STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP141-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS L. SCHWIND,

Defendant-Appellant.

ON APPEAL FROM ORDERS DENYING A MOTION TO TERMINATE PROBATION AND A MOTION FOR RECONSIDERATION, ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@doj.state.wi.us

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STATEMENT OF THE ISSUES

1. Does a circuit court have inherent authority to modify or terminate a term of probation?

   The circuit court did not definitively determine whether it had inherent authority, but it declined to modify or terminate Schwind's probation.

   This Court need not decide whether a circuit court has inherent authority to modify or terminate probation. Instead, as it did in *State v. Dowdy*, 2010 WI App 158, ¶ 33, 330 Wis. 2d 444, 792 N.W.2d 230, this Court should conclude that if a circuit court has inherent authority to modify or terminate probation, that authority is limited in the same manner that a court's inherent authority to modify a sentence is limited.

2. If a circuit court has inherent authority to modify or terminate probation, is that authority limited in the same manner that a court's inherent authority to modify a sentence is limited?

   The circuit court did not determine whether, if it had inherent authority to modify or terminate Schwind's probation, it was limited in exercising that authority.

   This Court should conclude, as it did in *Dowdy*, that if a circuit court has inherent authority to modify or terminate probation, that authority is limited in the same manner that a court's inherent authority to modify a sentence is limited. Schwind does not dispute that he has not satisfied the criteria set forth in *Dowdy*.

3. Should the "for cause" standard for modification or termination of probation under Wis. Stat. § 973.09(a) be extended to motions for modification or termination of probation under a court's inherent authority?

   The circuit court did not answer. But it concluded that it had no authority to extend the standard, and that Schwind has not satisfied the statutory criteria for modification or termination of probation.

   This Court should decline to extend the statutory "for cause" standard, and should further conclude that Schwind has failed to satisfy the statutory standard.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, does not request oral argument or publication.

INTRODUCTION

This case concerns whether a circuit court has inherent authority to terminate probation "for cause," the standard that applies to motions to modify probation under Wis. Stat. § 973.09(3). Dennis L. Schwind asked the circuit court to exercise its inherent authority to terminate his probation. The court declined, concluding that Schwind has not satisfied the criteria under § 973.09(3), and that even if the court has inherent authority to terminate probation, it would not exercise that authority in this case. Schwind now asks this Court to conclude that (1) a circuit court has inherent authority to terminate probation; and (2) a court's inherent authority is not subject to the standards under which a court can exercise its inherent authority to modify a sentence, but instead a court can modify probation under the

"for cause" standard that applies to motions to modify probation under Wis. Stat. § 973.09(3).

However, as Schwind acknowledges, in *Dowdy*, 330 Wis. 2d 444, ¶ 33, this Court "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." (Schwind's Br. 8.) This Court is bound by its determination in *Dowdy*. Schwind does not dispute that he has not satisfied the standards that this Court set forth in *Dowdy*. The circuit court properly denied Schwind's motion to terminate probation, and this Court should affirm.

STATEMENT OF THE CASE AND FACTS

Schwind was convicted in 2001 of engaging in repeated acts of sexual assault of the same child, incest with a child, and first degree sexual assault of a child. (R. 22; 28.)[1] The circuit court, the Honorable James L. Carlson, imposed and stayed a sentence of ten years of imprisonment, and placed Schwind on probation for 25 years. (R. 22; 28.) The court noted that it "would consider early termination of supervision after [defendant] has served a minimum of 15 years, upon recommendation of the Agent." (R. 22:1; 28:1.)

In 2014, Schwind moved for early termination of his probation. (R. 32.) The circuit court, the Honorable David M. Reddy, denied Schwind's motion after a hearing. (R. 49:15.) The court concluded that Schwind was not entitled to termination of probation under Wis. Stat. § 973.09(3)(d), because the department of corrections had not

[1] Additional charges of engaging in repeated acts of sexual assault of a child and incest with a child were dismissed but read in at sentencing. (R. 22; 28.)

petitioned for discharge, and that even if the court had inherent authority to terminate Schwind's probation, it would not exercise that authority in this case. (R. 49:11–15.)

In 2016, Schwind again moved for early termination of his probation. (R. 33.) The circuit court denied Schwind's motion, again noting that the department of corrections had not petitioned for discharge. (R. 36.) Schwind moved for reconsideration, asking the court to exercise its inherent authority under the probation statute to terminate his probation. (R. 37.) The court denied the motion after a hearing (R. 54), in a written order (R. 42). Schwind now appeals. (R. 43.)

STANDARD OF REVIEW

Whether a circuit court has inherent authority to take some action is a question of law reviewed de novo. *Dowdy*, 330 Wis. 2d 444, ¶ 23 (citing *State v. Klubertanz*, 2006 WI App 71, ¶ 26, 291 Wis. 2d 751, 713 N.W.2d 116).

