COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1130 **Cir. Ct. No. 97CF974831**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN K. RICE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Brian K. Rice appeals, *pro se*, from the denial of his postconviction motion to correct his sentence for his conviction on one of the counts of burglary. He submits that the postconviction court erred in ruling that no conflict existed between the trial court's statements found in the sentencing transcript and the entries found in the judgment roll and the judgments of

conviction. Rice maintains that during his sentencing for three counts of burglary, he was sentenced to probation on the third count, to be served concurrently with his parole. He argues that this sentence was unlawful, and thus requires resentencing. Because Rice has misread the transcript and misinterpreted WIS. STAT. § 973.09(1)(a) (2001-02),[1] we affirm.

I. BACKGROUND.

¶2 On October 28, 1997, Rice was charged with three counts of burglary, all occurring during the month of October 1997. Eventually, after plea negotiations, Rice pled guilty to all three counts. The trial court ordered a presentence investigation report. The judgment roll reflects that at the sentencing proceeding, he was sentenced to fifty-two months' imprisonment on both count one and count two, to be served concurrently. On count three, he was sentenced to 108 months' imprisonment, consecutive to the earlier sentences, but this sentence was stayed and he was placed on probation for seven years, to be served concurrent with the sentences for counts one and two. Also, two forms of a document entitled "judgment of conviction and sentence," reflect the identical sentences found in the judgment roll.

¶3 In April 2003, Rice brought a postconviction motion seeking resentencing. He claims that his sentence on count three, as reflected in the aforementioned two documents, conflicts with the trial court's sentencing remarks. He argues that, on the third count, the trial court actually sentenced him to probation to be served concurrently with his anticipated parole from the sentences

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

for counts one and two. In support, he offers a Department of Corrections inmate classification summary as proof that he was sentenced to probation concurrent to his parole. His motion was denied.

II. ANALYSIS.

¶4 Rice makes several arguments that can be distilled into two separate issues. First, he argues that the trial court's statements at his sentencing conflict with the official records listing his sentences, and that the oral pronouncements at sentencing trump the written judgment. He submits that the trial court sentenced him to probation on count three to be served concurrently with his eventual parole from the sentences he received for counts one and two. Next, he argues that this sentence—probation concurrent with parole—is unlawful because the trial court is not empowered to order probation to be served concurrent with parole. He also insists that, pursuant to WIS. STAT. § 973.09, the trial court could only impose probation consecutive to a sentence. He cites ***Grobarchik v. State***, 102 Wis. 2d 461, 307 N.W.2d 170 (1981), for support. Rice's arguments fail, although he is correct that probation may not be ordered to be served concurrent with parole.

¶5 Rice argues that the judgment of conviction and the judgment roll differ from the trial court's sentencing comments.[2] He argues that the transcripts of his sentencing show that the trial court ordered probation on count three, to be served concurrently with his anticipated future parole from the sentences for counts one and two, while the judgment roll and judgments of conviction state that

[2] One of the two forms entitled "judgment of conviction and sentence" is inaccurate as to the date Rice pled guilty, but in all other respects it is correct. On remand, the clerk's office should correct the error.

probation is concurrent with his incarceration for counts one and two. He claims that "[w]here there is a conflict between a trial court['s] unambiguous oral pronouncement and a written judgment, the oral pronouncement controls[,]" and "[a]ny sentence pronounced orally and recorded in the sentencing transcripts controls." For this proposition he cites ***State v. Perry***, 136 Wis. 2d 92, 401 N.W.2d 748 (1987); ***Scott v. State***, 64 Wis. 2d 54, 218 N.W.2d 350 (1974); and ***State v. Ortiz***, 2001 WI App 215, 247 Wis. 2d 836, 634 N.W.2d 860. To buttress his argument, Rice has also filed a copy of a Department of Corrections inmate classification summary as proof that he was sentenced to probation to be served concurrent with his parole.

