

**COURT OF APPEALS
DECISION
DATED AND FILED**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

September 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1177-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY D. KINGSTAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
ROGER P. MURPHY, Judge. *Affirmed.*

BROWN, P.J. Timothy D. Kingstad appeals his sentence for fourth-degree sexual assault. He claims that the successor trial court judge improperly modified the original trial court judge's sentence by adding a fine where none had been adjudged before. He also argues that the original trial court judge had no lawful authority to order community service as a condition of

probation because such a requirement is only permissible when imposed in lieu of a fine and his sentence did not include a fine. He further asserts that the original trial court judge had no authority to require a cash contribution to the Women's Center as an item of costs. We agree with the State that the original trial court judge's sentence clearly and unambiguously imposed a jail sentence—which it stayed—and a fine. The law so allows. Therefore, the successor trial judge's order that Kingstad pay the fine was merely a carrying out of the original trial court judge's sentence. As to the payment to the Women's Center, that condition was part of Kingstad's 1996 judgment of conviction, which this court has already affirmed. See *State v. Kingstad*, No. 97-2262-CR (Wis. Ct. App. Feb. 4, 1998). Kingstad cannot again appeal from that judgment. Only the February 19, 1999 judgment of conviction is before this court and the new judgment does not order a payment to the Women's Center. We affirm.

Much of Kingstad's argument is based on what could be fairly characterized as a self-serving interpretation of the original trial court judge's sentencing order. The original trial court judge was the Honorable Marianne E. Becker. In this court's view, Judge Becker's decision is clear and unambiguous. In pertinent part, this is what the trial court ruled from the bench:

A stayed sentence of nine months, for two years probation on the following terms. First four months condition time in the Waukesha County jail as long as you are worthy of it, because there is restitution to be paid here. First there is for Sarah's therapy. You will do it in the huber facility And with condition time I can extend that if I don't have your attention. I'm not really sure I have your attention. I'm certainly hoping 120 days will get it.

I'm ordering \$2,500 fine knowing you can't pay it, so for that at the rate of \$5 an hour there will be community service. Probation officer will help set that up. The condition, costs are 70 dollars

....

All right. They will be paid in cash as a condition of probation. DNA surcharge ordered. Biological sample is ordered. There will be a \$200 ... cash contribution over the period of your probation to the Women's Center, Waukesha.

The written judgment of conviction was equally clear and unambiguous. It is important to note here that the judgment of conviction is a form document and space is limited. The form shows that Kingstad is sentenced to jail for "9-months-imposed & stayed" and "is placed on probation for-2-years." In what could be termed as a "section" regarding "conditions of sentence/probation," there is a space for a fine. This space is not filled in. But to the right of that space is a form marked "Jail: To be incarcerated in the county jail/HOC for." Here, the trial court's oral pronouncements are typed in, which we repeat in pertinent part as follows:

-4-Months ... condition time to be served with work release if defendant employed, is able to keep bakery open. Condition time to be served at main jail if defendant is not employed [A]nd \$2,500 fine to be satisfied by performing community service at the rate of \$5.00 an hour at an organization not involved with and not at the Women's Center.

It is crystal clear from both the oral pronouncement from the bench and the written judgment of conviction that Judge Becker ordered both jail time *and* a \$2500 fine.

Kingstad contends that the "court did not impose any sentence of a fine." He claims that the "nine month sentence imposed was stayed by the trial court ... with the defendant placed on probation for two years." He asserts that "[t]he transcript of the sentencing hearing ... establishes that Judge Becker intended community service was to be 'in lieu of a fine.'" Kingstad seizes upon this as proof that the judge was not ordering any fine, but was ordering community service as a condition of probation rather than a fine. He argues that despite this

intent, the judgment entered by the clerk listed “\$2,500 fine to be satisfied by performing community service at the rate of \$5.00 an hour” as one of the “conditions of probation.” He makes much of the fact that the judgment form left blank the space where “fine” was to be included. He concludes that nothing in the record establishes that Judge Becker sentenced him to a fine.

After spending four months in jail as a condition of probation, Kingstad sought to reject probation and serve out the rest of his sentence in jail. He makes this argument because of what happened after he had spent four months in jail with Huber privileges following his original sentence. Apparently, Kingstad did not want to perform the community service because it would interfere with his being able to conduct his bakery business. So, he went before Judge Murphy, the judge who succeeded Judge Becker on the case, and asked that he be allowed to serve the rest of the jail sentence, with Huber, in lieu of probation, thus avoiding the community service.

But Judge Murphy saw it differently. He read Judge Becker’s decision to have ordered jail and a fine. Judge Murphy understood Judge Becker’s decision to be that because Kingstad obviously could not afford to pay \$2500 as a fine, he could work it off by performing community service at the rate of \$5 an hour. Judge Murphy okayed Kingstad’s request to do the full nine months instead of probation, but kept intact the payment of the fine over Kingstad’s objection.

Now, Kingstad argues to this court that Judge Becker’s decision must be read to have imposed community service as a condition of probation. And because he has rejected probation and taken the rest of his jail time instead, he does not have to perform community service.

We see no support for Kingstad's interpretation. The only time that Judge Becker used the term "in lieu of a fine" was in the context of a request asked of Judge Becker following the imposition of sentence. Judge Becker had just told Kingstad that he would have to serve four months of the nine months in jail. Kingstad asked to stay the jail sentence for sixty days. Judge Becker gave him two weeks. Judge Becker then admonished Kingstad to let this matter come to "its own conclusion." The judge said, "After Mr. Kingstad has done his sentence, *paid his fine*, worked his community service hours and done his full restitution, we have every reason to believe that this is unlikely to happen again." Kingstad pressed on. His attorney asked if his client could be released to community service instead of going to jail. His attorney wanted the community service to count as credit against the jail time. But the court said the "community service that he is doing for this court is in lieu of a fine."

This is not, in our view, a demonstration that the trial court was intending to use community service as a condition of probation with no actual fine being imposed. Nor is the court's statement proof that the earlier order by the trial court that Kingstad pay a "\$2,500 fine" was merely a measuring stick by which the probation agent could know how many community service hours were to be performed as a condition of probation. Instead, the court's statement was a response to Kingstad that the community service could not be used as a credit against the jail portion of his sentence. It could be used as a credit against his fine. The words "condition of probation" were never uttered by the judge in connection with the term "community service."

What Judge Becker was trying to do was give Kingstad a break. The trial court had already imposed a fine of \$2500 in addition to the jail term. She had given Kingstad a break on the jail term by ordering him to serve but four

months of the nine-month sentence and be placed on probation instead. She additionally gave him a break on paying the fine of \$2500 by allowing him to work off the fine by performing community service work. This is absolutely made clear by the court's comment, quoted above, that she was fining him \$2500 "knowing [he] can't pay it" and then immediately softening the blow by saying "so for *that* at the rate of \$5 an hour there will be community service." (Emphasis added.) Kingstad's attempts to provide a different interpretation about what Judge Becker ordered fail.

Kingstad's second issue pertains to his 1996 judgment of conviction, which was already affirmed by this court. See *State v. Kingstad*, No. 97-2262-CR (Wis. Ct. App. Feb. 4, 1998). We note that the issue he wants this court to decide—whether the original trial judge had lawful authority to impose a fine as a condition of probation—was never raised in the first appeal and is therefore waived. Even if not waived, we have already interpreted Judge Becker's decision as imposing community service as an alternative to paying a fine, not as a condition of probation.

Kingstad's third issue, the payment to the Women's Center, is not part of the new judgment.

By the Court—Judgment affirmed.

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

