COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP2320
2013AP969

Cir. Ct. No. 1999CV451

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

STATE OF WISCONSIN EX REL. LARRY L. GEORGE,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and orders of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. These consolidated appeals stem from Larry L. George's three felony convictions in two different counties and a 1999 certiorari action George filed seeking review of his parole revocation. We affirm the judgment and orders.

¶2 In 1986 and 1987, George was convicted in Winnebago county of sexual assault of a child and theft. Judge William Carver sentenced George to sixteen years and two years, respectively.[1] George was released on discretionary parole in 1995 and absconded in early 1996. During his nearly three years on the lam, he picked up sexual assault and false imprisonment charges in Brown county. His parole was revoked. The Division of Hearings and Appeals (DHA) determined he should be reincarcerated for his remaining sentence of eight years, eighteen days.

¶3 George filed a certiorari action to review his parole revocation. In September 2000, the circuit court reversed the DHA decision, reduced George's reincarceration to nineteen months, and, as that period exceeded what he already had served after absconding, ordered his release. The State appealed.[2] This court reversed on grounds that the circuit court had exceeded its authority in a certiorari action. ***George v. Schwarz***, 2001 WI App 72, ¶30, 242 Wis. 2d 450, 626 N.W.2d 57. We remanded with directions to reinstate the original sentence of eight years

[1] The sentences initially were ordered to run consecutively but, for reasons not germane to the appellate issue, later were ordered to run concurrent with each other.

[2] We granted the State's motion for a stay of release pending appeal and expedited the briefing schedule. ***George v. Schwarz***, 2001 WI App 72, ¶9, 242 Wis. 2d 450, 626 N.W.2d 57.

and eighteen days. ***Id.*** The parties agreed that the start date of the corrected sentence would be October 22, 2001, the date the appeal became final.

¶4 Meanwhile, George was found guilty in the Brown county case. On August 13, 2001, the Brown county circuit court sentenced George to fifteen years for the sexual assault, "consecutive to other sentence now serving," and to a concurrent two years on the false-imprisonment charge.

¶5 George petitioned to have the DHA recalculate his reincarceration time and on April 28, 2006, Judge Carver reduced George's revocation time in the Winnebago county cases from eight years, eighteen days to seven years, seven days. "Concurrent" or "consecutive" was not addressed.

¶6 On January 15, 2010, a hearing was held, as the Department of Corrections (DOC) was treating the revocation sentence as consecutive to the Brown county sentence. George asked the court to clarify whether the Winnebago county and Brown county sentences were consecutive or concurrent. Judge Carver stated that the Winnebago county sentences were concurrent with each other but that George would have to address the Brown county sentence in that county. Judge Carver's subsequent order provided that "the Court's intent is that these sentences are concurrent to each other and to any other sentence imposed prior to 10/22/01 when the appeal in this case became final."

¶7 The DOC asked the Winnebago county court to clarify its order. The DOC observed that the court had expressly addressed the concurrent nature of case numbers 86CF22 and 86CF175 (the two Winnebago county sentences) but had not specifically stated whether case number 96CF163 (the Brown county case)

was consecutive or concurrent. The DOC asked whether it was the court's intent that 96CF163 also be concurrent.

¶8 Based on that same language in Judge Carver's order, George filed a pro se motion asking the court either to sanction the DOC for failing to comply with the order to treat all three sentences as concurrent or, alternatively, to sign an order directing that all the sentences were concurrent. The court denied George's motion after a hearing. The court reasoned that it could tell the Brown county court only that the Winnebago county sentences were concurrent with each other but it was up to Brown county to determine the treatment of its sentence.

¶9 George, through counsel, moved to have the Winnebago county court clarify and determine whether the Brown county sentence was concurrent with or consecutive to the Winnebago county sentences. At the July 7, 2010 hearing, the court reiterated that it had no authority over a Brown county sentence.

¶10 Again pro se, George continued his efforts to have the court declare its intent that his three sentences be served concurrently. On February 3, 2011, the circuit court, now presided over by Judge John Jorgenson, entered a "Corrected Order From July 7, 2010, Hearing." The corrected order made findings "to clarify the record" but expressly took no position as to whether those findings amounted to a new factor in his Brown county case. The court ordered that "[i]n all other respects not contrary hereto, the prior Orders of this Court shall remain in full force and effect."

¶11 George then moved to compel the DOC to calculate his seven-year, seven-day sentence with a start date of October 22, 2001. On July 20, 2011, the court denied the motion in an order stating that, as the January 15, 2010 and

February 3, 2011 orders had been entered on the parties' agreement, they remained in full force and effect, and that "[n]o further Orders are needed at this time." George filed a motion to have the DHA found in contempt and for sanctions because the DOC did not start his revocation sentence on October 22, 2001.

¶12 The DHA filed a motion asking the circuit court to clarify whether its orders of January 15, 2010 ("these sentences are concurrent to each other and to any other sentence imposed prior to 10/22/01"), February 3, 2011 (the court's prior orders "shall remain in full force and effect"), and July 20, 2011 (the two above-named orders were entered on the parties' agreement and remained in full force and effect), determined that the Brown county sentence was concurrent with the Winnebago county sentences and, if so, to vacate the orders under WIS. STAT. § 807.03 (2011-12)[3] because they were premised on a mistake of fact.

¶13 The court, now presided over by Judge Daniel Bissett, held a hearing on the motion on September 20, 2012. George was represented by appointed counsel. At the outset, the court found that the motion more properly came under WIS. STAT. § 806.07(1)(d), which applies to a motion seeking relief from an order that is void, that the DHA brought its motion within a reasonable time, and that the matter needed clarification. Consistent with the prior judges' unwavering position, Judge Bissett ruled that the court's earlier orders did not determine the relationship of the Brown county sentence to the Winnebago county sentences. George filed motions for a stay pending appeal, to vacate, for sanctions, and for reconsideration. On October 18, 2012, the court denied them all.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶14 On November 5, 2012, the circuit court ordered George to pay attorney fees to his court-appointed attorney and entered a judgment for the unpaid attorney's fees. The court denied George's motion to vacate the order on December 14, 2012, and George's subsequent motion for reconsideration on January 29, 2013. This pro se appeal followed.

