

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2007

A. John Voelker
Acting 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 Nos. 2006AP725-CR
2006AP726-CR
2006AP727-CR
2006AP728-CR**

**Cir. Ct. Nos. 2002CM777
2002CM986
2003CF125
2004CF417**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER T. PETROSELLI,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Dodge County:
DANIEL W. KLOSSNER, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.¹ Alexander Petroselli appeals *pro se* from circuit court orders rejecting his claim for relief from his sentences. We also reject that claim, and affirm the circuit court's orders.

¶2 On December 16, 2004, Petroselli received dispositions in four criminal cases. In Case Nos. 2002CM777, 2002CM986, and 2003CF125, the circuit court withheld sentence and imposed concurrent terms of three and a half years of probation. In Case No. 2004CF417, the circuit court sentenced Petroselli to one year in jail, concurrent to his probation terms.

¶3 Petroselli's probation was revoked on May 12, 2005. He was returned to the circuit court, which imposed several one-year periods of incarceration in Case Nos. 2002CM777, 2002CM986, and 2003CF125. Petroselli subsequently filed a motion challenging these sentences. The circuit court denied Petroselli's motion and also denied a motion for reconsideration. Petroselli appeals the resulting orders.

¶4 To the extent Petroselli is challenging what the circuit court did on May 12, 2005, he does not present a developed argument, except to say that sentencing was inconsistent with the supreme court's interpretation of WIS. STAT. § 973.09 in *Grobarchik v. State*, 102 Wis. 2d 461, 307 N.W.2d 170 (1981). We disagree.

¶5 In *Grobarchik*, the supreme court addressed whether the circuit court had authority under the predecessor to WIS. STAT. § 973.09(1)(a) to impose a

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

term of probation on one charge to commence when the defendant was released from prison and placed on parole for another charge.² **Grobarchik**, 102 Wis. 2d at 463, 465. The supreme court reasoned that such a disposition did not comport with the circuit court's authority under the statute to order probation "consecutive" to a sentence because a "sentence" includes the period of parole and continues until the defendant is finally discharged. *Id.* at 467-69.

¶6 Petroselli argues:

The judgment of Judge Klossner is a finding *inconsistent* with our Supreme Court's holding in **Grobarchik**, when Judge Klossner ordered revocation of probation in cases 2002CM777, 2002CM986 and 2003CF125 *prior to the expiration of Petroselli's county huber jail sentence* in case 2004CF417.

Viewed another way, Judge Klossner's original sentence in case 2004CF417 precluded him from revoking the probation sentences in cases 2002CM777, 2002CM986 and 2003CF125, until that county jail huber [sentence] had expired or had itself been revoked.

Petroselli apparently likens his jail sentence in Case No. 2004CF417 to the defendant's prison sentence in **Grobarchik**, and asserts that the circuit court acted contrary to **Grobarchik** when it revoked his probation and imposed incarceration in Case Nos. 2002CM777, 2002CM986, and 2003CF125 during the time that his jail sentence continued to run. However, we agree with the circuit court that Petroselli's comparison is flawed. The problem in **Grobarchik** was that the circuit

² The supreme court in **Grobarchik v. State**, 102 Wis. 2d 461, 307 N.W.2d 170 (1981), was addressing WIS. STAT. § 57.01 (1965), a previous version of WIS. STAT. § 973.09(1)(a). Section 57.01 (1965) used the phrase "sentence of imprisonment" where § 973.09(1)(a) simply uses the term "sentence." See **Grobarchik**, 102 Wis. 2d at 466 & n.1. In **State v. Givens**, 102 Wis. 2d 476, 478-79, 307 N.W.2d 178 (1981), however, the court resolved the same issue the same way under § 973.09(1)(a), explaining that the difference in language was immaterial.

court fashioned a disposition that made a term of probation consecutive to something other than a “sentence,” a result not authorized by the statute. That error is not present here. Indeed, the circuit court here did not, on May 12, 2005, impose probation at all, much less impose it consecutive to something.

¶7 Although it is not readily apparent that actions taken by the circuit court at Petroselli’s December 16, 2004 sentencing are properly before this court, we nonetheless briefly address Petroselli’s arguments on that topic.

¶8 Petroselli asserts that the circuit court erred on December 16, 2004, by imposing terms of probation concurrent with a jail sentence. He focuses on the following sentence in WIS. STAT. § 973.09(1)(a): “The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously.” Petroselli reads the term “may” to mean “must” or “shall.” This reading is incorrect. “Generally in construing statutes, ‘may’ is construed as permissive and ‘shall’ is construed as mandatory unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature.” *City of Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963). There is no reason to deviate from that general rule here.

¶9 Petroselli directs us to the following language in *State v. Pierce*, 117 Wis. 2d 83, 85, 342 N.W.2d 776 (Ct. App. 1983): “Section 973.09(1), Stats., authorizes a sentencing court to impose probation *only* when it is *consecutive* to a sentence.” (Petroselli’s emphasis.) We acknowledge that this language from *Pierce* is imprecise, but it is obvious the *Pierce* court did not mean that probation may be imposed only when it is imposed consecutive to a sentence. Such a holding would mean, absurdly, that probation may never be imposed when there is

no other case carrying a “sentence” that the probation can run consecutive to. Rather, as the circuit court here has already explained to Petroselli, the proper reading of *Pierce* is that the court there was merely observing that under WIS. STAT. § 973.09 if the circuit court is imposing a term of probation *consecutive to something*, that something must be a “sentence,” and a “sentence” does not include probation. *See Pierce*, 117 Wis. 2d at 85; *see also State v. Gereaux*, 114 Wis. 2d 110, 113, 338 N.W.2d 118 (Ct. App. 1983) (“consecutive periods of probation may not be imposed” under § 973.09(1)(a) and “[p]robation is not a sentence”).

By the Court.—Orders affirmed.

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

