COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3638

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT GAREL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Reversed and cause remanded with directions.*

EICH, C.J.[1] Robert Garel appeals from an order denying his motion to vacate a sixty-five-day jail sentence for attempted theft. He argues that

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

the sentence violated his double-jeopardy rights because he had already served the maximum sentence for the offense.[2] We agree and reverse the judgment.

The appeal concerns three separate cases. In this one, Garel pled no contest to a charge of attempted theft on November 2, 1992. Sentence was withheld and he was placed on probation for two years. At that time he was on parole from a seven-year prison sentence imposed for a separate armed-robbery conviction, and was also serving a probationary term for a forgery conviction.

In 1993 the Department of Corrections revoked all three supervisory terms, and Garel was returned to court. The court ordered him to serve the approximately four years remaining on the original seven-year prison term for armed robbery and sentenced him to a consecutive eight-year term for forgery. The prosecution and defense jointly recommended the maximum sentence for attempted theft (this case)—four and one-half months—to be served concurrently with his armed-robbery sentence. The trial court accepted the recommendation and, on November 8, 1993, imposed the concurrent sentence of four and one-half months and gave Garel ten days' sentence credit.

On February 21, 1994, the judge in the other two cases vacated the revocation of Garel's parole in the armed-robbery case and his probation in the forgery case, restoring the supervisory terms. The trial court in this case followed

[2] Garel, acknowledging the well-known rule that a litigant may not as a matter of right raise issues on appeal which were not raised in the trial court, concedes that he did not specifically raise the double jeopardy issue in his *pro se* post-sentence motions. He argues on appeal, however, that there are "compelling reasons" for us not to find waiver in this case. Because the State does not argue that Garel has waived the right to raise the issue, we need not consider the matter further.

suit on March 28, 1994, issuing an order vacating the four-and-one-half-month sentence and reinstating Garel's probationary term.

In January 1995, the department again revoked all three supervisory terms. On March 17, 1995, Garel appeared before the trial court for sentencing in this case and argued that he had already served the previously imposed four-and-one-half-month sentence at the time it was "vacated." The trial court rejected the argument and sentenced Garel to sixty-five days in jail, with twelve days of sentence credit, this time ordering the sentence to run consecutive to the time remaining on the forgery and robbery sentences. The court reasoned that it had vacated the original sentence because "once the underlying revocations were themselves vacated," the court lost jurisdiction to impose the sentence. It went on to conclude that because Garel "was in prison on a separate sentence, and … received credit for the time served on that other, valid sentence," he should not be allowed "additional credit for the sentence that was vacated."

The double jeopardy clause prohibits multiple punishments for the same offense. ***State v. Upchurch***, 101 Wis.2d 329, 334, 305 N.W.2d 57, 60 (1981). The clause is also designed to ensure that the total punishment a defendant receives does not exceed that authorized by the legislature. ***United States v. Halper***, 490 U.S. 435, 450 (1989). As indicated, Garel was sentenced in this case to the maximum jail term—four and one-half months—on November 8, 1993. On March 28, 1994, approximately four and one-half months later, the sentence was vacated. Garel, pointing to § 973.15(1), STATS., which plainly states that sentences are to "commence at noon on the day of sentence," argues that, without even counting the full ten days of sentence credit the court gave him when imposing the sentence, the four and one-half month sentence—the maximum

provided by law for the crime of which he was convicted—had been fully served before it was vacated.

It is a compelling argument. The State counters by first suggesting that because Garel's sentence was vacated it was "eras[ed]" and everything returned to "the status quo"—presumably to the date on which the sentence was imposed. And the State further argues that, in any case, Garel could not have suffered any detriment as a result of the additional, consecutive, sixty-five-day sentence because, as the trial court stated, he was legally imprisoned on the sentences in the other case during the period November 8, 1993, to March 28, 1994, and received credit for time served on that sentence when it was reinstated after the final parole and probation revocations.

The fact is, however, that the initial four and one-half month sentence in this case was imposed to run concurrently with the other sentences, and it began running on the day it was imposed. It matters little, therefore, that he was given time-served credit in the other cases which included the period in question. In ***In re Bradley***, 318 U.S. 50 (1943), the defendant was convicted of an offense punishable by either a fine or a prison term and the trial court imposed both. Realizing its error at some later time, the court directed the clerk to return the fine—which had been paid—to the defendant's attorney. The attorney refused to accept it and sought to have the entire sentence vacated. The Supreme Court ruled in the defendant's favor, concluding that because "the judgment of the court was … executed … to be a full satisfaction of one of the alternative penalties …, the power of the court was at an end." ***Id***. at 52 (footnote omitted). In other words, because the defendant, by being both fined *and* imprisoned, had received more than the maximum fine *or* imprisonment penalty provided by law, the fact that one of those sanctions—the fine—was later rescinded, or credited to the

defendant, did not matter. The government argued in ***Bradley***, as the State does in this case, that because the defendant's fine had been remitted, he suffered no harm. The Supreme Court rejected the argument, concluding that "the subsequent amendment of the sentence could not avoid the satisfaction of the judgment, and the attempt to accomplish that end was a nullity." ***Id***.

We agree with Garel that the trial court's reasoning in this case parallels the government's argument in ***Bradley***—that as long as Garel received credit on the armed-robbery sentence for the time he spent in prison before the revocations and corresponding sentences were vacated, he suffered no real harm. As ***Bradley*** demonstrates, however, once the sentence imposed has been satisfied, the court is powerless to impose further punishment.[3]

The inescapable fact is that Garel had fully served a concurrent sentence that was valid when it was imposed, and the later vacating of that sentence cannot change that fact. In that situation, the cases tell us that he cannot again be imprisoned for the same offense. We therefore reverse the order and remand with directions to the circuit court to vacate the sixty-five-day sentence it imposed on Garel on March 17, 1995.

By the Court.–Order reversed and cause remanded with directions.

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

[3] The State does not address ***In re Bradley***, 318 U.S. 50 (1943), or the older, very similar case on which it is based, ***Ex parte Lange***, 21 L. Ed. 872 (1874), in its brief.