STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2011AP2833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE R. ROBINSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, HONORABLE PAUL R. VAN GRUNSVEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Robinson's constitutional rights against double jeopardy were not violated when the circuit court, after realizing it relied upon a mistaken assumption, recalled her case one day after sentencing and increased her sentence by nine months.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

FACTS AND PROCEDURAL BACKGROUND

The State charged defendant Jacqueline R. Robinson with one count of possession of controlled substances – narcotic drug – contrary to Wis. Stat. §§ 961.41(3g)(am) and 939.50(3)(i), and with two counts of battery to a police officer, contrary to Wis. Stat. § 940.20(2) and 939.50(3)(h). (2; 27). Robinson pled guilty to the charges (8, 23, 30:9-16).[1]

The court held a sentencing hearing in which the parties jointly recommended that the court impose a sentence to be served concurrently to a sentence that Robinson was serving in three Waukesha County cases (21:13-16).

The State explained Robinson's sentences:

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 committed and she was revoked off of probation for all three of these cases and was sentenced in 2008CF518 to State prison, two years in custody, four years extended supervision and then in 2008CM2563 she was revoked off of probation and sentenced to nine months, which was to run concurrent, was to run concurrent with the bail sentence and in 2008CM1636 she was revoked.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

[1] 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 (30:5-8).

. . . .

> [G]iven the fact that the defendant has been revoked off of probation and now faces two years in custody and four years extended supervision, the State feels that such time is appropriate to [sic] due to the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.

(21:13-16; A-Ap. 106-09).

In imposing its sentence, the court discussed Robinson's behavior, noting that police officers were brought to a scene to help Robinson after a relapse. (21:10; A-Ap. 112). Robinson started "taking swipes" at the officers and said to them, "'Fucking Bitches, I'll kill you. I didn't punch you, you fucking pigs'" (21:11; A-Ap. 113). The court opined that her "violence" and her "history and violation of laws" gave it "great cause for concern" (*id.*).

The court sentenced Robinson on Count One to 42 months imprisonment (18 months initial confinement/24 months extended supervision) concurrent to any other sentence; on Counts Two and Three the court sentenced Robinson to 60 months imprisonment (24 months initial confinement/36 months extended supervision) concurrent to any other sentence (21:12; A-Ap. 114).

The day after sentencing, the court recalled the case (32). The court explained that after the sentencing hearing, it did some research and realized that he made a mistake (32:2; A-Ap. 117). The court stated, "[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 stated that he misheard the sentence in Waukesha County Case No. 08CM1636 and mistakenly believed that the prosecutor stated that Robinson's nine-month probation sentence was *consecutive* to the 24 months ordered in that case (32:3; A-Ap. 118). The court 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 actions and interactions with the police officers . . . .
>
> 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 need to protect the public.
>
> Given all of that and the 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 upon the record now before the Court, as to Count 1, I'm continuing with a 42 months sentence . . . .
>
> 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. Robison as to Count 2, to 69 months . . . concurrent to any other sentence; 33 months initial confinement, 36 months extended supervision.
>
> As to Count 3; 69 months . . . concurrent to any other sentence. With 33 months initial confinement, 36 months extended supervision.

(32:3-4; A-Ap. 118-19).

This sentence increased Robinson's initial incarceration by nine months. The court explained that "the error was made by this court under the mistaken assumption of what she was ordered to serve in Waukesha" (32:5; A-Ap. 120). It continued, "Given the clarity of the record now, I believe the sentence based upon the record now before the court is appropriate" (*id.*).

Robinson timely filed a notice of intent to pursue postconviction relief and a Rule 809.30 motion to restore the original sentence (17; 21). The trial court denied the motion, finding no violation of the double jeopardy clause (22; A-Ap. 101-03). The court found that it had not increased the sentence upon reflection but rather because the court had a mistaken understanding of Robinson's Waukesha County sentence (22:2; App. 102).

STANDARD OF REVIEW

The federal and Wisconsin constitutions provide co-extensive protections against double jeopardy. *See State v. Burt,* 2000 WI App 126, ¶ 7, 237 Wis. 2d 610, 614 N.W.2d 42. Because "[t]he double jeopardy provisions of the United States and Wisconsin constitutions are coextensive," Wisconsin's appellate courts "treat them as one" analytically. *Id.* "Whether . . . double jeopardy protections have been violated is a question of law that [this court] review[s] de novo." *Id.*

ARGUMENT

The double jeopardy protection raised in Robinson's appeal relates to her interest in preserving the finality of a judgment of conviction so that she does not live in a state of fear that she will be punished further for the same offense. *See State v. Martin*, 121 Wis. 2d 670, 675, 360 N.W.2d 43 (1985). Yet double jeopardy jurisprudence, while "plac[ing] a premium on ensuring finality of judgments," "does not demand that a defendant's sentence be given a level of finality such that its later increase [is] prohibited." *State v. Gruetzmacher*, 2004 WI 55, ¶¶ 23, 29, 271 Wis. 2d 585, 679 N.W.2d 533 (citing *United States v. DiFrancesco*, 449 U.S. 117, 135 (1980)). Thus, in applying double jeopardy analysis to a situation where a defendant's sentence is increased, Wisconsin courts recognize that the "analytical touchstone" turns on "the extent and legitimacy of [the] defendant's expectation of finality in that sentence." *State*

v. Jones, 2002 WI App 208, ¶ 10, 257 Wis. 2d 163, 650 N.W.2d 844.

