STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 14-AP-982-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMIE R. ANDERSON,

Defendant-Appellant.

ON REVIEW OF A DECISION AND ORDER DENYING THE DEFENDANT'S PETITION FOR SENTENCE ADJUSTMENT, ENTERED IN THE MONROE COUNTY CIRCUIT COURT ON FEBRUARY 11, 2014, HON. MARK L. GOODMAN PRESIDING

SUPPLEMENTAL REPLY BRIEF OF DEFENDANT-APPELLANT, JAMIE RUSSELL ANDERSON

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I. A PLAIN TEXT ANALYSIS OF WIS. STAT. § 973.195 CANNOT RESOLVE THE ISSUE PRESENTED IN THIS CASE.

Anderson's position that Wis. Stat. § 973.195 is ambiguous as to *when* he is eligible to petition for sentence adjustment is soundly based on the ***Tucker*** court's analysis of Wis. Stat. § 973.195's eligibility provisions. In ***Tucker***, the court was tasked with deciding if *and when* a group of offenders sentenced under Wis. Stat. § 973.01 were eligible to petition for sentence adjustment despite the fact that the statute failed to provide an "applicable percentage" that applied to them. ***State v. Tucker***, 2005 WI 46, 279 Wis. 2d 697, 694 N.W.2d 926. The question of statutory interpretation presented in Anderson's case is identical. Like Tucker, Anderson represents a class of prison inmates sentenced under Wisconsin's Truth-in-Sentencing system. According to Wis. Stat. § 973.01 and ***State v. Lasanske***, 2014 WI App 26, ¶¶ 8-9, 12, 353 Wis. 2d 280, 844 N.W.2d 417, his TIS sentence was required to be bifurcated into a period of initial confinement and a period of extended supervision. Also like Tucker, Anderson was not serving a sentence for a Class B felony, the only class of TIS offenders explicitly excluded from petitioning for sentence adjustment. *See* Wis. Stat. § 973.195(1r)(a). Finally, Wis. Stat. § 973.195(1g) fails to define the applicable percentage that TIS-I offenders, like Tucker, or TIS-II repeat misdemeanants, like Anderson, must serve before petitioning for sentence adjustment.

The State made a nearly identical and seemingly simple plain text argument against Tucker's eligibility as they make against Anderson's: because subsection (1g) does not explicitly provide for an applicable percentage that applies to his type of TIS sentence, this individual is excluded from

petitioning for sentence adjustment.[1] The ***Tucker*** court rejected the State's plain text argument in that case and this Court should do the same in Anderson's case.

II. WIS. STAT. § 973.195 ALLOWS TIS-II MISDEMEANANTS TO PETITION FOR SENTENCE ADJUSTMENT AFTER SERVING 75 PERCENT OF THEIR PERIOD OF INITIAL CONFINEMENT.

The State's attempt to downplay the significance of ***Tucker*** is based on a flawed understanding of the legislative intent expressed in TIS-II's version of Wis. Stat. § 973.01 and an erroneous description of misdemeanor and felony sentencing under TIS-II.

A. TIS-II's requirement, expressed in Wis. Stat. § 973.01, to bifurcate repeat misdemeanant prison sentences represents clear legislative intent to treat repeat misdemeanants like TIS-II felons.

Section 973.01(1), requires the bifurcation of any prison sentence imposed for a felony committed on or after December 31, 1999 *or a misdemeanor committed on or after February 1, 2003*. The only way a court can impose a prison

[1] The State's full argument against Wis. Stat. § 973.195's applicability to TIS-I offenders was made in its briefs in ***State v. Stenklyft***, 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769 (*see* Anderson's Supp. App. A at 4, fn. 7). The State's arguments in ***Stenklyft and Tucker*** included the following now familiar arguments: (1) Wis. Stat. § 973.195(1g)'s "applicable percentage" used TIS-II's felony classification system; (2) It would have been a "simple proposition for the legislature to state that § 973.195 applies to TIS-I offenders and to indicate when TIS-I offenders could seek sentence adjustment, (3) § 973.195 is not easily applied to TIS-I felonies and attempts to apply the provision to TIS-I inmates raises a number of questions only answered by speculation and guesswork (Anderson's Supp. App. B at 2-8; Anderson's Supp. App. C at 2-5).

sentence for a misdemeanor offense is if the offender is subject to a penalty enhancer such as Wis. Stat. § 939.62's repeat offender provision. ***Lasanske***, 353 Wis. 2d 280, ¶8. Under TIS-II, prison sentences imposed on repeat misdemeanants must be bifurcated and are therefore subject to the following provisions of Wis. Stat. § 973.01:

- **No good time**: TIS inmates must serve the entire term of confinement in prison portion of the sentence without reduction for good behavior. Wis. Stat. § 973.01(4).

