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OF WISCONSIN**

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2011AP2833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE R. ROBINSON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I,
Affirming a Judgment of Conviction Entered in the
Milwaukee County Circuit Court, the Honorable Paul R. Van
Grunsven, Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

Were Ms. Robinson's state and federal constitutional protections 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 because of an error of law or a misstatement of fact?

The circuit court and court of appeals found that the circuit court did not violate Ms. Robinson's protection against double jeopardy.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents issues of statewide concern, meriting both oral argument and publication.

STATEMENT OF THE CASE

On January 22, 2011, the State filed a criminal complaint charging Jacqueline R. Robinson with one count of possession of narcotic drugs and two counts of battery to a police officer, contrary to Wis. Stat. §§ 940.20(2) & 961.41(3g)(am). (2). Following a preliminary hearing, the State filed an information charging the same three counts as the complaint. (3). On April 12, 2011, Ms. Robinson pled guilty to all three charges. (30:9-16).

On May 10, 2011, the Honorable Paul R. Van Grunsven sentenced Ms. Robinson to 18 months of initial confinement and 24 months of extended supervision for

possession of narcotic drugs. (31:12; App. 118). As to the counts of battery to a police officer, the court imposed sentences of 24 months of initial confinement, followed by 36 months of extended supervision. (31:12; App. 118). The court ordered that these sentences run concurrently with each other, and concurrently with sentences previously imposed in Waukesha County. (31:12; App. 118).

The next day, the judge *sua sponte* recalled the case. (32; App. 121-24). The court adjusted its sentence on the two counts of battery to a police officer, imposing concurrent sentences of 33 months of initial confinement and 36 months of extended supervision. (32:4; App. 123).

Ms. Robinson filed a postconviction motion, seeking reinstatement of the sentence originally imposed on May 10, 2011. (21). The motion asserted that the court violated the double jeopardy clauses of the United States and Wisconsin constitutions when it increased her sentence on May 11, 2011. (21:5-7).

The circuit court denied the postconviction motion. (22; 105-07). The court found that there was no double jeopardy violation. (22:3; App. 107). The court reasoned that it had not increased the sentence upon reflection, but rather because it had a mistaken understanding of Ms. Robinson's sentences in Waukesha County. (22:2; App. 106).

Ms. Robinson appealed. The court of appeals held that the circuit court did not violate double jeopardy when it increased Ms. Robinson's sentence. *State v. Robinson*, No. 2011AP2833, unpublished slip op. at ¶¶ 5; (App. 103-04).

Ms. Robinson petitioned this Court to review the court of appeals' decision. This Court granted the petition.

STATEMENT OF FACTS

As part of a plea agreement in the present case, the State agreed to recommend a sentence concurrent to previously imposed sentences in Waukesha County case numbers 08CF518, 2008CM2563, 2008CM1636. (30:7-8).

At sentencing, the prosecutor outlined Ms. Robinson's prior convictions in Waukesha County and the sentences she was serving at the time. (31:2-4; App. 108-10). Ms. Robinson was serving two years in confinement and four years of extended supervision. (31:4; App. 110). That sentence was running concurrent to two nine month jail sentences. (31:4; App. 110). The bottom line, the prosecutor explained, was that "the defendant currently in those cases, is serving two years in custody, four years extended supervision." (31:4; App. 110).

At the end of her sentencing argument, the prosecutor reiterated that any sentence should run concurrently with the two year confinement, four year extended supervision being served:

[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 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. 112-13).

Defense counsel also explained that Ms. Robinson had been revoked and "sentenced to two years initial confinement, four years extended supervision." (31:7; App. 113).

Just before imposing sentence, the court then explained that it was taking into consideration the revocation sentence that had been imposed: “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.” (31:11; App. 117).

The court then sentenced Ms. Robinson to 18 months confinement and 24 months extended supervision for possession of narcotic drugs. (31:12; App. 118). The court also sentenced Ms. Robinson to 24 months in confinement and 36 months extended supervision for battery to a police officer. (31:12; App. 118). These sentences were ordered to run concurrently to one another and the Waukesha sentence. (31:12; App. 118).

