

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

No. 99-2347-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE H. KRAUSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Dale H. Krause appeals from a judgment of conviction for obstructing an officer contrary to WIS. STAT. § 946.41(1) and from a postconviction order addressing an illegality in his initial sentencing and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

requesting that he be resentenced. In its postconviction order, the trial court corrected the sentence illegality but refused to vacate or otherwise reconsider the original sentence.² Krause contends that he is entitled to a full “resentencing” which includes a vacation of the original sentence and sentencing anew. We disagree and affirm.

¶2 The relevant sentencing facts are undisputed. On October 14, 1998, Krause was sentenced to pay a fine of \$500, costs and fees of \$350, and surcharges of \$50. The judgment of conviction acknowledged that Krause had paid full restitution of \$230. Krause was also “sentenced to the county jail for five (5) days consecutive to 98CF123”—involving a prior criminal matter. The incarceration ordered in case number 98-CF-123 was jail time as a condition of probation. At a postconviction motion hearing held on August 24, 1999, the trial court agreed with Krause that a jail sentence consecutive to jail time as a condition of probation was illegal. “[WISCONSIN STAT. §] 973.15(2) does not permit a court to impose a [jail] sentence consecutive to a term of probation.” *State v. Maron*, 214 Wis. 2d 384, 395, 571 N.W.2d 454 (Ct. App. 1997). The court then corrected the sentence to read “five days jail to be served within 60 days.”

¶3 Krause, however, was not satisfied with just the sentence correction and requested that the matter be set for “a resentencing, and perhaps in front of another Judge, so that it is truly a resentencing.” The trial court denied any further relief on the basis that it had corrected the error raised by the postconviction

² Krause also moved to withdraw his no contest plea based upon an inadequate plea colloquy and ineffective assistance of counsel at sentencing, but he withdrew that request at the postconviction hearing.

motion and that Krause was not entitled to “the whole sentencing hearing all over again.” Krause appeals from that determination.

¶4 The parties differ as to the applicable standard of review. Krause contends that the appellate issue—whether he is entitled to a full resentencing—is an issue of law that this court reviews de novo. The State submits that the issue is whether the trial court properly exercised its discretion in refusing to grant resentencing after it corrected the illegal sentence. The State is correct. When a sentence is corrected pursuant to a statutory illegality, “the sentencing court may, *in its discretion*, resentence the defendant if the premise and goals of the prior sentence have been frustrated.” *State v. Holloway*, 202 Wis. 2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996) (emphasis added).

¶5 In *Holloway*, the initial sentence was illegal because it violated WIS. STAT. § 973.13. Krause’s initial sentence violated WIS. STAT. § 973.15(2). In each case, the standard of review as to whether a statute barred the sentencing court from exercising its discretion is de novo. Whether a court correctly interprets and applies a statute is a question of law for our independent review. *See State v. Zimmerman*, 185 Wis. 2d 549, 554, 518 N.W.2d 303 (Ct. App. 1994). Here, however, after the court corrected the statutory illegality, we return to the discretionary standard as indicated in *Holloway*.

¶6 Krause contends that a judicial correction of his sentence was legally insufficient because we said in *Maron* that “a remand for resentencing is the proper method to correct the sentence.” *Maron*, 214 Wis. 2d at 396. As a general rule, resentencing is the proper method to correct a sentence which is not in accord with the law. *See Holloway*, 202 Wis. 2d at 700. However, Maron did not seek “resentencing” but the avoidance of the illegal consecutive jail time as a matter of

law because he had already served the time for a prior offense. *See Maron*, 214 Wis. 2d at 395. Therefore, the “resentencing” remand in *Maron* must be read in context. We disagree that *Maron* mandates a new sentencing procedure in this case because “a court has the power to correct ... an illegal or void sentence at any time.” *Hayes v. State*, 46 Wis. 2d 93, 101-02, 175 N.W.2d 625 (1970), *overruled in part by State v. Taylor*, 60 Wis. 2d 506, 521-23, 210 N.W.2d 873 (1973).

¶7 While Krause’s postconviction motion raises the illegality of the consecutive jail time sentence contrary to WIS. STAT. § 973.15(2), his motion and the record fail to present any additional reason or basis for the court to revisit the prior sentence. We must first look for evidence that discretion was in fact exercised. *See McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Neither the State nor Krause has presented an issue concerning the frustration of the premise and goals of the prior sentence that would require a trial court’s discretionary analysis. Because Krause presented no new factors to the court that would justify a resentencing, we conclude that the trial court did not erroneously exercise discretion it was not called upon to exercise.

By the Court.—Judgment and order affirmed.

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

