STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Court of Appeals Case No. 2017AP000141-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DENNIS L. SCHWIND,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

On Appeal from the Walworth County Circuit Court, the Honorable James L. Carlson and the Honorable David M. Reddy, Presiding.
Circuit Court Case No. 2000CF407

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ISSUES PRESENTED

I. Does the judiciary's inherent authority include the authority to reduce the length of a probation term?

Circuit Court Answer: No.

II. If courts have inherent authority to reduce the length of probation, what standard should they apply?

Circuit Court Answer: The circuit court did not address this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Schwind does not request oral argument. However, Schwind respectfully recommends publication of the opinion in this case. Whether circuit courts have inherent authority to reduce a probationary term is an issue of first impression. Thus, the opinion will announce a new rule of law. Further, the issue is one of continuing and substantial public interest.

STATEMENT OF THE CASE

In 2001, Schwind was convicted in Walworth County Circuit Court of Repeated Acts of Sexual Assault of the Same Child, contrary to Wis. Stat. § 948.025(1) and (2m) (1999-2000), (R.22; App. at 1); Incest with a Child, contrary to Wis. Stat. § 948.06(1) (1999-2000) (R.21; App. at 3); and First Degree Sexual Assault of a Child, contrary to Wis. Stat. § 948.02(1) (1999-

2000)(R.21; App. at 3).[1] On the conviction for Repeated Acts of Sexual Assault, the circuit court imposed and stayed a ten-year prison sentence and placed Schwind on probation for 25 years. (R.22; App. at 1-2.) On the two other convictions, the court withheld sentence and imposed 25 years of probation. (R.21: App. at 3-4.) The judgments state that the "Court would consider early termination of supervision after deft has served a minimum of 15 years, upon recommendation of the agent. (R.1, R.2; App. at 1-4.)

In 2014 Schwind brought a motion to terminate probation. (R.32.) At the hearing, Schwind's probation agent supported Schwind's discharge request. (R.49:6.) However, the agent didn't file the petition for early termination because Department of Corrections policy prohibits those petitions. (R. 49:5-6.) The circuit court summarized the Department's position as "wink, wink, we agree, but we can't petition," and the agent agreed. (R.49:6.)

Schwind conceded that, absent a petition by the DOC, the court lacked statutory authority to reduce his probation term because Wis. Stat. § 973.09(3)(d) requires a DOC petition. (R.49:12.) Section 973.09(3)(d) states:

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[1] All convictions were in Walworth County Case No. 2000CF407. The circuit court entered one judgment of conviction for the imposed and stayed sentence, (R.22; App. at 1), and another for the withheld sentence on the two other convictions, (R.21; App. at 3). The judgments were later amended to add that Schwind could travel to Illinois and Indiana for employment while serving a conditional jail term, (R.24; App. at 5-6), and to clarify the location of his treatment, (R.28; App. at 7-8). Because these details are unimportant to the issues in this case, Schwind will hereafter refer to them collectively as the judgments.

(d) The court may modify a person's period of probation and discharge the person from probation if all of the following apply:

1. The department petitions the court to discharge the person from probation.
2. The probationer has completed 50 percent of his or her period of probation.
3. The probationer has satisfied all conditions of probation that were set by the sentencing court.
4. The probationer has satisfied all rules and conditions that were set by the department.
5. The probationer has fulfilled all financial obligations to his or her victims, the court, and the department, including the payment of any fine, forfeiture, fee, or surcharge, or order of restitution.
6. The probationer is not required to register under s. 301.45.

Schwind asked the circuit court to exercise its inherent authority to terminate his probation. (R.49:3.) The circuit court first said that it had that authority, (R.49:11), but later it said that it wouldn't decide whether it had that authority, (R.49:15). Ultimately, the circuit court held that it wouldn't exercise any inherent powers because "once you start utilizing some of those inherent powers, that's a slippery slope that this court is not willing to go down." (R.49:11.) Thus, the court denied Schwind's motion. (R.49:18.) However, the court told Schwind that he could refile his motion, and that, due to an upcoming judicial rotation,

the sentencing judge would take over the case again in August.[2] (R.49:14.)

Schwind filed another motion for discharge in 2016. Because of a change in the expected judicial rotation, the case remained with the Honorable David M. Reddy instead of being assigned to the sentencing judge. The court declined to schedule a hearing. Instead, it denied Schwind's motion by an order which stated that the court lacked authority under § 973.09(3)(d) to discharge probation because the Department did not file a petition. (R.36; App. at 9.)

