intensive sanctions program and was to report to the county jail. Brownson filed a motion to modify his sentence on the basis of new factors and a hearing was conducted on February 25, 1999. Brownson filed a notice of appeal on October 22, 1999; we dismissed the appeal on February 25, 2000.

¶5 In response to the trial court's order that Brownson was to begin serving his eighteen-month jail sentence on March 17, 2000, he filed a motion seeking to have the trial court declare that under WIS. STAT. § 973.03(2) the

---

[2] ***State v. James R. Brownson***, No. 96-3555-CR, unpublished slip op. (Wis. Ct. App. June 4, 1997).

[3] ***State v. James R. Brownson***, No. 97-3160-CR, unpublished slip op. (Wis. Ct. App. April 15, 1998).

eighteen-month jail sentence was served while he was in the Wisconsin prison system. The trial court denied the motion and this appeal followed.

¶6 The statutory underpinning for Brownson's argument is WIS. STAT. § 973.03(2), which provides:

> A defendant sentenced to the Wisconsin state prisons and to a county jail or house of correction for separate crimes shall serve all sentences whether concurrent or consecutive in the state prisons.

Whether or not § 973.03(2) saves Brownson from having to serve three consecutive six-month county jail sentences is a question of statutory interpretation that we review de novo. *See* ***State v. Olson***, 175 Wis. 2d 628, 633, 498 N.W.2d 661 (1993). If the language of the statute is clear and unambiguous, we merely apply the language to the facts of the case. *See* ***State v. Keding***, 214 Wis. 2d 363, 368-69, 571 N.W.2d 450 (Ct. App. 1997).

¶7 Brownson correctly begins his argument by noting that when the judgment of conviction was reentered on October 3, 1997, he was in the custody of the department of corrections. The record reflects that on December 1, 1994, Brownson started to serve a two-year prison sentence imposed in Fond du Lac county and on January 12, 1996, he was given a consecutive four-year sentence in Outagamie county. Brownson spent approximately fifteen months in prison before he was transferred to intensive sanctions on May 21, 1996. Under the intensive sanctions program, Brownson was on electronic monitoring and confined to his residence. He was removed from the intensive sanctions program on January 7, 1999, and placed on parole. Considering this chronology of events, Brownson asserts that the statute requires that the aggregate eighteen-month jail sentence reentered on October 3, 1997, be considered served while he was in the custody of the department of corrections.

¶8 Brownson, however, incorrectly includes several crucial facts in his argument. First, when the aggregate eighteen-month jail sentence was imposed on September 26, 1994, he was not serving a prison sentence. Second, at his request, the jail sentence was immediately stayed pending appeal. Third, at his repeated requests, the jail sentence was stayed through more than five years and two appeals until he was removed from the intensive sanctions program on January 7, 1999.

¶9 Brownson also incorrectly applies the law to the facts. Upon sentencing, the essence of the judicial process is completed and nothing remains for the court to do but to turn the defendant over to the executive authority for incarceration. *See* ***State v. Szulczewski***, 216 Wis. 2d 495, 506 n.12, 574 N.W.2d 660 (1998). The limited exception to this principle is that the circuit court may grant a delay in turning the defendant over to the executive authority. *See* WIS. STAT. § 973.15(8)(a).[4] A delay in the commencement of the sentence to permit a defendant convicted of one or more misdemeanors is normally granted as it was to Brownson. *See* WIS. STAT. RULE 809.31. The delay Brownson sought and was granted provided him temporary freedom from spending up to eighteen months in the county jail.

¶10 The statute is unambiguous: when a defendant has both an active prison sentence and an active county jail sentence, both will be served in prison. When Brownson was in the custody of the department of corrections—either in a

[4] Section 973.15(8)(a) provides:

> The sentencing court may stay execution of a sentence of imprisonment or to the intensive sanctions program only:
>
> 1. For legal cause;
> 2. Under s. 973.09 (1) (a); or
> 3. For not more than 60 days.

prison or in the intensive sanctions program—he requested and was given a respite from the county jail term that had been imposed. At his request, there was no jail sentence to be served while he was in custody of the executive authority; therefore, WIS. STAT. § 973.03(2) is not applicable.

¶11 We can also affirm the trial court on the principal of judicial estoppel. Because Brownson repeatedly sought to avoid serving the jail sentence, even when he was in prison or intensive sanctions, he cannot now argue that the statute must be construed to deem the jail sentence served. Brownson is judicially estopped from such a cold manipulation of the justice system. *See* ***State v. Fleming***, 181 Wis. 2d 546, 558, 510 N.W.2d 837 (Ct. App. 1993). We cannot permit Brownson to play fast and loose with the judicial system. To accept his argument would be to permit a gross perversion of the system. *See* ***id.***

By the Court.—Order affirmed.

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