RECEIVED
10-04-2018
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

---

Appeal No. 2017AP000141-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DENNIS L. SCHWIND,

Defendant-Appellant-Petitioner.

---

# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

---

Review of a Decision of the Court of Appeals, District II, Affirming an Order of the Walworth County Circuit Court, the Honorable James L. Carlson and the Honorable David M. Reddy, Presiding

---

WALTER LAW OFFICES LLC
108 West Court Street
Elkhorn, WI 53121
Tel. (262) 743-1290
Fac. (262) 723-7715

By: Andrew R. Walter
State Bar No. 1054162

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Wisconsin Cases

Wisconsin Statutes



Other

## ISSUES PRESENTED

I. Does a circuit court have inherent power to modify its judgment in a criminal case to reduce the length of probation?

The court of appeals declined to address this issue.

II. Assuming a circuit court has inherent power to modify its judgment in a criminal case to reduce the length of probation, what limits, if any, apply to the exercise of that power?

The court of appeals relied on its decision in *State v. Dowdy*, 2010 WI App 158, ¶¶ 31-32, 330 Wis. 2d 444, 792 N.W.2d 230, *aff'd on other grounds*, 2012 WI 12, 338 Wis. 2d 565, 808 N.W.2d 691, to hold that if a circuit court has this inherent power, it is subject to the same limitations that apply to a circuit court's inherent power to modify sentences.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are appropriate in this case.

## STATEMENT OF THE CASE

The issues in this case are pure questions of law: whether a circuit court has inherent power to modify its own judgment to reduce the length of probation, and what standard should apply to the exercise of that power. These questions do not depend on

the facts of this case and will impact probationers convicted of serious felonies as well as those convicted of the petty misdemeanors. Schwind's position is that whether to exercise those powers in any given case should lie in the sound discretion of the circuit court.

Nevertheless, it must be conceded that Schwind has been convicted of very serious offenses. In 2001, he was convicted of numerous acts of sexual assault of the same child, including incest. (R.21-22; App. at 1-4). The circuit court imposed twenty-five years of probation.[1] 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.) His probation agent testified Schwind should be discharged. (R.49:6.) However, the agent said he could not petition for discharge because of a policy set forth "by the State." (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.)

The circuit court denied Schwind's motion. It said it lacked statutory authority to reduce his probation term because Wis.

[1] All convictions were in Walworth County Case No. 2000CF407. The circuit court entered one judgment of conviction for an imposed and stayed sentence, (R.22; App. at 1), and another for a 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).

Stat. § 973.09(3)(d) requires a DOC petition. (R.49:12.) Section 973.09(3)(d) states:

> 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 the judge who imposed the sentence would rotate onto the case again that August.[2] (R.49:14.)

Schwind filed a second motion 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.

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.*

The court of appeals affirmed. *State v. Dennis L. Schwind,* No. 2017AP000141-CR (Ct. App. Feb. 14, 2018). On appeal, Schwind asked the court to hold that a circuit court has inherent power to modify its judgments to reduce the length of probation. Schwind's Court of Appeals Brief at 5-7. Additionally, he asked the court to hold that circuit courts may exercise that power for

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

cause. *Id.* The court of appeals held that if a circuit court has that inherent power it is subject to the same limitations as the power to modify sentences, that is: clear mistake, a new factor, or undue harshness or unconscionability. Slip op. at 3. Schwind did not establish any of those, thus the court of appeals affirmed.

## STANDARD OF REVIEW

Whether a circuit court has inherent authority to modify its judgments presents a question of law that is reviewed de novo. *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 747, 595 N.W.2d 635 (1999).

## ARGUMENT

At issue is the power of the courts to modify their own judgments when necessary to accomplish their judicial functions. The courts cannot effectively exercise their function of imposing remedies in criminal cases if they are powerless to act when they discover they have imposed an illegal remedy, imposed a remedy without the benefit of essential information, when the chosen remedy is altered by clerical error, or when adherence to an order would obstruct the purposes of that order. Therefore, just as courts have inherent power to modify sentences, they must have inherent power to modify their judgments to reduce the length of probation.

