COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1146-CR **Cir. Ct. No. 1996CF226**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD D. BURKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Reginald Burke appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the trial court erred when it denied his

motion to find that a probation term was concurrent to a prison term. Because we conclude that the trial court did not err, we affirm.

¶2 In 1997, Burke pled no contest to two counts of third-degree sexual assault and one count of false imprisonment. The court sentenced him to five years in prison on count one, and two years in prison on count two, to be served consecutively. On the count that is at issue here, the court said: "On Count 3, the other sexual assault, I will sentence the Defendant to five years in the Wisconsin State Prison. I will stay that and place the Defendant on five years probation." Although the judge did not state this at sentencing, the clerk's notes and the judgment of conviction state that the sentence for this count was consecutive to the prison sentences. The judgment of conviction also did not show that the sentence for the third count was imposed and stayed.

¶3 In 1999, Burke moved to modify the sentences, and the court granted the motion. The court made the two prison sentences concurrent to "one another and concurrent to your probation revocation…." In 2004, Burke moved to amend the judgment of conviction to show that the third count was to be concurrent to the prison sentences. The court denied the motion. In February 2005, Burke's probation was revoked and he was sentenced after revocation. Because the court noted that the judgment of conviction did not accurately reflect that the initial sentence on count three was imposed and stayed, the court entered an amended judgment of conviction reflecting an imposed and stayed sentence of five years. Burke then brought a motion for postconviction relief under WIS. STAT. RULE 809.30 (2003-04), asking the court to change the judgment to have the probation run concurrent to the prison sentence. The State initially challenged the motion as being procedurally barred. The court held a hearing, and then ruled on the merits that its intent had been to run the probation consecutive to the prison sentence.

¶4 Burke now renews his argument that the revocation was improper because his probation should have been concurrent, and therefore it expired before the revocation. The State first argues that Burke has waived his argument because he did not raise it in any of his other postconviction proceedings. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). We conclude, however, that this argument is not barred by ***Escalona***. Burke did not bring this as a WIS. STAT. § 974.06 (2005-06)[1] motion, but rather brought a motion for postconviction relief under WIS. STAT. RULE 809.30, challenging the amended judgment of conviction. Further, the State abandoned the procedural argument at the postconviction hearing by agreeing that the trial court should decide the issue on the merits. Because the State waived the argument in the trial court, we will not consider it here. We conclude that the issue is not barred and we will address the issue on the merits.

¶5 We agree with Burke that the well-established law is that when a sentencing court does not state whether the sentence is consecutive, the law presumes that it is concurrent. ***In re McDonald***, 178 Wis. 167, 171, 189 N.W. 1029 (1922). However, we conclude that the circuit court's sentencing remarks were ambiguous. The court imposed and stayed the prison sentence on the third count. The court obviously was not immediately implementing the prison portion of that sentence, so it is distinctly possible that the court intended the probation portion to be stayed, or in other words, to be consecutive. Consequently, when the court's remarks are ambiguous then we must look to the entire record to determine

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the court's intent at sentencing. ***State v. Oglesby***, 2006 WI App 95, ¶¶20-21, 292 Wis. 2d 716, 715 N.W.2d 727.

¶6 We conclude that the record establishes that the circuit court intended the sentence to be consecutive. When viewing the record as a whole, and particularly the sentence structure, it is illogical for the court to have placed Burke on probation, and then run that probation concurrent to the prison sentence. Burke was sentenced initially to a total of seven years in prison, and five years of probation. If he served the probation term concurrent to the prison term, he would have completed probation while still in prison. Further, one of the court's conditions of probation was that Burke not have contact with the victim. If the court had intended Burke to serve the probation while in prison, that condition would not have been necessary.

¶7 Further, considering the record in its entirety, we note that Burke did not argue that the probation was intended to be concurrent until after his probation was revoked. While we have concluded that he is not barred from raising the argument here, this history nonetheless demonstrates Burke's apparent contemporaneous interpretation of the court's sentence. Under all of these circumstances, we conclude that the argument that the court intended the sentence to be concurrent does not make sense in law or logic. We affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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