COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0404-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL SLAUGHTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: BRUCE E. SCHROEDER, Judge. *Affirmed in part, vacated in part, and remanded with directions.*

BROWN, J. Daniel Slaughter appeals from a judgment of conviction for misdemeanor false swearing. Slaughter seeks to withdraw his guilty plea contending that the trial court lacked jurisdiction to convict him because the statute of limitations had run on the charge. Because Slaughter waived this objection through an informed guilty plea, we affirm the conviction.

However, we vacate that part of the judgment setting Slaughter's fine and remand with directions in that regard.

The false swearing charge against Slaughter stemmed from his inconsistent testimony in depositions. *See* § 946.32(1), STATS. The depositions were taken in connection with civil suits that are not pertinent to this appeal. As a result, the State brought charges against Slaughter for felony false swearing. Slaughter moved to dismiss, contending the prosecution was barred by the statute of limitations. The trial court denied his motion finding that the statute of limitations had been tolled while Slaughter was incarcerated out of state. *See* § 939.74(3), STATS. Slaughter appealed and we affirmed. *See* ***State v. Slaughter***, 200 Wis.2d 190, 546 N.W.2d 490 (Ct. App. 1996). Subsequently, pursuant to a plea agreement, Slaughter pled guilty to a charge of misdemeanor false swearing as a habitual offender. *See* §§ 946.32(2) and 939.62(1)(b), STATS. The original criminal complaint was amended to reflect the new charge.

Slaughter raises three issues. First, as in his previous appeal in this case, he claims the trial court was without jurisdiction to convict due to the running of the statute of limitations. Slaughter contends that though the original complaint was timely filed, the amended complaint, charging him with a misdemeanor instead of a felony, is time-barred.[1] Second, he asserts that it was error for the trial court to order full payment of his fine immediately upon release from prison without making a determination of his ability to pay. Finally, Slaughter points out a discrepancy between the oral pronouncement and the judgment of conviction as to the amount of his fine; he urges that the judgment of

[1] The statute of limitations for misdemeanors is only three years, while that for felonies is six. *See* § 939.74(1), STATS.

conviction be amended to conform to the oral pronouncement. We will address each of these issues in turn.

For authority that he should be permitted to withdraw his guilty plea, Slaughter relies on ***State v. Pohlhammer***, 78 Wis.2d 516, 254 N.W.2d 478 (1977). There, the original charges were for arson. *See* ***id.*** at 519, 254 N.W.2d at 479. Pursuant to a plea negotiation, Pohlhammer pled guilty to theft by fraud. *See* ***id.*** at 520, 254 N.W.2d at 480. However, more than six years had passed from the date on which the underlying incident occurred. *See* ***id.*** While a prosecution tolls the time in which another prosecution for that same act must be filed, *see* ***id.*** at 522, 254 N.W.2d at 480-81, the second complaint was for a new and different charge. *See* ***id.*** at 522-23, 254 N.W.2d at 481. As such, it was time-barred. *See* ***id.*** The court held that Pohlhammer's guilty plea did not waive his statute of limitations objection and that he should be permitted to withdraw his guilty plea since the charge was time-barred. *See* ***id.*** at 524, 254 N.W.2d at 481.

The State distinguishes ***Pohlhammer*** based on the fact that the charges in the present case arise out of the "same acts." Additionally, the State asserts that ***Pohlhammer*** does not apply in a case where the new charge is a lesser included offense of the original charge. Misdemeanor false swearing is a lesser included offense of felony false swearing because there is no additional fact that must be proved in the misdemeanor charge that is not proved in the felony charge. *See* ***Randolph v. State***, 83 Wis.2d 630, 640, 266 N.W.2d 334, 339 (1978). The State asserts that the ***Pohlhammer*** court "explicitly stated an exception to the statute of limitations when the substituted or amended information charges a lesser included offense."

There is language in the rehearing of ***Pohlhammer*** to support the State's lesser included offense exception. *See* ***State v. Pohlhammer***, 82 Wis.2d 1, 3, 260 N.W.2d 678, 679 (1977). The court stated:

> Where, as here, pursuant to a plea bargain a substituted and amended information is filed which charges *not the commission of a lessor included offense* but a new and different offense, prosecution of which is on its face barred by the applicable statute of limitations, trial courts are on notice that absent an express waiver of the statute of limitations' defense such an amended information is not to be accepted, a bargained plea of guilty to such information is not to be approved, and a plea of guilty to such an amended information may be withdrawn on motion of the defendant so to do.

Id. (emphasis added). However, there is also support for the assertion that the misdemeanor charge is time-barred. *See* ***State v. Muenter***, 138 Wis.2d 374, 383-84 n.7, 406 N.W.2d 415, 419 (1987) ("It would make little sense to allow the State to obtain a conviction on a misdemeanor offense on which the statute of limitations has run due solely to the fact that the misdemeanor charge constituted a lesser included offense in a timely brought prosecution for a felony offense.").