The standard that guides a circuit court's exercise of that power should be designed to effectuate the purposes of a probationary order. After all, a probation order that is not suited to achieve the goals of probation, or that even obstructs them, is not an accomplishment of the judicial function of imposing probation. Probation and sentencing have different purposes, so a standard designed to serve the purposes of sentencing is unsuitable. Instead, the Court should hold that a circuit court may exercise the inherent power to modify its judgment to reduce the length of probation when doing so would advance probation's purposes of rehabilitating the defendant while protecting society.

## I. A circuit court has inherent power to modify its judgment in a criminal case to reduce the length of probation.

Circuit courts possess inherent powers, which are those powers that are necessary for the judiciary to accomplish its constitutionally and legislatively mandated functions. *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995). Imposing sentence and imposing probation are both judicial functions. *State v. Horn*, 226 Wis. 2d 637, 648, 594 N.W.2d 772 (1999). This Court has already held that a circuit court has inherent power to modify its sentences. *See Hayes v. State*, 46 Wis. 2d 93, 101, 175 N.W.2d 625 (1970) *overruled on other grounds by State v. Taylor*, 60 Wis. 2d 506, 523, 210 N.W.2d 873 (1973). The court has never explicitly applied that power to probation modification, but it should make that clear now. The concerns that led the Court to recognize the inherent power to modify sentences also apply to probation. In addition, the power is essential because sometimes adhering to the original judgment can obstruct the purposes of probation. Further, the Court at least suggested the existence of this power in *Hayes.* Finally, like sentence modification, a circuit court's inherent power to modify its own judgment to reduce the length of probation does not unduly interfere with the legislative or executive branches functions regarding probation.

Our constitution expressly grants powers to courts, and it also provides them with inherent, implied, and incidental powers ("inherent powers"). *Friedrich*, 192 Wis. 2d at 16. A power is inherent if it is necessary to enable the judiciary to accomplish its constitutionally and legislatively mandated functions. *Id.* One area courts assert these powers is "ensuring that the court

functions efficiently and effectively to provide the fair administration of justice." *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999).

Within that area, the Court has held that a circuit court has inherent power to modify a sentence. *See Hayes*, 46 Wis. 2d at 101. A circuit court may exercise that power in three situations: (1) to correct a clerical error or illegal sentence; (2) when there is a "new factor" that was unknown but highly relevant to the purpose of the sentence; and (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.

The same concerns that necessitate that power also necessitate the power to reduce a probation term. A clerical error can undermine a court's intent regardless of whether the judgment imposes sentence or probation. A judgment that imposes an illegal remedy, whether it be an illegal sentence or illegal probation term, is not an accomplishment of the judicial function. And when a circuit court learns of a new factor, the inability to modify the order to reflect the newly discovered information frustrates the purposes of probation as much as it could frustrate the purposes of sentencing. Thus, a circuit court needs at least as much power to modify a probation term as it has to modify a sentence.

There is an additional need for this power with regard to probation orders. Courts impose probation to rehabilitate the defendant while protecting society. *State v. Sepulveda*, 119 Wis. 2d 546, 554, 350 N.W.2d 96 (1984) (stating that the dual purposes of probation are rehabilitation and protection of the public). Sometimes rigid adherence to the judgment can obstruct those

goals. For example, a probationer may not be able to accept a promotion that would require interstate travel or be forced to resign when an employer transfers them to another state. *See* Interstate Commission for Adult Offender Supervision, ICAOS Rules § 3.101 (2018) (limiting interstate travel without the receiving state's approval). Employment is an integral part of the rehabilitation process. *See County of Milwaukee vs. LIRC*, 139 Wis. 2d 805, 821, 407 N.W.2d 908 (1987). In these situations, the probation order could actually obstruct the purposes of probation. If the defendant has already been rehabilitated, or if employment is the only remaining rehabilitative need, reduction may be necessary to accomplish the purpose of the probation order.

Further, the absence of this power generates absurd results. Under Wis. Stat. § 973.09(3)(a), circuit courts have the power to remove all conditions of probation. If the probationer has been rehabilitated, a court could remove all conditions of probation to avoid wasting supervisory resources. This isn't supervision, it is merely the illusion of supervision. It undermines the integrity of supervision and the public's confidence in it.

