COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1816

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GARY J. HAZEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Gary J. Hazen appeals from an order denying his motion to withdraw his no contest pleas, arguing that his sentences after revocation constitute double jeopardy, in violation of the Fifth Amendment to the

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

United States Constitution, because he had already served a one-year jail sentence as a condition of probation. We disagree with Hazen's arguments and therefore affirm the order.[2]

FACTS

¶2 On December 1, 1997, Hazen was convicted, as part of a plea agreement, of the misdemeanor offenses of battery (count one) and disorderly conduct (count two), both as a repeat offender. As to count one, a three-year prison sentence was imposed and stayed and Hazen was placed on three years' probation. One condition of this probation was service of one year in the county jail. As to count two, a three-year prison sentence was imposed, consecutive to the three-year prison term in count one. However, this prison term was also stayed, and Hazen was again placed on probation for three years, concurrent with count one. Again, a condition of this probation was the service of one year in the county jail; this conditional jail time was to be served concurrent to the conditional jail time of count one. Hazen was granted work release privileges on both conditional jail terms. He served the conditional jail time, but his probation was eventually revoked and the stayed prison sentences were executed.

¶3 After the prison sentences were imposed, Hazen filed a motion to withdraw his no contest pleas, arguing that his prison sentences constituted double jeopardy. This motion was denied.

[2] Hazen requested oral argument pursuant to WIS. STAT. RULE 809.22. This court has considerable discretion to grant or deny oral argument. *See* RULE 809.22(2)(b). We deny Hazen's request as unnecessary in this appeal.

DISCUSSION

¶4 In order to withdraw his pleas after sentencing, Hazen must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). Determining whether a manifest injustice has occurred lies within the trial court's discretion. *See* ***State v. Farrell***, 226 Wis. 2d 447, 453-54, 595 N.W.2d 64 (Ct. App.), *review denied*, 228 Wis. 2d 174, 602 N.W.2d 760 (Wis. July 1, 1999) (No. 98-1179-CR). We will not disturb a trial court's discretionary determination as long as the court considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

¶5 First, we must note that Hazen appeals the order of the trial court denying his motion to withdraw his pleas. A hearing was held on this motion on June 26, 2000. Hazen has not provided us with a transcript of this hearing. It appears that he did request the transcript, but then withdrew the request after determining that the transcript was unnecessary. However, it is the trial court's pronouncement at this hearing that Hazen is asking this court to review. Hazen is responsible for ensuring that the record is complete on appeal; when the record is incomplete, this court must assume that the missing material supports the trial court's ruling. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

¶6 The trial court did issue a written order denying the motion to withdraw the pleas:

> Upon a Hearing held on June 26, 2000 on defendant's Motion for Withdrawal Of Plea Of Guilty Or No Contest

> After Conviction, with the defendant Gary J. Hazen, appearing by telephone and the State of Wisconsin, represented by Assistant District Attorney Robert Sager, the court hereby denies the defendant's motion. This decision is made based upon a review of the Sentencing Transcript of a Plea and Sentencing Hearing, which was held on December 1, 1997. The court hereby finds that there is no basis for allowing the defendant to withdraw his no contest plea[s].

We will review Hazen's claim in reference to the written order.

¶7 Hazen, appearing pro se, does not directly challenge the denial of his motion to withdraw his pleas. That issue, therefore, is not preserved for appellate review and we generally will not review an issue which has not been addressed by the trial court. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). We will, however, review Hazen's claim that he is entitled to release from custody because his punishment violates double jeopardy protections as being incorporated in the trial court's denial of his plea withdrawal motion. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (a rule of judicial administration does not affect the power of the appellate court to deal with the issue raised on appeal).

¶8 Hazen argues that the imposition of the stayed prison sentence upon revocation after service of conditional jail time constitutes double jeopardy. We disagree. Hazen's arguments demonstrate a fundamental misunderstanding of Wisconsin law regarding probation and criminal sentencing.

