STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE R. ROBINSON,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY
CIRCUIT COURT, THE HONORABLE
PAUL R. VAN GRUNSVEN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

SARA LYNN LARSON
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
larsonsl@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTUES

STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE R. ROBINSON,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY
CIRCUIT COURT, THE HONORABLE
PAUL R. VAN GRUNSVEN, PRESIDING

BRIEF AND APPENDIX OF
PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Does a defendant have a legitimate expectation of finality in her sentence when the sentencing court – realizing its error later the same day of sentencing – recalls the defendant's case the next day and increases her sentence because it was "mistaken" as to the defendant's sentence in another case?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents the Court with a double jeopardy claim regarding a defendant's legitimate expectation of finality in a sentence, meriting oral argument and publication.

PROCEDURAL BACKGROUND

The facts of this case are undisputed.

On January 19, 2011, Jacqueline R. Robinson was arrested for Operating a motor Vehicle While Suspended, for Loitering, and for Violation of Probation (2:2). At the police station, Officer Amy Bartol conducted a search of Robinson and recovered a pill bottle (*id.*). Bartol then felt a bulging object in Robinson's lower buttocks (*id.*). With the assistance of Officer Lisa Arloszynski and Officer Stephanie Seitz, Bartol escorted Robinson to the bathroom for a further search (*id.*). Arloszynski located another pill bottle (*id.*).

When Bartol left the bathroom, Robinson struck Seitz on her jaw (2:2). There was a struggle, as Robinson resisted, during which Robison yelled, "you fucking bitches. I'll kill you" (*id.*). Robinson struck Seitz a second time on her forehead. Robinson also kicked Arloszynski twice on her left knee (*id.*). After she was restrained by additional officers, Robinson yelled, "I didn't punch you, you fucking pigs" (*id.*)

The State charged defendant Robinson with one count of possession of controlled substances and two counts of battery to a police officer.

Robinson pled guilty to the charges (8; 23; 30:9-16). At the sentencing hearing, the State informed the court that Robinson was a defendant in seven different criminal cases in Waukesha County. (31; A-Ap. 108; R-Ap. 102). Four of the cases were dismissed and read-in as

a global sentencing for the three other criminal cases (31:2-3; A-Ap. 108-109; R-Ap. 102-03). Those three criminal cases included the following convictions in Waukesha County:

> **2008CM2563** and **2008CM1636:** Receiving stolen property less than or equal to $2,500. Both sentences withheld; two years probation on both counts.
>
> **2008CF518:** Possession with intent to deliver narcotics. Sentence withheld; three years probation.

(31:4; A-Ap. 110; R-Ap. 104)

The State explained that Robinson's probation was revoked and that she was sentenced in Waukesha County to two years in custody and four years extended supervision, concurrent to two, nine-month jail 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* . . . and in 2008CM1636 she was revoked. Sentenced to nine months to run *concurrent* with the other two cases.

(Emphasis added) (31:4, 6-8; A-Ap. 110, 112-14; R-Ap. 104, 106-08).

With regards to Robinson's *current* conviction in Milwaukee County, the State recommended to the sentencing court that Robinson be incarcerated and that any sentence "run concurrent to the sentence in the other [Waukesha County] cases" (31:6-7; A-Ap. 112-13; R-Ap. 106-07).

In imposing its sentence, the court discussed Robinson's "absolutely despicable behavior" (31:10; A-Ap. 116; R-Ap. 110), noting that Robinson took "swipes" at the officers, cursed, and threatened them (31:10-11; A-Ap. 116-17; R-Ap. 110-11). The court also noted Robinson's "litany of cases that were dismissed and read-in as part of plea negotiations out in Waukesha" (31:11; A-Ap. 117; R-Ap. 111). It opined that Robinson's "violence" and her "history and violation of laws" gave it "great cause for concern" (*id.*).

The court sentenced Robinson on Count One (possession of a controlled substance) to 42 months imprisonment (18 months initial confinement, 24 months extended supervision – concurrent to any other sentence (31:12; A-Ap. 118; R-Ap. 112). On Counts Two and Three (battery to a police officer), the court sentenced Robinson to 60 months imprisonment (24 months initial confinement, 36 months extended supervision) – concurrent to any other sentence. The court remanded "[Robinson] into custody to serve the sentence forthwith" (31:12, 14; A-Ap. 118, 120; R-Ap. 112, 114).