- **Extension of confinement**: TIS inmates may have their term of confinement in prison extended as a result of poor prison conduct. Wis. Stats. §§ 973.01(4) and 302.113(3).

- **Adjustment of confinement:** A term of confinement may be adjusted by reducing the term of confinement and enlarging the term of extended supervision by equal amounts so that the overall length of the bifurcated sentence remains the same. Wis. Stat. §§ 973.01(4) and 973.195(1r).

- **No parole:** TIS inmates are not eligible for release on parole. Wis. Stat. § 973.01(6).

- **No early discharge:** The Department of Corrections may not discharge a TIS inmate until the inmate has served the entire bifurcated sentence. Wis. Stat. § 973.01(7).

As such, Anderson represents a class of state prison inmates that, while sentenced for committing misdemeanor

crimes, are intentionally treated like felons in the way they are sentenced and imprisoned under TIS-II.

TIS-II's mandate to bifurcate enhanced misdemeanor prison sentences originated in the Criminal Penalties Study Committee's (CPSC) conclusion that misdemeanants dangerous enough to warrant incarceration in prison should receive a bifurcated sentence (R-Ap. at 106).

B. Far greater distinctions exist between non-repeat misdemeanants and TIS-II repeat misdemeanants than between repeat misdemeanants and Class F through I felons.

The State erroneously argues that Anderson's interpretation of Wis. Stat. § 973.195(1g) creates a benefit for more serious, repeat misdemeanants, while withholding any benefit for less serious non-repeat misdemeanants (State's supp. br. at 11-12). To start with, the State's argument and illustration ignores the fact that a Class A non-repeat misdemeanant faces only nine months imprisonment in *county jail*. County jail inmates are eligible for numerous credits, programs, and benefits not available to prison inmates. For example,

- County jail inmates are eligible to earn good time credit that results in service of only 75 percent of the sentence imposed. Wis. Stat. § 302.43. Additionally, whereas sentence adjustment results in no actual shortening of a TIS inmate's total sentence, good time credit reduces a county jail inmate's sentence by up to 25 percent. Wis. Stat. § 302.43.

- County jail inmates may be granted the privilege of leaving jail during "necessary and reasonable hours" under Wisconsin's "Huber law." Wis. Stat. § 303.08.

- Unlike TIS inmates, there is no term of supervision for county jail inmates. *Compare* Wis. Stat. § 973.03, *with* § 973.01.

Additionally, reviewing a sentence adjustment petition is a completely discretionary decision made by the circuit court (*see* Anderson's Reply Brief at 3-4). Further, county jail inmates serve their sentences in their county of conviction, which is almost always closer to family, friends, and potential visitors. In contrast, an individual who is from Milwaukee County and was convicted in that county could serve a prison sentence at Stanley Correctional Institution, located approximately 250 miles from Milwaukee, Wisconsin.

Examining the State's illustration in proper context reveals its absurdity (s*ee* State's supp. br. at 11-12). Person Y, who is not subject to the repeater enhancement will likely serve only six months and 23 days in the county jail, [2] which may include Huber release and regular visits from friends and family. Person Y will then be released without serving time on supervision and without facing possible revocation. Person X, however, sentenced to two years imprisonment consisting of one year initial confinement and one year extended supervision, even if he is eligible to petition for sentence adjustment, must wait until he has served nine months in prison before submitting a petition through the institution's records office, which then sends the petition to the sentencing court. Upon receipt of a petition, Wis. Stat. § 973.195

[2] Earned good time under Wis. Stat. § 302.43 would result in Person Y's nine-month county jail sentence being reduced to six months and 23 days.

provides for a rather cumbersome review process that could significantly eat into the three months of time eligible to be adjusted. *See* Wis. Stat. § 973.195(1r)(c)-(h). Finally, Person Y will be released without being subject to any community supervision whereas Person X will face up to 15 months extended supervision, revocation, and return to prison to serve the remainder of his TIS bifurcated sentence. *See* Wis. Stat § 302.113(9)(am).[3] Thus, Anderson's position would still result in Person Y, the non-repeat misdemeanant, being treated, in relative terms, much better than Person X.

