COURT OF APPEALS DECISION DATED AND FILED

May 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP2944-CR

Cir. Ct. No. 2003CT361

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT R. CALDWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Reversed and cause remanded.*

¶1 DYKMAN, J.[1] Kurt Caldwell seeks resentencing on a judgment of conviction for causing injury while operating a motor vehicle while under the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

influence of an intoxicant, contrary to WIS. STAT. § 346.63(2)(a)1. (2003-2004).[2] He contends that the trial court erroneously exercised its discretion by basing its rejection of Caldwell's request to be placed on probation on the mistaken view that such a disposition was not permissible under WIS. STAT. § 973.09(1)(d)(2).

¶2 We conclude that WIS. STAT. § 973.09(1)(d)(2) does not prohibit a court from placing a convicted defendant on probation for a violation of WIS. STAT. § 346.63(2)(a)1. Instead, we follow ***State v. McKenzie***, 139 Wis. 2d 171, 407 N.W.2d 274 (Ct. App. 1987), where we construed the phrase "may be imprisoned" under the penalty section for § 346.63(2)(a)1. to mean that a sentence of imprisonment was discretionary. Thus, probation is an available disposition for this offense, and therefore the trial court's sentence was based on a mistake of law. Accordingly, we reverse and remand for resentencing.

Background

¶3 The parties do not dispute the relevant facts. Caldwell was convicted after entering a plea of no contest to one count of causing injury by intoxicated operation of a motor vehicle. At sentencing, Caldwell argued that probation was a dispositional alternative available to the court, and was appropriate in this case. The State argued that probation was not an available option for this offense. The court concluded that the reasons for placing Caldwell on probation were "certainly persuasive," but that WIS. STAT. § 973.09(1)(d) prohibited the court from choosing this disposition. Caldwell appeals.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Discussion

¶4 We review a court's sentencing decisions for an erroneous exercise of discretion. ***State v. Mata***, 2001 WI App 184, ¶13, 247 Wis. 2d 1, 632 N.W.2d 872. Appellate courts rarely interfere with the sentencing decisions of trial courts. However, when a trial court issues a sentence that is based on a mistaken view of the law, it exercises its discretion erroneously, and we will remand for the trial court to issue a sentence that is within the limits of its discretion. ***State v. Eckola***, 2001 WI App 295, ¶¶15-16, 249 Wis. 2d 276, 638 N.W.2d 903.

¶5 A court may place a convicted defendant on probation unless the defendant has been convicted of a crime which is punishable by life imprisonment, WIS. STAT. § 973.09(1)(c), or "if probation is prohibited for a particular offense by statute," § 973.09(1)(a). Probation is a prohibited disposition when the penalty section of a statute provides for a mandatory period of imprisonment. ***State v. Duffy***, 54 Wis. 2d 61, 64-65, 194 N.W.2d 624 (1972).

¶6 An exception to the general rule that probation is not available for offenses that mandate a sentence of imprisonment is found under WIS. STAT. § 973.09(1)(d), which states that convictions for offenses that carry "a mandatory or presumptive minimum period of one year or less of imprisonment, a court may place the person on probation … if the court requires, as a condition of probation, that the person be confined … for at least that mandatory or presumptive minimum period." Paragraph (d) does not apply, however, to many operating while intoxicated (OWI) offenses. Section 973.09(1)(d)1.-3. Specifically, exempted from (d) are violations "under s. 346.63(2) … that subject[] the person to a mandatory minimum period of imprisonment under s. 346.65(3m), if the

person has a total of 3 or fewer convictions, suspensions or revocations …." Section 973.09(1)(d)2.

¶7 Caldwell contends probation is an available disposition for a conviction under WIS. STAT. § 346.63(2)(a)1. because the penalty section for the offense provides the court *may* sentence a defendant to a period of imprisonment: "Any person violating s. 346.63(2) … shall be fined not less than $300 nor more than $2,000 and may be imprisoned for not less than 30 days nor more than one year …." WIS. STAT. § 346.65(3m). Caldwell asserts that ***State v. McKenzie***, 139 Wis. 2d 171, 407 N.W.2d 274 (Ct. App. 1987), controls. McKenzie, like Caldwell, appealed from a judgment of conviction for injury by intoxicated operation because the trial court did not consider the option of placing McKenzie on probation. There, we construed § 346.65(3) (1985-1986)[3] and concluded that the statute's use of the permissive "may" indicated that a sentence of imprisonment was not mandatory. ***McKenzie***, 139 Wis. 2d at 178. We therefore determined that the trial court erred when it did not consider probation as a possible disposition. ***Id.***

