COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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Nos. 00-0490-CR and 00-0491-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEONARD J. LAROCHE, JR.,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Case No. 00-0490-CR reversed and cause remanded with directions; Case No. 00-0491-CR affirmed.*

Before Dykman, P.J., Deininger and Leineweber, JJ.[1]

[1] Circuit Judge Edward E. Leineweber is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 LEINEWEBER, J. In this consolidated appeal, Leonard J. LaRoche appeals from judgments and an order[2] sentencing him to prison on four counts of failure to pay child support following probation revocation proceedings. He argues that his probation in 94 CF 201 expired prior to the hearing at which the circuit court purported to extend his probation and that his probation in that case could not be extended in any event for failure to pay restitution.

¶2 LaRoche also argues that the sentences imposed in each case must be vacated because his lack of involvement in his children's lives was impermissibly considered by the court in its sentencing decision.

¶3 We conclude that LaRoche's probation in 94 CF 201 expired by its terms before the trial court ordered extension, and could not thereafter be extended. Accordingly, we reverse the judgment and order with regard to counts ten and eleven of this case, and do not reach his other two arguments in that matter.

¶4 We further conclude that LaRoche's history with his children was properly considered by the circuit court in sentencing him on the two counts of 96 CF 7. We therefore affirm the judgment and order with regard to that matter.[3]

I. BACKGROUND

[2] The same order applies to both cases consolidated in this appeal, although each trial record contains a separate copy of the order.

[3] LaRoche's arguments concerning probation extension do not apply to No. 00-0491-CR appealing 96 CF 7, leaving only the impermissible sentencing factor argument to be considered.

¶5 The histories of the two cases consolidated in this appeal are convoluted and must be set out in some detail in order to properly address LaRoche's arguments. Additional facts are also provided in the analysis section of this opinion.

A. Case No. 94 CF 201 (No. 00-0490-CR)

¶6 The original non-support prosecution, 94 CF 201, was commenced on November 21, 1994, with the filing of a five-count complaint. The information filed following the preliminary hearing set out a total of eleven counts of failure to pay child support, five felonies and six misdemeanors. These charges were resolved by the entry of guilty pleas to misdemeanor counts eight, nine, ten, and eleven on March 27, 1995.

¶7 Following acceptance of LaRoche's guilty pleas, the circuit court sentenced him to consecutive six-month jail terms on counts eight and nine, and withheld sentencing on counts ten and eleven and placed him on concurrent three-year probation terms. The probation disposition was to be consecutive to the straight-time sentences of counts eight and nine.

¶8 LaRoche filed a motion seeking "*release on bail* pending the appeal of this case" pursuant to WIS. STAT. § 969.01 (1993-94)[4] on March 27, 1995, the same day he entered his guilty pleas. (Emphasis added.) An order granting his motion was subsequently entered by the circuit court on September 18, 1995, providing that "his *sentence* shall be stayed pending the outcome of his appeal ...." (Emphasis added.)

[4] All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

¶9 It is not clear from the record why almost six months elapsed between the filing of the motion and the entry of the order, or whether LaRoche was in custody during any of this time. The record does contain transcripts of two hearings on his motion for bail pending appeal, the first held on April 6, 1995, and the second on May 12, 1995.

¶10 The first hearing ended in the matter being set over, and the transcript of the second hearing ends with a recess being taken and a reporter's note that the remaining proceedings were reported by a different court reporter. No transcript of the conclusion of the motion hearing appears in the appellate record. Thus the circuit court's ruling from the bench on the motion, which might elaborate on the scope of the relief granted, is not available.

¶11 While the complete final ruling from the bench on the motion for bail pending appeal is not available, an interim ruling by the circuit court is significant. During the April 6, 1995 hearing, prior to adjourning the hearing to a later date, the court did "move back the time to commence the *jail sentence* ...." (Emphasis added.) No mention is made of a stay of probation.

¶12 On October 12, 1995, the circuit court received a letter from the Department of Corrections (DOC) field supervisor asking if LaRoche's probation supervision on counts ten and eleven was also stayed along with the jail sentences on counts eight and nine. An unsigned hand-written note on the letter dated that same day says "Called and left message that stay includes counts ten and eleven."

¶13 Although the record is thus unclear regarding LaRoche's probation status following the receipt of the DOC's inquiry, it is undisputed that he was accepted on probation supervision on March 27, 1995, and was in fact subject to supervision over the next three years.

