COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2229-CR **Cir. Ct. No. 2004CF1**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMIAH J. GRUBE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: THOMAS J. GRITTON, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Jeremiah J. Grube appeals from a judgment of conviction imposing sentence after the revocation of his probation. At or just before the 2009 post-revocation sentencing, the trial court realized there was an error in the sentencing portion of the 2005 judgment of conviction. Our review of

the sentencing transcript confirms that the written judgment does not reflect the court's sentencing intent. We therefore affirm the judgment of conviction after revocation of probation.

¶2 The essential facts are undisputed. In 2004, the parties negotiated a plea agreement to resolve a number of criminal cases from two counties. Grube agreed to enter no-contest pleas to: delivery of cocaine and possession with intent to deliver cocaine in Calumet county case no. 04-CF-01; misdemeanor battery in Calumet county case no. 03-CF-122; and felony bail jumping and misdemeanor theft in Calumet county case no. 03-CF-142. The parties agreed that Grube also would be sentenced for felony bail jumping in a Winnebago county case which, for sentencing purposes, was denominated count seven in 04-CF-01. Other cases and counts were dismissed and read in. The dispute on appeal arises from the sentence for the cocaine delivery count in 04-CF-01 ("Count One").

¶3 At the June 2005 sentencing hearing, the court began by ordering nine months' jail for the misdemeanor battery charge in 03-CF-122. It continued:

> In regard to case number 04-CF-01, I'm going to withhold sentence and place you on probation for a period of ten years. This sentence will be consecutive to case number 03-CF-122.
>
> In regard to count 7, which is the bail jumping charge from Winnebago County, a condition of this sentence will be—Or it's actually a condition of probation. As a condition of probation, you will serve 12 months in the county jail. That is a sentence for which there will be no credit for "good time." So, effectively, what I have done with that, Mr. Grube, you will be serving the next 20 months or so in the county jail.
>
> ….
>
> [A]nother condition that I am placing on there is that I am imposing and staying 12 months in the county jail on count 1. So, that is a condition of your probation. That

> means, if you cannot behave yourself, and if the Department doesn't revoke your probation, you will at least get another year in jail added on. That is what the imposed-and-stayed time is for, on count 1.
>
> ….
>
> Just so it's clear, I will indicate that in case number 04-CF-01, that sentence is consecutive. All of these counts are consecutive to 03-CF-122.
>
> As I indicated to you, Mr. Grube, my intention, quite frankly, was to look at sentencing you to prison for two to three years. But there are some things that led me to believe that probation can accomplish our goals. So, we are going to attempt probation, and we are sentencing you in this fashion.
>
> But my intention is that you serve 12 months in jail, plus nine months. You will get good time on the nine months. There is nothing I can do about that. But the 12 months, you are not going to get any good time. It will be a straight 12 months.
>
> ….
>
> I think that covers everything.
>
> ….
>
> MR. FROEHLICH [prosecutor]: I recall the Court addressing count 1 and count 7 in case number 04-CF-01. But not count 2.
>
> THE COURT: Count 2 is identical to count 1. It is 12 months of imposed-and-stayed time. I don't know if I said that, but that was my intention.

¶4 The clerk of circuit court entered a judgment of conviction ordering, for Count One, ten years' probation, a twelve-month imposed-and-stayed jail sentence, but no withheld sentence or conditional time; for count two, a withheld sentence, ten years' probation but no conditional time; and for count seven, twelve months' jail time, a withheld sentence and six years' probation. The court signed the judgment, unaware that some written terms departed from the oral remarks.

¶5 Four years later, Grube violated probation and was jailed. The revocation order and warrant ordered Grube to return to court for sentencing only on 03-CF-142 and count two of 04-CF-01. Consistent with the judgment, the probation agent recommended the twelve-month imposed-and-stayed jail sentence for Count One. She also recommended concurrent sentences of twelve months' jail for both count two and 03-CF-142.

¶6 Post-revocation sentencing occurred six months later. The court indicated it had just that day received the revocation summary and stated it was "shocked" by the probation agent's recommendation of twelve months in jail. The State asserted that the probation agent was mistaken because the twelve months' jail time was not a stayed sentence but a condition of probation. Defense counsel disagreed, pointing out that the written judgment expressly indicated an imposed-and-stayed twelve-month sentence. The court adjourned the hearing to give the probation agent an opportunity to explain the recommendation. In the meantime, the court entered a corrected judgment. For Count One it recited a withheld sentence, ten years' probation and twelve months' conditional jail time.

