COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3286-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL MORRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Reversed and cause remanded.*

NETTESHEIM, J. Michael Morris rejected the trial court's sentence of probation and, instead, asked for a sentence to the county jail following his conviction for disorderly conduct. The trial court rejected Morris' request. Based on our supreme court's decisions in ***Garski v. State***, 75 Wis.2d 62, 248 N.W.2d 425 (1977), and ***State v. Migliorino***, 150 Wis.2d 513, 442 N.W.2d 36 (1989), we reverse. We remand for further sentencing.

The facts underlying the issue on appeal are undisputed. On August 10, 1996, Morris was arrested for disorderly conduct while armed with a dangerous weapon following a domestic dispute with his live-in girlfriend. On November 18, 1996, a jury found Morris guilty of disorderly conduct, but further answered that Morris did not commit the crime while armed with a dangerous weapon. At the sentencing hearing on December 18, 1996, the State asked that Morris be placed on probation with various conditions, including jail time. Morris, through his counsel, asked for a straight sentence of thirty days. The trial court withheld the imposition of sentence and placed Morris on probation subject to various conditions, including an imposed but stayed thirty-five day period of confinement in the county jail.

Morris' attorney then advised the trial court that Morris was refusing the court's sentence of probation. Instead, counsel asked that Morris "be given a sentence right now." Counsel contended that case law supported Morris' request, but she did not provide the court a citation to the case law. The State argued that Morris did not have an absolute right to reject probation. The court scheduled this issue for a hearing on January 3, 1997.

However, the next day, December 19, 1996, the trial court entered a written order vacating the sentence and stating the court's belief that the ***Garski*** and ***Migliorino*** decisions, plus the further holding in ***State v. Smith***, 100 Wis.2d 317, 325, 302 N.W.2d 54, 58 (Ct. App. 1981), supported Morris' position.[1] In the order, the court confirmed the adjourned sentencing hearing scheduled for January 3, 1997.

[1] We note that ***State v. Smith,*** 100 Wis.2d 317, 302 N.W.2d 54 (Ct. App. 1981), was overruled on other grounds by ***State v. Firkus***, 119 Wis.2d 154, 350 N.W.2d 82 (1984).

At the adjourned hearing, however, the trial court disavowed its prior written order. Instead, the court ruled that the case law, particularly the ***Garski*** decision, permitted a defendant to refuse probation if the defendant could demonstrate that the conditions of probation would be more onerous than the sentence. The court stated: "I'm not prohibited from … ordering probation, but I've got to make certain findings in order to do it …. [W]hat I have to find out is … why is probation so onerous he can't comply with it." The State agreed with the court's reasoning. Based on its reading of ***Garski***, the court further adjourned the sentencing to January 23, 1997, to allow Morris time to prepare arguments as to why the conditions of probation were too onerous.

At the further adjourned hearing, Morris reiterated his belief that Wisconsin law granted him an absolute right to refuse probation. Again the State disagreed. The trial court confirmed its most recent ruling that Morris did not have an absolute right to reject probation. Since Morris had failed to demonstrate that the conditions of probation were more onerous than the sentence, the trial court withheld sentence and ordered probation with appropriate conditions.

On September 5, 1997, Morris filed a motion for postconviction relief requesting a new sentence. The trial court held a motion hearing on October 9, 1997. The court denied Morris' motion maintaining that Morris had failed to offer any explanation as to why the probation conditions were more onerous than the sentence. Morris appeals.

The sole issue on appeal is whether the trial court's imposition of probation against Morris' wishes was based upon an erroneous interpretation of the law. The application of law to undisputed facts presents a question of law

which we review de novo. *See* ***State v. Beiersdorf***, 208 Wis.2d 492, 496, 561 N.W.2d 749, 751 (Ct. App. 1997).

We begin by noting that on appeal the State abandons the position it took on this issue in the trial court. Instead, the State now agrees with Morris that ***Garski*** grants the defendant an absolute right to refuse probation in favor of the imposition of sentence.