¶9 WISCONSIN STAT. § 973.09 addresses probation; § 973.09(1)(a) authorizes the circuit court to impose and stay a sentence:

> Except as provided in par. (c) or if probation is prohibited for a particular offense by statute, if a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation to the

> department for a stated period, stating in the order the reasons therefor. The court may impose any conditions which appear to be reasonable and appropriate. The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously. If the court imposes an increased term of probation, as authorized under sub. (2) (a) 2. or (b) 2., it shall place its reasons for doing so on the record.

Section 973.09(4) permits conditional jail time as a condition of probation:

> **(4)** The court may also require as a condition of probation that the probationer be confined during such period of the term of probation as the court prescribes, but not to exceed one year. The court may grant the privilege of leaving the county jail, Huber facility, work camp or tribal jail during the hours or periods of employment or other activity under s. 303.08 (1) (a) to (e) while confined under this subsection. The court may specify the necessary and reasonable hours or periods during which the probationer may leave the jail, Huber facility, work camp or tribal jail or the court may delegate that authority to the sheriff. In those counties without a Huber facility under s. 303.09, a work camp under s. 303.10 or an agreement under s. 302.445, the probationer shall be confined in the county jail. In those counties with a Huber facility under s. 303.09, the sheriff shall determine whether confinement under this subsection is to be in that facility or in the county jail. In those counties with a work camp under s. 303.10, the sheriff shall determine whether confinement is to be in the work camp or the county jail. The sheriff may transfer persons confined under this subsection between a Huber facility or a work camp and the county jail. In those counties with an agreement under s. 302.445, the sheriff shall determine whether confinement under this subsection is to be in the tribal jail or the county jail, unless otherwise provided under the agreement. In those counties, the sheriff may transfer persons confined under this subsection between a tribal jail and a county jail, unless otherwise provided under the agreement. While subject to this subsection, the probationer is subject to s. 303.08 (1), (3) to (6), (8) to (12) and (14) or to s. 303.10, whichever is applicable, and to all the rules of the county jail, Huber facility, work camp or tribal jail and the discipline of the sheriff.

¶10 The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in

jeopardy of life or limb." U.S. CONST. amend. V. The Wisconsin Constitution's double jeopardy clause is essentially the same: "[N]o person for the same offense may be put twice in jeopardy of punishment." WIS. CONST. art. I, § 8. An individual's constitutional right to be protected from double jeopardy is a question of law which we review de novo. *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998).

¶11 We begin by observing that probation is not a sentence; likewise, the imposition of confinement as a condition of probation is not a sentence. *See* ***State v. Hays***, 173 Wis. 2d 439, 444, 496 N.W.2d 645 (Ct. App. 1992). Instead, probation is an alternative to punishment, imposed when the trial court determines that a defendant should not be punished as the law would otherwise require. *See* ***State v. Meddaugh***, 148 Wis. 2d 204, 211, 435 N.W.2d 269 (Ct. App. 1988). Probation is imposed when the court concludes that the defendant's character and the circumstances are such that he or she is not likely to reoffend and that the public welfare does not require imprisonment. *See* ***id***. at 212.

¶12 A trial court's authority to impose conditions of probation is derived from WIS. STAT. § 973.09. *See* ***Hays***, 173 Wis. 2d at 444. Section 973.09(1)(a) provides the trial court with the authority to place an individual on probation and impose reasonable and appropriate conditions of probation. *See* ***Hays***, 173 Wis. 2d at 444.

¶13 By virtue of WIS. STAT. § 973.09(4), a court may confine a probationer to the county jail between the hours of his or her employment as a condition of probation. *See* ***Prue v. State***, 63 Wis. 2d 109, 112, 216 N.W.2d 43 (1974). However, the fact that a probation condition of confinement to the county jail is similar to the confinement of a sentence under the Huber law does not

render probation a sentence. *See* ***id.*** at 114. The courts have rejected the idea that jail confinement during probation has the common meaning of "sentence." *See* ***id***. Because probation is an alternative to punishment, *see* ***Meddaugh***, 148 Wis. 2d at 211, double jeopardy principles are not implicated merely by imposing incarceration after revocation of probation.

