COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP26-CR **Cir. Ct. No. 2001CF692**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH PRINGLE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: BRADLEY J. PRIEBE and MARK J. McGINNIS, Judges. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kenneth Pringle appeals his judgment of conviction and the circuit court's order setting the amount of restitution. He argues that the circuit court lacked competence to impose a sentence after

revocation of his probation because he was not yet on probation at the time he was revoked. He also argues that the amount of restitution was incorrect. Because Pringle was not able to violate probation he was not yet serving, and because the circuit court erred in not holding a restitution hearing, we reverse with directions.

BACKGROUND

¶2 This appeal stems from Pringle's conviction in Outagamie County Case No. 2001CF692. In that case, Pringle entered a no contest plea to one count of forgery/uttering on May 31, 2002. In return, the State dismissed and read in a second forgery/uttering count. The two counts were based on two forged paychecks totaling $1,566.89. Pringle had cashed those checks at Appleton Piggly Wiggly stores in June 1999.

¶3 At the time of his plea, Pringle had similar cases against him in several other Wisconsin counties, plus a federal case.[1] Most importantly here, he was convicted of mail fraud in federal court, apparently on May 13, 1999, and was sentenced to one year in federal prison and three years of federal parole.[2]

¶4 Pringle's Outagamie County case came up for sentencing on February 26, 2003, before the Honorable James T. Bayorgeon. At that hearing, Pringle, who appeared pro se, and the State jointly recommended "five years probation consecutive to his current [federal] sentence, and then concurrent to his other [state] probation with restitution and costs that are required." At the time,

[1] CCAP shows additional cases in Milwaukee, Rock, Waukesha, and Sheboygan Counties.

[2] Pringle's federal judgment of conviction is not in the record. Pringle's revocation memorandum notes May 13, 1999, as the date of the federal mail fraud conviction.

Pringle was serving a twelve-month federal term imposed for a violation of his federal parole. In pronouncing sentence, Judge Bayorgeon noted the federal time that Pringle had to serve. He stated that the circumstances of the offense merited prison, but that he was inclined to accept the recommendation because of the long time that Pringle would be under supervision and the length of the potential sentence if he were revoked. Judge Bayorgeon then imposed six years of probation, sentence withheld, noting that "when you get done with your federal probation you still have this to be concerned about." He did not, however, explicitly make the six years of probation consecutive to Pringle's federal sentence. The judgment of conviction did not specify whether the probation was consecutive or concurrent.

¶5 Pringle's probation was revoked on October 12, 2004, for violations that took place in April 2004. The case was set for sentencing on February 24, 2005. At that hearing, Pringle argued that his probation had not yet started in April 2004, and so he could not be revoked for violations that took place at that time.[3] The court postponed sentencing in order to consider Pringle's argument and review the 2003 record. On April 13, 2005, the court held that Pringle's probation had been concurrent to Pringle's federal sentence, and that Pringle had therefore been properly revoked. Pringle was sentenced to three years in prison consecutive to any other sentence.

¶6 With regard to restitution, different restitution amounts have appeared as the case proceeded. In the criminal complaint, dated October 2, 2001,

[3] At the hearing, Pringle stated that his federal parole ended in June 2004. While nothing in the record confirms that statement, the State apparently concedes that Pringle's federal parole had not yet ended in April 2004.

the State alleged two bad checks totaling $1,566.89. The restitution summary, filed three weeks after the complaint, noted two separate losses of $5,401.24 each plus a ten percent surcharge, for a total of $11,882.73. An amended restitution summary filed March 4, 2002, included the same two $5,401.24 losses plus an additional $562.80 in extradition fees but somehow ended up with a total of $11,478.93.[4] At Pringle's original sentencing in February 2003, the court ordered a total of $5,401.24 in restitution, but the judgment of conviction included $11,365.28 in restitution plus an additional $1,136.52 in other fees (apparently the ten percent surcharge). At Pringle's sentencing on revocation in April 2005, the court set restitution at $11,365.28; however, the judgment of conviction listed the amount as $11,882.72. Pringle filed a postconviction motion to reduce the restitution amount to $1,566.89, the amount of the two charged offenses. In response, the court, without a hearing, reduced the amount to $5,401.24.

STANDARD OF REVIEW

¶7 We review the circuit court's determination of the sentencing judge's intent without deference. This standard of review has not been explicitly set out; however, Wisconsin courts have engaged in an independent review of the record when determining the sentencing judge's intent. *See* ***State v. Lipke***, 186 Wis. 2d 358, 364, 521 N.W.2d 444 (Ct. App. 1994); ***State v. Brown***, 150 Wis. 2d 636, 642, 443 N.W.2d 19 (Ct. App. 1989).