We will assume, without deciding, that absent an express waiver of the right to object to jurisdiction, when a felony charge survives the statute of limitations, but the misdemeanor lesser included offense is time-barred, the State may not prosecute for the misdemeanor charge. *See* ***id.***

Here, Slaughter waived his jurisdictional objections at the plea hearing, where the following exchange took place:

> MS. BLACKWOOD: It is part of the understanding in this plea agreement that the defendant will stipulate that there is subject matter jurisdiction in this case based upon and stipulate to the facts alleged that demonstrate that this complaint has been filed within the six years, within the mandatory statute of limitations in this case.
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> ....

> THE COURT: Okay. Mr. Sharp, is that a correct statement of the agreement?
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> MR. SHARP: That's a correct statement of the agreement. So the Court is aware, the Court—in the court file we did appeal the issue of the statute of limitations on the felony matter in a different sort of argument. But given the relation back of the criminal complaint and the fact that my client was not a public resident of the State of Wisconsin, we would be stipulating to the fact that the statute of limitations was tolled during this period of time.
>
> THE COURT: Mr. Slaughter, do you understand what's happening here?
>
> DEFENDANT: Yes, Judge.

It is worth noting that this colloquy took place after Slaughter had already appealed and lost on the statute of limitations question. Clearly he knew he was waiving any further objections to the statute of limitations. While the prosecutor mentioned subject matter jurisdiction rather than personal jurisdiction and mentioned six years rather than three, *see* ***Pohlhammer***, 78 Wis.2d at 523, 254 N.W.2d at 481 (noting that jurisdictional question involved in statute of limitations is personal, not subject matter), we will not put form over substance. *See* ***State v. Marks***, 194 Wis.2d 79, 87, 533 N.W.2d 730, 732 (1995). It is abundantly clear from the procedural history of this case and the colloquy at the plea hearing that Slaughter knowingly waived any further argument sounding in statute of limitations.

We now turn to Slaughter's fine. The court ordered Slaughter to pay $5000 plus court costs and disbursements. The court made the fine due immediately upon Slaughter's release from prison. Slaughter claims, and the State concedes, that Slaughter was entitled to a determination of his ability to pay. *See* ***State ex rel. Pedersen v. Blessinger***, 56 Wis.2d 286, 296, 201 N.W.2d 778, 784 (1972). We do not accept the concession.

In ***Pedersen***, the supreme court held that it is unconstitutional to imprison an indigent defendant for his inability to pay a fine. *See* ***id.*** at 296, 201 N.W.2d at 784. And while "[m]uch time could be saved if trial courts would follow the practice of ascertaining the defendant's ability to pay a fine at the time of sentencing," ***id.***, such a determination is not mandatory. *See* ***West Allis v. State ex rel. Tochalauski***, 67 Wis.2d 26, 30-31, 226 N.W.2d 424, 427 (1975). The burden is on the defendant to apply to the court for relief, alleging and proving that he or she is unable to pay the fine imposed. *See* ***Will v. State***, 84 Wis.2d 397, 404, 267 N.W.2d 357, 360 (1978); ***Pedersen***, 56 Wis.2d at 296, 201 N.W.2d at 784. The defendant may so apply to the court either within the time given him or her to pay or prior to commitment for nonpayment. *See* ***Will***, 84 Wis.2d at 404, 267 N.W.2d at 360.

Here, Slaughter did not claim he was unable to pay. Furthermore, the trial court stated that it had "no idea of what his financial situation will be at that time." Unlike in ***Pedersen***, confinement was imposed here in addition to a fine, not in lieu of a fine. The court apparently felt that a determination of Slaughter's ability to pay would be better made when Slaughter is released from prison because his financial situation might change in the meantime. Such a conclusion is not error; if Slaughter finds himself in danger of jail time for nonpayment of a fine and wants to apply to the court for relief at that time due to indigence, he may do so.

Finally, Slaughter requests that the judgment of conviction be amended to reflect the oral pronouncement of a fine of $5000 plus costs. The judgment of conviction lists Slaughter's fine as $6200. The State argues that the discrepancy is immaterial once Slaughter's costs are included, as the oral pronouncement dictated.

If there is a discrepancy between the oral pronouncement and the judgment of conviction, the oral pronouncement controls. *See* ***State v. Perry,*** 136 Wis.2d 92, 114, 401 N.W.2d 748, 758 (1987). Here, the court imposed $5000 plus costs and disbursements. While the State claims that the $1200 difference is made up by the costs imposed, the State does not direct us to any verification of these costs in the record. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964) (An appellate court need not sift through the record in search of facts to support an assertion.). We have no choice but to vacate that portion of the judgment of conviction regarding the fine and remand with directions that the State provide the trial court with documentation of the $1200 in costs. If the trial court concludes that the State's verification of costs is sufficient and that the total is $1200, the trial court may then reinstate the judgment to include this amount over and above the $5000 fine.

By the Court.—Judgment affirmed in part, vacated in part, and cause remanded with directions.

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