After the sentencing hearing, later that same day, the court researched CCAP and realized that it had "made a mistake" (32:2; A-Ap. 121; R-Ap. 117). The court recalled the case for a hearing the next day (32; A-Ap. 121; R-Ap. 116-21). At the hearing, the court informed the parties, "[t]he split sentence I proposed yesterday did not reflect this court's intent as far as a fair sentence in this case" (32:2; A-Ap. 121; R-Ap. 117). The court noted Robinson's lengthy record and stated that it had "mis-heard and mis-noted some of the sentences that were handed down" in Waukesha County (32:3; A-Ap. 122; R-Ap. 118). The court stated that it was its "mistaken impression" that Robinson's sentence in Case No. 2008CM1636 was a nine-month probation sentence that was *consecutive* to the 24 months ordered in 2008CF518 and 2008CM2563 (*id.*). The court explained:

> [Y]esterday 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 . . . .
>
> [T]he 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 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[.]

(32:3-4; A-Ap. 121-23; R-Ap. 118-19).

The court ultimately retained the original sentence for Count 1. With respect to Counts 2 and 3, however, the court explained that it was increasing Robinson's sentence:

> [I]t 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.

(32:4; A-Ap. 123; R-Ap. 119).

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 [Robinson] was ordered to serve in Waukesha [County]" (32:5; A-Ap. 124; R-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 filed a postconviction motion seeking to restore the original sentence (21). The trial court denied the motion, finding no violation of the double jeopardy clause (22; A-Ap. 105-07; R-Ap. 122-24). Citing *State v. Burt*, 2000 WI App 126, 237 Wis. 2d 610, 614 N.W.2d 42, the court found that it "did not increase defendant Robinson's sentence upon reflection but instead because the court was under a mistaken impression about her Waukesha County sentence" (22:2; A-Ap. 106; R-Ap. 123).

THE COURT OF APPEALS DECISION

The court of appeals issued a per curium decision, holding that the trial court did not violate Robinson's double jeopardy protections when it increased her sentence (A-Ap. 103-04; R-Ap. 127-28). The court recognized that "[a] sentencing court violates double jeopardy when it increases a previously imposed sentence if the defendant had a legitimate expectation of finality in the original sentence" (A-Ap. 102; R-Ap. 126). The court noted that in *Burt*, it had held that the sentencing court did not violate jeopardy when it changed a sentence later the same day in order to correct a "'slip of the tongue'" (A-Ap. 103; R-Ap. 127). The court of appeals recognized that, in this case, "Robinson served only one day of her sentence when the circuit court realized its mistake. . . and recalled Robinson to increase her sentence" (*id.*). As the court noted, "The difference in time between the circuit court's action in *Burt* and the circuit court's action here is a matter of hours, not days." (*id.*). It found that, "[w]hile Robinson's expectation in the finality of her sentence was not illegitimate . . . 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" (A-Ap. 103-04; R-Ap. 127-28).

Robinson appeals.

STANDARD OF REVIEW

Whether Robinson's double jeopardy protections have been violated is a question of law that an appellate court reviews de novo. *State v. Burt*, 2000 WI App 126, ¶ 7, 237 Wis. 2d 610, 614 N.W.2d 42.

ARGUMENT

Robinson argues that the sentencing court's increase in her sentence violated her double jeopardy protections because she had a legitimate expectation in the finality of her sentence. According to Robinson, her expectation became legitimate when "[she] left the courtroom [after sentencing] on May 10, 2010" (Robinson's Br. at 14). This is an impractical test, as it would prevent the prompt correction of sentencing court errors.

The State submits that in preserving and applying Wisconsin's existing caselaw, Robinson had no legitimate expectation of finality in her sentence. The court of appeals properly applied Wisconsin caselaw in determining that Robinson's sentence did not have a degree of finality and that her double jeopardy protections were not violated when the sentencing court corrected its mistake the day after sentencing.

I. WISCONSIN'S CASELAW ON THE ISSUE OF A DEFENDANT'S EXPECTATION OF FINALITY IN HER SENTENCE.

In addressing the issue of what constitutes a legitimate expectation of finality in a sentence, a review of Wisconsin caselaw is provided:

In deciding double jeopardy claims specific to sentencing, Wisconsin courts have consistently cited the

United States Supreme Court decision *United States v. DiFrancesco*, 449 U.S. 117 (1980). In *DiFrancesco*, the Court reviewed a federal statutory scheme that authorized the imposition of an increased sentence for a convicted "dangerous special offender" and allowed the government to seek review of the sentence in the court of appeals. *Id.* at 118. The *DiFrancesco* court recognized that the level of finality accompanying an acquittal was qualitatively different than the level of finality that a defendant had after sentencing. *Id.* The Court stated that the "Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *Id.* at 137.

