STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2011AP2833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE R. ROBINSON,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction and an Order Denying Post Conviction Relief Entered in the Circuit Court for Milwaukee County, Honorable Paul R. Van Grunsven, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

1. Were Ms. Robinson's state and federal constitutional rights against double jeopardy violated when, after imposing a sentence and remanding her to start serving the sentence forthwith, the circuit court recalled the case the next day and increased her sentence, not based on an error of law or a misstatement of fact?

   The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case involves the application of well-settled legal principles regarding a defendant's constitutional protection against double jeopardy when the court increases a sentence following an imposition of sentence. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

On January 22, 2011, the defendant, Jacqueline R. Robinson, was charged by criminal complaint with count one – possession of controlled substances – narcotic drug – contrary to Wis. Stats. §§ 961.41(3g)(am), and 939.50(3)(i) and counts two and three – battery to police officer, contrary to Wis. Stats. § 940.20(2) and 939.50(3)(h). (2; 27). Following a preliminary hearing, the state filed an information charging the same three counts as in the criminal complaint, and the defendant eventually entered guilty pleas to the charges. (3, 28, 30:9-16). At the plea hearing, the State explained that part of the plea agreement included its

recommendation that the sentence be served concurrently to a sentence recently imposed in Waukesha County Case No. 08CF518. (30:5-8).

On May 10, 2011, the Honorable Paul R. Van Grunsven conducted a sentencing hearing. (31). The parties jointly recommended that the court impose a sentence to be served concurrently to a sentence that the defendant was serving in Waukesha County cases. (31:2, 6-8; App. 104, 108-10).

The assistant district attorney detailed the defendant's Waukesha County charges and sentences. (31:2-4; App. 104-106). She explained that the defendant had received a withheld sentence and was placed on probation for three counts: in Case No. 2008CM1636, receiving stolen property, less than or equal to $2,500, in Case No. 2008CF518, possession with intent to deliver narcotics and in Case No. 2008CM2563, receiving stolen property, less than or equal to $2,500. (31:3-4; App. 105-106).

The assistant district attorney then explained:

> So, the defendant was on probation when this offense was, when the offense in this case was committed and she was revoked off of probation for all three of these cases and was sentenced in 2008CF518 to State prison, two years in custody, four years extended supervision and then in 2008CM2563 she was revoked off of probation and sentenced to nine months, which was to run *concurrent*, was to run *concurrent* with the bail sentence and in 2008CM1636 she was revoked. Sentenced to nine months to run *concurrent* with the other two cases.
>
> So, the defendant currently in those cases, is serving two years in custody, four years extended supervision.

(31:4; App. 106) (emphasis added).

At the end of her sentencing argument, the assistant district attorney stated:

> [G]iven the fact that the defendant has been revoked off of probation and now faces two years in custody and four years extended supervision, the State feels that such time is appropriate to [sic] due to the seriousness of the offense and therefore would recommend any sentence in this case run concurrent to the sentence in the other cases.

(31:6-7; App. 108-109).

During his sentencing remarks, defense counsel explained that Ms Robinson "was revoked and sentenced to two years initial confinement, four years extended supervision." (31:7; App. 109).

In its sentencing remarks, the circuit court explained that it was considering the revocation sentence:

> I consider the fact that Judge Domina ordered a sentence of two years in and four years out after she was revoked and returned to him for sentencing. I do need to consider that.

(31:11; App. 113).

The court sentenced Ms. Robinson on Count One to 42 months imprisonment (18 months initial confinement/24 months extended supervision) concurrent to any other sentence, on Count Two to and on Count Three to 60 months imprisonment (24 months initial confinement/36 months extended supervision) concurrent to any other sentence. (31:12; App. 114). It ordered that Ms. Robinson was eligible for the Earned Release Program and the Challenge

Incarceration Program after serving 15 months of initial confinement and did not order a risk reduction sentence. (31:13; App. 115). The court remanded Ms. Robinson into custody to serve this sentence forthwith. (31:14; App. 116).

