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DISTRICT II

October 19, 2022

To:

Hon. Mark T. Slate
Circuit Court Judge
Electronic Notice

Daniel J. O'Brien
Electronic Notice

Amy Thoma
Clerk of Circuit Court
Green Lake County Courthouse
Electronic Notice

Bradley J. Young, #248723

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

2021AP1316-CR State of Wisconsin v. Bradley J. Young (L.C. #2013CF78)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Bradley J. Young appeals from an order denying his motion to vacate amended judgments of conviction entered by the circuit court. Young contends that the court erred when it entered amended judgments to state that a term of probation on two counts to which he pled guilty was to be consecutive to the prison sentences on five other counts in his plea. 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 (2019-20).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In February 2015, Young pled guilty to seven felony counts of burglary, arising from burglaries in seven counties between July 7, 2010 and August 5, 2013. The complaints from the seven counties were consolidated, and numerous other counts were dismissed and read in. In a proffer before his plea, Young admitted to committing over fifty burglaries and other offenses between 2008 and 2013.

The circuit court sentenced Young in September 2015. Under WIS. STAT. § 973.01(1), sentences for felonies committed after December 31, 1999, must be bifurcated sentences. “A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under [WIS. STAT. §] 302.113.” Sec. 973.01(2). In Young’s consolidated cases, the State recommended a total of ten years of initial confinement followed by twenty-seven years of extended supervision. Defense counsel recommended four to six years of initial confinement followed by a lengthy period of extended supervision.

The circuit court did not follow either side’s recommendation. Instead, it imposed bifurcated sentences of three years of initial confinement and three years of extended supervision on each of five burglary counts, for a total sentence of thirty years of imprisonment (fifteen years of initial confinement and fifteen years of extended supervision). *See* WIS. STAT. § 973.01(2) (“The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision.”). The court ordered that the sentences were to be served “[c]onsecutive to each other and consecutive to any other sentence.” This meant that Young would serve the fifteen years of initial confinement followed by the fifteen years of extended supervision. *See* WIS. STAT. § 973.15(2m)(b)2. (stating that consecutive sentences require that “the person sentenced shall serve the periods of confinement in prison under the sentences consecutively and the terms of extended supervision under the sentences consecutively

and in the order in which the sentences have been pronounced”); WIS. STAT. § 302.113(4) (“All consecutive sentences imposed for crimes committed on or after December 31, 1999, shall be computed as one continuous sentence. The person shall serve any term of extended supervision after serving all terms of confinement in prison.”).

On the remaining two counts, the circuit court withheld sentence and imposed a five-year term of probation. *See* WIS. STAT. § 973.09(1)(a) (“if a person is convicted of a crime, the court, by order, may withhold sentence ... and ... place the person on probation ... for a stated period”). At the sentencing hearing, the court did not state explicitly whether the term of probation was to be consecutive to or concurrent with the prison sentences on the other five counts. Nor did the judgment of conviction entered on September 17, 2015, state whether the term of probation was consecutive or concurrent. The court also ordered Young to pay \$99,921.17 in restitution to the many victims of his burglaries.

In 2020, the Department of Corrections notified the circuit court that Young’s probation was nearing completion but that he had not fulfilled the restitution condition. In response to this notice, the court issued an order explaining that it was amending the judgment of conviction to state that the probation term was to run consecutively to the prison sentences, which conformed to the court’s intent at sentencing. An amended judgment of conviction for each of the two counts was entered reflecting the court’s ruling.

Young moved to vacate, asking the circuit court to change the judgments to have the term of probation run concurrent to the prison sentences. He argued that the amended judgments

violated his rights under the Double Jeopardy Clause² and were contrary to the presumption that multiple sentences are to run concurrently. The court held a hearing and denied the motion, stating that it entered the amended judgments to conform to its intent at sentencing as soon as it learned that the Department of Corrections erroneously believed Young's probation term was nearing its end. The court also rejected Young's argument that it had increased his sentence in violation of his double jeopardy rights.

On appeal, Young renews his argument that his probation term should have run concurrent with his prison sentences. Although this case involves a withheld sentence and placement on probation, both parties point to well established law stating that sentences for separate offenses are presumed to run concurrently "*in the absence of a statutory or judicial declaration to the contrary.*" *State v. Oglesby*, 2006 WI App 95, ¶21, 292 Wis. 2d 716, 715 N.W.2d 727 (quoting *State v. Rohl*, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991)); *State v. Coles*, 208 Wis. 2d 328, 332, 559 N.W.2d 599 (Ct. App. 1997). When the circuit court's sentencing remarks are ambiguous, however, we look to the entire record to determine the court's intent. *Oglesby*, 292 Wis. 2d 716, ¶¶20-21.

Here, the circuit court's sentencing remarks were arguably ambiguous because the court did not state whether the probation term was to run consecutive to or concurrent with the prison sentences on the other five counts. The court's remarks, however, along with the structure of the sentence, the restitution order, and the absence of any statement in the judgment of conviction

² See U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."); WIS. CONST. art. I, § 8(1) ("[N]o person for the same offense may be put twice in jeopardy of punishment.").

that the probation term was to run concurrently, establish that the court intended the term of probation to be consecutive.