The next day, the court *sua sponte* recalled the case. (32; App. 121-24). The court stated that after the hearing, it did some research and realized it made a mistake. (32:2; App. 121). Specifically, the court explained that it mistakenly believed the previously imposed nine month sentences were consecutive to the two year confinement sentence. (32:3; App. 122).

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 the 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.

(32:4; App. 123). Thus, the court increased Ms. Robinson's sentence by nine months in confinement. (31:12; 32:4; App. 118, 123).

Ms. Robinson's postconviction motion asserted that the court violated the double jeopardy clauses 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 correction of an illegal sentence. (21:6-7). It pointed out that the record conclusively

established that the court understood Ms. Robinson's existing sentences, and argued that the increase was impermissibly based on the court's second guessing of its original sentence. (21:6-7).

In denying the postconviction motion, the circuit court ruled that there was no double jeopardy violation. (22:3; App. 107). The court reasoned that it had not increased the sentence upon reflection, but rather after recognizing its mistaken understanding of Ms. Robinson's Waukesha sentences. (22:2-3; App. 106-07). The court did not address Ms. Robinson's argument that the record contradicted any claim that it did not understand the Waukesha County sentence.

The court of appeals affirmed, holding that the circuit court did not violate double jeopardy when it increased Ms. Robinson's sentence. **Robinson**, No. 2011AP2833, slip op. at ¶ 5. The court of appeals analogized to its earlier decision in **State v. Burt**, where the sentencing court recalled the case on the same day as the original sentencing to correct a "slip of the tongue" because the court mistakenly said concurrent when it meant consecutive. 2000 WI App 126, 237 Wis. 2d 610, 614 N.W.2d 42. In the present case, the court of appeals acknowledged that "Ms. Robinson's expectation in the finality of her sentence was not illegitimate" because the circuit court imposed a legally valid sentence, and she engaged in no malfeasance. **Robinson**, No. 2011AP2833 slip op. at ¶ 5. Nevertheless, the court concluded that "the sentence did not yet have a degree of finality that prohibited the circuit court from correcting its own mistake the day after the initial sentencing." *Id.*

Ms. Robinson filed a petition for review, asking this Court to grant review to address the conflict between **Burt**,

the present case, and an unpublished court of appeals opinion which prohibited a circuit court from changing a sentence from concurrent to consecutive two days after the sentence was imposed. Ms. Robinson argued that this conflict demonstrated the need for clarification on the limits of **Burt**. She asked this Court to hold that **Burt** only applies to a true “slip of the tongue,” or an obvious, clearly stated error at the original sentencing.

ARGUMENT

- I. The Post-Sentencing 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 Her Sentence.

Ms. Robinson’s protection against double jeopardy was violated when the circuit court increased her sentence the day after the original sentencing hearing. The day after imposing sentence, the court recalled the case, *sua sponte*, and increased the sentence by nine months, explaining that it mistakenly believed that Waukesha County had previously imposed a nine month sentence consecutive to another sentence, rather than concurrent. (32:2-3, 5; App. 121-22). The record establishes that the court was accurately and repeatedly advised of, and accurately recited the sentence Ms. Robinson was serving. (31:4, 6, 7, 11; App. 110, 112, 113, 117). There was no misunderstanding or ambiguity. Therefore, this Court should reinstate the originally imposed sentence.

- A. A circuit court cannot increase a defendant's sentence after sentencing if the defendant had a legitimate expectation of finality in the sentence.

The Wisconsin and United States Constitutions protect a criminal defendant from being subjected to multiple punishments for the same offense. U.S. Const. amend. V, XIV; Wis. Const. art. I, § 8. The double jeopardy provisions of the state and federal constitutions are coextensive and are treated as one on appeal. *State v. Burt*, 2000 WI App 126, ¶ 7, 237 Wis. 2d 610, 614 N.W.2d 42. On appeal, this court reviews independently whether a defendant's double jeopardy rights have been violated. *Id.* at ¶ 15.

“[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. This interest in finality is designed to avoid the “embarrassment, expense and ordeal and compelling [a defendant] to live in a continuing state of anxiety and insecurity” See *Id.* at ¶ 20 (quoting *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980)).

Although primarily directed towards successive prosecutions, a defendant's protection against double jeopardy extends to increases in his or her sentence. *State v. Jones*, 2002 WI App 208, ¶ 10, 257 Wis. 2d 163, 650 N.W.2d 844.

