COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2931

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL S. FIELDSEND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 BROWN, P.J.[1] In this misdemeanor battery and disorderly conduct case, Paul S. Fieldsend was ultimately sentenced to nine months in the county jail for these crimes. In addition, the trial court tacked on another ninety days to the

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

sentence based on information that Fieldsend had, outside the confines of the courtroom, called the trial judge a "dickhead." We hold that the ninety-day sentence was unlawfully imposed. It was not part of the battery sentence but was a punishment resulting from allegedly disrespectful behavior toward the court. As such, the proper procedure for addressing this alleged behavior is found in WIS. STAT. § 785.03(1), the punitive contempt statute. We reverse that part of the sentence imposing an extra ninety days for this alleged behavior. We affirm the remainder of the sentence. We remand with directions that the extra ninety days be removed from the sentence.

¶2 The facts of this case are as follows. On October 28, 1998, Fieldsend pled no contest to one count of misdemeanor battery in violation of WIS. STAT. § 940.19(1) and one count of disorderly conduct in violation of WIS. STAT. § 947.01, stemming from a fight. On December 17, 1998, the trial court withheld sentence and placed him on probation for three years. The trial court further ordered that Fieldsend spend six months in jail as a condition of probation. The trial court stayed five of the six months and granted Huber privileges on the condition that Fieldsend could be placed in jail for the entire six months if he drank again.

¶3 Following sentencing, Fieldsend allegedly called the trial judge a "dickhead" in a probation agent's office. A probation agent reported this conduct to the trial court, which responded by ordering Fieldsend to serve the entire six months in jail without Huber privileges.[2] While in jail, Fieldsend violated the conditions of probation. On July 30, 1999, a probation revocation hearing was

[2] Fieldsend did not appeal this action by the trial court at the time and does not attempt to contest it now.

held. The same trial court judge who initially sentenced Fieldsend presided over the probation revocation hearing. The trial court sentenced Fieldsend to jail for one year. The court stated:

> Nine months on the battery charge, and I would, considering that I am the dickhead that he addressed to earlier, order that he serve an additional 90 days. For that inappropriate terminology showing disrespect for the court, he will serve one year.

Fieldsend appeals, claiming that the ninety-day sentence was an erroneous exercise of the trial court's sentencing discretion. For the reasons stated below, we agree.

¶4 Fieldsend's statement, if actually made, is properly characterized as contempt because it "impairs the respect due the court." WIS. STAT. § 785.01(1). The court may use summary or nonsummary procedures to punish contempt. The summary contempt procedure is reserved for contumacious behavior occurring "in the actual presence of the court." WIS. STAT. § 785.03(2). In that case, the court imposes a sanction immediately after the contempt without notice and a separate hearing. This court has held that the summary contempt procedure is fair despite the denial of rights such as notice and a hearing because the court has observed the conduct and must act promptly to preserve order and protect the authority and dignity of the court. *See* ***Lemmons v. Racine County Circuit Court***, 148 Wis. 2d 740, 746-47, 437 N.W.2d 224 (Ct. App. 1989).

¶5 If the summary procedure is inapplicable, contempt may nonetheless be punished by nonsummary procedure. Remedial or punitive sanctions may be imposed under nonsummary procedure. *See* WIS. STAT. § 785.03(1)(a)-(b). Punitive sanctions are imposed to punish past contempt while remedial sanctions are imposed to terminate continuing contempt. *See* WIS. STAT. § 785.01(2)-(3).

To impose punitive sanctions, a complaint must be filed and processed under the criminal procedures of WIS. STAT. chs. 967 to 973. *See* § 785.03(1)(b).

¶6 In this case, the alleged contempt did not occur in the actual presence of the court because Fieldsend's alleged statement was made at the probation agent's office after sentencing, not in the courtroom during the hearing. For this reason, Fieldsend's contempt may only be properly sanctioned by using a nonsummary procedure. More to the point, pursuing a punitive sanction would be the correct avenue because the contempt occurred in the past and was not continuing.

¶7 The State argues that the ninety-day sentence was proper because a court may consider a person's character in deciding the length of a sentence. The State contends that Fieldsend's statement about the court showed how he has a bad attitude and lacks remorse. The State cites ***State v. Bizzle***, 222 Wis. 2d 100, 107-08, 585 N.W.2d 899 (Ct. App.), *review denied*, 222 Wis. 2d 675, 589 N.W.2d 629 (Wis. Dec. 15, 1998) (No. 97-2616-CR), and ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984), in support of its position. In ***Bizzle***, the trial court considered the fact that the defendant stated she did not sell drugs in front of her children in order to mitigate her drug-related charges. However, police statements contradicted the defendant's statement. In ***Curbello-Rodriguez***, the trial court considered the fact that at sentencing, the defendant denied committing the sexual assault.

¶8 There can be no dispute that character flaws such as a bad attitude and a lack of remorse may be relevant in sentencing. However, in both of the cited cases, as well as numerous other cases not cited, the defendant's bad attitude and lack of remorse related in some way to the defendant's past history of

antisocial behavior toward the victim and others and to a disregard for the law. The situation before this court is not of that ilk. If the disrespectful statement about the court was made, it was contumacious behavior toward the court. The trial court concluded that the statement was, in fact, made and clearly punished Fieldsend for having made the statement. The ninety-day sentence was not in any way connected to the battery or disorderly conduct convictions. We conclude that if Fieldsend is to be punished for his allegedly disrespectful behavior to the court, it should be through the punitive, nonsummary contempt procedure, not as an adjunct to the battery and disorderly conduct sentence.

¶9 The State also argues that this appeal is improperly before this court because a postconviction motion was not first filed with the trial court. Usually, in order to obtain review of a sentence as a matter of right, the defendant must move for a sentence modification under WIS. STAT. RULE § 809.30 or § 973.19. *See* ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992). However, when compelling circumstances exist, the court of appeals can review a sentence even if no postconviction motion was filed. *See* ***State v. Lynch***, 105 Wis. 2d 164, 167, 312 N.W.2d 871 (Ct. App. 1981).

¶10 In this case, the trial court erroneously exercised its discretion by using the battery and disorderly conduct sentence to punish Fieldsend for contempt. We note that if the proper procedure had been used, the trial court could not have sat in judgment of the contempt action. This is because the punitive contempt statute prohibits the judge who is the object of the alleged contempt to preside over the action. *See* WIS. STAT. § 785.03(1)(b). Since the trial court could not have presided over this allegation if the proper procedure had been used, it stands to reason that neither should the trial court sit in judgment of a postconviction motion examining the ninety-day sentence. We hold that a

compelling reason exists for this court to waive the fact that the usual postconviction procedure was not utilized.

¶11 This case is reversed and the cause remanded. The trial court is instructed to reduce the jail sentence from one year to nine months. Of course, the trial court is free to initiate a punitive contempt procedure as outlined in WIS. STAT. § 785.03(1)(b).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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