ARGUMENT

I. This Court need not address the issue whether a circuit court has inherent authority to modify or terminate probation.

The first issue that Schwind raises is whether a circuit court has inherent authority to modify or terminate a term of probation. The same issue was raised in *Dowdy*, 330 Wis. 2d 444, but neither this Court nor the Supreme Court of Wisconsin addressed it. This Court noted that the issue was one of first impression, *id.* ¶ 30, but declined to address it, stating: "We do not decide today whether circuit courts possess inherent authority to reduce probation periods that have already been imposed that is comparable to the well-defined and limited inherent authority courts possess to reduce sentences." *Id.* ¶ 31. The Supreme Court of Wisconsin

subsequently also "decline[d] to decide today whether a circuit court has inherent authority to reduce the length of probation." *State v. Dowdy*, 2012 WI 12, ¶ 43, 338 Wis. 2d 565, 808 N.W.2d 691.

This Court declined to decide whether a circuit court has inherent authority to reduce or terminate probation because it concluded that, "even assuming that circuit courts possess this inherent authority, it must be circumscribed in the same way as the inherent authority of courts to modify sentences already imposed." *Dowdy*, 330 Wis. 2d 444, ¶ 31.

The State does not concede that a circuit court has inherent authority to modify or terminate probation. Instead, it maintains that, like it did in *Dowdy*, this Court should decline to decide whether a circuit court has inherent authority to modify or terminate probation in this case. Just as in *Dowdy*, even if a circuit court has inherent authority, that authority is limited, and Schwind has not satisfied the criteria this court set forth in *Dowdy* for a court to exercise that authority.

II. Even if a circuit court has inherent authority to terminate probation, that authority is subject to the limitations that apply to a court's inherent authority to modify a sentence.

A. Under *Dowdy*, even if a court has inherent power to terminate probation, it would be constrained by limits on its power to modify a sentence.

Circuit courts in Wisconsin have "inherent, implied and incidental powers" including such powers that are necessary "to fairly administer justice." *Dowdy*, 330 Wis. 2d 444, ¶ 24 (citing *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350) (additional citations omitted). An inherent power "is one without which a court cannot

properly function." *Id.* (citing *Henley*, 328 Wis. 2d 544, ¶ 73) (quoted source omitted).

A circuit court has inherent authority to modify a sentence. *Id.* ¶ 25 (citations omitted). But no Wisconsin appellate court has determined whether a circuit court has inherent authority to reduce or terminate a term of probation. *Id.* ¶ 30.

As this Court noted in *Dowdy*, a circuit court has inherent authority to modify a sentence, but that authority is limited. *Id.* ¶¶ 25, 27. A court may modify a sentence under its inherent authority, but only under "defined parameters." *Id.* ¶ 28 (citing *State v. Crochiere*, 2004 WI 78, ¶ 12, 273 Wis. 2d 57, 681 N.W.2d 524). A court may use its inherent authority to modify a sentence in three situations. First, when there was a clear formal or clerical error at sentencing, or an illegal sentence. Second, when the defendant presents a new factor that the sentencing court did not consider, but should consider to fulfill its purpose in imposing sentence. Third, when the sentence is unduly harsh or unconscionable. *Id.* ¶ 28 (citing *Crochiere*, 273 Wis. 2d 57, ¶ 12).

This Court noted in *Dowdy* that, like under the law for sentence modification, rehabilitation is not a new factor warranting termination of probation. *Id.* ¶ 35 (citing *State v. Kaster*, 148 Wis. 2d 789, 804, 436 N.W.2d 891 (Ct. App. 1989)).

In *Dowdy*, this Court concluded that if a circuit court has inherent authority to modify or terminate probation, the same parameters apply. *Id.* ¶ 31. The supreme court affirmed this Court's decision in *Dowdy*, but declined to address whether a circuit court has inherent authority to modify probation, and if so, what standard applies. *Dowdy*, 338 Wis. 2d 565, ¶ 4. The supreme court left in place this Court's conclusion that the same defined parameters that

apply to sentence modification under inherent authority also apply to probation modification under inherent authority. That conclusion is binding on this Court.

B. Even if the court here had the inherent authority to terminate Schwind's probation, he would meet none of the relevant factors applicable to sentence modification.

In this case, Schwind sought termination of his probation under the circuit court's inherent authority. He pointed out that on the judgments of conviction, the sentencing court had stated that the "Court would consider early termination of supervision after [defendant] has served a minimum of 15 years, upon recommendation of the Agent." (R. 22:2; 28:2; 33:2.)