Given the legislature's decision to treat enhanced misdemeanants sentenced to prison like felons, Anderson's position is both logical and supported by ***Tucker*** (*contra* State's supp. br. at 14-15, 20-22). Repeat misdemeanants may petition for sentence adjustment after serving 75 percent of the confinement portion of their TIS-II sentences. No additional statutory analysis is required. The sentence adjustment statute creates two applicable percentages, 85 percent for Class C, D, and E felons and 75 percent for any other eligible TIS inmate convicted and sentenced for a less serious offense. Anderson's position simply recognizes the legislature's intent to treat repeat misdemeanants like Class F through I felons. The State argues that allowing repeat misdemeanants to petition for sentence adjustment when non-repeat misdemeanants cannot would be absurd. But what would be even more absurd is an interpretation of the statute that allows an inmate convicted of first degree reckless

[3] "If the extended supervision of the person is revoked, the reviewing authority shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the sentence." Wis. Stat. § 302.113(9)(am).

homicide, a Class B felony under TIS-I,[4] to petition for sentence adjustment and denying that same potential relief, albeit on a much smaller scale, to Anderson, who was convicted of misdemeanor battery as a repeater.

C. Analyzed in proper context and in light of the relative treatment of non-repeat misdemeanants, TIS-II repeat misdemeanants, and Class F through I felons, *Tucker* fully supports Anderson's position.

The State's argument against applying the ***Tucker*** court's reasoning to Anderson's case is based almost exclusively on an overly formalistic distinction between felons and misdemeanants. As argued above in subsections A. and B., TIS-II's primary legislative distinction lies between bifurcated and non-bifurcated sentences, not misdemeanants (in general) and felons. The ***Tucker*** court recognized that the legislature's failure to explicitly include an applicable percentage for a class of inmates is not indicative of legislative intent to exclude them. 279 Wis. 2d 697, ¶¶ 22-23.

Anderson represents a group of TIS-II inmates serving bifurcated sentences for crimes other than Class B felonies that the legislature also failed to exclude from sentence adjustment. In comparison, Anderson is situated in a similar, if not better, position than was Tucker.

[4] *See e.g.*, Wis. Stat. § 940.02(2) (1999-2000) (defining first degree reckless homicide by delivery of a controlled substance as a Class B felony under TIS-I) and Wis. Stat. § 940.02(2) (2003-04) (defining the same offense as a Class C felony under TIS-II, thereby making the former offense eligible for sentence adjustment under ***Tucker***.

III. LEGISLATIVE HISTORY, TO THE EXTENT IT IS OF ANY VALUE TO THIS CASE, SUPPORTS ANDERSON'S POSITION.

The "legislative history" cited in this case, as compared to the statutory history of Wis. Stat. § 973.195 and Wis. Stat. § 973.01, is more revealing for what it fails to address than for what it proves. Also, contemporaneous analyses of TIS-II provide no support for the State's claim that the legislature intended to exclude repeat misdemeanants from the sentence adjustment process.

First, the State attempts to use then-Judge Michael Brennan's analysis of TIS-II as support for its position. At the outset, however, it must be noted that the CPSC proposed no sentence adjustment provision. Rather, the Criminal Law Section of the Wisconsin State Bar proposed its own broad sentence adjustment provision (s*ee* R-Ap. at 109, 119-20; *contra* State's supp. br. at 15-16). More importantly, Brennan's full comment regarding the sentence adjustment provision reveals Brennan's assessment of presumed eligibility and uncertain timing, rather than intended exclusion.[5]

Second, nowhere in Professor Thomas Hammer's analysis of TIS-I and TIS-II is there any evidence of legislative intent to *exclude* TIS-II repeat misdemeanants from sentence adjustment. Thomas J. Hammer, *The Long Journey to Truth-in-Sentencing in Wisconsin*, Fed. Sentencing Rptr., Oct. 2002 (R-Ap. at 128-32). Professor Hammer's

[5] The full comment reads, "While inmates serving a bifurcated sentence for an enhanced misdemeanor *apparently* may petition for a sentence adjustment, the statute does not specify the applicable percentage of time that they must serve before petitioning and obtaining early release." Michael B. Brennan, et al., *Fully Implementing Truth-in-Sentencing*, 75 Wis. Lawyer No. 11, 56, n.81 (Nov. 2002) (emphasis added).

reference to "felony" sentences is simply another way to describe bifurcated sentences under Wisconsin's TIS system. This descriptive comment is hardly evidence of legislative intent to exclude repeat misdemeanants from sentence adjustment when it is uncontested that Wis. Stat. § 973.01's purpose reflected the CPSC's conclusion that "a misdemeanant who is dangerous enough or has committed offenses serious enough to warrant incarceration in prison also should receive a bifurcated sentence" (R-Ap. at 106).

Along these same lines, it is not particularly telling or surprising that the Legislative Reference Bureau (LRB) used the word "felons" when referring to sentence adjustment. Wisconsin Legislative Reference Bureau, *Wisconsin Briefs, Truth-in-Sentencing and Criminal Code Revision* (Aug. 2002) (R-Ap. at 136). In fact, in the same brief the LRB explains that "[p]etitions for adjustment may be filed, beginning February 1, 2003, by *any* prisoner sentenced for a crime committed after the effective date of bifurcated sentencing (December 31, 1999)" (R-Ap. at 136). The only explicit exclusions the LRB notes is for those convicted of Class A and B felonies and those convicted of crimes committed before December 31, 1999, who may be eligible for parole consideration and are thus not permitted to petition for sentence adjustment (R-Ap. at 136). As noted in Anderson's initial brief, the LRB's analysis supports his eligibility.