On the next day, May 11, 2011, the judge *sua sponte* recalled this case. (32; App. 117-120). He explained that, after the sentencing hearing, he did some research and realized that he had made a mistake. (32:2; App. 117). The judge stated that: "[t]he split sentence I proposed yesterday did not reflect this court's intent as far as a fair sentence in this case." (*Id*.).

The court indicated that he misheard the sentence in Waukesha County Case No. 08CM1636 and mistakenly believed that the prosecutor stated that the nine-month sentence was consecutive to the 24 months that Judge Domina ordered in that case. (32:2-3; App. 117-18). He explained that a review of the Consolidated Court Automation Program records after the sentencing hearing revealed that in fact this sentence was concurrent to the other two Waukesha cases. (32:3; App. 118).

The court then stated:

> In fashioning a sentence in this case, the Court does look at the gravity of the offense, the defendant's character and need to protect the public and yesterday I started my sentencing arguments by talking about how despicable the behavior was by Ms. Robinson in this case in terms of her reactions and interactions with the police officers in this case.
>
> In fashioning a sentence the Court does need to look at probation and probation is not appropriate. The court considers prior record of convictions and the court does look at a period of incarceration and believes it is

> necessary to accomplish the objectives of good sentencing, which is the gravity of the offense, the defendant's character and the need to protect the public.
>
> Given all of that and harkening back to the comments made yesterday, I asked this case be called back so I can re-state and announce the sentence I wanted to achieve yesterday and based on the record now before the Court, as to Count 1, I'm continuing with a 42 month sentence for Ms. Robinson, concurrent to any other sentence, with 18 months initial confinement, and 24 months extended supervision.
>
> As to Count 2 and Count 3, however, it is my belief that there should be time reflected in this sentence *over and above what Judge Domina did* and given the circumstance and my confusion as to whether that case was concurrent or consecutive; that is 08CM1636, I'm sentencing Ms. Robinson as to Count 2, to 69 months in the Wisconsin State Prison System, concurrent to any other sentence; 33 months initial confinement, 36 months extended supervision.
>
> As to Count 3; 69 months in the Wisconsin state prison system, concurrent to any other sentence. With 33 months initial confinement, 36 months extended supervision…

(32:3-5; App. 118-20) (emphasis added).

The court reiterated that Ms. Robinson was eligible for the Earned Release Program and the Challenge Incarceration Program after serving 15 months of initial confinement and did not order a risk reduction sentence. (32:4; App. 119). It ordered that the terms and conditions of extended supervision remained as stated the day before. (32:5; App. 120).

The court then explained:

> I wanted this case brought back because I realize the error was made by this court under the mistaken assumption of what she was ordered to serve in Waukesha. Given the clarity of the record now, I believe the sentence based upon the record now before the court is appropriate.

(32:5; App. 120)[1].

This sentence increased Ms. Robinson's initial incarceration by nine months over the sentence imposed on May 10, 2011. *Compare* 31:12; App. 114 and 32:4; App. 119.

On May 24, 2011, Ms. Robinson timely filed a notice of intent to pursue post conviction relief and on November 14, 2011, she filed a Rule 809.30 post conviction motion to restore the original sentence imposed on May 10, 2011. (17, 21). The motion asserted that the court violated the double jeopardy clause of the United States and Wisconsin constitutions when it increased her sentence on May 11, 2011. (21:5-7). The motion noted that this case did not involve a correction of an illegal sentence. (21:6). It argued that the court was never misinformed of the total sentence that Ms. Robinson was serving and that the court increased its sentence based on a second guessing of its original sentence. (21:6-7).

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[1] On May 13, 2011, the court issued the original judgment of conviction. 16; App. 121-22). In response to an inquiry from the Department of Corrections, it issued an order and an amended judgment of conviction denying Ms. Robinson eligibility for the Earned Release Program and the Challenge Incarceration Program. (18, 19, 20; App. 123-24).