The *DiFrancesco* Court further stated that, "[T]he Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase," and it ultimately held that the increase of the "dangerous special offender" sentence on appeal by the government did not violate double jeopardy. *Id*. at 137, 138-39. Several Wisconsin cases following the *DiFrancesco* decision have hinged on the expectation of finality consideration set forth in that opinion.

A. *State v. Burt,* 2000 WI App 126, 237 Wis. 2d 610, 614 N.W.2d 42

In *Burt*, the sentencing court misspoke at the defendant's sentencing when it sentenced him to concurrent sentences, rather than the consecutive sentences originally intended. 237 Wis. 2d 610, ¶¶ 3, 4. The sentencing court recalled the case later the same day to change the sentence from concurrent to consecutive. The court of appeals held that the sentencing court did not violate double jeopardy when it changed the sentence it had imposed earlier that same day. *Id*., ¶ 12. The court of appeals explained 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*. The court of appeals noted that the sentencing court did not modify the sentence after reflection, but rather "misspoke" as to the intended sentence. *Id*., ¶ 15. The court concluded that "Burt did not have a legitimate expectation that [the sentencing court] could not correct his slip of the tongue on the day of sentencing." *Id.*, ¶ 12 (emphasis added)[1].

B. *State v. Willett*, 2000 WI App 212, 238 Wis. 2d 621, 618 N.W.2d 881

Less than three months after *Burt*, the court of appeals decided *State v. Willett.* In that case, the court of appeals held that the defendant *did* have a legitimate expectation of finality when the sentencing court imposed its sentence after the defendant had already served four

---

[1] The court in *Burt* noted that Wis. Stat. § 973.15(1) unambiguously states that "'all sentences commence at noon on the day of sentence[.]'" The court concluded the statue was not relevant to a double jeopardy analysis:

> If we were to use § 973.15(1) in the manner Burt suggests, it would produce absurd results. Accepting Burt's argument, any defendant sentenced in an afternoon hearing would have already begun to serve his or her sentence retroactively at noon, and a trial court would be barred from changing its mistaken use of the word "concurrent" at that hearing even if it immediately realized that it meant to say "consecutive." On the other hand, a defendant sentenced in a morning hearing would have no such instant double jeopardy protection, as the trial court would have until noon to correct any mistakes. We decline to adopt the use of § 973.15(1) in a context that would produce such arbitrary results.

Burt, 237 Wis. 2d 610, ¶ 13.

months. 238 Wis. 2d 621, ¶ 6. In *Willet*, the sentencing court originally held that the defendant's sentences for three convictions could not be served consecutively, and it therefore sentenced the defendant to a concurrent sentence. About four months later, the sentencing court opined that its original ruling was based on an erroneous understanding of the law. *Id*. It then changed the three sentences so that they were consecutive.

The court of appeals reversed, citing *Burt* and providing the following justifications:

> [U]nlike Burt, who was resentenced on the same day, Willett had already been serving his sentence for four months when the trial court changed it from concurrent to consecutive. . . . [T]his was not a "slip of the tongue" on the part of the trial court. Here, the trial court had an incorrect understanding of the law governing its sentencing authority. Double jeopardy prevents the State from using this error, four months later, to seek a stiffer sentence for Willett. That the trial court wanted to impose a consecutive sentence to begin with is of no moment; what the trial court actually did was impose a valid, concurrent sentence. Our reading of the transcript of the original sentencing hearing convinces this court that those proceedings fostered in Willett a legitimate expectation of finality in the sentence.

Willett, 238 Wis. 2d 621, ¶ 6. The court concluded that "[t]he double jeopardy clause prevents the trial court from going back, four months later, to redo the sentence." *Id.*

C. *State v. Jones*, 2002 WI App 208, 257 Wis. 2d 163, 650 N.W. 2d 844

Two years later, in *State v. Jones,* the court of appeals considered an issue of first impression in Wisconsin: "can a defendant have a legitimate expectation of finality in a sentence that was induced by his or her purposeful misrepresentations?" 257 Wis. 2d 163, ¶ 11. At sentencing, Jones told the court that he had been a prisoner of war in Vietnam, and the court

considered this factor when revising his sentence. *Id.,* ¶ 2. Two weeks later, the court found out that Jones had never been a prisoner of war. *Id.,* ¶ 4. At a resentencing hearing, the court increased Jones' sentence. *Id.*, ¶ 6.