¶14 Hazen appears to argue that because his conditional jail term contained work release privileges (what he refers to as "Huber"), the jail term was converted to a punitive sentence and thus the court was constitutionally prohibited from imposing any additional prison sentences. Hazen misunderstands work release privileges.

¶15 The case upon which Hazen primarily relies, ***Yingling v. State***, 73 Wis. 2d 438, 243 N.W.2d 420 (1976), fails to support his arguments and explains the difference between a Huber sentence and work release privileges. ***Yingling*** states that "those who receive Huber Law privileges under sec. 56.08(1), Stats., [now WIS. STAT. § 303.08] serve a sentence. *A person confined to the county jail as a condition of probation does not serve a sentence*." ***Yingling***, 73 Wis. 2d at 440 (emphasis added). ***Yingling*** discussed the occasional confusion of terminology whereby the term "Huber law" was erroneously used interchangeably to describe the work release privileges of WIS. STAT. § 973.09(4). *See* ***Yingling***, 73 Wis. 2d at 440. Thus, conditional jail time with work release privileges is not the same as a Huber sentence.

¶16 A review of the transcript from Hazen's original sentencing and the judgment of conviction setting forth the sentence demonstrates that he was not sentenced to a Huber law sentence pursuant to WIS. STAT. § 303.08, but was being afforded probation, with jail confinement and work release privileges as a

condition of probation. Admittedly, the trial court's oral pronouncement at sentencing is somewhat ambiguous when read in isolation. When sentencing Hazen on count one, the trial court stated, "[T]he Court is going to order that you serve one year in the county jail. Court will order that you be granted Huber privileges ...." Then when placing Hazen on probation for count two, the trial court stated, "I also will order as a condition that you serve one year in the county jail with Huber to run concurrent to the one year jail condition to Count 1." However, it is apparent from the context in which the term "Huber" was mentioned that the court intended to grant Hazen work release privileges with this probation conditional jail time, and not to dispense a Huber law sentence.

¶17 The judgment of conviction places Hazen on probation and states that he is to serve "12 months on each ct concurrent to commence immed. w/ work release." The judgment of conviction makes the trial court's intention clear: Hazen was given probation with one year jail time, with work release privileges, as a condition of probation. If there is a conflict between an ambiguous oral pronouncement and the written judgment, it is proper to look at the written judgment to ascertain the trial court's intention. *See* ***Jackson v. Gray***, 212 Wis. 2d 436, 443, 569 N.W.2d 467 (Ct. App. 1997). Hazen was given probation and jail time as a condition of probation, with work release privileges. He was not given a Huber sentence. Thus, he was not serving a sentence, *see* ***Yingling***, 73 Wis. 2d at 440, and his double jeopardy rights were not implicated.

CONCLUSION

¶18 Hazen's double jeopardy rights were not violated by postprobation revocation prison sentences when he served conditional jail time as a condition of probation. The order of the trial court is thereby affirmed.[3]

By the Court.—Order affirmed.

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

[3] Hazen argues that the State's brief was untimely filed. Our records indicate that this assertion is true. Hazen asks this court to refuse to accept the brief for filing. The State's untimely brief is less than three full pages, provides no record citations, and cites no legal authority for its contentions. Under WIS. STAT. RULE 809.19(1)(e), proper appellate briefing requires an argument containing the party's contention and the reasons therefor, with citation of authorities and citation to that part of the record relied on. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 546 n.3, 292 N.W.2d 370 (Ct. App. 1980). The State's brief does not comply with RULE 809.19(1)(e) and is of little assistance to this court.