On November 15, 2011, the court denied the post conviction motion. (22; App. 101-103). It found that there was no violation of the double jeopardy clause. (22:3; App. 103). The court reasoned that had not increased the sentence upon reflection but rather because the court had a mistaken understanding of the defendant's Waukesha County sentence. (22:2; App. 102). It found that the increase in the sentence was not a second guessing of its original decision and that the court explained the sentence necessary to achieve its sentencing objectives based on a correct understanding of the defendant's record. (22:2-3; App. 102-103).[2]

Other facts will be discussed below as necessary.

[2] The court also ordered that the amount of sentence credit be amended on the judgment of conviction and issued an amended judgment of conviction. (22:3; App. 103, 23; App. 125-26).

ARGUMENT

I. The Nine-Month Increase in Ms. Robinson's Sentence Violated Her State and Federal Constitutional Protection Against Double Jeopardy Because She had A Legitimate Expectation of Finality in the Sentence Ordered to Commence "Forthwith" and There was No Error of Law or Misstatement of Fact at the Sentencing Hearing.

A. Principles of law and standard of review.

The Wisconsin and United States Constitutions protect a criminal defendant from being subjected to multiple punishments for the same offense. *See* U.S. Const. amend. V, XIV; Wis. Const. art. I, § 8. The double jeopardy provisions of the state and federal constitution are coextensive and appellate courts analyze them as one. ***State v. Burt***, 2000 WI App 126, ¶ 7, 237 Wis. 2d 610, 614 N.W.2d 42. "[J]urisprudence has placed a premium on ensuring finality of judgments and not subjecting defendants to endless prosecutions or multiple punishments." ***State v. Gruetzmacher***, 2004 WI 55, ¶23, 271 Wis. 2d 585, 679 N.W.2d 553. Whether an increase in a previously imposed sentence violates a criminal defendant's right to be free from double jeopardy is a question of law subject to *de novo* review. ***Id***.

B. The increase in the sentence violated Ms. Robinson's protection against double jeopardy because she had a legitimate expectation of finality in the original sentence imposed.

An increase in a previously imposed sentence violates double jeopardy if the defendant has a legitimate expectation of finality in the sentence. ***Gruetzmacher***, 271 Wis. 2d 585,

¶33 (citing ***State v. Jones***, 2002 WI App 208, ¶ 9, 257 Wis. 2d 163, 650 N.W.2d 844). Several factors influence whether a defendant had legitimate expectation of finality: "the completion of the sentence, the passage of time, the pendency of an appeal or the defendant's misconduct in obtaining the sentence." ***Jones***, 257 Wis. 2d 163, ¶ 10 (citations omitted).

Ms. Robinson had a legitimate expectation of finality in the sentence as pronounced and entered on May 10, 2011. First, the court's own words conveyed that this sentence was the court's final decision. The court expressly stated that the sentence would begin "forthwith": "Remanding her into custody to serve the sentence forthwith." (31:14; App. 116).

Second, Ms. Robinson's expectation of finality also arose from the fact that there was no error of law at the sentencing hearing, and she heard the court pronounce a legally valid sentence and state the law correctly. Ms. Robinson's legitimate expectation of finality in this case therefore is stronger than in ***State v. Willett*** where the court imposed a valid concurrent sentence, but expressed an incorrect understanding of the law governing his authority to impose a consecutive sentence. 2000 WI App 21, ¶ 6, 238 Wis. 2d 621, 618 N.W.2d 881. Despite the stated misunderstanding of the law, this Court concluded that Willett had a legitimate expectation of finality in the sentence and the court's change in the sentence to a consecutive sentence four months later violated double jeopardy. 238 Wis. 2d 621, ¶¶ 1-2, 6. Given that, unlike ***Willett***, the court below did not express any misunderstanding of law or facts at the sentencing hearing, Ms. Robinson's legitimate expectation of finality in the sentence imposed is even stronger than Mr. Willett's.