On appeal, the court of appeals recognized that "[i]n Wisconsin, we have recognized the principle that the application of the double jeopardy clause to an increase in a sentence turns on the extent and legitimacy of a defendant's expectation of finality in that sentence." *Jones*, 257 Wis. 2d 163, ¶ 10. It then stated that it "adhere[s] to the tenet that the analytical touchstone for double jeopardy is the defendant's legitimate expectation of finality in the sentence, which may be 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 sentence." *Id*. (citing *State v. Hardesty,* 129 Wash. 2d 303, 915 P.2d 1080, 1085 (Wash.1996)). The *Jones* Court ultimately concluded that because the defendant had perpetrated a fraud upon the sentencing court, he did not have a legitimate expectation of finality in his sentence. *Id.,* ¶ 14.

D. *State v. Gruetzmacher*, 2004 WI 55, 271 Wis. 2d 585, 679 N.W.2d 533

This Court was presented with a double jeopardy issue two years later in *State v. Gruetzmacher.* In *Gruetzmacher*, the trial court sentenced the defendant to 40 months of initial confinement, but mistakenly ordered that the 40 months be served for a conviction with a maximum period of initial confinement of 24 months. 271 Wis. 2d 585, ¶ 8. The court realized its mistake later the same day, and it convened a hearing to address the matter two days after sentencing. *Id.,* ¶¶ 8-9. At a hearing held two weeks later, the trial court resentenced the defendant to 40 months of initial confinement on one of the other charges, while reducing the erroneous sentence to the maximum penalty of 24 months of initial confinement. *Id.,* ¶¶ 10-11.

On appeal, this Court noted, "We now decide whether circuit courts should be allowed to correct obvious errors in sentencing where it is clear that a good faith mistake was made in an initial sentencing pronouncement, where the court promptly recognizes the error, 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."[2] *Gruetzmacher*, 271 Wis. 2d 585, ¶ 14. In its analysis, this Court noted that "[t]here is not a per se rule barring sentence increases after a defendant has been sentenced." *Id.,* ¶ 16. It also noted that, "[a]fter *DiFrancesco* dismissed the notion that there was a per se rule, the idea that modification to increase sentences already being served ran afoul of the double jeopardy clause was no longer sound." *Id*., ¶ 30. "Moreover, courts exercising criminal jurisdiction were encouraged to evaluate the defendant's expectation of finality in the sentence imposed." *Id*.

In discussing the court of appeals' recent decision in *Jones*, the *Gruetzmache*r Court stated, "[t]he factors set forth in *Jones* belie the fact that there is no immutable rule prohibiting sentence increases once a defendant has begun to serve the sentence. Instead, the *Jones* factors must be evaluated in the light of the circumstances in each particular case."[3] 271 Wis. 2d 585, ¶ 34.

---

[2] The court of appeals certified the issue to this Court.

[3] After discussing *DiFrancesco*, *Burt*, *Willett*, and *Jones*, the *Gruetzmacher* Court withdrew specific language from *State v. North*, 91 Wis. 2d 507, 509-10, 283 N.W. 2d 457 (Wis. App. 1979), which had provided that the due process clause acts as a bar to increasing sentences:

> Given the United States Supreme Court's decision in *DiFrancesco,* and subsequent Wisconsin cases that relied on its holding, we conclude that the language in *North* stating that the due process clause acts as a bar to increasing sentences must be withdrawn. The *Jones*

In evaluating Gruetzmacher's case under the *Jones* factors, the court of appeals noted that "the circuit court discovered the sentencing error the same day," and that "the court notified the parties and everyone was back in court two days later to address the matter." *Id.*, ¶ 38. The Court also noted that it "was not a case where, upon mere reflection, the circuit court decided to increase Gruetzmacher's sentence." *Id.*

The Court ultimately concluded that the "circuit court acted appropriately in notifying the parties and holding another hearing two days later and resentencing Gruetzmacher two weeks later . . . in order to correct a sentencing error." 271 Wis. 2d 585, ¶ 2. The Court continued, "As is evidenced by the statements made during sentencing, the circuit court clearly intended to sentence Gruetzmacher to 40 months initial confinement." *Id*. Therefore, "Gruetzmacher did not have an expectation of finality at his initial sentencing, because of the prompt actions of the court, so the sentence could be modified to correct the sentencing error." *Id*.[4]

> decision clearly recognizes that such a per se rule no longer exists in Wisconsin. Thus, we conclude that the per se rule language in *North*, which states that "(m)odification to correct sentencing flaws runs afoul of the double jeopardy provisions when the amending court seeks to increase sentences already being served," must be and it is withdrawn.