The circuit court did not specifically determine whether it had inherent authority to terminate Schwind's probation. It declined to exercise that authority—even if it exists—because it concluded that Schwind failed to meet the statutory authority for modification or termination of probation. (R. 49:11.) The court did not address the limitations that would apply if a circuit court has such authority that this Court recognized in *Dowdy*. The court noted that the notations that the sentencing court made on the judgments of conviction did not indicate that early termination of probation was available, only that the court might be willing to consider it under the proper circumstances. (R. 54:15–17.)

Schwind does not assert that the sentencing court's notation and its willingness to revisit the term of probation after a minimum of 15 years, under certain circumstances meets any of the factors discussed in *Dowdy*. He does not argue that it constitutes a mistaken or illegal sentence, a new factor, or an unconscionable or unduly harsh term of

probation. His request for termination of probation because of the sentencing court's notation therefore fails to meet any of the defined parameters for termination of probation under a circuit court's inherent authority that *Dowdy* set forth.

Schwind also seems to be requesting early termination because he believes he has been rehabilitated and no longer requires supervision. (R. 34:1–3.) But he does not even assert that these factors mean that the 25-year term of probation that the sentencing court imposed was mistaken or illegal, or unduly harsh or unconscionable when it was imposed. And rehabilitation is not a new factor warranting termination of probation. *Dowdy*, 330 Wis. 2d 444, ¶ 35 (citation omitted).

III. Schwind provides no authority for this Court to extend the "for cause" standard in Wis. Stat. § 973.09(3)(a) to motions to modify probation under a court's inherent authority, and in any event, he fails to satisfy the criteria under that statute.

Schwind does not dispute that even if a circuit court has inherent authority to terminate probation, his request for termination does not fall within the defined parameters that this Court set forth in *Dowdy*. Instead, Schwind asserts that this "Court should extend the probationary 'for cause' standard rather than applying the sentencing standard because probation has different purposes than sentencing." (Schwind's Br. 8.)

A. The statutory "for cause" standard requires that six criteria be satisfied.

The "for cause" standard in Wis. Stat. § 973.09(3)(a) provides that "Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof." In *Dowdy*, the supreme court recognized

that a court can modify probation or discharge a person from probation "for cause" only if the six criteria set forth in Wis. Stat. § 973.09(d) are satisfied. *Dowdy*, 338 Wis. 2d 565, ¶ 41 n.8. The first criterion is that the department of corrections has petitioned the court for discharge. The remaining criteria concern the probationer. He or she must have completed 50 percent of the sentence; satisfied all conditions of probation; satisfied all of the department's rules and conditions; and fulfilled all financial obligations to the victims, the court, and the department. Finally, the probationer must not be required to register as a sex offender under Wis. Stat. § 301.45. Wis. Stat. § 973.09(3)(d).

B. Schwind does not meet all of the statutory criteria, and his argument about extending the statutory criteria is barred by *Dowdy*.

Schwind makes no claim that he satisfies all of the criteria in § 973.09(d). And he has failed to satisfy the first criterion, because the department has not petitioned the circuit court for Schwind's discharge. (R. 54:11–12.) Instead, he is seemingly asking this Court to extend a circuit court's inherent authority so that a court can terminate probation "for cause" but without requiring the court to follow the statutory criteria the Legislature has set forth. He asks this Court to extend the "for cause" standard in accordance with Justice Abrahamson's dissenting opinion in *Dowdy*. Justice Abrahamson concluded that "a circuit court may exercise its inherent authority to reduce the length of probation when doing so advances the dual purposes of probation: 'to rehabilitate the defendant and to protect society without placing the defendant in prison.'" *Dowdy*, 338 Wis. 2d 565, ¶ 92 (Abrahamson, J. dissenting). But that dissent is not the law; no other justice joined Justice Abrahamson's dissent.

This Court cannot simply extend the "for cause" standard because doing so would require this Court to disregard its own opinion in *Dowdy*, which concluded that a circuit courts' inherent authority to reduce or terminate probation "must be circumscribed in the same way as the inherent authority of courts to modify sentences already imposed." *Dowdy*, 330 Wis. 2d 444, ¶ 31. This Court cannot "overrule, modify or withdraw" language from another decision of the court of appeals. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). And as the circuit court noted in rejecting Schwind's claim, termination of Schwind's probation even though he failed to meet the statutory criteria would mean that the requirements set forth by the Legislature are meaningless. (R. 54:11.)

Schwind has not satisfied the statutory criteria for termination of probation, or the defined parameters that this Court has set forth for termination of probation under a court's inherent authority, and he has provided no authority for this Court to extend or change those standards. The circuit court properly denied his motion to terminate his probation, and this Court should affirm.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the circuit court's orders denying Schwind's motion for termination of probation and for reconsideration.

Dated this 7th day of September, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 266-9594 (Fax)
sandersmc@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 2346 words.

_____
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 7th day of September, 2017.

_____
MICHAEL C. SANDERS
Assistant Attorney General