Third, there was no misstatement of fact at the sentencing hearing which would have undermined Ms. Robinson's legitimate expectation of finality in the sentence imposed. Her sentences in the Waukesha County cases were correctly stated at the sentencing hearing. The assistant district attorney explained each of the sentences imposed in Waukesha County Court and that the sentences on each of the Waukesha misdemeanor cases, including Case No. 08CM1636, were to be served *concurrently* to the two years initial confinement and four years extended supervision imposed in Case No. 08CF518. (31:3-4; App. 105-106)**.**

Additionally, the assistant district attorney twice explained that Ms. Robinson was serving two years initial confinement and four years extended supervision and defense counsel also explained this once. (31:4, 6-7; App. 106, 108-109). Most importantly, the court itself stated that the Waukesha judge ordered a sentence of two years initial confinement and four years extended supervision for Ms. Robinson at the sentencing after revocation of her probation. (31:11; App. 113). Given these correct statements by each of the parties *and the court* about her Waukesha sentences, Ms. Robinson's legitimate expectation of finality in the sentence was not undermined by any affirmative misinformation at the sentencing hearing.

This is not a case where the court later corrected an error of speech or a "slip of the tongue" at the sentencing hearing. *See* ***Burt***, 237 Wis. 2d 610, ¶¶ 3-4, 12 (defendant does not have a legitimate expectation of finality where, later on the day of the sentencing, the court corrected its "slip of the tongue" – from concurrent to consecutive sentences). The court's statements the next day that it misheard Ms. Robinson's sentence in Waukesha County Case No. 08CM1636 does not undermine her legitimate expectation of

finality in the sentence. The sentence in Case No. 08CM1636 was correctly stated, and the circuit court correctly repeated the total overall sentence in the Waukesha cases. Here the record suggests that there was no misunderstanding. Rather, it suggests that the court simply changed its mind about imposing an initial incarceration sentence equal to the amount of initial incarceration in the Waukesha cases.

Fourth, Ms. Robinson was completely blameless, even if the court did err in some way. She did not engage in any deception, misconduct or fraud at the sentencing hearing, which would undermine the legitimacy of her expectation of finality in the sentence. Unlike the situation in ***Jones***, where the defendant misrepresented to the court that he had been a prisoner of war while serving in Vietnam, 257 Wis. 2d 163, ¶ ¶¶ 2-4, Ms. Robinson did not defraud or deceive the court about the Waukesha County sentences. If a failure occurred, it was the court's failure to carefully listen to the information presented about her Waukesha sentence. Because Ms. Robinson was blameless, she therefore "'may *legitimately* expect that the sentence, once imposed and commenced, will not be enhanced.'" *See* ***Jones***, 257 Wis. 2d 163, ¶ 12 (quoting ***United States v. Jones***, 722 F.2d 632, 638-39 (11th Cir. 1983) (emphasis in original).

Finally, although the passage of time (one day) was brief, Ms. Robinson still had a legitimate expectation of finality in the original sentence imposed. She had commenced serving her sentence in the county jail. Although she was not incarcerated for a lengthy period before returning to court, her service of one day of the sentence is a relevant consideration to determining that she had a legitimate expectation that the sentence imposed was final. *Cf.* ***Willett***, 238 Wis. 2d 621, ¶ 6.

Under these circumstances, the circuit court erred in increasing Ms. Robinson's sentence. She had a legitimate expectation of finality in the original sentence imposed. The court ordered Ms. Robinson to start serving the sentence "forthwith" and there was no error of law or misstatement of fact at the sentencing hearing. Further, Ms. Robinson had not engaged in any fraud or misconduct at the sentencing hearing, nor was the court correcting a slip of the tongue. This court should thus reinstate the original sentence.

CONCLUSION

For all of the above reasons Ms. Robinson requests that this court reverse the circuit court's denial of her post conviction motion and remand this case with an order that the circuit court vacate the sentence imposed on May 11, 2011 and reinstate the original sentence imposed on May 10, 2011.

Dated this 15th day of March, 2012.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,855 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of March, 2012.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of March, 2012.

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