Gruetzmacher, 271 Wis. 2d 585, ¶ 35 (internal citations omitted).

[4] Appropriately, Robinson does not cite as authority *State v. Crewz*, No. 2007AP2831, 2008 WL 4793789, unpublished slip op. (WI Ct. App Nov. 5, 2008). This decision has no persuasive authority pursuant to Wis. Stat. § 809.23(3)(a) ("An unpublished opinion may not be cited in any court of this state as precedent or authority[.]"). The State similarly does not discuss *Crewz* as this Court "need not distinguish or otherwise discuss" it. Wis. Stat. § 809.23(3)(b). The State simply brings to this Court's attention that in her petition for review, Robinson asked this Court to grant review based upon the court of appeals' "inconsistent" application of *State v. Burt* in *Crewz* and in her case.

II. ASSERTIONS THE STATE DOES NOT DISPUTE

In her appellate brief, Robinson distinguishes her case from those cited above to advance her argument that her double jeopardy protections were violated. For this Court's focus and clarity, the State agrees with the following assertions in Robinson's brief:

- Unlike *Gruetzmacher,* this case does not involve the correction of an illegal sentence, but rather a valid sentence (Robinson's Br. at 5).

- The parties accurately advised the sentencing court of the sentence that Robinson was serving in Waukesha County (Robinson's Br. at 7).

- Robinson's original sentence was not based on any error of law (Robinson's Br. at 10, 11).

- Robinson's original sentence was not based on any error of fact (Robinson's Br. at 12).

- Unlike the court in *Burt*, the sentencing court did not "misspeak" or engage in a "slip of the tongue" (Robinson's Br. at 12, 13).

- Unlike the defendant in *Jones*, Robinson was completely blameless; she did not engage in any misconduct (Robinson's Br. at 13).

Because the sentencing court did not resentence Robinson upon reflection, based upon an error of law, based upon an error of fact, or as a result of misconduct,

Robinson's case is, factually, unlike any other case decided by the Wisconsin courts. Regardless, applying existing Wisconsin law – the *Jones* factors – to Robinson's case, the State submits that Robinson did not have a legitimate expectation of the finality in her sentence.

III. ROBINSON HAD NO LEGITIMATE EXPECTATION OF FINALITY IN HER SENTENCE

The parties agree that the issue this Court has to decide is whether Robinson had a legitimate expectation of finality in her sentence, thereby implicating her double jeopardy protections. As discussed in *Jones*, what constitutes a legitimate expectation of finality "may be 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 sentence." 257 Wis. 2d 163, ¶ 10. These *Jones* factors are to "be evaluated in the light of the circumstances in each particular case." *Gruetzemacher*, 271 Wis. 2d 585, ¶ 34.

A. Application of the *Jones* Factors

Applying *Jones* to the facts of this case, the State submits that Robinson did not have a legitimate expectation of finality in her sentence because:

- Her sentence was not completed, nor substantially completed, when the court resentenced her.

- Under existing case law, the very limited passage of time between when the sentencing court imposed its sentence and when it recalled the case did not provide a legitimate expectation of finality.

- Contrary to Robinson's suggestion, under existing caselaw, Robinson did not have a legitimate expectation of finality in her sentence when she left the courtroom after setencing (Robinson's Br. at 14).

Robinson was remanded back to custody for one day, where she was already serving a sentence for her Waukesha County convictions. Yet in her brief, Robinson argues that she had a legitimate expectation of privacy when she "left the courtroom" after sentencing (Robinson's Br. at 14). But this Court and the court of appeals has already decided that such a brief passage of time does not constitute a legitimate expectation of finality in one's sentence. In *Burt*, the court of appeals held that the sentencing could – later the same day – correct its "slip of the tongue" sentence from concurrent to consecutive. 237 Wis. 2d 610, ¶ 12. And as the court of appeals noted in Robinson's case, "The difference in time between the circuit court's action in *Burt* and the circuit court's action here is a matter of hours, not days." (A-Ap. 103; R-Ap. 127).

