COURT OF APPEALS
DECISION
DATED AND RELEASED

April 3, 1996

No. 95-1758-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHERYL L. WELSCH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

SNYDER, J. Cheryl L. Welsch appeals from a judgment of conviction for one count of felony welfare fraud contrary to § 49.12(9), STATS.,[1]

[1] This section has since been renumbered as § 49.95(9), STATS. *See* 1995 Wis. Act 27, §§ 2782, 9426(13).

and an order denying her motion for postconviction relief. Welsch contends that the sentence imposed was illegal because she received a stayed sentence and a withheld sentence for the same conviction. She also argues that she was denied statutory due process when she was assessed the costs of her public defender representation without a hearing.

We conclude that the sentence orally expressed by the trial court was legal. However, because the written judgment of conviction does not properly reflect the oral pronouncement of the imposed sentence, we reverse and remand to allow the trial court to bring the written judgment into conformance. The procedure used by the trial court in imposing the costs of representation by a public defender afforded Welsch due process, and on that issue, we affirm.

The facts concerning Welsch's sentencing are undisputed. Welsch pled no contest to one count of felony welfare fraud. As part of a plea agreement, an additional misdemeanor welfare fraud count was dismissed but read in for sentencing purposes. The State then recommended three years of probation, thirty days of "condition time" and payment of restitution. Welsch requested that the trial court consider community service in lieu of jail time because her fourteen-year-old daughter had an attention deficit disorder, was in outpatient therapy and required constant supervision.

After considering Welsch's request, the trial court imposed the following sentence:

I will withhold sentence; place you on probation for three years.

As conditions you will pay restitution of $2373.32,

> and [by] your own representation you will pay that at $500 a month starting March 1st and on the first of each month thereafter that.
>
> As a further condition of probation, you're going to spend ten days in jail. I will impose another twenty days but stay that.

This oral sentence was transposed to the judgment of conviction as follows:
Sentence Withheld, Probation Ordered
....

> **IT IS ADJUDGED** that the defendant is convicted as found guilty, and ... is placed on probation for **36 MO** ... is to be incarcerated in the County Jail [for a] period of ..... **10 DAYS COM 1/26/95 7PM; 20 DAYS IMPOSED AND STAYED** ....

Sentence Legality

Welsch complains that the sentence is illegal on both statutory and constitutional grounds. Statutorily, she contends that (1) her probation was wrongly based upon both a withheld and an imposed but stayed sentence,[2] (2) the sentence imposed exceeded statutory limits, and (3) the sentence failed to set a definite term of probation. Her constitutional claim is premised on her belief that she received two sentences (punishments) for the same conviction and was thereby subjected to double jeopardy.

Section 973.09(1)(a), STATS., provides in relevant part:

[2] Specifically, Welsch contends that the following two sentences were imposed in the written judgment: (1) a withheld sentence, three years of probation, restitution and ten days of probation condition time; and (2) a twenty-day stayed jail sentence, an undetermined probation term and restitution.

> **Probation. (1)** (a) ... [T]he 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. [Emphasis added.]

A determination of whether Welsch's sentence violates § 973.09(1)(a) requires the application of a statute to the facts of the case. When we are called upon to apply a statute to a set of facts and the facts are undisputed, only questions of law remain, which we review de novo. ***First Nat'l Leasing Corp. v. City of Madison,*** 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

Where a statute is unambiguous, the court must give effect to its ordinary and accepted meaning. ***DNR v. Wisconsin Power & Light Co.,*** 108 Wis.2d 403, 407, 321 N.W.2d 286, 288 (1982). In this case, the language of the statute unambiguously requires a sentencing court to either withhold sentence or impose sentence and stay its execution, but not both.

Welsch argues that the court erred and gave her two sentences for one conviction: a withheld sentence and an imposed but stayed twenty-day jail sentence. The State maintains that the trial court unambiguously withheld sentence, placed Welsch on probation for three years, ordered restitution and required that Welsch serve thirty days of condition time, with twenty days of that time stayed. According to the State, this was a single sentence, properly imposed. The written judgment reads as Welsch represents, and the State's position is supported by the oral sentence pronouncement. Therefore, we

conclude that a conflict exists between the oral pronouncement of sentence and the written judgment of conviction.

The trial court's oral pronouncement unambiguously withheld sentence and placed Welsch on three years of probation, subject to conditions. The State requested thirty days of condition time. In response to Welsch's concern about the welfare of her daughter during her incarceration, the trial court crafted a modified thirty-day order. The trial court stated, "As a further condition of probation, you're going to spend ten days in jail. I will impose another twenty days but stay that." The court was within its authority to impose condition time in that fashion. *See* § 973.09(1), (4), STATS.

The sentence conflict centers upon the written judgment's failure to relate the total condition time imposed (thirty days) prior to breaking the time down into the manner in which the condition time was to be implemented. In order to comply with the clear pronouncement of the trial court, the judgment should have read that Welsch was to serve a "period of ..... **30 days**, 10 days to be served commencing 1/26/95, remaining 20 days stayed," or words to that effect. In this case, the brevity of the language in the judgment of conviction omitted essential sentence components and resulted in an illegal sentence.