IV. CHANGES TO THE SENTENCE ADJUSTMENT STATUTE IN 2009 WISCONSIN ACT 28 AND 2011 WISCONSIN ACT 38 FURTHER SUPPORT ALLOWING TIS-II MISDEMEANANTS TO PETITION FOR SENTENCE ADJUSTMENT AFTER SERVING 75 PERCENT OF THEIR TERM OF INITIAL CONFINEMENT.

In 2009 Wis. Act 28, the legislature simultaneously limited sentence adjustment to inmates serving a bifurcated sentence imposed before October 1, 2009 and greatly expanded early release provisions available to TIS inmates petitioning the Earned Release Review Commission. *See* Wis. Stat. §§ 304.06 and 973.195 (2009-10). Then, 2011 Wis. Act 38 more or less did away with the new early release provisions of 2009 Wis. Act 28 and restored Wis. Stat. § 973.195 to its pre-Act 28 state. *See* Wis. Stat. § 973.195 (2011-12).

The State accurately points out that some of the early release provisions created by 2009 Wis. Act 28 explicitly included TIS-II misdemeanants along with Class F-I felons in terms of when they could apply for early release. It then argues that the inclusion of TIS-II misdemeanants there, followed by the failure to amend Wis. Stat. § 973.195 to explicitly include them, "eliminated any statutory basis for a 75% standard for misdemeanants." State's supplemental brief at 19.

The State inaccurately presumes that these changes formed the basis for the DOC's current treatment of repeat, or otherwise enhanced, misdemeanants' petitions under Wis. Stat. § 973.195 (State's supplemental brief at 19). To the contrary, as early as 2007 Attorney William Rosales observed that some TIS-II misdemeanants were being granted sentence adjustment under § 973.195. *See* William E. Rosales, *Sentence Adjustment Petitions: An Update*, The Wisconsin Defender, Winter/Spring 2007, at 5-6 (Anderson's Supp. App. D, at 5-6). This data contradicts the State's argument that the DOC's policy to process TIS-II misdemeanant petitions was the result of 2009 Wis. Act 28 early release mechanisms (*contra* State's supp. br. at 19).

Viewed in proper context, the changes made in 2009 Wis. Act 28 and 2011 Wis. Act 39 support Anderson's position and give specific legislative support to his interpretation that TIS-II misdemeanants may apply for sentence adjustment using 75 percent as the applicable percentage. Changes made in 2009 Wis. Act 28 came several years after the legislature mandated bifurcated sentences for misdemeanants sentenced to prison. They also came several years after our supreme court's decision in ***Tucker***. TIS-II misdemeanants had existed for some time and were presumably familiar to legislators and drafters in a way that they were not when 2001 Wis. Act 109, § 1114 was passed. Thus, their explicit inclusion is an example of better drafting, not evidence of intent to exclude TIS-II misdemeanants from the sentence adjustment statute. *See e.g.*, ***Lasanske***, 353 Wis. 2d 280, ¶10.

The legislature did not amend Wis. Stat. § 973.195 to explicitly include TIS-II misdemeanants in 2009 or 2011 because it did not need to. Given the plain language of the statute including inmates who are "serving a sentence imposed under § 973.195 for a crime other than a Class B felony," the DOC's practice of allowing TIS-II misdemeanant petitions to proceed to the court, and our supreme court's holding in ***Tucker***, it is far more significant that the legislature did not take the opportunity to explicitly *exclude* TIS-II misdemeanants. Significantly, despite all of this, the State cites to no legislative history indicating that the inclusion or exclusion of TIS-II misdemeanants from § 973.195 was ever the subject of significant debate.

To the extent that the 2009 early release mechanisms explicitly applying the 75 percent threshold to TIS-II misdemeanants and Class F-I felons are relevant, they are relevant as evidence that the legislature views these inmates

as similarly situated and deserving of similar treatment under the various early release mechanisms.

CONCLUSION

For the above reasons, this Court should reverse the circuit court's order and clarify that inmates serving bifurcated misdemeanor sentences are eligible to petition for sentence adjustment under Wis. Stat. § 973.195 after serving 75 percent of the confinement portion of their sentences.

Respectfully submitted this _____day of March, 2015.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2984 words.

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Jeremy Newman

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 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.

_____

Jeremy Newman

TABLE OF SUPPLEMENTAL APPENDICES