When a defendant's sentence is enhanced, “the analytical touchstone for double jeopardy is the defendant's legitimate expectation of finality in the sentence”. *Jones*, 257 Wis. 2d 163, ¶ 10. Whether a defendant had a legitimate expectation of finality in his or her sentence turns on “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 sentence.” *Id.* The courts have also considered whether the court imposed an illegal sentence, whether the court's sentence was based on an inaccurate understanding of the law, and whether the court's sentencing intent was clear from the record at the original sentencing hearing. *Gruetzmacher*, 271 Wis. 2d 585, ¶¶ 1-2; *State v. Willett*, 2000 WI App 212, ¶ 6, 238 Wis. 2d 621, 618 N.W.2d 881.

B. Ms. Robinson had a legitimate expectation of finality in her sentence.

Ms. Robinson had a legitimate expectation of finality in her sentence, a sentence which was not based on any error of law or fact. The court articulated a legally valid sentence, and there was no misunderstanding as to how Ms. Robinson's existing sentences would operate in relation to the sentence being imposed. The parties clearly and accurately communicated the length of Ms. Robinson's sentence in Waukesha County. (31:4, 6, 7; App. 110, 112, 113). The record demonstrates that the court clearly and accurately understood the Waukesha sentences. (31:117; App. 123). The court's belief that it misunderstood the Waukesha sentences is belied by its own record in which it accurately recited the Waukesha sentences.

1. Ms. Robinson had a legitimate expectation of finality in her sentence because the original sentence was not based on any error of law.

On May 10, 2011, the circuit court imposed a legally valid sentence and ordered Ms. Robinson to begin serving the sentence “forthwith.” (31:12-14; App. 118-120). Ms.

Robinson had a legitimate expectation that this sentence was final because it was not based on any error of law.

A circuit court may increase a sentence when based on a genuine misunderstanding of law, and where the circuit court's actual intent at the original sentencing is clear from the record. In *Gruetzmacher*, this Court allowed the circuit court to adjust an illegal sentence to conform to its intent as stated at the sentencing hearing. 271 Wis. 2d 585, ¶ 2. There, the circuit court explained unambiguously that its intent was to impose a 40 month confinement period, believing that period to be the minimum necessary. *Id.* The defendant had been convicted on multiple counts and the circuit court mistakenly ordered the 40 months confinement on a count for which the maximum penalty was only 24 months in confinement. *Id.* at ¶¶ 7-8. Later that same day, the court recognized the error and contacted the parties to adjust its sentence. *Id.* at ¶ 8. The court then sentenced the defendant to 40 months confinement on a different count, in order to effectuate its intent as stated at the original sentencing hearing. *Id.* at ¶ 11.

This Court held that the sentence increase did not violate double jeopardy. *Id.* at ¶ 38. Significantly, the circuit court's intent to impose a 40 month sentence was abundantly clear from the initial sentencing hearing. *Id.* at ¶ 36. Thus, the circuit court was merely rectifying an error of law to impose the sentence that it clearly intended to impose in the first place.

In contrast to *Gruetzmacher*, the circuit court in the present case imposed a legally valid sentence at the original sentencing. Perhaps more significantly, in *Greutzmacher*, the court record conclusively established that at the original sentencing, the court intended to impose a sentence of 40

months in confinement. *Id.* at ¶ 36. The record in the present case does not include any evidence from the original sentencing that the court intended a different sentence than it imposed. This distinction lends significant weight to the legitimacy of Ms. Robinson's expectation that her sentence was final and would not be subject to later increase.

Ms. Robinson's legitimate expectation of finality is more akin to that in *State v. Willett*, where the court of appeals reversed an increase in the defendant's sentence, which was based on an error of law. 2000 WI App 21, ¶ 6, 238 Wis. 2d 621, 618 N.W.2d 881. In *Willett*, the circuit court stated that it wanted to impose a consecutive sentence, but believed that it was not legally authorized to do so; thus, the court imposed a concurrent sentence. *Id.* at ¶ 2. The court subsequently learned that it could have imposed a consecutive sentence, then, four months after the initial sentencing, it imposed a consecutive sentence. *Id.* The court of appeals reversed, holding that the defendant had a legitimate expectation of finality. *Id.* at ¶ 6. The circuit court's error was not a "slip of the tongue," rather the court imposed a valid sentence based solely on its own incorrect understanding of the law. *Id.*

Ms. Robinson's expectation of finality was even stronger than Willett's. Unlike *Willett*, there is no evidence in this record that the court's sentence was based on a mistaken understanding of the law. The court's sentence was legally valid, so there was no reason to think that the court would need to revisit the sentence to correct any error.