Schwind moved for reconsideration. (R.37.) His motion and supporting papers explained that Schwind was requesting that the court exercise its inherent authority, and the court's order did not address that issue. (R.37.) The court agreed to hold a hearing on the merits of Schwind's motion.

After a hearing, the circuit court held that courts have no inherent authority to reduce a probationary term. (R.54:10-12, 18-19; App. at 10-12, 18-19.) Therefore, it denied Schwind's motion. *Id.*

Schwind now appeals, and asks the Court to find that circuit courts have inherent authority to terminate or reduce a probation term when there is cause, that is, when reducing a probationary term effectuates the dual goals of probation.

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[2] The Honorable James L. Carlson presided at sentencing. The Honorable David M. Reddy presided over Schwind's motions for early discharge.

ARGUMENT

I. Circuit courts have inherent authority to reduce or terminate a probation term when necessary to effectuate the two goals of probation.

Wisconsin courts have both enumerated and inherent powers. *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995). Inherent powers are those that courts need in order to accomplish their constitutionally and legislatively mandated functions. *Id.* The question of a circuit court's inherent authority is a question of law that is subject to de novo review. *State v. Dowdy*, 210 WI App 158, ¶ 23, 330 Wis. 2d 444, 792 N.W.2d 230.

The power to modify a sentence is one of these inherent powers. *State v. Harbor*, 11 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828. However, our supreme court has never explicitly stated that courts possess inherent authority to reduce a probationary term. *See State v. Dowdy*, 2012 WI 12, ¶ 5, 338 Wis. 2d 565, 808 N.W.2d 691 (declining to decide the issue because the defendant didn't raise it in the circuit court). But it has held that "inherent within the probation statute is the court's continued power to effectuate the dual purposes of probation, namely, rehabilitating the defendant and protecting society, through the court's authority to modify or extend probationary terms." *State v. Gray*, 225 Wis. 2d 39, 68, 590 N.W.2d 918 (1999) (quoting *State v. Sepulveda*, 119 Wis. 2d 545, 554, 350 N.W.2d 96 (1984)) (internal quotation marks omitted). In order to ensure that those goals are fulfilled, that continuing power must include the power to reduce or end a probation term.

This power is necessary to effectuate the rehabilitative purpose of probation. The possibility of early discharge often encourages a probationer's rehabilitative efforts. In contrast, fixed probation terms sometimes stand in the way of a probationer's rehabilitation. For example, continued probation can prevent probationers from accepting job offers from another state, or from keeping their job when an employer transfers them to another state. Without prior residency or family in that other state, the other state can prohibit those probationers from moving. *See* Interstate Compact for Adult Offender Supervision, sec. 3.101. Similarly, probationers who are accepted to a prestigious out-of-state university may not be allowed to transfer their probation. *See id.* Employment and education are both part of rehabilitation, and people who are educated or employed present a lower risk to reoffend. *See County of Milwaukee vs. LIRC*, 139 Wis. 2d 805, 821, 407 N.W.2d 908 (1987) ("Employment is an integral part of the rehabilitation process."). To effectuate the purposes of probation, courts must have the power to decide, on a case by case basis, whether continuing a probation term would impede the probationer's rehabilitation and protection of the public.

This power is also necessary to protect and effectively direct the public's limited supervisory resources. Wasting limited funds and supervisory resources on probationers who have been rehabilitated means that those resources can't be devoted to more dangerous offenders. A court's choice of probationary term, which was appropriate at the time of sentencing but becomes unnecessary because of subsequent rehabilitation, should not prevent supervisory resources from being devoted to those offenders who present a continuing risk.

In addition, the absence of this inherent power would generate absurd results. Under section 973.09(3)(a), circuit courts have the power to remove all conditions of probation. If the probationer has been rehabilitated, a court might reasonably remove all conditions of probation to avoid wasting supervisory resources. This isn't supervision, it is merely the illusion of supervision. Rather than protecting the public, illusionary supervision undermines the integrity of supervision and the public's confidence in it.

Although the supreme court hasn't explicitly ruled on this issue, existing case law implies that circuit courts have the authority to reduce the length of probation. For example, in *State v. Kluck*, the supreme court held that although rehabilitation is not a new factor that allows a court to reduce a jail term, sentencing courts can leave themselves the option to reward a defendant's post-sentencing rehabilitation by placing the defendant on probation and then using probation modification as a reward. 210 Wis. 2d 1, 9, 563 N.W.2d 468 (1997).