At the sentencing hearing, the circuit court stated that it was placing Young on probation “so that there is some hammer hanging over your head after you are released from the Wisconsin Prison System to know that if you continue to go back to these [criminal] ways you can face additional time in prison.” This statement indicates that the court intended the term of probation to be served *after* completion of the prison sentences.

The circuit court imposed this sentence structure after expressing deep concern about Young’s extensive record of burglary over a long period of time, which only stopped when he was caught. It also stated that Young used his knowledge and experience as a police officer to commit these crimes and avoid detection. These comments support the conclusion that the court intended Young to be on probation after completion of the prison sentences to maximize his incentive to avoid revocation and imposition of the withheld sentences on the two counts. Ordering a concurrent probation term which could end during the first five years of Young’s confinement would be directly contrary to the circuit court’s stated intent to hold a hammer over Young’s head after his release from the prison system.

In addition, various conditions of probation would make no sense if the probation term were to run concurrent with the prison sentences. For example, the circuit court prohibited Young from serving in any law enforcement or security position or business related to them while on probation. In addition, he was ordered to provide a copy of the judgment of conviction

to the sheriffs in the county where he lived and all surrounding counties in each year of his probation³ to make them aware of his presence:

I do this because you will be going to prison. Over time, you will have been forgotten, but this court believes that you have vast knowledge in how not only to commit burglaries but to avoid detection, and by every year handing that judgment of conviction personally to the sheriff or chief deputy in the county which you live and surrounding counties, that puts them on notice if there are any unresolved burglaries, you are one of the people that they need to get ahold of to look at.

If the court had intended Young to serve the probation term while confined, these conditions would not have been necessary, and indeed, would be utterly illogical.

As the circuit court pointed out in addressing Young's motion to vacate, the court imposed a substantial restitution obligation—approximately \$100,000—which presumably will take many years to pay. *See Coles*, 208 Wis. 2d at 333 (circuit court may clarify ambiguity regarding its intent after sentencing). Because the court may extend the term of probation before it expires if Young has not satisfied his restitution obligation pursuant to WIS. STAT. § 973.09(3)(a) and (b), it would be illogical to impose a concurrent sentence that would require an extension during Young's confinement after five years and repeatedly thereafter during the remaining twenty-five years of the prison sentences. The court noted that it could extend probation if Young fails to fulfill the restitution condition, which it could not do with extended supervision. Thus, the substantial restitution obligation further confirms the court's intent that the term of probation was to be consecutive to the prison sentences.

³ The court also required Young to provide copies of his judgment of conviction to the sheriffs each year he was on extended supervision.

We reject Young’s suggestion that the circuit court was referring to its imposition of the long period of extended supervision when emphasizing the importance of a strong incentive to live crime-free after release from the “Wisconsin Prison System.” The court referred to Young’s eventual release while explaining its rationale for imposing a term of probation—not in discussing extended supervision. Moreover, the court’s mention of the prison system necessarily referred to the “one continuous sentence” of thirty years of imprisonment that he received on the five counts. *See* WIS. STAT. § 302.113(4). WISCONSIN STAT. § 973.09(1)(a) provides that a “period of probation may be made consecutive to a sentence on a different charge.” Here, that other sentence was the aggregate thirty-year prison sentence, which included both the terms of confinement and extended supervision until Young is fully discharged. *See* WIS. STAT. § 973.01(2); *see also State v. Givens*, 102 Wis. 2d 476, 478-79, 307 N.W.2d 178 (1981) (stating that a circuit court is without authority to order probation after release from confinement in prison to parole under § 973.09(1)(a) because a “sentence” includes the period of parole and continues until a defendant is fully discharged); *Grobarchik v. State*, 102 Wis. 2d 461, 468-69, 307 N.W.2d 170 (1981). Young fails to argue otherwise.

In sum, instead of adopting the State’s recommendation for twenty-seven years of extended supervision, the circuit court imposed a period of fifteen years and imposed a withheld sentence and five years of probation on two counts. The record makes clear that it did so for the purpose of deterring Young from returning to his criminal ways, protecting the public, and maximizing the ability to ensure that Young meets his restitution obligation. Thus, we agree with the circuit court that the amended judgments of conviction conformed to its sentencing intent, and it was merely making clarifications.

We likewise reject Young’s contention that the amended judgments violate his double jeopardy rights, because the amendments did not increase the sentence. A sentence modification violates double jeopardy when the sentence is increased, and the defendant possessed a legitimate expectation of finality in the original sentence. *See State v. Jones*, 2002 WI App 208, ¶¶9–10, 257 Wis. 2d 163, 650 N.W.2d 844. Here, as explained above, the amended judgments do not extend Young’s sentence but instead accurately were conformed to the sentencing court’s intent. We also reject Young’s contention that the circuit court’s sua sponte amendment violated his due process right to notice and an opportunity to be heard, because the court did hold a hearing at which Young set forth his challenge, and his objections were heard.

Based on the foregoing,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals