COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2631-CR **Cir. Ct. No. 2011CF1746**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GABRIEL GRIFFIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and ELLEN R. BROSTROM, Judges. *Judgment affirmed; order reversed and cause remanded for further proceedings*.

¶1 FINE, J. This case has its history in Gabriel Griffin's disputes with the mother of their child over the child's custody. He appeals the judgment entered on jury verdicts convicting him of the following misdemeanors:

(1) criminal trespass to a dwelling, *see* WIS. STAT. § 943.14; and (2) disorderly conduct, *see* WIS. STAT. § 947.01. Griffin also appeals the circuit court's denial of his motion for postconviction relief.[1] He makes two claims on this appeal. First, even though he consistently indicated that he wanted to go to trial without a lawyer, he contends that the trial court erred in not granting him an adjournment, while the prospective jurors were either on their way to the courtroom or waiting in the hall, so he could get a lawyer. Second, he claims that his sentence was illegal. We affirm in part and reverse in part.[2]

I.

¶2 Griffin's first court appearance in this case was before a court commissioner on April 20, 2011. *See* WIS. STAT. §§ 970.01 (initial appearance); 970.02 (duty of judge at the initial appearance). A lawyer with Griffin told the commissioner that "Mr. Griffin would like to represent himself," and that Griffin was eligible to be represented by the state public defender's office. The commissioner told Griffin that he had "the right to be represented by counsel, as I've been told that you are not willing to be represented by the Public Defender. Is that true?" Griffin replied, "Yes. It's true."

¶3 Griffin appeared *pro se* for his preliminary examination on April 27, 2011. *See* WIS. STAT. § 970.03. The trial court told Griffin that he could either be

[1] The jury acquitted him of misdemeanor battery, *see* WIS. STAT. § 940.19(1), and was unable to reach a decision on the felony interference-with-custody charge, *see* WIS. STAT. § 948.31(1)(b). The parties tell us that another jury acquitted Griffin when that charge was retried.

[2] The Honorable Ellen R. Bostrom presided over the preliminary examination and the trial. The Honorable Rebecca F. Dallet denied Griffin's motion for postconviction relief.

represented by the public defender's office or he could "hire someone on your own." As he did at his initial appearance, Griffin replied, "I'd rather represent myself pro se." After asking Griffin questions to see if he could represent himself, *see* ***State v. Klessig***, 211 Wis. 2d 194, 203–204, 212, 564 N.W.2d 716, 720, 724 (1997) (defendant has a constitutional right to represent him- or herself) (trial court must ascertain whether defendant is competent to appear *pro se*), the trial court asked, "Do you want to re-consider your decision not to have a lawyer?" Griffin said "No." The trial court then asked, "You want to represent yourself?" When Griffin replied, "Yes," the trial court asked "why is that?" Griffin responded: "Because it's a personal matter dealing with me. And I feel that I can represent myself better and present the facts more clearer than a[n] attorney that work[s] for the state." The trial court then tried to disabuse Griffin of any concern he might have as to how the lawyer who would represent him was being paid, and explained that "the attorney has an ethical obligation if it's a public defender to zealously represent your interests. If you hire someone privately they have that same obligation and they don't work for the state. Do you understand both of those things?" Griffin said that he did. The trial court found that Griffin was competent to represent himself, and Griffin does not challenge that finding on this appeal.

¶4 The trial court bound Griffin over for trial, and told him that he could reconsider his decision to represent himself: "If you would like to re-consider your decision to have [a] lawyer, you certainly may do so. I can give you time to hire a lawyer or I can allow a public defender to be appointed to you." Griffin replied that he worked around chemicals and that he: "[d]idn't get any sleep. So I have time to re-consider that, you know." The trial court replied: "Yes. Would you like to have lawyer at this point?" Griffin said: "No. I will

reconsider. I will find out. I have a thousand lawyers on hand already." Griffin added, "I'll notify you within a week or so." The trial court and Griffin then worked out a procedure for that:

> THE COURT: Why don't we set it -- is it your intention to hire a lawyer at this point?
>
> THE DEFENDANT: Yes. I might get a lawyer, but I'm going to sit back and do find some time to do research for myself --
>
> THE COURT: Okay. Why don't we set it also --
>
> THE DEFENDANT: I would have been prepared today, but today caught me off guard because I didn't know today was the court date.
>
> THE COURT: Okay.
>
> THE DEFENDANT: I was working. Luckily my sister assisted me.
>
> THE COURT: You're certainly entitled to hire a lawyer. Why don't we set a status of counsel date to see what that, how that turns out.
>
> Given that at this point I think [the prosecutor] cannot ethically speak with you now that you moved back into a posture of wanting a lawyer.
>
> THE DEFENDANT: Right.
>
> THE COURT: But that's fine.