In sum, circuit courts must have the power to terminate probation in order to effectuate the two goals of probation. Therefore, this Court should hold that the circuit courts have that power. The question then, is what standard should circuit courts apply to determine when to exercise that power.

II. The Court should hold that circuit courts have discretion to exercise that inherent authority for cause, that is, when discharging or reducing a probationary term effectuates the defendant's rehabilitation and the protection of the public.

"For cause" is the standard governing when a court can modify the terms and conditions of probation. Wis. Stat. § 973.09(3)(a). Outside the probationary context, there are greater restrictions on a court's ability to modify a sentence. A court may modify a sentence in three circumstances: (1) to correct clerical or formal errors or an illegal sentence; (2) if a "new factor" exists; or (3) if the sentence is unduly harsh or unconscionable. *State v. Crochiere*, 2004 WI 78, ¶ 12, 273 Wis. 2d 57, 681 N.W.2d 524. This Court has previously concluded that, if courts have inherent authority to reduce the length of probation, the standards for sentence modification would limit the exercise of that power. *See State v. Dowdy*, 210 WI App 158, ¶ 33, 330 Wis. 2d 444, 792 N.W.2d 230.

The Court should extend the probationary "for cause" standard rather than applying the sentencing standard because probation has different purposes than sentencing. The more flexible "for cause" standard is the only one which effectuates the forward-looking purposes of probation.

The restrictions on sentence modification exist because of the importance of finality in sentencing. *Id.* However, probation and sentencing have different purposes. Finality is not important in the context of probation.

The purposes of sentencing are deterrence, rehabilitation, retribution, and segregation. *State v. Loomis*, 2016 WI 68, ¶ 96, 371 Wis. 2d 235, 881 N.W.2d 749 (citing *Dowdy*, 338 Wis. 2d 565, ¶ 97 (Abrahamson, C.J., dissenting)). Finality is essential for both deterrence and retribution. *See Dowdy*, 338 Wis. 2d 565, ¶¶99-100 (Abrahamson, C.J., dissenting). Without finality, sentences lose their deterrent effect because the public, particularly potential lawbreakers, may question the true length of reported sentences. *Id.*, ¶ 99. Similarly, finality is essential for retribution, because without finality the message that the punishment coincides with the debt the defendant owes to society would be undermined. *Id.*, ¶ 100.

While deterrence and retribution are backward-looking, probation is about the future. *Id.*, ¶¶102-03. Its two purposes, rehabilitation and protection of the public, are forward-looking. *Id.* The standard must fit those forward-looking goals.

The "for cause" standard can effectuate those forward-looking goals. Some defendants progress more quickly than others, and the standard allows courts to consider rehabilitative progress. Circumstances that arise after sentencing are important in determining whether continued supervision would serve or impede the probationer's rehabilitation and the protection of the public. The "for cause" standard is necessary to allow courts to determine how to best effectuate those purposes based on the information available at that time.

In contrast, the standards for sentence modification are about correcting errors. *See Kluck*, 210 Wis. 2d at 8-9. Under those standards, a "new factor" is a fact "highly relevant to the impostition of sentence, but not known to the trial judge at the

time of the original sentencing." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). In contrast to probation, rehabilitation is not the goal, thus rehabilitation isn't a new factor. *Kluck*, 210 Wis. 2d at 7-8. Since sentencing modification has different goals than probation, those standards can't effectuate probation's goals. Fortunately, the "for cause" standard that applies to probation modification does allow a court to consider rehabilitation. *Id.* at 9. Thus, the "for cause" standard effectuates the goals of probation.

CONCLUSION

For the reasons stated above, Schwind respectfully requests that the Court hold that circuit courts have the inherent authority to reduce or terminate a probationary term and that they have discretion to exercise that authority for cause. Schwind further requests that the Court reverse the Order Denying Motion for Early Termination of Probation, (R.36), and the Order Denying Defendant's Motion for Reconsideration, (R.42), and remand the matter to the circuit court for consideration of his motion to discharge him from probation.

Dated this 13th day of June, 2017.

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) and 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 a minimum of 2 points and maximum of 60 characters per line of body text. The length of this brief is 2,174 words.

Dated this 13th day of June, 2017.

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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 Rule 809.19(12). I further certify that the 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 this 13th day of June, 2017.

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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 the brief, is an appendix that complies with Rule 809.19(2)(a), and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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.

Dated this 13th day of June, 2017.

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