¶6 We first observe that Rice has apparently both misunderstood the trial court's comments and misread the transcript. At sentencing, the trial court stated: "[W]hat the Court's going to do is impose on Counts 1 and 2 sentences of 52 months concurrent to each other, concurrent to anything that you're serving." The trial court further stated:

> As to the other count, the Court is going to impose but stay a sentence of a hundred and eight months and place you on probation for a period of seven years ….
>
> … The sentence is consecutive to anything you're serving. The other is concurrent, the probation is to be concurrent; so when he gets out of the state institution on parole, he'll also be on probation concurrently with parole.

The only reasonable interpretation of these remarks is that the trial court intended to have Rice's probation begin at the same time he began his term of incarceration. The trial court's later remarks were merely an observation that when released on parole, Rice would be on both probation and parole at the same time. Thus, the judgment roll and the judgments of conviction are entirely accurate and comport with the trial court's comments at sentencing.

¶7 The Department of Corrections document states, in pertinent part: "On 5/15/01, he was released on MR from OCI. He had been given WSP time for Count 1 and 2 of the burglary offense and probation for Count 3. He also began his probation when released from the institution." Assuming that the Department of Corrections record actually conflicts with the sentencing transcript and the official court records, the agency's declarations cannot modify a trial court's sentence. *See* ***State v. Fearing***, 2000 WI App 229, ¶19, 239 Wis. 2d 105, 619 N.W.2d 115 ("DOC's authority to administer probation is not the same as the authority to impose conditions of probation. Indeed, WIS. STAT. § 973.10(1) specifically states that once probation is imposed by the court, the defendant is subject to the control of DOC 'under *conditions set by the court* and rules and regulations established by the department….'") (emphasis in original). Thus, even assuming that the document's author believed Rice's probation was supposed to start when he was on parole, that would not affect Rice's actual sentence.

¶8 Next, Rice contends that his sentence—a term of probation to be concurrent with his parole—was unlawful, and that he should be resentenced. Rice correctly notes that ordering probation to commence upon release on parole is not authorized under WIS. STAT. § 973.09. *See also* ***State v. Givens***, 102 Wis. 2d 476, 478-79, 307 N.W.2d 178 (1981). However, as we have already noted, he was not sentenced to probation concurrent with parole. Thus, the lynchpin of his argument has been removed. Further, Rice's second argument that, pursuant to § 973.09(1)(a), the trial court is permitted to impose probation only when it is consecutive to a sentence, is wrong. Rice misreads § 973.09(1)(a) in arguing that probation must be consecutive to a sentence. Section 973.09(1)(a) provides:

> 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 therefore. 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.

(Emphasis added.) The statute uses the word "may," not "shall," in authorizing probation to be served consecutive to a sentence on a different charge. Generally, the use of the word "may" gives the trial court discretion to do an act, while not mandating it. *See* ***Scanlon v. City of Menasha***, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962) ("[g]enerally, the word 'may' is permissive when used in the statute, and this is especially true where the word 'shall' appears in close juxtaposition in other parts of the same statute) (footnote omitted). Here, the statute allows, but does not require, the trial court to order probation to be served consecutive to a different sentence.

¶9 Finally, we note that WIS. STAT. § 973.15(2)(a) authorizes Rice's actual sentence. The statute permits probation to be served concurrently with a prison term on a different charge. In ***State v. Aytch***, 154 Wis. 2d 508, 511-12, 453 N.W.2d 906 (Ct. App. 1990) (citation omitted), a similar argument, that probation could not be served concurrently with a prison sentence, was rejected:

> The validity of each portion of Aytch's sentence is found in the statutes. Section 973.15(2), Stats., provides: "The court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously." In addition, a sentence with probation that is concurrent to a prison sentence on a different charge is permitted under sec. 973.09(1)(a), Stats. "The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously." Therefore, we

> conclude that the sentencing court acted within its statutory authority in structuring and imposing Aytch's sentence.

¶10 Because Rice's arguments are without merit, we affirm.

By the Court.—Order affirmed.

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