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DISTRICT II

July 2, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1961-CR

State of Wisconsin v. Tye Frazee (L.C. #1994CF228)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Tye Frazee appeals from a judgment of conviction and an order denying his motion for postconviction relief. Frazee argues, and the State concedes, that the trial court erroneously exercised its sentencing discretion by imposing two separate terms of probation whose aggregate total exceeded the maximum length permitted by statute. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We reverse and remand with directions.

On September 23, 1994, Frazee pled to seven counts of forgery charged in a single case. On November 10, 1994, Frazee appeared for sentencing and on count one, the trial court ordered a four-year prison sentence to run consecutive to a pre-existing Racine County sentence. On counts two through seven, the court sentenced Frazee as follows:

On counts two through seven, on each count you are sentenced to a period of six years in the State prison, each to be served consecutively to the other and to all other sentences previously imposed. Those sentences only will be stayed and you will be placed on probation to the Department of Corrections for a term of ten years. On counts two, three and four the ten-year probation will be concurrent with the sentences previously imposed upon you. And on counts five, six and seven [the ten-year probationary term] will be consecutive to the sentence [previously] imposed in Racine and the sentence imposed on count one of this Information.²

Ten years later, Frazee discharged from the probationary term ordered in connection with counts two through four. In 2007, he discharged from the prison sentence ordered in connection with count one, and began his ten-year probationary term on counts five through seven. Frazee later filed a motion requesting that the trial court vacate his second ten-year probationary term. The trial court denied the motion, determining that under WIS. STAT. § 973.09(2)(b)2, it was

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The judgment reflects that the court imposed two separate ten-year terms of probation, one on counts two through four, and the other on counts five through seven, for a total length of twenty years.

empowered to impose two separate terms of probation in connection with two different offense groupings.

We agree with the parties that pursuant to WIS. STAT. § 973.09(2)(b)2, the trial court's authority was limited to the imposition of a single probationary term not to exceed seventeen years.³ The sentencing authority of a trial court is limited to that authorized by statute. *Grobarchik v. State*, 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981). Section 973.09(2)(b)2, provides:

If the probationer is convicted of 2 or more crimes, including at least one felony, at the same time, the maximum original term of probation may be increased by one year for each felony conviction.

Rather than permitting multiple periods of probation in connection with convictions occurring at the same time, the statute contemplates the imposition of a single, unitary term of probation that may be increased according to the number of convictions. *State v. Schwebke*, 2001 WI App 99, ¶27, 242 Wis. 2d 585, 627 N.W.2d 213. As stated in *Schwebke*,

[WISCONSIN STAT. § 973.09(2)] accommodates the multiple counts of conviction by allowing a single, extended term of probation Under the rules of statutory construction, we must give effect to the legislative intent. ... The statute does not authorize consecutive terms of probation. Because the multiple counts are already reflected in the extended maximum allowable probation term, it defies legislative intent to allow consecutive terms of probation.

³ The application of a statute to undisputed facts is a question of law subject to independent review. *State v. Setagord*, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997).

Id. (citations omitted); *Cf. State v. Johnson*, 2005 WI App 202, ¶9, 287 Wis. 2d 313, 704 N.W.2d 318 (convictions which occur at the same time “give rise to a single ‘term of probation.’”

We conclude that commutation of the excessive probationary term is the appropriate remedy under *Schwebke*, 242 Wis. 2d 585, ¶31, and WIS. STAT. § 973.09(2m).⁴ We reverse the imposition of two ten-year periods of probation and direct the trial court to enter an amended judgment of conviction imposing, on counts two through seven, one seventeen-year term of probation, to run concurrent with count one.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily reversed and the cause is remanded with directions pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

⁴ WISCONSIN STAT. § 973.09(2m) provides:

If a court imposes a term of probation in excess of the maximum authorized by statute, the excess is void and the term of probation is valid only to the extent of the maximum term authorized by statute. The term is commuted without further proceedings.