Where a conflict exists between a sentencing court's oral pronouncement of sentence and a written judgment, the oral pronouncement controls. ***State v. Perry,*** 136 Wis.2d 92, 114, 401 N.W.2d 748, 758 (1987). While we agree with Welsch's claim that the written judgment unambiguously

sentences her twice for the same offense, we are satisfied that the trial court's oral pronouncement unambiguously imposes only one sentence of probation for a time certain with lawful conditions. Because the written judgment should properly reflect the court's intended sentence and because the written judgment would follow Welsch should she violate probation, *see* § 973.08, STATS., we reverse and remand for the trial court to resolve the sentence conflict.[3]

Welsch also argues that the sentence she received violates the double jeopardy provisions of the United States and Wisconsin Constitutions. This argument is premised upon her belief that two separate and distinct sentences were expressed in the written judgment. Having determined that she received only one sentence based on the trial court's oral pronouncement, we do not address the double jeopardy argument. An appellate court will not reach a constitutional issue if the resolution of another issue disposes of an appeal. ***Grogan v. Public Serv. Comm'n,*** 109 Wis.2d 75, 77, 325 N.W.2d 82, 83 (Ct. App. 1982).

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[3] Because we conclude that this disposes of the statutory issues regarding the legality of her sentence, it is unnecessary to address the remaining contentions regarding the sentence. If a decision on one point disposes of an appeal, an appellate court will not decide other issues raised. *See* ***Sweet v. Berge,*** 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

Imposition of Costs of Representation

We now turn to Welsch's argument that the trial court wrongly imposed costs for her public defender representation. She contends that she was denied statutory due process in violation of § 973.09(1g), STATS.[4] The relevant statutory requirements are as follows:

> If the court places the person on probation, the court may require, *upon consideration of the factors specified in s. 973.20(13)(a)2. to 5.*, that the probationer reimburse the county or the state, as applicable, for any costs for legal representation to the county or the state for the defense of the case. In order to receive this reimbursement, the county or the state public defender shall provide a statement of its costs of legal representation to the defendant and court within the time period set by the court. [Emphasis added.]

Welsch maintains that because the trial court imposed the costs of her public representation off the record, without any consideration of the statutorily-mandated factors, the assessment was improper. The State responds that the trial court properly assessed the fees as mandatory ministerial costs.[5]

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[4] Welsch also suggests that her constitutional due process rights were violated, but then abandons that argument in favor of seeking statutory relief. We need not address constitutional issues raised but not adequately briefed. *See* ***Dumas v. State,*** 90 Wis.2d 518, 522-23, 280 N.W.2d 310, 313 (Ct. App. 1979).

[5] The State also argues that § 973.09(1g), STATS., does not apply because the trial court had authority to impose the public defender fees as costs under § 973.06(1)(e), STATS. Because the trial court determined to treat the attorney's fees as a condition of probation under the former, we do not address that argument.

After the sentencing hearing at which Welsch was ordered, inter alia, to pay restitution, the court also included assessments of $52 in court costs, $49.40 in witness fees, a $50 mandatory victim/witness surcharge and an assessment for public defender fee reimbursement.[6] At the postconviction hearing, defense counsel argued that the assessment of the costs of Welsch's public defender was improper because it failed to comport with the language of § 973.09(1g), STATS., in that the court failed to consider factors affecting Welsch's ability to pay as outlined in the statute.

At the postconviction hearing, the court clarified its inclusion of the fee reimbursement as a condition of probation. Prior to sentencing, Welsch had represented to the court that she was prepared to pay restitution at the rate of $500 per month. The cost of public defender representation was unknown at the time it was included in the conditions of probation.[7] However, when this assessment was challenged at the postconviction hearing by defense counsel, the court stated, "When you receive the number and the amount of attorney's fees that you're required to pay as a condition of probation, in writing within 30 days of that date, if you'd like a hearing to have those fees reviewed, I would be glad to do that."

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[6] The written judgment contains the entry "**94P53FC00206**" after the words "is to pay: attorney fees." The State suggests that this reference is to the case number. The trial court case number is 94CF263. The case number in this court is 95-1758-CR. We are unable to determine what the entry represents.

[7] The record does not disclose whether Welsch has been provided with the actual amount assessed for public defender representation or a date that she received such information.

We conclude that the trial court's offer of a hearing comported with the requirements of § 973.09(1g), STATS. The trial court may properly order reimbursement for public defender representation as a condition of probation. *See* ***id.*** By affording Welsch an opportunity to avail herself of the protection of the § 973.09(1g) treatment, we conclude that her statutory due process rights were adequately addressed and protected. We affirm the assessment of public defender fees as a condition of probation.

Because of the conflict between the oral pronouncement of sentence and the sentence expressed in the written judgment, we reverse and remand for the trial court to conform the written judgment to the oral pronouncement.

By the Court. – Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.