¶8 This standard of review is consistent with the general rule that circuit court determinations are accorded deference in situations where the circuit court is

[4] The total of the two $5,401.24 losses and the $562.80 extradition fee is $11,365.28.

in a better position to make a determination than the appellate court. *See* ***Schultz v. Schultz***, 194 Wis. 2d 799, 807, 535 N.W.2d 116 (Ct. App. 1995) (citing ***State v. Pepin,*** 110 Wis. 2d 431, 435-36, 328 N.W.2d 898 (Ct. App. 1982)). Determining the intent of the sentencing judge requires a review of the record, a task that the circuit and appellate courts are equally able to perform.

¶9 Whether the circuit court has competence to act in a given situation is a question of law that is reviewed without deference. ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190. Similarly, whether the circuit court is required to hold a postconviction hearing is a question of law that is reviewed without deference. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

DISCUSSION

I. Pringle's challenge to his sentence

¶10 Pringle argues that his probation term in this case did not start until several months after he supposedly violated it. He argues that the court lacked competence to sentence him for a violation of a probation term he was not actually serving. To resolve this issue, we must decide whether Judge Bayorgeon intended Pringle's probation in this case to run consecutive to his federal sentence, and whether he may raise this challenge in his WIS. STAT. RULE 809.30[5] postconviction motion. We agree with Pringle on both of these issues.

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

A. The circuit court's intent

¶11 The intent of the sentencing judge determines the terms of a sentence. ***Brown***, 150 Wis. 2d at 642. Ordinarily, the intent of the judge is found in his or her oral pronouncement of sentence. However, when the judge's oral pronouncement of sentence is ambiguous, the court looks to the record as a whole to determine that intent. ***Id.*** As a general rule, courts resolve ambiguities in favor of the defendant. ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987). This usually means that in the case of ambiguity, sentences will be concurrent; however, there is no set presumption that sentences are concurrent. *See* ***Brown***, 150 Wis. 2d at 639 (questioning the vitality of that general rule).

¶12 In this case, the circuit court noted that neither the judgment of conviction nor Judge Bayorgeon's pronouncement of sentence specified whether the sentence was consecutive or concurrent. The circuit court also felt that Judge Bayorgeon's statement that Pringle "would still have this to be concerned about" when he finished his federal sentence was unhelpful because Pringle's probation would have extended past the end of his federal sentence regardless of whether it was to run consecutive or concurrent. The court then noted that "if Judge Bayorgeon meant for this probation to run consecutive to some other sentence he would have said so. And I am sure he would have picked the sentence, or sentences, to which this would run consecutive and that is nowhere in the record here." The court then found that "the presumption applies in that the probation was concurrent" to the federal sentence.

¶13 While the circuit court's analysis was a plausible one, we believe the record as a whole shows that Judge Bayorgeon intended that the probation run consecutive, for three reasons. First and most importantly, the joint

recommendation was for probation consecutive to Pringle's federal sentence. Judge Bayorgeon noted that he "was inclined to accept the recommendation" and did in fact impose probation (although one year longer than the recommendation). Second, Judge Bayorgeon's comments indicated that he wanted to keep Pringle on probation as long as possible. While a concurrent probation term would have kept Pringle on probation past the end of his federal sentence, a consecutive term kept him on supervision significantly longer than a concurrent one would have. Finally, the most likely meaning of Judge Bayorgeon's comment that Pringle would still have probation to worry about after finishing his federal sentence is that Pringle would have the *full* probation term to worry about, not just a part of it. Thus, we conclude that Judge Bayorgeon intended Pringle's probation to run consecutive to his federal sentence.

B. Competence

¶14 The State argues that Pringle is essentially challenging his revocation, and that he lost his chance to do so when he failed to challenge his revocation by certiorari. We disagree.

¶15 The State's argument mischaracterizes Pringle's argument. Pringle's challenge is in fact a challenge to the court's power to pronounce sentence. Even though the facts necessary to resolve his challenge involve his revocation, the legal issue remains whether the circuit court was competent to pronounce sentence.[6]

[6] Obviously, Pringle could have raised this issue at his revocation hearing, and perhaps that would have been the most efficient way to resolve this dispute. That does not change the legal principle that a court may not act when it lacks competence to do so.