Similarly, in *Gruetzmacher* the sentencing court realized its mistake later the same day and convened a hearing to address the matter two days later. 271 Wis. 2d 585, ¶¶ 8-9. Although *Gruetzmacher* involved an error of law, this Court pointed out, "[t]here is not a per se rule barring sentence increases after a defendant has been sentenced." *Id.,* ¶ 16. It also noted that after *DiFrancesco*, "the idea that modification to increase sentences already being served ran afoul of the double jeopardy clause was no longer sound." *Id*. ¶ 30.

Also similar to *Burt* and *Gruetzmacher*, the sentencing court in this case did not impermissibly modify the sentence "upon reflection" *See Gruetzmacher*, 271 Wis. 2d 585, ¶ 38; *Burt*, 237 Wis. 2d 610, ¶ 15. Contrary to Robinson's assertion, there is no evidence in the record

that the sentencing court misrepresented its mistaken impression regarding Robinson's Waukesha County sentence. Rather, at the resentencing hearing, the court explained, "the error was made by this court under the mistaken assumption of what she was ordered to serve in Waukesha [County]" (32:5; A-Ap. 124; R-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*.).

The sentencing court's mistake is understandable, considering that at the original sentencing hearing, the court was considering Robinson's "litany of cases" out of Waukesha County, as well as Robinson's current charges out of Milwaukee County (31:11; A-Ap. 117; R-Ap. 111). While the State does not dispute that the sentencing court was accurately informed about Robinson's Waukesha County sentence, there is no evidence that the sentencing court did anything but "ma[k]e a mistake" (32:2; A-Ap. 121; R-Ap. 117). Applying *Gruetzmacher's* language, in this case, the sentencing court's modification to increase Robinson's sentence does not "r[u]n afoul of the double jeopardy clause." 271 Wis. 2d 585, ¶ 30.

B. *Willett's* Four Month Passage of Time is Inapposite to Robinson's One Day Passage of Time

Robinson argues that her legitimate expectation of finality is "akin to that in *State v. Willett*," and "even stronger than [defendant] Willett's" (Robinson's Br. at 11). The State disagrees.

In *Willett*, the sentencing court resentenced the defendant (because of an error of law) after the defendant had already served four months. In deciding that the defendant had a legitimate expectation of finality, *Willett* hinged on the fact that the defendant had already served

four months of his sentence: "[U]nlike Burt, who was resentenced on the same day, Willett had already been serving his sentence for four months when the trial court changed it from concurrent to consecutive." 238 Wis. 2d 621, ¶ 6. And, therefore, the *Willett* court concluded that "[t]he double jeopardy clause prevents the trial court from going back, four months later, to redo the sentence." *Id.*

Conversely, in Robinson's case, the sentencing court realized its mistake on CCAP the same day it sentenced Robinson, and it recalled the case for resentencing the next day. Contrary to Robinson's argument, the State disagrees that her expectation of finality in her sentence is "even stronger than Willett's." (Robinson's Br. at 11). On the contrary, applying the *Jone's* factors, Robinson's expectation of finality in her sentence was not legitimate because:

- Her sentence was not completed, nor substantially completed.

- The passage of time between when the sentencing court imposed its sentence and when it resentenced Robinson was only one day.

- Under *Burt* and *Gruetzmacher*, Robinson did not have a legitimate expectation of finality in her sentence when she left the courtroom after sentencing.

CONCLUSION

In this case the sentencing court, realizing its error on the the day of sentencing, recalled Robinson's case for a hearing the next day and increased her sentence to reflect the court's intent. Applying the *Jones* factors, Robinson did not have a legitimate expectation of finality in her sentence, and therefore her double jeopardy

protections were not violated. The State requests that this Court affirm the court of appeals decision that Robinson's sentence did not have a degree of finality that prohibited the sentencing court from correcting its own mistake the day after sentencing.

Dated this 17th day of April, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

SARA LYNN LARSON
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
larsonsl@doj.state.wi.us

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 4828 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, 2013.

_____
Sara Lynn Larson
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE R. ROBINSON,

Defendant-Appellant-Petitioner.

APPENDIX OF PLAINTIFF-RESPONDENT

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 17th day of April, 2013.

_____

Sara Lynn Larson
Assistant Attorney General

INDEX