¶14 This is made clear by the discussion between the court, counsel, and the probation agent at the hearing held March 31, 1998. It is also apparent from the revocation order and warrant filed on July 20, 1999, which shows the "Date Offender Granted Status" as March 27, 1995. Finally, the DOC's notice of court-ordered financial obligations status dated November 10, 1997, and filed with the court on November 25, 1997, shows the date LaRoche was received on probation as March 27, 1995, and his discharge date as March 27, 1998.

¶15 The record further reveals that Tina Perkofski, LaRoche's supervising probation agent, sent the trial court a memo dated January 23, 1998, filed on January 29, informing the court that LaRoche was due to be discharged from probation on March 27, 1998, and asking whether his probation should be extended. Clarification was requested by March 1, 1998.

¶16 The circuit court responded by letter dated January 29, 1998, informing the agent that it was important that LaRoche fulfill his court obligations and concluding that probation should be extended to accomplish this. The agent was advised that if LaRoche was unwilling to comply with his obligations, then it would be appropriate to return him to court for judicial review.

¶17 Perkofski wrote back on February 6, 1998, informing the court that LaRoche refused to sign a probation extension agreement and requesting that the matter be set for court review.

¶18 The State filed a motion to require LaRoche to commence his sentence. No further proceedings occurred until March 31, 1998, four days after LaRoche's original term of probation expired, and following the receipt of a previous remittitur from this court on March 25.

¶19 At the start of the March 31 hearing, the circuit court stated that the purpose of the hearing was to determine when LaRoche would commence his sentence.[5] However, confusion about LaRoche's by-then expired probation status on counts ten and eleven arose when the court mistakenly assumed that the stayed jail time was a condition of probation on these counts. The court apparently believed it had to extend probation in order to compel the service of the long-delayed jail time.

¶20 Although the prosecutor, defense counsel, and probation agent seemed confused by this turn of events, they acquiesced in the court's determination. LaRoche, on the other hand, objected strenuously.

¶21 The probation agent, in acknowledging that LaRoche had indeed been on probation during the stay of the jail time, said: "That's correct. We just stopped his time pending this. It's my understanding that he receives probation and that three year period was going to be up March 27, 1998." This is the only evidence in the record concerning any tolling of the running of LaRoche's probation term.

¶22 The circuit court extended LaRoche's probation from May 1, 1998, to May 1, 1999, to coincide with dates within which LaRoche was to be incarcerated.

[5] The record suggests that as of March 31, 1998, LaRoche had not served either of the consecutive six-month jail sentences imposed on counts eight and nine on March 27, 1995.

¶23 The prosecutor then raised the issue of restitution, which after three years had never been determined.[6] She suggested that this did not happen because the State thought that the release on bail pending appeal also stayed the restitution determination. The State requested and was granted an additional sixty days to determine restitution and notify LaRoche. He, in turn, was granted thirty days from receipt of the State's determination to request a hearing if he disagreed with the State.

¶24 This arrangement was subsequently reflected in the judgments of conviction entered following the March 31, 1998 hearing. A restitution order on a DOC form in the amount of $32,466.30 was entered, apparently without a hearing or response from LaRoche, on April 9, 1998.

¶25 LaRoche subsequently absconded from probation supervision in October 1998, and remained at large until his apprehension on May 20, 1999. His probation was thereafter revoked by the DOC and he was returned to the circuit court to be sentenced on counts ten and eleven.

¶26 The sentencing hearing took place on August 20, 1999, and was consolidated with LaRoche's later case, 96 CF 7.

B. Case No. 96 CF 7 (00-0491-CR)

¶27 The procedural history of LaRoche's second case, consolidated in this appeal, is quite straight-forward prior to its joining the earlier case at the

[6] At the March 27, 1995 plea and sentencing hearing, the circuit court held open the restitution determination to permit the parties to offer evidence at a later date on the child support arrearage. The judgments of conviction subsequently entered also noted that restitution was to be determined.

August 20, 1999 combined sentencing hearing. LaRoche was charged with one count of felony failure to pay child support, count one, and one count of misdemeanor non-support, count two, in a complaint filed on January 24, 1996. He was convicted on both counts on December 16, 1996, following a bench trial, and was placed on three years of concurrent probation on each count, with restitution to be determined and paid as a condition of probation, as reflected in the judgment of conviction entered December 20, 1996.

¶28 A revocation order and warrant was filed with the circuit court on July 20, 1999. It is the same document filed in the earlier case and arose out of the same conduct, absconding from supervision.