The transcript says that the trial court adjourned the matter to May 5, 2011, "for status of counsel," and told Griffin that "if you hire a lawyer that person should come back with you at the next court date." The next court date was, however, May 6, and neither party asserts that this is either a material variance or relevant to this appeal. Griffin replied: "All right. That's fine." The trial was set for July 11, 2011.

¶5 Griffin appeared without a lawyer on May 6. The trial court gave both the State and Griffin its written decision addressing the motions that Griffin had filed *pro se*. When Griffin expressed concern about his child, the trial court suggested that he talk to the prosecutor and added that, "[i]f you had a lawyer, your lawyer would be doing that for you." Nevertheless, the trial court asked the assistant district attorney who was appearing for the State that day to have the prosecutor call Griffin.

¶6 Griffin filed additional motions, which the trial court denied, and Griffin filed a *pro se* notice of appeal, which we dismissed because, we lacked jurisdiction over the appeal. ***State v. Griffin***, No. 2011AP1404, unpublished op. and order (WI App Sept. 1, 2011). The trial court held a brief hearing on June 20, 2011, and told Griffin, who again appeared *pro se*, that in light of what it determined was the baselessness of some motions that Griffin filed, that he was "not allowed to file anymore motions in this case without prior approval of the Court on the record." It explained that "[p]arties are not allowed to file frivolous motions." Griffin does not argue on this appeal that the trial court prevented him from filing pertinent motions.

¶7 The next court date was July 7, and another judge sat in for the trial court. Griffin appeared *pro se*.

¶8 As noted, the trial court had set July 11, 2011, as the trial date. The State, however, asked for an adjournment because the child's mother did not appear. Griffin sought dismissal of the case, which the trial court denied, saying: "It is my policy to grant one adjournment per side for good cause. This is the state's first adjournment and based on that record I will grant the request for an adjournment."

¶9 The trial court held a pre-trial hearing on September 2, 2011, and Griffin again appeared *pro se*. Griffin did not say anything about needing time to either get a lawyer or to consider whether he needed one.

¶10 Griffin appeared *pro se* for the trial on September 21, 2011. The trial court asked for potential jurors to come from the jury assembly room. While the trial court and the parties were waiting, they discussed the number of prior convictions that could be used for impeachment under WIS. STAT. RULE 906.09. Although the prosecutor asked that the trial court approve seven for Griffin, Griffin successfully argued that all but one were too old to count. The trial court agreed with Griffin. The trial court also granted the State's motion *in limine* to prevent the jury from hearing evidence of any prior bad acts by either the child's mother or by Griffin. Further, Griffin agreed with the trial court's ruling that witnesses would be sequestered after they were introduced to the jury.

¶11 While the jury was apparently waiting in the hall, the trial court ruled that some exhibits Griffin wanted to use during the trial were not relevant and therefore would not be admitted. Griffin objected and accused the trial court of being "not fair or impartial." Then, after some further discussion about evidence that Griffin wanted the jury to consider, he said that the trial court's analysis "doesn't make sense. I think you need to get--go back to law school. Oh, I want a different judge or a public defender." The trial court reiterated that it was impartial and that it wanted "to go forward with the trial." It told Griffin that he "had plenty of opportunity to seek a lawyer, if that's what you wanted to do. This case needs to be resolved today." When the trial court indicated that the prospective jurors were waiting in the hall and that they should be brought in,

Griffin said: "I want a new judge. You and the DA have already shown impartiality. [*sic*] I want a public defender."

¶12 The trial court did not respond, but rather told the deputies to bring the prospective jurors into the courtroom, and to give Griffin "a cup of water from my dispenser," saying that the prosecutor could also have some water.

¶13 The case was tried, and, as noted, the jury convicted Griffin of the two misdemeanors. The parties agree on appeal that the misdemeanor convictions were subject to the habitual-criminality enhancement. *See* WIS. STAT. § 939.62(1)(a). The trial court sentenced Griffin to bifurcated terms of two years on each of the misdemeanor convictions, one year of initial confinement on each conviction followed by one year of extended supervision, and made the sentences "consecutive to each other." We address Griffin's legal arguments in turn.

II.

A. *Right to a lawyer*.

¶14 Once a defendant decides to go *pro se*, his or her right to counsel "'is no longer absolute.'" ***State v. Rhodes***, 2011 WI App 145, ¶30, 337 Wis. 2d 594, 608, 807 N.W.2d 1, 7 (quoted source omitted). Further, "a defendant's request to withdraw from self-representation and proceed with the assistance of counsel rests in the trial court's discretion." 2011 WI App 145, ¶27, 337 Wis. 2d at 607, 807 N.W.2d at 7. The issue here is thus whether the trial court erroneously exercised its discretion in denying Griffin's last-minute request to get "a public defender."