¶16 A court is competent when it has the power to exercise subject matter jurisdiction. ***In re Joshua S.***, 2005 WI 84, ¶16, 282 Wis. 2d 150, 698 N.W.2d 631. While a court's subject matter jurisdiction is limited only by the constitution, a court's power to exercise that jurisdiction may be limited by statute. ***Id.*** (citing WIS. CONST. ART. VII, § 8; WIS. STAT. § 801.04). When a court acts beyond statutory limits on its power, it acts without competence. ***Id.*** For example, a court always has subject matter jurisdiction over CHIPS proceedings. However, when it runs afoul of certain statutory time limits on its exercise of jurisdiction, it lacks competence to proceed. *See* ***In re B.J.N.***, 162 Wis. 2d 635, 654, 469 N.W.2d 845 (1991).

¶17 The Wisconsin Statutes do not give a judge the power to sentence after revocation when there is no probation to revoke. A court's power to sentence after revocation is found in WIS. STAT. § 973.10(2)(a). That power is limited to persons "in the custody of the department" who are adjudged by the department to have violated the terms of their probation. WIS. STAT. § 973.10(1)-(2). A person is "in the custody of the department" when that person is serving probation imposed by the court. WIS. STAT. § 973.10(1). If a person is not serving probation, that person is not "in the custody of the department," and the court lacks the statutory authority to sentence that person.

¶18 Here, Pringle was not on probation at the time the department found he violated it. Because Pringle was not on probation at the time of the violations, the court lacked competence to sentence him for those violations.

II. The court's restitution award

¶19 Pringle also argues that the court erred when it refused him a hearing on his postconviction motion contesting his restitution obligation. He argues that

the remedy for that refusal is a reduction of restitution to the amount of loss listed in the complaint. We agree that a hearing on this issue was required, and we reach the issue despite Pringle's arguable waiver. However, we agree with the State that Pringle's remedy is a hearing, not a reduction in his obligation.

¶20 The State argues that Pringle waived this issue when he conceded at sentencing that the $5,401.24 figure was correct. Arguably, Pringle did waive this issue by admitting that the State's figure was correct. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (issues not properly preserved at circuit court are considered waived). However, this court has the power to address waived arguments. ***State v. Whitrock,*** 161 Wis. 2d 960, 970, 468 N.W.2d 696 (1991). We may exercise this authority if justice will be served by doing so, both parties have had the opportunity to brief the issue, and there are no factual issues that need resolution. ***Id.*** Here, both parties have had the opportunity to brief the issue, and no fact determinations are required in order to require a hearing. In addition, justice will be served by a final determination of restitution.

¶21 When a defendant raises an issue in a postconviction motion, the court is required to hold an evidentiary hearing on that motion if the motion "alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The court need not do so, however, if "the record conclusively demonstrates that the defendant is not entitled to relief." ***Id.***

¶22 In his postconviction motion, Pringle argued that the amount of restitution due the Piggly Wiggly stores was the amount of the forged checks listed in the complaint, $1,556.89. The State responded that the court should order $5,401.24, the amount that the State argued was correct at sentencing. The circuit

court agreed with the State without a hearing and without noting the reasons for its decision. In its brief to this court, the State now concedes that it is unable to determine the factual basis for the $5,401.24 figure.

¶23 Pringle's argument, based on the complaint, that the Piggly Wiggly stores had only sustained $1,566.89 in losses, was enough to raise a material fact entitling him to a hearing. The numerous different restitution figures in different parts of the record and the State's admission that it is unable to determine the origin of the $5,401.24 figure demonstrate that the record does not conclusively show any particular figure.

¶24 Pringle argues that the remedy for the court's decision not to hold a hearing should be reduction of restitution to the amount found in the complaint. He cites ***State v. Lopez***, 2001 WI App 265, ¶22, 249 Wis. 2d 44, 637 N.W.2d 468, which held that the proper remedy for errors made in a plea withdrawal hearing was actual withdrawal of the plea, not a new hearing. The court in that case held that giving the State a new chance to meet a burden it had failed to meet the first time around would allow the State an impermissible "second kick at the cat." ***Id.***, ¶24.

¶25 However, ***Lopez*** involved a significantly different fact situation. Most importantly, in ***Lopez*** the court was reviewing a hearing that had actually occurred, not a circuit court decision not to grant a hearing at all. So, while the State in ***Lopez*** failed to take advantage of its opportunity to supplement the record, the State in this case never had a chance to put in evidence other than the complaint and restitution summary. In addition, Pringle bears some responsibility for the court's refusal to order a hearing in this case due to his ill-considered

admission that $5,401.24 was owing. In ***Lopez***, the defendant was not responsible for the error in any way. ***Id.***, ¶9.

¶26 Because the court lacked competence to sentence Pringle, we reverse the judgment of conviction. Because the court erred by refusing to hold a restitution hearing, we remand for a restitution hearing pursuant to WIS. STAT. § 973.20.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.