¶7 At the adjourned sentencing hearing, the court reviewed the 2005 sentencing transcript. Although the judgment recited an imposed-and-stayed sentence, the transcript, the court noted, "says very clearly here it is a condition of probation." The court concluded that it must not have looked at the judgment of conviction before signing it.

¶8 The probation agent then explained that the recommendation was based on the original judgment, which "now … has been explained that was an error." The agent presented a revised recommendation for each of the two 04-CF-01 counts: concurrent sentences of seven years' initial confinement (IC)

and three to four years' extended supervision (ES). The court sentenced Grube to consecutive terms of four years' IC and six years' ES, later reduced to five years' ES to comport with the maximum allowable for class E felonies.

¶9 On appeal, Grube seeks reversal of the corrected judgment of conviction. He asserts that the clearly written original judgment governs because the oral sentencing pronouncement was ambiguous, jumping confusingly from one count to another and mixing the terms "sentence" and "probation." *See* ***Cashin v. Cashin***, 2004 WI App 92, ¶22, 273 Wis. 2d 754, 681 N.W.2d 255 (stating that an unambiguous written judgment trumps an ambiguous oral pronouncement). He also raises double jeopardy concerns, claiming he was halfway through serving his imposed-and-stayed twelve-month jail sentence when the court changed it to a withheld sentence and imposed a nine-year prison term.

¶10 The State responds that the written judgment must give way because it contradicts the court's clearly stated intent. *See* ***State v. Brown***, 150 Wis. 2d 636, 642, 443 N.W.2d 19 (Ct. App. 1989) (stating that the sentencing judge's intent determines the terms of a sentence). We side with the State.

¶11 As with statutory construction, the test for ambiguity in sentencing pronouncements is whether the language at issue can be understood by reasonably well-informed persons in two or more different ways. ***State v. Oglesby***, 2006 WI App 95, ¶19, 292 Wis. 2d 716, 715 N.W.2d 727. Ambiguity is a question of law. *See* ***State v. Peterson***, 2001 WI App 220, ¶13, 247 Wis. 2d 871, 634 N.W.2d 893. Whether the sentence portion of a written judgment of conviction should be corrected also presents a question of law. ***State v. Prihoda***, 2000 WI 123, ¶8, 239 Wis. 2d 244, 618 N.W.2d 857. We review questions of law de novo. ***State v. Ploeckelman***, 2007 WI App 31, ¶8, 299 Wis. 2d 251, 729 N.W.2d 784.

¶12 At the outset of its sentencing comments, the court stated that as to 04-CF-01 it was "going to withhold sentence and place you on probation for a period of ten years." Grube contends now, although he did not question it at the time, that this statement is ambiguous because it does not state to which of the three 04-CF-01 counts it applies.

¶13 That is a straw-man argument. Both the original and the corrected judgments ordered ten years' probation on Count One. Thus, nothing would change in that regard were we to reverse the corrected judgment.

¶14 Grube's real challenge goes to whether the court withheld sentence on Count One and whether the imposed-and-stayed jail term was a sentence or a condition of probation. The court stated that it was "going to withhold sentence and place [Grube] on probation for a period of ten years" and was "imposing and staying 12 months in the county jail on count 1," as "a condition of [his] probation." The original written judgment ordering an imposed-and-stayed sentence utterly misses the clear language about the *withheld sentence* and the imposed-and-stayed jail term being a *condition of probation*. Also, the dissimilar sentences it recited for the two 04-CF-01 counts contradict the court's oral statement that "Count 2 is identical to count 1." Where a conflict exists between a court's unambiguous oral pronouncement of sentence and an equally plain written judgment, the oral pronouncement controls. ***Brown***, 150 Wis. 2d at 640-41.

¶15 Grube also challenges the court's statement that it was "imposing and staying 12 months in the county jail on count 1. So, that is a condition of your probation." He argues that the imposed-and-stayed sentence reflected on the original judgment of conviction is a more reasonable interpretation. He reasons that if it were conditional time, it would fall to the Department of Corrections to

impose jail time. The court is without authority to fashion such an order, he points out, and the DOC is without authority to execute it. *See* ***State v. Fearing***, 2000 WI App 229, ¶¶17, 21-22, 239 Wis. 2d 105, 619 N.W.2d 115.