Additionally, the holding in *Hayes* is broad enough to establish this power. The Court held that in a criminal case "a trial court may exercise its inherent power to modify its judgments after the execution of sentence has commenced and the term ended." *Hayes*, 46 Wis. 2d at 101. No court has modified that language to state that the power to modify judgments does not include the probation portion of a judgment. *See State v. Dowdy*, 2012 WI 12, ¶ 5, 338 Wis. 2d 565, 808 N.W.2d 691 (declining to address this issue). In fact, the Court subsequently approved the use of this power to modify a probation term when

it held that a court could "modify" a probation term to a three-year prison sentence based on subsequent developments that frustrate the purpose of the probation order. *See Sepulveda*, 119 Wis. 2d at 556-59 (holding a circuit court could modify a probation term to a prison term because the defendant was not admitted to an inpatient treatment facility as the probation order required).

As is the case with sentence modification, a circuit court's inherent power to modify its own judgments to reduce the length of probation does not unduly interfere with the powers of the legislative or executive branches. Probation and probation revocation are within the shared powers of the legislative, executive, and judicial branches of government. *State v. Horn*, 226 Wis. 2d 637, 648, 594 N.W.2d 772 (1999). "Like sentencing, the legislature has constitutional authority to offer probation as an alternative to sentencing, the judiciary has authority to impose probation, and the executive branch has authority to administer probation." *Id.* As in sentencing, a court must be able to modify its judgment when necessary to effectively accomplish its function of imposing a proper remedy in a criminal case. Such a modification in an area of shared power does not interfere with the powers of the other branches any more than sentence modification.

In sum, circuit courts have the power to modify their own judgments in this manner. It is necessary at least for the same reasons that courts need the power to modify sentences, and it is necessary to accomplish the judicial function of imposing probation. However, this power is subject to reasonable limitations. Thus, the Court should determine the limits of that power.

## II. The Court should hold that a circuit court may, in its discretion, exercise the inherent power to modify its judgment to reduce the length of probation when doing so will advance the defendant's rehabilitation and the protection of society.

Because an inherent power is one that is necessary to accomplish a judicial function, that function's purpose should dictate the standard for exercising that power. The Court followed that logic when it developed the standards for sentence modification; it chose a standard designed to effectuate the purposes of sentencing. Thus, to fashion a standard for probation modification, the Court should seek a standard that advances the purposes of imposing probation. Sentencing and probation have different purposes, so the sentence modification standard is unsuitable. Thus, the Court should overrule the court of appeals decision in *State v. Dowdy*, 2010 WI App 158, ¶¶ 31-32, 330 Wis. 2d 444, 792 N.W.2d 230 (holding that if courts have inherent power to reduce the length of probation it is limited in the same manner as sentence modification) *aff'd on other grounds*, 2012 WI 12, 338 Wis. 2d 565, 808 N.W.2d 691. Another option is to hold that a court can exercise this power when there is "cause," meaning that reducing the length of probation will advance the defendant's rehabilitation and the protection of society. That is the better option, because it defines the parameters of the power but still provides enough flexibility to allow courts to ensure that rigid adherence to probationary orders does not obstruct the purposes of probation.

The Court has provided several principles to follow in deciding when a circuit court may exercise its inherent power to modify its judgment in a criminal case. First, there must be some reasonable limitations on a circuit court's inherent power to

modify its judgments. *Hayes*, 46 Wis. 2d at 105. Second, those limitations exist "in the interest of promoting justice in the administration of criminal law." *Id.* at 101.

Those limitations should further the purpose served by the judicial function. The limitations on sentence modification exist because finality is essential to achieve the purposes of sentencing. Sentencing has four primary purposes: deterrence, retribution, rehabilitation, and segregation. *State v. Loomis*, 2016 WI 68, ¶ 96, 371 Wis. 2d 235, 881 N.W.2d 749. Finality is essential for deterrence and retribution. *Dowdy*, 338 Wis. 2d 565, ¶¶ 99-100 (Abrahamson, C.J., dissenting) (*citing Crochiere*, 273 Wis. 2d 57, ¶¶ 12, 23). Thus, a restrictive standard designed to achieve finality was essential to achieve the purposes of sentencing.