C. Consolidated Proceedings

¶29 At the August 20, 1999 combined sentencing hearing, the circuit court sentenced LaRoche as follows: In 96 CF 7, he was sentenced to two years in prison on count one, and an additional nine months of imprisonment on count two, consecutive to time imposed on the first count. He was also sentenced to consecutive six-month terms on counts ten and eleven in 94 CF 201, for a total term of imprisonment of forty-five months.

¶30 LaRoche renewed his objection to the extension of his probation in 94 CF 201 at his sentencing following revocation, albeit on grounds that restitution had never been determined and that there was an insufficient showing to justify extending his supervision for unpaid restitution under the governing case law. LaRoche's motion to dismiss revocation proceedings was denied.

¶31 Restitution in both cases (the unpaid child support arrearage) remained undetermined at the conclusion of the combined sentencing hearing, the

earlier entry of the DOC restitution form order notwithstanding. The court determined that the child support agency would have to make the necessary calculations.

¶32 A motion to modify sentence was filed in each case on January 21, 2000, seeking a modification of the prison sentences on various grounds, including, as it pertains to the instant appeal, that the circuit court's consideration of LaRoche's lack of social involvement with his children was an impermissible factor upon which to base a sentencing decision. The motion was denied at a hearing held on January 31, 2000, with a written order entered on February 2, 2000. This appeal followed.[7]

II. STANDARD OF REVIEW

A. The Expiration of Probation on Counts Ten and Eleven of 94 CF 201

¶33 The determination of whether LaRoche's probation on counts ten and eleven of 94 CF 201 expired on March 27, 1998, depriving the circuit court of jurisdiction to extend supervision as to those counts, involves the application of the statutes and administrative rules governing probation to the undisputed facts concerning the history of this case. This presents a question of law that we review without deference to the trial court's ruling. ***State v. Stefanovic***, 215 Wis. 2d 310,

[7] Defense counsel at the August 20, 1999 sentencing hearing argued for 116 days sentence credit, but the court let the county jail determine the amount. The August 1999 judgments of conviction set the sentence credit at zero. Both records contain a letter from a Lieutenant Robarge of the Monroe County Police dated February 1, 2000, suggesting that LaRoche was entitled to 487 days credit for jail time served against the prison sentences imposed. An amended judgment of conviction was subsequently entered in 96 CF 7 granting such credit on count one. It is not clear from the records in these cases if LaRoche ever served the consecutive six-month sentences imposed on March 27, 1995, on counts eight and nine of 94 CF 201, or how he could have accumulated that much credit against the sentences imposed on August 20, 1999.

313, 572 N.W.2d 140 (Ct. App. 1997). However, despite our de novo standard of review, we value a trial court's analysis of the issue. ***Id.*** at 313-14.

B. Lack of Involvement with His Children As a Sentencing Factor

¶34 Sentencing criminal offenders is a function left to the sound discretion of the trial court, and review is limited to determining whether there has been a clear misuse of that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶35 We will not disturb a sentence imposed by the trial court unless it erroneously exercised its discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). There is a strong policy against interfering with the trial court's sentencing discretion. ***Id.*** Further, the trial court is presumed to have acted reasonably, and the burden is on the appellant to show some unreasonable or unjustified basis in the record for the sentence complained of. ***Id.***

III. ANALYSIS

A. The Expiration of Probation on Counts Ten and Eleven of 94 CF 201

¶36 The law concerning the expiration and extension of terms of probation supervision is well settled. Two statutes and one administrative rule govern this area, and several cases have illustrated their application and made their meanings plain.

¶37 WISCONSIN STAT. § 973.09 is the primary statute concerning the placement of offenders on probation. Subsection (3)(a) provides as follows:

> Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof.

¶38 WISCONSIN STAT. § 304.072 addresses circumstances in which the running of the probation term may be tolled, or "stopped" in the parlance of the DOC personnel. It provides in pertinent part of subsection (3) as follows:

> [T]he [DOC] preserves jurisdiction over a probationer or parolee if it commences an investigation, issues a violation report or issues an apprehension request concerning an alleged violation prior to the expiration of the probationer's or parolee's term of supervision.

WISCONSIN ADMIN. CODE DOC § 331.15 *Tolled time*, further elaborates on the process authorized under § 304.072.[8] The fact of tolling, and the amount of time

[8] WISCONSIN ADMIN. CODE § 331.15(2) specifically refers to WIS. STAT. § 57.072, now repealed. WISCONSIN STAT. § 304.072 is the current statutory authorization for time tolling, and is in some respects even more restrictive of the practice than the former statute. *See generally* ***Locklear v. State***, 87 Wis. 2d 392, 274 N.W.2d 898 (Ct. App. 1978). The present statute makes explicit what case law inferred from § 57.072: that a specific determination must be made in an administrative hearing that tolling has occurred, and the length of the tolled period established. *See also* WIS. STAT. § 973.10(2).

to be tolled, must be officially determined by a hearing examiner or the secretary in accordance with other provisions of WIS. ADMIN. CODE ch. DOC 331.