¶16 The offending condition of probation in ***Fearing*** is not present here. There, the court ordered Fearing to serve six months in the county jail with work-release privileges but without good time. ***Id.***, ¶1. The court then stayed three months of that period of confinement and ordered that the stayed time "[could] be imposed at the discretion of [Fearing's] agent, if he or she deems it appropriate." ***Id.*** Here, though, the judgment of conviction makes clear that the court did not relinquish its authority: "Any violations of probation [are] to be reported to Judge Gritton immediately to determine [the] need for [a] probation review hearing." Thus, the court here withheld sentence, placed Grube on probation for ten years, ordered twelve months in jail as a condition of probation and then permissibly stayed that conditional jail time. *See* ***State v. Johnson***, 2005 WI App 202, ¶7, 287 Wis. 2d 313, 704 N.W.2d 318 (stating that the authority to impose conditional jail time includes the authority to stay it). If Grube did not "behave," the violation was to be reported to the court.

¶17 In sum, while not a model of clarity, we conclude that the oral pronouncement is legally unambiguous and illustrates what the court sought to do. Even if we were to agree with Grube that it is ambiguous, however, he still would not prevail.

¶18 In such a case, we examine the entire record to discern the court's intent. *See* ***Oglesby***, 292 Wis. 2d 716, ¶25. Here, the court resolved any ambiguity at the post-revocation sentencing hearing. After reviewing its original sentencing comments as set forth in ¶3 above, the court stated:

> I don't know how much clearer it can be and I must just not have looked at the judgment of conviction before I signed it. It says very clearly here [in the sentencing transcript] it is a condition of probation. I don't know how else that could be taken.
>
> ….
>
> Yes, I just don't see how else this could be read any other way. It looks to me like the judgment of conviction that I signed was done in error so in my opinion the simple fact it was out there and was wrong doesn't change what the sentence really was which is imposed and stayed—not imposed and stayed sentence, a probation sentence with conditional jail time.

¶19 The court's post-revocation comments confirm its intent to impose and stay the jail term as a condition of probation.

¶20 Grube next contends that increasing his sentence post-revocation violated his right to be free of double jeopardy because he had a legitimate expectation of finality in the sentence. *See* ***State v. Jones***, 2002 WI App 208, ¶¶9-10, 257 Wis. 2d 163, 650 N.W.2d 844. Again, we are not persuaded.

¶21 In its constitutional sense, "jeopardy" means the risk associated with criminal prosecution and with proceedings to invoke criminal punishment for the vindication of public justice, a risk absent from proceedings that are not "essentially criminal." ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 383, 260 N.W.2d 727 (1978) (citation omitted). A proceeding is considered to be criminal if it imposes a sanction intended as punishment. ***Id.*** Probation revocations are not punishment. *See* ***id.*** at 385-87. The purposes of probation and incarceration as a condition of probation are rehabilitation of offenders and protection of the community interest. *See* ***State v. Heyn***, 155 Wis. 2d 621, 629, 456 N.W.2d 157 (1990); *see also* ***State v. Hays***, 173 Wis. 2d 439, 444-45, 496 N.W.2d 645 (Ct. App. 1992). The "punishment" attendant to probation revocation is attributable to

the crime for which the probationer originally was convicted and sentenced. *See* ***State ex rel. Flowers***, 81 Wis. 2d at 386. Any lingering double jeopardy concerns because Grube served six months in jail before being sentenced to prison can be addressed by appropriate sentence credit.

¶22 Furthermore, Grube's double jeopardy argument could succeed only if his expectation in the finality of the previous judgment was "legitimate." *See* ***Jones***, 257 Wis. 2d 163, ¶10. An expectation's legitimacy may be influenced by many factors, including the completion of the sentence, the passage of time, the pendency of an appeal or the defendant's misconduct in obtaining the sentence. ***Id.*** The factors must be evaluated in light of the circumstances of the particular case. ***State v. Gruetzmacher***, 2004 WI 55, ¶34, 271 Wis. 2d 585, 679 N.W.2d 533. This presents a question of law that we review de novo. ***State v. Willett***, 2000 WI App 212, ¶4, 238 Wis. 2d 621, 618 N.W.2d 881.

¶23 Grube's claimed expectation was not legitimate. The court bluntly told him that its initial intention was to sentence him to prison for two to three years, but decided to try to accomplish the same goals through probation; that if he could not behave he would "at least get another year in jail added on" as a condition of his probation for Count One; and that count two was "identical." It strains credulity for Grube—not a naïf on this terrain—to now claim that he believed that the court simply imposed and stayed a twelve-month sentence. We conclude that the written judgment was erroneous and was properly corrected. His post-revocation sentence stands.

By the Court.—Judgment affirmed.

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