STATE OF WISCONSIN

IN SUPREME COURT

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.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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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 the Legally Valid Sentence Imposed by the Court.

The parties agree that the sentencing court imposed a legally valid sentence, that the sentence was not based on any error of law or fact, that Ms. Robinson was completely blameless, and that there was no "slip of the tongue" at the original sentencing. (Plaintiff-Respondent's Brief at 14). Yet the State maintains that Ms. Robinson could not legitimately expect that the sentence she had already begun serving was final.

When determining whether a defendant legitimately expects that his or her sentence is final, the State places dispositive weight on the amount of time that passed between the original sentencing and the sentence increase. (Plaintiff-Respondent's Brief at 16-18). The State points to ***Burt*** and ***Gruetzmacher***, two cases where a sentence increase was allowed when the parties were alerted to the sentencing error later on the day of sentencing. 2004 WI 55, ¶¶ 8, 38, 271 Wis. 2d 585, 679 N.W.2d 533; 2000 WI App 126, ¶ 4, 237 Wis. 2d 610, 614 N.W.2d 42. However, those cases remain distinguishable on other important grounds.

Burt is unlike this case because it involved a "slip of the tongue" at sentencing. 237 Wis. 2d 610, ¶¶ 12. The sentencing court said concurrent when evidence in the record demonstrated it meant consecutive. ***Id.*** at ¶ 4. The sentencing court's intent to impose consecutive sentences was supported

by the co-defendant's consecutive sentence and the court's own notes, which were sealed for the record. ***Id.*** at 4. That the sentencing court acted on its error the same day as sentencing was only one factor in the double jeopardy analysis. ***Id.*** at ¶ 12. The appellate court was also presented with a record demonstrating that there was a genuine slip of the tongue when imposing sentence. ***Id.*** at ¶ 4. There is no evidence of a similar "slip of the tongue" in this case, and the State concedes that none exists. (Plaintiff-Respondent's Brief at 14).

Gruetzmacher also looked beyond the time between sentencing and the subsequent increase. There, the originally imposed sentence on one count was illegal because it mistakenly exceeded the statutory maximum. 271 Wis. 2d 585, ¶¶ 7-8. Like in ***Burt***, the court recognized its error and contacted the parties on the day of sentencing. ***Id.*** at ¶ 8. The court then increased the sentence on a different charge to effectuate its originally stated intent. ***Id.*** at ¶ 11. Thus, although the sentence on one charge was increased, the defendant was ultimately left with the same sentence he was expecting at the end of the original sentencing hearing. On the other hand, Ms. Robinson's sentence was increased in the absence of any legal error, and when no evidence in the record suggested the court intended any sentence other than what it imposed.

The State also attempts to distinguish ***Willett*** by examining only the four months between sentencing and the sentence increase. (Plaintiff-Respondent's Brief at 17-18). 2000 WI App 212, 238 Wis. 2d 621, 618 N.W.2d 881. There, the circuit court increased the sentence four months after sentencing when the judge realized that he was mistaken in his belief that he could not impose a consecutive sentence. ***Id*** at ¶ 2. The court of appeals noted that the sentence

enhancement came four months after sentencing, but explained that perhaps the "most important" factor prohibiting the sentence increase was that "this was not a 'slip of the tongue' on the part of the trial court." ***Id.*** at ¶ 6. The court of appeals held that the sentencing court imposed a "valid, concurrent sentence" at the original sentencing; consequently, "those proceedings fostered in Willett a legitimate expectation of finality in the sentence." ***Id.*** at ¶ 6. Similarly, the legally valid sentence that Ms. Robinson had begun serving allowed her to legitimately expect that her sentence was final.

Gruetzmacher, ***Burt***, and ***Willett*** all demonstrate the double jeopardy analysis requires more than an examination of how much time passed between sentencing and the sentence enhancement. Whether a defendant can legitimately expect that his or her sentence is final "may be influenced by many factors." ***State v. Jones***, 2002 WI App 208, ¶ 10, 257 Wis. 2d 163, 650 N.W.2d 844. ***Jones***'s expressly non-exhaustive list included: "the completion of the sentence, the passage of time, the pendency of an appeal, or the defendant's misconduct in obtaining sentence." ***Id.*** Other relevant factors include whether the court is correcting an illegal sentence (***Gruetzmacher***), whether the court's initial sentencing intent was clear from the record at sentencing (***Gruetzmacher***/***Burt***), whether the sentence was based on a genuine slip of the tongue (***Burt***), whether the sentence was based on the court's mistaken understanding of the law (***Willett***), and whether the sentence was legally valid (***Willett***).

Applying those factors to the present case, it is apparent that Ms. Robinson had a legitimate expectation of finality in her sentence. The court imposed a legally valid sentence, which was not premised on any error of fact, error of law, or slip of the tongue. Ms. Robinson was entirely

blameless for the court's decision to increase her sentence. Although she had only served one day of her sentence, Ms. Robinson had already begun serving her sentence, unlike in ***Burt*** or ***Gruetzmacher*** where the parties were alerted to the error before serving any part of their sentences. And the record demonstrates that the parties and the sentencing court were under no misunderstanding as to how Ms. Robinson's existing sentences were structured.

The State also argues that "[t]he sentencing court's mistake was understandable" because Ms. Robinson was serving a number of previously imposed sentences. (Plaintiff-Respondent's Brief at 17). But the record clearly establishes that there was no mistake at the original sentencing. Not only did the prosecutor and defense counsel accurately recite the structure of Ms. Robinson's existing sentences, the sentencing court also accurately stated that Ms. Robinson was serving a two year sentence. (31:4, 6, 7, 11; App. 110, 112, 113, 117).

Where the court imposes a legally valid sentence, which is not based on any error of law, error of fact, or misconduct by the defendant, the defendant should be able to legitimately expect that his or her sentence is final and not subject to later increase. Therefore, this Court should reverse and reinstate the originally imposed sentence.

CONCLUSION

For the reasons stated above, and the reasons stated in her initial brief, 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 May 1, 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 1,132 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 May 1, 2013.

Signed:

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