However, finality is not necessary to accomplish the purposes of probation. Probation has different purposes than sentencing. Those purposes are: (1) rehabilitation; and (2) protecting the public without imprisoning the defendant. *State v. Gray*, 225 Wis. 2d 39, 68, 590 N.W.2d 918 (1999). Finality is unimportant; Wis. Stat. § 973.09(3)(a) gives the court continuing power to extend probation or modify its conditions, and a defendant can reject probation at any time, *State v. McCready*, 2000 WI App 68, ¶ 6, 234 Wis. 2d 110, 608 N.W.2d 762.

Because probation has different purposes than sentencing, the Court should not transplant the "new factor" limitation from sentence modification onto a circuit court's inherent power to reduce the length of probation. In sentence modification rehabilitation is not a new factor. *State v. Kluck*, 210 Wis. 2d 1, 7-8, 563 N.W.2d 468 (1997). But rehabilitation is the purpose of

probation. Because rehabilitation is the goal, any standard that requires courts to ignore rehabilitation is inappropriate.

The "for cause" standard is best suited to effectuate that purpose. This standard is flexible because flexibility is necessary to achieve the purposes of probation. *See Prue v. State*, 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974) ("The trial court should have leeway if probation is to be an effective tool of rehabilitation."). The American Bar Association advises that "the success of probation as a correctional tool is in large part tied to the flexibility within which it is permitted to operate." ABA, *Standards Relating to Probation*, § 3.3 (comment) (1970). Thus, the ABA recommends that courts should have the authority to terminate probation at any time and should exercise that power when the offender has made a good adjustment and supervision is no longer needed. ABA, *Standards Relating to Probation* § 4.2 (1970).

This flexibility is necessary to respond to changing circumstances in the ongoing process of rehabilitation. For example, an already rehabilitated probationer may not be able to accept admission to a prestigious university in another state because of travel restrictions. In that case rehabilitation might be better served by early termination, particularly if the term is nearing its end or the defendant has been rehabilitated. Flexibility is also important to protect the public. For example, a victim who garnishes the wages of a probationer pursuant to a civil judgment might benefit from early termination of probation when that probation would cause the defendant to lose a job that requires interstate travel. As these examples demonstrate, in some cases adherence to the probation order can obstruct the purposes of that order. For that reason, the inherent power to

reduce the length of probation is necessary to accomplish the purpose of probation.

In addition, the courts' ability to accomplish the purposes of probation more generally is obstructed by the waste of leaving already rehabilitated offenders on probation. Rehabilitated offenders no longer present a risk to society. Leaving them on probation diverts scarce resources away from more dangerous offenders. It also wastes the public's funds. It costs $8.51 per day for each offender on supervision, and in 2017 the Department of Community Corrections budgeted over $213,000,000 for operations but collected only $7,896,110 from offenders. Division of Community Corrections, 2017 A Year in Review 15 (2018).[3]

In sum, flexibility is essential to ensure that a court's probationary order does not obstruct the purposes of probation. The sentence modification standard cannot provide the necessary flexibility because it is designed to promote finality as the goals of sentencing require. But the cause standard would allow a court to ensure that rigid adherence to an order does not obstruct the purpose of that order. Therefore, the Court should hold that a circuit court may, at its discretion, exercise the inherent power to modify its judgment to reduce the length of probation when doing so will advance the rehabilitation of the defendant and the protection of society.

## CONCLUSION

For the reasons stated above, Schwind respectfully requests that the Court overrule the court of appeals and hold that circuit courts have the inherent authority to reduce or

[3] These figures include amounts for all offenders on supervision with the Division of Community Corrections rather than just probationers

terminate a probationary term and that they have discretion to exercise that authority for cause. Schwind further requests that the Court vacate the order denying Schwind's motion for reduction of the probation term and remand the matter to the circuit court so that the circuit court can exercise its discretion in deciding whether to exercise its inherent power to modify the judgment to reduce the length of Schwind's probation.

Dated this 3rd day of October, 2018.

_____
Andrew R. Walter
Attorney for Defendant-Appellant
State Bar No. 1054162

## 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 3,584 words.

Dated this 3rd day of October, 2018.

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162

## 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 3rd day of October, 2018.

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162

## 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 3rd day of October, 2018.

_____

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162