

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 25, 2000

Cornelia G. Clark  
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. 99-2848-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**LAURIE J. MALONE,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Barron County:  
ROBERT H. RASMUSSEN, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J. The State appeals Laurie Malone's judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, third offense, contrary to WIS. STAT. § 346.63(1)(a).<sup>1</sup> The State claims

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All statutory references are to the 1997-98 edition.

the circuit court erred by staying the sentence without legal cause. Because the court did not have the authority to indefinitely stay the execution of Malone's sentence, the judgment is reversed and remanded for resentencing.

#### BACKGROUND

¶2 Malone pled no contest and was convicted on June 9, 1999. The circuit court deferred sentencing Malone to jail at that time and decided to modify Malone's bond to allow her to undergo an alcohol assessment and begin any recommended treatment program. As a condition of bond, she was placed on home detention and monitored electronically.<sup>2</sup> While on home detention she was restricted from using alcohol or controlled substances and was to submit to random testing to ensure compliance. Approximately three months later, the court held a sentencing hearing. The court imposed a sentence of one year in the county jail with ninety-three days credit for the time Malone spent on home detention. The court then stayed the remaining sentence and ordered Malone to continue attending alcohol treatment. The court ordered that for every six months Malone was able to remain sober, she would receive one month credit against her remaining jail sentence.

#### STANDARD OF REVIEW

¶3 This court reviews discretionary sentencing determinations with deference to the sentencing court. *See State v. Lechner*, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998). While a court has broad power in sentencing criminals, the court's "authority in sentencing ... is controlled by statute." *State v. Maron*,

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<sup>2</sup> The court also fined Malone \$1,346.50.

214 Wis. 2d 384, 388, 571 N.W.2d 454 (Ct. App. 1997). “[I]t is the legislative province to prescribe the punishment for a particular crime and the judicial province to impose that punishment.” *State v. Machner*, 101 Wis. 2d 79, 81, 303 N.W.2d 633 (1981). Accordingly, this court must also interpret the statutory requirements for sentencing, a question of law reviewed without deference to the lower court. See *State v. Lipke*, 186 Wis. 2d 358, 363, 521 N.W.2d 444 (Ct. App. 1994).

#### DISCUSSION

¶4 The State actually makes two arguments on appeal: (1) the sentencing court imposed an unlawful sentence, and (2) the sentencing court improperly stayed the remaining portion of Malone’s sentence. The first argument is captioned: “The Sentence Imposed By The Trial Court Was Unlawful” and, in its entirety, states:

The penalty for the charge at [the time of conviction] was a fine of between \$600 and \$2,000, and jail of between 30 days and one year. Section 346.65 (2) (c), Stats. The trial court never ordered the defendant to spend a single day in the County Jail. Although the State concedes that the trial court had authority to impose electronic monitoring in lieu of jail time under Section 973.04 (4), Stats., the court was still required to order the defendant to remain in the County Jail for not less a [sic] 48 consecutive hour period pursuant to Section 346.65 (7), Stats.

¶5 This argument is insufficiently developed for this court to decipher. Apparently Malone had the same problem, as she does not respond to it in her brief. The State may be claiming that Malone had to spend at least thirty days in jail and any additional time could be served on electronic monitoring. Or it may be conceding that electronic monitoring may be used for all but forty-eight consecutive hours, which must be served in jail.

¶6 Whatever the argument, it is unrelated to what happened here. The trial court did not impose electronic monitoring in lieu of jail time under WIS. STAT. § 973.03(4). Rather, the court imposed twelve months in the county jail, and then gave Malone credit for time spent in custody on home detention. The State's argument does not address, in any way that this court can determine, the actual sentence imposed by the trial court. This court will not abandon its neutrality and develop or raise new issues on the State's behalf. *See Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

¶7 For its second argument, the State claims the court improperly stayed the remainder of Malone's jail sentence. After crediting Malone with the time she spent on home detention, the court stayed Malone's remaining jail term and ordered defense counsel to report every six months on whether Malone had maintained her sobriety. The court explained that it would then grant one month credit for each six-month period of sobriety up to the time that her entire jail sentence was fully credited.

¶8 The State argues that the sentencing court did not have the authority to stay the sentence and create "de facto" probation. This court agrees.

The sentencing court may stay execution of a sentence of imprisonment ... only:

1. For legal cause;
2. Under s. 973.09 (1) (a) [Probation]; or
3. For not more than 60 days.

WIS. STAT. § 973.15(8)(a). Malone agrees that the only issue here is whether the court had "legal cause" to stay her sentence indefinitely.

¶9 “In Wisconsin there is no precise or detailed definition of what constitutes ‘legal cause’ for the stay of execution of sentence.” *State v. Szulczewski*, 216 Wis.2d 495, 505, 574 N.W.2d 660 (1998). Historically, sentencing courts have “legal cause” to stay the execution of sentence during an appeal or to consolidate sentencing matters. *See id.* at 506. However, a stay for the purpose of personally accommodating a defendant is not a stay for legal cause. *See id.*

¶10 “The essence of the phrase ‘legal cause’ seems to be tied to institutional functions: In granting a stay, a court may not exercise a power that belongs to the executive.” *Id.* at 506 n.12. Further,

[l]egal cause refers to a stay based on the legality of the conviction or the duty to enforce the sentence, and has been explained as “good cause, having to do with the sentence itself, and not on grounds which have no relation to the action in which the sentence is pronounced and are more properly for the consideration of the governor, in whom the power to pardon is vested, rather than the judiciary.”

*Id.* at 505-06 (quoting *Drewniak v. State ex rel. Jacquest*, 239 Wis. 475, 486, 1 N.W.2d 899 (1942)).

¶11 Here, the sentencing court stayed the execution of sentence for the purpose of observing Malone’s behavior. But, conceivably, under the court’s reasoning, Malone could have avoided the execution of the sentence entirely. This type of authority is more akin to the governor’s authority to commute a sentence or to pardon. Accordingly, this court concludes that the sentencing court’s reason for staying Malone’s sentence did not constitute legal cause under WIS. STAT. § 973.15(8)(a)1. The judgment of conviction and sentence are therefore reversed and the cause is remanded for resentencing.

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

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