¶8 The State does not address ***McKenzie***. However, its argument implies that WIS. STAT. § 973.09(1)(d)2. supercedes WIS. STAT. § 346.65(3m) as interpreted by ***McKenzie*** because ***McKenzie*** was decided prior to the adoption of § 973.09(1)(d)2. in 1999. *See* 1999 Wis. Act 9, Secs. 3205d-3205e. The State asserts that that § 973.09(1)(d)2. specifically addresses the issue of the availability of probation for convictions for injury by intoxicated operation of a motor vehicle,

[3] WIS. STAT. § 346.46(3) (1985-1986) has since been renumbered § 346.46(3m). The relevant portion of the statute has remained unchanged.

and should therefore control. ***State v. Larson***, 2003 WI App 235, ¶6, 268 Wis. 2d 162, 672 N.W.2d 322 ("Where two statutes relate to the same subject matter, the specific statute controls the general statute."). The State further argues that to conclude that probation is available for first-offense injury by intoxicated operation would render § 973.09(1)(d)2. surplusage. ***State v. Martin***, 162 Wis. 2d 883, 894, 470 N.W.2d 900 (1991) ("A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect.").

¶9 We reject the State's suggested application of WIS. STAT. § 973.09(1)(d)2. and conclude that under WIS. STAT. § 346.65(3m) probation continues to be a potential disposition for persons convicted of injury by intoxicated operation. Since ***McKenzie***, the relevant language of WIS. STAT. § 346.65(3m) has been unchanged. It also remains true that when "shall" and "may" are used in the same section, we can infer that the legislature was aware of the precise meanings of both words. *See, e.g.* ***Town of Cedarburg v. Dawson***, 2004 WI App 174, ¶29, 276 Wis. 2d 206, 687 N.W.2d 841. Therefore, the statue's continued use of the word "may" as to a term of imprisonment unambiguously provides that a sentence of imprisonment is discretionary, and hence a court may place a defendant convicted of injury by intoxicated operation on probation.

¶10 Conversely, the State's suggested interpretation would require us to overlook the plain language of WIS. STAT. §§ 973.09(1)(d) and 973.09(1)(d)2. *See* ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute."). (Citation omitted.) Paragraph (d) of § 973.09(1)(d) states that probation is an available disposition "[i]f a person is

convicted of an offense *that provides a mandatory or presumptive minimum period of one year or less of imprisonment* …." (Emphasis added.) This paragraph does not apply to Caldwell, who was convicted of injury by intoxicated operation, an offense that under the plain language of § 346.65(3m) does not provide for a mandatory period of imprisonment.

¶11 WISCONSIN STAT. § 973.09(1)(d) further provides that "[t]his paragraph [d] does not apply if the conviction is for any of the following" including, under subparagraph 2. of § 973.09(1)(d), "[a] violation under s. 346.63(2) [injury by intoxicated operation] … that subjects the person to a mandatory minimum period of imprisonment under s. 346.65(3m), if the person has a total of 3 or fewer convictions, suspensions or revocations …." Again, the State's interpretation ignores the plain language of the statutes. As discussed above, paragraph (d) *does not apply* to convictions for injury by intoxicated operation; therefore, we need not consider whether a conviction for injury by intoxicated operation is specifically exempted from paragraph (d) in the subparagraphs that follow. Additionally, no "violation under s. 346.63(2)" in fact "subjects the person to a *mandatory minimum period of imprisonment* under s. 346.65(3m)." (Emphasis added.) Section 346.62(3m) does not subject a person to a mandatory period of imprisonment, it provides that a sentence of imprisonment is within the court's discretion.

¶12 "To abrogate the common law, the intent of the legislature must be clearly expressed, either in specific language or in a manner that leaves no reasonable doubt of the legislature's purpose." ***Gibson v. Overnite Transp. Co.***, 2003 WI App 210, ¶16, 267 Wis. 2d 429, 671 N.W.2d 388, *review dismissed*, 2004 WI 20, 269 Wis. 2d 202, 675 N.W.2d 808 (Wis. Jan. 29, 2004) (No. 02-3158). ***McKenzie***'s interpretation of WIS. STAT. § 346.65(3m) established that

probation is an available disposition for a person convicted of injury by intoxicated operation. The State implies that the legislature overruled ***McKenzie*** by adopting WIS. STAT. §§ 973.09(1)(d) and 973.09(1)(d)2. However, adopting these provisions, which by their very terms are inapplicable, and preserving the permissive "may" in § 346.65(3m) does not even approach a clear legislative intent to overrule ***McKenzie***. We therefore conclude that probation remains a potential disposition for injury by intoxicated operation of a motor vehicle.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.