¶15 Griffin contends that the trial court's decision to not grant him an adjournment in order to get a lawyer was wrong because, he argues, it was

contrary to its assurance that each side got one adjournment. Of course, the trial court said, as we have seen, that it was its usual policy to give each side one adjournment "for good cause." That was not and could not be a chit that could be used at any point, even if only for delay. Given the circumstances that we have set out at length, the trial court's refusal to derail the trial to accommodate Griffin's last-minute request for "a public defender" was not by any stretch of the imagination an erroneous exercise of discretion. *See* ***id.***, 2011 WI App 145, ¶31, 337 Wis. 2d at 608, 807 N.W.2d at 8 ("'[T]he timing of the motion is part and parcel with the consideration of whether disruption would result if the motion was granted.'") (quoted source omitted).

B. *Sentencing*.

¶16 Griffin claims that he is entitled to re-sentencing because he contends that the bifurcated sentences were illegal, and cites two one-judge unpublished decisions: ***State v. Gerondale***, No. 2009AP1237/1238-CR, unpublished slip op. (WI App Nov. 3, 2009), and ***State v. Ash***, No. 2012AP381-CR, unpublished slip op. (WI App Aug. 15, 2012). Essentially, he argues that under ***State v. Volk***, 2002 WI App 274, ¶¶35–37, 258 Wis. 2d 584, 602–604, 654 N.W.2d 24, 33, penalty enhancers may not be used to increase the period of extended supervision. As we show below, the statutory scheme here, which is similar but not wholly congruent with that considered by ***Volk***, is fairly clear and requires sentences different than the trial court imposed.

¶17 Although sentencing is generally a matter of trial-court discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶4, 270 Wis. 2d 535, 544, 678 N.W.2d 197, 201, we review *de novo* contentions that a sentence violates the statutes, *see* ***State v.***

Turnpaugh, 2007 WI App 222, ¶2, 305 Wis. 2d 722, 725, 741 N.W.2d 488, 490 (statutory construction a matter of appellate *de novo* review).

¶18 As material, the statutes here provide the following (bolding added for emphasis):

- WISCONSIN STAT. § 973.01(1):

  > [W]henever a court sentences a person to imprisonment in the Wisconsin state prisons for … a misdemeanor committed on or after February 1, 2003, the court **shall impose a bifurcated sentence under this section**.

- WISCONSIN STAT. § 973.01(2):

  > STRUCTURE OF BIFURCATED SENTENCES. A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113. **The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision.** An order imposing a bifurcated sentence under this section shall comply with all of the following:
  >
  > (a) *Total length of bifurcated sentence*. **Except as provided in par. (c)**, **the total length of the bifurcated sentence may not exceed … the maximum term of imprisonment provided by statute for the crime**, if the crime is not a classified felony, **plus additional imprisonment authorized by any applicable penalty enhancement statutes**.
  >
  > (b) *Confinement portion of bifurcated sentence*. The portion of the bifurcated sentence that imposes a term of confinement in prison **may not be less than one year and, except as provided in par. (c)**, is subject to whichever of the following limits is applicable:
  >
  > …
  >
  > (10) … [T]he term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence.

> …
>
> (c) *Penalty enhancement.* 1. **Subject to the minimum period of extended supervision required under par. (d), the maximum term of confinement in prison specified in par. (b) may be increased by any applicable penalty enhancement statute. If the maximum term of confinement in prison specified in par. (b) is increased under this paragraph, the total length of the bifurcated sentence that may be imposed is increased by the same amount**.
>
> …
>
> (d) *Minimum and maximum term of extended supervision.* **The term of extended supervision may not be less than 25% of the length of the term of confinement in prison imposed under par. (b).**

- WISCONSIN STAT. § 939.62(1):

> If the actor is a repeater … and the present conviction is for any crime for which imprisonment may be imposed … the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> (a) **A maximum term of imprisonment of one year or less may be increased to not more than 2 years**.

¶19 As we have seen, the jury convicted Griffin of criminal trespass to a dwelling and disorderly conduct. Criminal trespass to a dwelling is a Class A misdemeanor. WIS. STAT. § 943.14. Disorderly conduct is a Class B misdemeanor. WIS. STAT. § 947.01. Under WIS. STAT. § 939.51(3)(a), a person convicted of a Class A misdemeanor may be sentenced to a term of "imprisonment not to exceed 9 months." Under WIS. STAT. § 939.51(3)(b) a person convicted of a Class B misdemeanor may be sentenced to a term of "imprisonment not to exceed 90 days."