¶15 George sought review of the judgment and all of the orders entered since October 18, 2012. His notice of appeal was timely only as to the January 29, 2013 order. The State asserts that this court does not have jurisdiction to review that order, which denied George's motion for reconsideration, as the motion presented the same issues as those determined in the October 5, 2012 order.

¶16 For this court to have jurisdiction over an appeal from the denial of a motion for reconsideration, "a party must present issues other than those determined by the original final order or judgment." ***Marsh v. City of Milwaukee***, 104 Wis. 2d 44, 45, 310 N.W.2d 615 (1981). Whether a party's motion for reconsideration raised a new issue "presents a question of law that this court reviews de novo." ***State v. Edwards***, 2003 WI 68, ¶7, 262 Wis. 2d 448, 665 N.W.2d 136. We conclude we have jurisdiction because George raises the new issue of whether the Winnebago court had the authority to clarify the sentences.

¶17 Despite this case's lengthy and knotty history and George's prodigious motion-filing, the appellate issues are fairly clean. We discern just two: whether the Winnebago county circuit court had the authority to address DHA's clarification motion, and whether the parties had an agreement that all sentences would be concurrent. We answer issue one "yes" and issue two "no."

¶18 The DHA filed its motion for clarification or vacation on November 17, 2011. George contends the court lacked authority to grant relief because the motion was made more than one year after the January 15, 2010 order was entered. *See* WIS. STAT. § 806.07(1)(a), (c), (2).

¶19 The circuit court concluded the motion was properly made under WIS. STAT. § 806.07(1)(d). We agree. The January 15, 2010 order would have been void if it had determined that the sentence in the Brown county criminal case was either consecutive to or concurrent with the sentences in the Winnebago county criminal cases because certiorari review, a civil matter, is limited to the record created before the DHA. *See* ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). A reviewing court may not consider matters outside the record on return to the writ. *See* ***State ex rel. Irby v. Israel***, 95 Wis. 2d 697, 703, 291 N.W.2d 643 (Ct. App. 1980).

¶20 Further, circuit courts have power to hear and determine actions and proceedings "within their respective circuits." WIS. STAT. § 753.03. Plainly, the Winnebago county circuit court and the Brown county circuit court are in different judicial circuits. WIS. STAT. § 753.06(4)(e), (8)(a). A court may expunge a void judgment at any time, making inapplicable even the reasonable time requirement under WIS. STAT. § 806.07(2). ***Neylan v. Vorwald***, 124 Wis. 2d 85, 97, 368 N.W.2d 648 (1985).

¶21 The court determined that the motion was brought within a reasonable time because the motion's subject matter needed clarification, and because the one-year limitation set forth in WIS. STAT. § 806.07(2) did not apply to a motion seeking relief from an order that is void. *See* § 806.07(1)(d). The court's conclusions were not unreasonable.

¶22 George next asserts that the circuit court erroneously exercised its discretion by deciding the matter based on WIS. STAT. § 806.07(1)(d) when that was not the argument DHA presented in its motion. Our concern is whether the circuit court was correct. It was, so we will sustain it. *See* ***Mueller v. Mizia***, 33 Wis. 2d 311, 318, 147 N.W.2d 269 (1967) ("Whether the ground assigned by the trial judge … is correct is immaterial if, in fact, the ruling is correct and the record reveals a factual underpinning that would support the proper findings.").

¶23 At bottom, the second issue is whether the parties agreed that the Brown county and Winnebago county sentences were concurrent. George contends they did, and that the agreement was embodied in the circuit court's orders approved by the parties. He also contends that a challenge to the agreement is barred by WIS. STAT. § 807.05 (agreements made in court and entered in court minutes or recorded by reporter are binding) and by the doctrines of election of remedies, claim preclusion, stare decisis, and breach of contract. The record simply does not support George's premise. His further arguments thus fall away.

¶24 George seeks to capitalize on the confusion resulting from time gaps and overlaps and the "concurrent to … any other sentence imposed prior to 10/22/01" language in the January 15, 2010 order. To recap, George's parole was revoked in his Winnebago county case due to his arrest in Brown county. He then was ordered reincarcerated for the remainder of his Winnebago county sentence, eight years and eighteen days. He challenged that determination. On review in the circuit court, the sentence was reduced to nineteen months, a period he already had served. Brown county imposed its sentence on August 31, 2001, ordering it to be consecutive. George argues that he was not serving any sentence at that point, so there was nothing for the Brown county sentence to be consecutive to, and,

further, it was "prior to 10/22/01." The nineteen-month reincarceration sentence was overturned on appeal, however, and the full eight-year, eighteen-day sentence was reinstated. That is the sentence the Brown county sentence is to be made consecutive to or concurrent with.

¶25 The record is clear that the Winnebago county circuit court consistently asserted that it had no authority to direct matters in the Brown county circuit court and that only Brown county could decide if the sentence it imposed should be consecutive or concurrent. Judge Carver's January 15, 2010 order stating that it was the court's intent that the Winnebago county sentences "are concurrent to each other and to any other sentence imposed prior to 10/22/01" could only mean "any other Winnebago county sentence imposed prior to 10/22/01" because, as Judge Carver repeatedly emphasized, and correctly so, the Winnebago county circuit court has no authority over Brown county.

By the Court.—Judgment and orders affirmed.

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