Whether a defendant's expectation of finality is legitimate is influenced by many factors, such as the completion of the sentence, the passage of time, the pendency of an appeal, or the defendant's misconduct in obtaining the sentence. *Id.* A court may permissibly increase a sentence already imposed where circumstances exist to undermine the legitimacy of that expectation. *Id.* at ¶ 9, citing *United States v. Fogel*, 829 F.2d 77, 87 (D.C. Cir. 1987). For example, in *Burt*, 237 Wis. 2d. 610, ¶¶ 11, 12, the circuit court misspoke at the defendant's sentencing and sentenced him to concurrent sentences, rather than the consecutive sentences originally intended by the court. But because the circuit court took immediate steps to correct the misstated sentence the same day it was issued, the court of appeals held that the defendant's double jeopardy rights were not violated. *Burt,* 237 Wis. 2d 610, ¶ 11. The court noted that the circuit court did not modify the sentence after reflection, but rather misspoke as to the intended sentence. *Id.*, ¶ 15. The court concluded that "a defendant's interest in the finality of his or her sentence is not a significant concern when the trial court simply corrects an error in speech in its pronouncement of the sentence later in the same day." *Id.*, ¶ 12.

Similarly, in *Gruetzmacher*, the Supreme Court expressly withdrew the language in *State v. North*, 91 Wis. 2d 507, 283 N.W.2d 457 (Ct. App. 1979), which provided that anytime a court seeks to increase a sentence already being served, it is a *per se* violation of the double jeopardy protections. In *Gruetzmacher,* the trial court sentenced the defendant in four consolidated cases in a single sentencing hearing. 271 Wis. 2d 585, ¶ 7. The court concluded that forty months was the minimum period of confinement that would be appropriate in the defendant's cases. *Id.* To achieve this goal, the court erroneously sentenced the defendant to forty months for substantial battery. *Id.*, ¶¶ 7-8. However, substantial

battery carried a maximum allowable sentence of twenty-four months. *Id.*, ¶ 8. On learning its error, the court notified the parties of its error the same day and corrected it two weeks later. *Id.*, ¶¶ 8-10. The court ultimately reduced the battery sentence to twenty-four months. *Id.*, ¶ 11. To maintain its sentencing objective of confining the defendant for forty months, the court imposed a concurrent forty-month sentence for bail-jumping (the defendant's bail-jumping sentence had originally been withheld). *Id.*, ¶¶ 7, 11.

On appeal the Supreme Court held that a trial court may correct obvious, good faith sentencing errors in the original sentencing pronouncement where the error is promptly addressed and "where the court, by reducing an erroneous original sentence on one count and increasing the original sentence on another, seeks to impose a lawfully structured sentence that achieves the overall disposition that the court originally intended." *Id.*, ¶ 14. The Court provided that modification of a sentence to achieve a trial court's original sentencing intention does not violate the defendant's double jeopardy rights as long as the modification does not upset the defendant's "legitimate expectation of finality" in his sentence. *Id.*, ¶¶ 32-34.

The *Gruetzmacher* Court concluded that the defendant's legitimate expectation of finality in his sentence was not violated because the sentencing court's original intent was clear and the modification prompt. 271 Wis. 2d 585, ¶¶ 36-38. The Court found that the circuit court acted appropriately in resentencing the defendant "in order to correct a sentencing error."[2]

[2] However, because the trial court made an error of law in resentencing yet again in September 2002, the Supreme Court held that it erroneously exercised its discretion. *Gruetzmacher,* 271 Wis. 2d. 585, ¶ 40. Therefore, the Supreme Court reversed and vacated the September resentencing judgment and order and reinstated the March sentences. *Id.*

In this case, like the trial court in *Gruetzmacher,* the court, upon learning its error and in an attempt to maintain its sentencing objective, took steps to correct its error the very next day. As the trial court stated at the resentencing hearing, it made an "error . . . under the mistaken assumption of what [Robinson] was ordered to serve in Waukesha." The court noted that at sentencing it was reviewing Robinson's "*lengthy record* with regard to a number of cases . . . and mis-heard and mis-noted some of the sentences" (32:2-3, 5; A-Ap. 117-18, 120) (emphasis added). It also stated it had a "mistaken impression," and that there was "confusion" as to whether Robinson's sentence of nine-month's probation was consecutive as opposed to concurrent (32:3-4; A-Ap. 118-19).

Given Robinson's lengthy record, this is certainly legitimate. Contrary to Robinson's assertion, there is no evidence that the court "simply changed its mind" the day after sentencing (Robinson Brief at 11). Rather, as the court stated at the resentencing hearing, the new sentence "reflect[s] this court's intent as far as a fair sentence" (32:2; A-Ap. 117). Therefore, given the court's articulate, appropriate reason for resentencing, and given that the passage of time between sentences was only one day, Robinson did not have an expectation of finality in regard to her initial sentencing.

CONCLUSION

Robinson's constitutional rights against double jeopardy were not violated when the trial court recalled her case the day after sentencing and increased her sentence by nine months. This is not a case where, upon mere reflection, the trial court decided to increase Robinson's sentence. Rather, the court admittedly made a sentencing error in its original sentencing pronouncement, and it promptly corrected that mistake by achieving the overall disposition that it originally intended. The State respectfully requests that this Court affirm the trial court's decision denying Robinson postconviction relief.

Dated this 17th day of April, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2122 words.

_____
Sara Lynn Larson
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 17th day of April, 2012.

_____
Sara Lynn Larson
Assistant Attorney General