¶20 Based on the foregoing, this is what we have here. If Griffin had not been a repeater subject to the penalty enhancer, he could have been sentenced to

"imprisonment" of nine months on the Class A misdemeanor, and ninety days on the Class B misdemeanor. His repeater status, however, permitted the trial court to increase his sentence for each crime to two years. *See* WIS. STAT. § 939.62(1)(a). Under WIS. STAT. § 973.01(1), those sentences had to be bifurcated. Under WIS. STAT. § 973.01(2), "The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision." Thus, the total permissible bifurcated sentence = initial confinement + extended supervision, which may not be less than 25% of the initial confinement. This, of course, limits the range of sentencing options, but adheres to the language of the statute, which we must do. *See* ***Bostco LLC v. Milwaukee Metropolitan Sewerage District***, 2013 WI 78, ¶55, ___ Wis. 2d ___, ___, ___ N.W.2d ___, ___; ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 662, 681 N.W.2d 110, 123–124.

¶21 This is how the statutes operate:

- Under WIS. STAT. § 973.01(2)(b), the bifurcated sentence has to have an initial confinement of at least one year.

- Further, the mandate in WIS. STAT. § 973.01(2)(b)(10) that "the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence" is subject to WIS. STAT. § 973.01(2)(c).

- As we have seen, § 973.01(2)(c) provides: "If the maximum term of confinement in prison specified in par. (b) is increased under this paragraph, the total length of the bifurcated sentence that may be imposed is increased by the same amount." Thus, the "75%"

direction in § 973.01(2)(b)(10) gives way if in conflict with the result permitted by § 973.01(2)(c).

We apply these provisions to this case.

- For the Class A misdemeanor:

  The maximum period of "imprisonment" (that is, confinement) without the enhancer is nine months. WIS. STAT. § 939.51(3)(a). The trial court sentenced Griffin to confinement for one year, thus increasing the confinement from nine months to twelve months. Under WIS. STAT. § 973.01(2)(c), the trial court is permitted to increase the total length of the bifurcated sentence to one year and three months (the one year initial confinement extended by the time by which the permissible period of confinement is increased from the original non-enhanced statutory maximum—for Griffin's Class-A-Misdemeanor conviction, three months). Thus, the permissible extended-supervision aspect of this sentence had to be three months, which satisfies both the 25% condition in WIS. STAT. § 973.01(2)(d), and the total length of the permissible bifurcated sentence, as mandated by WIS. STAT. § 973.01(2): "The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision."

- For the Class B misdemeanor:

  The maximum period of "imprisonment" (that is, confinement) without the enhancer is ninety days. WIS. STAT. § 939.51(3)(b). The trial court sentenced Griffin to confinement for one year, thus

increasing the confinement from ninety days to 365 days. Under WIS. STAT. § 973.01(2)(c), the trial court is permitted to increase the total length of the bifurcated sentence to one year and 275 days (the one year initial confinement extended by the time by which the permissible period of confinement was increased from the original non-enhanced statutory maximum—for Griffin's Class-B-Misdemeanor conviction, 275 days). Thus, the permissible extended-supervision aspect of this sentence could have been as much as 275 days, which satisfies both the 25% condition in WIS. STAT. § 973.01(2)(d), and the total length of the permissible bifurcated sentence, as mandated by WIS. STAT. § 973.01(2): "The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision."[3]

[3] We recognize the seeming anomaly of a statutory scheme that permits a greater period of extended supervision for the less-serious crime. Indeed, had a trial court imposed an initial confinement of two years for an enhanced Class B Misdemeanor, which is permissible under WIS. STAT. § 939.62(1)(a), the calculation would be: total permissible bifurcated sentence = 640 days (two years initial confinement + the difference between ninety days and two years). But we cannot say that this is "absurd" so as to require that we ignore what the legislature wrote. *See* ***Bostco LLC v. Milwaukee Metropolitan Sewerage District***, 2013 WI 78, ¶55, ___ Wis. 2d ___, ___, ___ N.W.2d ___, ___ ("[C]ourts are not free to ignore the words or phrases chosen by the legislature."); ***State v. Young***, 180 Wis. 2d 700, 704, 511 N.W.2d 309, 311 (Ct. App. 1993), *aff'd*, 191 Wis. 2d 393, 528 N.W.2d 417 (1995). The legislature may of course fine-tune the bifurcation scheme for misdemeanors if it chooses to do so.

¶22 In light of this, we reverse the order denying Griffin's motion for postconviction relief in connection with the sentences, and remand for resentencing consistent with this opinion.[4]

By the Court—Judgment affirmed; order reversed and cause remanded for further proceedings.

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

[4] Griffin argues that because the State agreed with his sentencing analysis in the circuit court, the State is judicially estopped from arguing to the contrary on this appeal. A necessary element of judicial estoppel is, of course, that the party takes a position that persuaded a court to do one thing and then argues that what the court did was error. *See* ***State v. Petty***, 201 Wis. 2d 337, 351, 548 N.W.2d 817, 822 (1996). This is not the case here. Indeed, the postconviction court specifically indicated that it did not agree with the State's concession.