¶39 ***Stefanovic***, 215 Wis. 2d at 312-13, 319, applied WIS. STAT. § 973.09(3)(a) to very similar facts in holding that jurisdiction to extend probation was lost when the original term of probation expired. In that case, the defendant was convicted on her no contest plea on March 4, 1996, of carrying a concealed weapon. ***Id.*** at 311-12. The trial court withheld sentence and placed her on probation for a period of one year. ***Id.*** at 312. As a condition of probation, Stefanovic was ordered to serve thirty days in the county jail. ***Id.*** On March 7, she filed a motion for release pending appeal, which was granted pursuant to WIS. STAT. §§ 969.01(2)(b) and 969.02. ***Id.*** However, the court did not stay her probation, and she remained on probation during her appeal. ***Id.***

¶40 We summarily affirmed Stefanovic's conviction by an order issued on April 2, 1997. ***Id.*** By then, however, she had already served her one-year probation, and the DOC had issued its certificate of discharge on March 27, 1997, and filed with the trial court on April 15, 1997. ***Id.*** The record was remitted to the trial court on May 6, 1997. ***Id.***

¶41 Following remittitur, the trial court conducted a hearing on May 27, 1997, to determine whether Stefanovic should be required to serve the jail term imposed as a condition of probation. ***Id.*** at 313. At the hearing, defense counsel questioned whether the court could order her to serve the jail time since she had been discharged from probation. ***Id.*** At a later hearing on June 11, 1997, the trial court determined that it retained authority to order the jail time served even though the period of probation had ended because to hold otherwise would frustrate the

court's sentence due to having granted her release pending appeal. *See* ***id.*** Stefanovic appealed. ***Id.***

¶42 We held that the trial court lost jurisdiction to extend Stefanovic's probation once she had been discharged by the DOC, conceding that the trial court's loss of jurisdiction before the jail time was served frustrated the court's sentencing scheme. ***Id.*** at 319. However, we noted that it is axiomatic that before any court can act, it must have jurisdiction to do so. ***Id.***

¶43 The case at bar differs from ***Stefanovic*** in at least one respect, which we deem inconsequential to the application of its holding here. In ***Stefanovic***, the trial court wanted to extend probation so that the jail time imposed as a condition could be served, following an unsuccessful appeal. In the instant case, that is what the trial court thought it was doing, although in actuality, the stayed jail time was two straight-time jail sentences, which could have been ordered served without any probation extension. Thus, the court's sentencing scheme would not be frustrated by the loss of jurisdiction on counts ten and eleven, and therefore, this case presents an even less compelling case for holding that jurisdiction to extend probation still existed as of the March 31, 1998 extension hearing.[9]

¶44 Other cases have held that a terminated probation cannot be later reinstated by the trial court. In ***State v. Balgie***, 76 Wis. 2d 206, 206, 251 N.W.2d

[9] A second variation from the facts of ***Stefanovic*** also fails to yield a difference here. The DOC had apparently issued Stefanovic a certificate of discharge from probation as of her original termination date, but no such certificate of discharge of LaRoche appears of record in 94 CF 201. WISCONSIN STAT. § 973.09(5) was amended by 1997 Wis. Act 289, § 5 to provide that certificates of discharge need only be issued by the DOC to felony offenders; misdemeanants are simply notified that their period of probation has expired. Probation for these offenders terminates merely with the passage of time. Although the amended statute was only effective as of June 29, 1998, the modified practice of the DOC appears to have preceded that date. We conclude that such certificate issuance or non-issuance by the DOC is not, in any event, a jurisdictionally significant act.

36 (1977), the defendant was initially placed on probation which was later revoked administratively. At the sentencing hearing following revocation, the circuit court "resentenced" Balgie by purporting to extend his probation for a period of one year, with ten months of jail imposed as a condition. ***Id.*** at 207. In reversing, the supreme court held that the trial court exceeded its authority, and ordered that the portion of the sentence extending probation be stricken. ***Id.*** at 209; *see also* ***State v. Olson***, 222 Wis. 2d 283, 588 N.W.2d 256 (Ct. App. 1998) (trial court erroneously exercises discretion by extending probation after the expiration date when it attempts to extend prior to termination, but does so without good cause).

