COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2993-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PETER R. BURGESON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA and JEAN W. DiMOTTO, Judges. *Affirmed.*

WEDEMEYER, P.J.[1] Peter R. Burgeson appeals from a judgment entered after he pled guilty to operating a motor vehicle while under the influence of an intoxicant (fourth offense), contrary to §§ 346.63(1)(a) and 346.65(2),

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

STATS. He also appeals from an order denying his postconviction motion seeking sentencing clarification.[2] He claims the trial court erred in concluding that the sentence imposed was to run consecutively to a current sentence that he was serving. Because the record as a whole demonstrates that the sentence was to be consecutive to any other sentence, this court affirms.

I. BACKGROUND

On September 20, 1996, the trial court held a pretrial on the OWI charge that Burgeson was facing. During the pretrial, the trial court was advised that Burgeson would probably plead guilty, but that he had a pending case in Waukesha County that he wanted to know the outcome of before proceeding with the instant case.

On October 11, 1996, Burgeson pled guilty. The trial court was informed that Burgeson was currently an inmate in the Waukesha County Huber Center. The trial court accepted the plea. On November 12, 1996, the trial court sentenced Burgeson to twelve months in the House of Correction with Huber privileges. The trial court did not state whether the sentence was to be served concurrent with, or consecutive to, the Waukesha sentence Burgeson was currently serving. The judgment of conviction entered on the same day as the sentence was pronounced, however, stated that this sentence should be served consecutive to any other sentence.

Burgeson filed a postconviction motion seeking clarification of whether the sentence imposed was concurrent or consecutive. The postconviction

[2] The Hon. Clare L. Fiorenza presided over the plea hearing and sentencing. The Hon. Jean W. DiMotto presided over the postconviction hearing.

court ruled that the sentencing court intended the sentence to be consecutive. Burgeson now appeals

II. DISCUSSION

Burgeson argues that the sentencing court's failure to state on the record whether the sentence imposed was to be served concurrently or consecutively results in an automatic concurrent sentence. The State argues that when the oral pronouncement of the sentence is ambiguous, one must look to the record as a whole to determine the intent of the sentencing court. The State continues that in looking to the whole record, it is clear the sentencing court intended Burgeson's sentence in this case be served consecutive to any other sentence. This court agrees with the State.

This case presents a question of law that this court decides independently. *See* ***State v. Lipke***, 186 Wis.2d 358, 363, 521 N.W.2d 444, 445-46 (Ct. App. 1994).

It is undisputed that the sentencing court's oral pronouncement was silent as to whether the sentence imposed should be concurrent or consecutive to any other sentence. It is also undisputed that the judgment of conviction entered on the same day the sentence was imposed states that the sentence should be served consecutively to any other sentence.

This factual scenario creates a situation where the oral pronouncement is ambiguous. *See* ***State v. Coles***, 208 Wis.2d 328, 559 N.W.2d 599 (Ct. App. 1997). In order to resolve that ambiguity, it is proper to look at the record as a whole, including the written judgment, to ascertain the sentencing

court's intention. *See* ***Lipke***, 186 Wis.2d at 364, 521 N.W.2d at 446; ***State v. Brown***, 150 Wis.2d 636, 642, 443 N.W.2d 19, 22 (Ct. App. 1989).

The judgment of conviction could not be more clear. It specifically stated that this sentence should be served consecutively to any other sentence. Further, it was entered on the same day as the sentence was imposed. Thus, this indicates that the sentencing court, although it failed to orally state that the sentence was to be served consecutively, did intend to impose a consecutive sentence. Moreover, this OWI was Burgeson's fourth offense. It is unlikely that a defendant convicted of a fourth offense OWI conviction would be given a sentence to be served concurrently to another OWI sentence he was currently serving. Therefore, this court concludes that the record as a whole demonstrates that the sentence imposed was to be consecutive to the sentence Burgeson was already serving.

Finally, this court rejects Burgeson's argument that the rule in ***State v. Perry***, 136 Wis.2d 92, 401 N.W.2d 748 (1987), which states that when the oral pronouncement is unambiguous and the judgment of conviction conflicts with the oral pronouncement, it is the oral pronouncement that controls. ***Perry*** does not apply to the instant case for two reasons: (1) the oral pronouncement here is *ambiguous* not *unambiguous*; and (2) the oral pronouncement here does not conflict with the written judgment of conviction. ***Perry*** applies to a case where, during the oral pronouncement, the court states that the sentence is concurrent, but the written judgment of conviction states that the sentence is consecutive. *See* ***id.*** at 112-13, 401 N.W.2d at 757. Therefore, ***Perry*** is inapplicable to the instant case.

By the Court.—Judgment and order affirmed.

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