In ***Garski***, the defendant did not reject the trial court's sentence of probation. Instead, the defendant took issue with certain of the conditions of probation. *See* ***Garski***, 75 Wis.2d at 69-77, 248 N.W.2d at 430-33. In response, the ***Garski*** court stated: "If the defendant finds the conditions of probation more onerous than the sentence which would have been imposed he can refuse the probation." ***Id***. at 77, 248 N.W.2d at 433. Beyond that statement, the issue was not further developed in the opinion. Nonetheless, we take particular note that the supreme court did not say that *the sentencing court* must find that the conditions of probation are too onerous before the defendant may reject probation. Rather, the court said, "*If the defendant* finds the conditions of probation more onerous …" the defendant may refuse probation. (Emphasis added.) The four corners of this language places the decision to reject probation with the defendant, not the trial court.

The supreme court revisited this issue in ***Migliorino***. Unlike ***Garski*** where the defendant had not rejected probation, the defendant in ***Migliorino*** expressly told the trial court that she wished to be sentenced rather than placed on probation. *See* ***Migliorino***, 150 Wis.2d at 540, 442 N.W.2d at 47. The trial court refused. *See* ***id***. The supreme court reversed, relying on its language in ***Garski***. *See* ***Migliorino,*** 150 Wis.2d at 541, 442 N.W.2d at 48. If the ***Migliorino*** court had

intended to burden the defendant with actually demonstrating how the conditions of probation were too onerous, it strikes us that the supreme court would have done so since, unlike ***Garski***, the defendant had expressly rejected the trial court's sentence of probation. Yet, the ***Migliorino*** court did not impose such a requirement, nor did it read ***Garski*** to that effect. We therefore are compelled to reverse the trial court's ruling.

Despite our disagreement with the trial court's reading of the law, we register our agreement with the wisdom underlying the court's decision. As the State notes in its brief, it is evident that the trial court was attempting to "do the right thing" in this case. At the sentencing hearing, Morris' counsel requested a sentence of thirty days in jail. The State, however, recommended that sentence be withheld and Morris be placed on probation for a fifteen-month period with conditions, including no alcohol, no contact with the victim, AODA treatment and a domestic abuse assessment.

After considering the victim impact statement, Morris' unusually high level of intoxication at the time of the arrest and his two prior misdemeanor convictions for battery, the court stated: "[I]t is more important that you be placed in a program where you can face and address rehabilitation and also the level of intoxication or drinking that was involved, together with some type of protection to the best extent I can for [the victim], as she clearly wants nothing to do with you …." Thus, in light of the defendant's behavior in this particular case, the trial court determined that probation would be more appropriate than a jail sentence in terms of rehabilitating the defendant and protecting the victim. In addition, the court aptly noted that it should be the court, not the convicted defendant, who controls the sentencing process.

The dilemma posed by the ***Garski*** decision was addressed by the supreme court in ***Migliorino*** when it stated: "We recognize that our interpretation can prevent a circuit court from imposing probation which, in a given case, may be more desirable both for society and an individual defendant than the imposition of a sentence." ***Migliorino***, 150 Wis.2d at 541-42, 442 N.W.2d at 48. However, the court also observed that the legislature's failure to amend the probation statute following the court's decision in ***Garski*** was a clear indication that the legislature had not "seen fit" to do so in order to overcome its effect. *See* ***Migliorino***, 150 Wis.2d at 541, 442 N.W.2d at 48. The ***Migliorino*** court suggested that the legislature consider amending the probation statute to eliminate optional rejection of probation by a convictee. *See* ***id***. at 542, 442 N.W.2d at 48. We add our voice to this suggestion. However, until the legislature does so, the defendant retains the option to reject probation. Accordingly, we reverse and remand for resentencing in accord with this opinion.

By the Court.—Judgment and order reversed and cause remanded.

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