¶45 Applying the foregoing law to the facts of this case, we conclude that LaRoche's probation on counts ten and eleven of 94 CF 201 expired on March 27, 1998, and could not thereafter have been extended for any reason, including non-payment of restitution, on March 31, 1998. In reaching this result, we further conclude that the record before us is insufficient to find that LaRoche's probation term was tolled administratively prior to March 27, 1998.

¶46 Having held that probation expired prior to the March 31, 1998 hearing, we need not reach the issue of whether the record made in that hearing was sufficient to extend LaRoche's probation for unpaid court obligations, including court-ordered restitution.

B. Lack of Involvement with His Children as a Sentencing Factor

¶47 We now turn to the third issue asserted on appeal by LaRoche: the sentencing court's consideration of his social relationship to his children. Our examination is conducted pursuant to the deferential standard of review described earlier.

¶48 When imposing sentence, a trial court must consider the gravity of the offense, the offender's character, and the public's need for protection. ***Thompson***, 172 Wis. 2d at 264. The court may consider many specific factors within this analysis, including a history of undesirable behavior patterns; personality, character and social traits; the degree of culpability; age, educational background, and employment record; and the offender's remorse, repentance, or cooperativeness. ***Id.*** at 264-65.

¶49 A trial court misuses its sentencing discretion when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one sentencing factor in the face of contravening considerations. ***Id.*** at 264. The weight given to each factor, however, is left to the trial court's broad discretion. ***Id.*** A trial court exceeds its discretion as to the length of the sentence imposed only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Id.***

¶50 In applying these legal precepts to the facts of this case as developed at the August 20, 1999 sentencing hearing, it is apparent that the sentences imposed on the two counts of 96 CF 7 were well within the bounds of the court's sentencing discretion, and that LaRoche has failed to carry his burden to show otherwise.[10]

[10] Defense counsel at the August 20, 1999 sentencing hearing conceded that prison was in order for LaRoche and stated that LaRoche did not object to it, but requested that the term imposed be minimal.

¶51 By the time he was sentenced on these offenses, LaRoche had been convicted on six counts of criminal non-support of his children, including one felony. The dates of the offenses ran over a time period of several years. Although not finally determined, unpaid child support arrearages were believed to run to tens of thousands of dollars. He absconded from probation, resulting in revocation. While the representations at sentencing also suggested that he might have more recently settled down to stable employment and regular support payments through wage assignments, the fact remains that he was before the court for sentencing as a repeat offender for the same offense, now on a felony, and had already been given probation and shorter terms of county jail time. A short prison sentence was the logical next step, and can hardly be said to be so excessive or unusual and so disproportionate to the offense as to shock public sentiment.

¶52 Nor was the trial court's consideration as a sentencing factor LaRoche's lack of interaction with his children during the period of his failure to support them impermissible. The trial court noted LaRoche's children were being twice punished, first by his lack of financial support, and again because "they have not had [him] in their lives to the extent that they should have ...." The sentencing court stated further that LaRoche had thrown away his chance to be a contributor to the lives of his children, and expressed the hope that even yet he might take a greater part in their lives. This failure to be a part of the lives of his children can be seen in aggravation of his failure to support them financially, and reflects directly upon his character. Furthermore, the trial court's comments were brief remarks in the overall sentencing process and, upon the deferential standard of review we are to apply, cannot be said to have been unduly weighted by the trial court so as to amount to a misuse of sentencing discretion.

¶53 LaRoche has failed to overcome the presumption that the sentencing court acted reasonably in imposing the thirty-three-month prison sentence on the two counts of 96 CF 7, and we therefore affirm the court's actions in this regard.

IV. CONCLUSION

¶54 The trial court was without jurisdiction to extend LaRoche's probation on counts ten and eleven in 94 CF 201. We therefore reverse the judgment in 94 CF 201 with respect to counts ten and eleven and remand for the trial court to vacate the two six-month sentences imposed following "revocation." On remand, the trial court should also order that LaRoche be discharged from probation on these matters as of March 27, 1998. The order in 94 CF 201 is also reversed insofar as it denied LaRoche relief on his sentence in that case.

¶55 In sentencing LaRoche on the two counts of 96 CF 7, the trial court remained well within its sentencing discretion in considering LaRoche's lack of involvement with his children during the period of his failure to support them. Accordingly, we affirm the judgment and order with regard to 96 CF 7.

By the Court.—Judgment and order in case No. 00-0490-CR reversed and cause remanded with directions; judgment and order in case No. 00-0491-CR affirmed.

Not recommended for publication in the official reports.