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.

REPLY BRIEF 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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ARGUMENT

This Court should hold, as Schwind has previously argued, that reducing a term of probation falls within the inherent powers of the circuit courts. Schwind has argued that the Court should adopt a "for cause" standard to govern when a circuit court can invoke its inherent authority to reduce a term of probation. (Appellant's Brief at 8-10.) However, Schwind must concede that this Court cannot adopt that standard without modifying its prior language which states that "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." *State v. Dowdy*, 2010 WI App 158, ¶ 31, 330 Wis. 2d 444, 792 N.W.2d 230. Therefore, Schwind concedes that this Court cannot adopt that standard. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (holding that the court of appeals cannot overrule, modify, or withdraw language from other decisions of the court of appeals). However, the applicable standard is not determinative in this case.

If the Court holds that circuit courts possess inherent authority to reduce the length of probation, it should remand the case to the circuit court because Schwind presented the circuit court with a new factor, but the circuit court declined to engage in any new factor analysis. If courts have inherent authority to reduce the length of probation, one of the situations in which they may invoke that authority is when a defendant establishes a new factor. *Dowdy*, 330 Wis. 2d 444, ¶¶ 28-31. The circuit court denied Schwind's motion because it did not meet the requirements of Wis. Stat. § 973.09(d). (54:12.) Thus, it did not conduct a new factor analysis or address any other standard that

would govern a courts invocation of its inherent authority. Schwind now asks this Court to find that courts have the inherent authority to reduce the length of probation, and remand the matter so that the circuit court can determine whether the limitations that *Dowdy* first recognized, which are inconsistent with the sentence and make it impossible to carry out all parts of the sentence, constitute a new factor that may justify the circuit court invoking its inherent authority to reduce the length of Schwind's probation term.

I. The circuit court had inherent authority to consider reducing Schwind's probation term because Schwind established a new factor.

Due to the decision in *Dowdy*, the circuit court cannot carry out the provision of the sentence that says it will consider early termination of Schwind's probation after 15 years if his probation agent agrees. Nine years after that judgment, *Dowdy* established that circuit courts have no discretionary authority to end a probationary term based solely upon the passage of time and an agent's recommendation. *See State v. Dowdy*, 2010 WI App 158, 330 Wis. 2d 444, 792 N.W.2d 230. In sum, the sentence calls for a discretionary determination that *Dowdy* prohibits.

The *Dowdy* holding and the inability to carry out the sentence due to *Dowdy* constitutes a new factor. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *State v. Harbor*, 2011 WI 28, ¶ 40, 333 Wis. 2d 53, 797 N.W.2d 828. The legality of

Schwind's sentence, and the inability to carry out the discretionary determination that the sentence orders, are highly relevant to that sentence, and it is clear that the circuit court did not know about the *Dowdy* limits on its authority.

The *Dowdy* limits on the circuit court's authority to shorten probation are highly relevant to Schwind's sentence. The consideration of early discharge once Schwind meets the two conditions is part of the sentence itself. (R. 22:2 and 23:2.) Now those conditions are insufficient, and it would be unlawful for the court to engage in the discretionary determination for which the sentence provides. Thus, the *Dowdy* limitations actually frustrate the sentencing court's purpose to conduct a discretionary determination once certain conditions are satisfied. *See State v. Harbor*, 2011 WI 28, ¶ 49, 333 Wis. 2d 53, 797 N.W.2d 828 (stating that although "frustration of the purpose" of the sentence is no longer required to establish a new factor, a fact that does frustrate the purpose is likely to constitute a new factor if it was unknown to the court at the time). In addition, the sentencing court would not have included that provision if it knew it was unlawful, so at least that portion of the sentence would be different if the sentencing court was aware of the limitations on its authority. Therefore, this is highly relevant to the sentence.

The sentencing court clearly didn't know that it lacked this authority. It would be absurd to argue that the sentencing court imposed a sentence with a provision that called for it to engage in an act that it knew to be beyond its authority. Therefore, it is clear that the limitations this Court recognized in *Dowdy* were unknown to the sentencing court.

Therefore, the Court should remand the matter so the circuit court can exercise its discretion to determine whether to

discharge Schwind. Whether a new factor justifies sentence modification is left to the discretion of the circuit court. *State v. Noll*, 2002 WI App 273, ¶ 7, 258 Wis. 2d 573, 653 N.W.2d 895. The circuit court declined to engage in any new factor analysis because it found that the absence of a DOC petition was a procedural bar. (54:12) ("I believe that based on *Dowdy* and the statutor—the statute—in question, that the court is not allowed to reduce his period of probation."). Because this is a discretionary determination, and the circuit court didn't exercise its discretion due to what it perceived as a procedural bar, the proper remedy is remand. *Noll*, 258 Wis. 2d 573, ¶ 7.

CONCLUSION

For these reasons, as well as those previously stated, Schwind requests that the Court reverse the Order denying his motion for early termination of probation and remand so that the circuit court can apply a new factor analysis to his motion.

Dated this 9th day of October, 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 1,064 words.

Dated this 9th day of October, 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 9th day of October, 2017.

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