2. Ms. Robinson had a legitimate expectation of finality in her sentence because the original sentence was not based on any error of fact.

Ms. Robinson also had a legitimate expectation of finality in her sentence because there was no misstatement of fact to justify a subsequent increase. Although the circuit court stated that it misunderstood the length of the previously imposed sentences that Ms. Robinson was serving, the record clearly shows otherwise.

The prosecutor accurately stated, on two occasions, that Ms. Robinson was serving a sentence of two years in confinement, followed by four years of extended supervision, and that that sentence was running concurrently with a nine month sentence. (31:4, 6; App. 110, 112). Even more significantly, the circuit court then indicated that it clearly understood Ms. Robinson's existing sentence of "two years in and four years out" (31:11; App. 117).

This case is distinguishable from a "slip of the tongue" at sentencing. In *State v. Burt*, the circuit court stated that it was imposing concurrent sentences of 20 and 40 years. 2000 WI App 126, ¶ 3, 237 Wis. 2d 610, 614 N.W.2d 42. When it was pointed out that Burt's co-defendant received a harsher sentence, the court recalled the case the same day. *Id.* at ¶ 4. The judge stated that he intended to impose consecutive sentences and asserted that his notes, which were sealed for appeal, reflected his intent to impose consecutive sentences. *Id.* ¶ 4. The court of appeals held that the sentence increase did not violate double jeopardy because the circuit court merely misstated concurrent when it meant consecutive, and it moved to correct the error immediately. *Id.* at ¶ 11.

Unlike the misstatement in **Burt**, there is no evidence of a similar “slip of the tongue” in the present case. The Waukesha County sentence was correctly stated and the court accurately recited the sentence in that case. (31:4, 6, 7, 11; App. 110, 112, 113, 117).

Ms. Robinson was completely blameless, enhancing the legitimacy of her expectation of finality. 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 concerning the Waukesha County sentences. Because Ms. Robinson was blameless, she therefore “may *legitimately* expect that the sentence, once imposed and commenced, will not be enhanced.” **Jones**, 257 Wis. 2d 163, ¶ 12 (quoting **United States v. Jones**, 722 F.2d 632, 638-39 (11th Cir. 1983) (emphasis in original)).

The existing caselaw on double jeopardy at sentencing has generated seemingly commonsense results. **Burt** and **Gruetzmacher** allowed an increased sentence when the circuit court acted to correct its error on the same day it occurred and its sentencing intent was clear from the record before the increase ever took place. **Jones** allowed an increased sentence to prevent a defendant from committing a fraud on the court. **Willett** prohibited an increased sentence despite an error of law on the court’s part where the defendant was completely blameless and legitimately expected that the sentence was final.

Here, there was no misunderstanding, and there was no mistake. The sentencing transcript reveals no confusion about

Ms. Robinson's Waukesha sentences (31:11; App. 117); the court's sentencing explanation demonstrated an accurate understanding of the structure of her existing sentences. Unlike *Burt* or *Gruetzmacher*, the record includes no evidence from the original sentencing that the court intended a sentence different than what it imposed. Furthermore, there is no evidence of any wrongdoing by Ms. Robinson.

Ms. Robinson left the courtroom on May 10, 2011, legitimately expecting that she would serve the sentence as stated by the court. She, and other similarly situated defendants, should have no reason to fear that a legally valid sentence, which reflects the court's expressed intent, is subject to a later increase. Therefore, like the court in *Willett*, this Court should reverse and reinstate the sentence imposed on May 10, 2011.

CONCLUSION

For the reasons stated above, Ms. Robinson requests that this Court reverse the decisions of the circuit court and court of appeals, and remand this case with an order that the circuit court vacate the sentence imposed on May 11, 2011 and reinstate the sentence imposed on May 10, 2011.

Dated March 14, 2013.

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 3,481 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.

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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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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.

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