RECEIVED
12-14-2018
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.

REPLY BRIEF 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

ARGUMENT

I. Circuit Courts Possess Inherent Authority to Reduce the Length of Probation.

The circuit courts' inherent authority to modify sentences is essential to the judiciary's role of fairly administering justice. *See Hayes v. State*, 46 Wis. 2d 93, 105, 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). Yet the State argues that the judiciary must surrender that authority to the legislature in probation cases. There are three reasons the Court should reject such an extreme restraint on the judiciary's power to fairly administer justice.

First, as in sentencing, the circuit courts' power to modify a judgment of probation is essential to the fair administration of justice. The State's argument goes so far as to strip circuit courts of the ability even to correct errors, such as an erroneous exercise of discretion, a violation of a defendant's due process right to be sentenced on accurate information, a sentencing decision tainted by ignorance of a new factor, and to correct and excessive or otherwise illegal judgment of probation.

Second, the separation of powers doctrine provides no reason to distinguish the judiciary's inherent authority to modify a sentence from its inherent authority to modify a probation order. The respective roles of the judiciary and legislature are the same in probation as they are in sentencing.

Finally, when the legislature granted circuit courts a new statutory authority to reduce a probation term under Wis. Stat. § 973.09(3)(d), it could not and did not restrict the judiciary's inherent authority to modify judgments. The statute does not relate to the judiciary's inherent authority, it subjects the Department of Corrections' authority to discharge a probationer,

which was unilateral under the prior statute, to judicial approval. Therefore, the statute and the judiciary's inherent authority operate harmoniously.

A. This Inherent Authority Is Essential For Courts To Fairly Administer Justice

Imposing probation is a judicial function. *State v. Horn*, 226 Wis. 2d 637, 645-48, 594 N.W.2d 772 (1999). Circuit courts have those inherent powers that are necessary "to enable the judiciary to accomplish its constitutionally or legislatively mandated functions. *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995). Those inherent powers include those powers that are necessary for circuit courts to "fairly administer justice." *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999).

Circuit courts need this authority in order to impose probation consistent with the fair administration of justice. The State's contrary argument relies on a flawed view of the duty to fairly administer justice, which the State repeatedly minimizes as merely "disposing" of cases. Resp. Br. at 14, 21, 22, 24. The fair administration of justice requires more than disposing cases, it requires an exercise of discretion to choose a disposition aimed at protecting the public and the defendant's rehabilitation. *See McCleary v. State,* 49 Wis. 2d 263, 271-74, 182 N.W.2d 512 (1971) (holding the record of sentencing must show an exercise of discretion). Justice is not fairly administered when a court imposes probation based on inaccurate information. Justice is not fairly administered when a court imposes probation while unaware of a new factor. Justice is not fairly administered by an illegal judgment of probation.

This authority is essential to remedy due process violations. A defendant has a due process right to be sentenced based on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1. Without inherent authority to modify a probation term, courts will be unable to fix a violation without first satisfying the criteria of Wis. Stat. § 973.09(3)(d). Courts will need permission from the Department of Corrections. Wis. Stat. § 973.09(3)(d)1. In sum, they would not be able to fairly administer justice.

Inherent authority to modify probation based on a new factor is also essential to the fair administration of justice. Ignorance of a new factor impedes a court's ability to impose a just sentence. A criminal disposition imposed without knowledge of new factor can be unjust. *State v. Harbor*, 2011 WI 28, ¶ 51, 333 Wis. 2d 53, 797 N.W.2d 828. It may be unnecessarily long, for example if a court imposes a long period of probation to accommodate treatment or restitution but then learns the treatment program is shorter or that the defendant paid restitution before sentencing. It is unfair to the public if a court's ignorance of essential information causes it to impose too short of a probation term. *See State v. Sepulveda*, 119 Wis 2d 546, 350 N.W.2d 96 (1984) (holding that circuit court could "modify" probation order to impose prison because defendant's inability to obtain admission to residential treatment constituted a new factor). This power is essential to ensure justice for all parties.

In addition, the State leaves the courts no inherent authority to modify a probation term in excess of the maximum. While Wis. Stat. § 973.09(2m) automatically reduces an excessive term, the circuit courts' authority to correct an illegal order does not depend on the legislature. *See Hayes*, 46 Wis. 2d at 101-02 (holding a court has authority to correct an illegal sentence at any time). The Court should not adopt an opinion stating that the

legislature controls the circuit courts' authority to modify illegal judgments.

These arguments demonstrate that the State's argument is so broad that it eliminates the courts' authority to correct errors. As Schwind has already argued, the fair administration of justice also requires that courts have authority to modify probation judgments so that the probation judgments they impose further the purposes of probation. *See* Opening Br. at 8-10. The State's argument would prevent courts from fairly administering justice when modification effectuates the purposes of probation. For all of these reasons, the inherent authority to modify a judgment of probation is essential to the fair administration of justice.

B. The Separation of Powers Doctrine Provides No Reason The Judiciary Must Surrender Its Inherent Authority In Probation Cases.

Like sentencing, probation involves power shared by the judiciary and the legislature. *State v. Horn*, 226 Wis. 2d 637, 645-48, 594 N.W.2d 772 (1999). As in sentencing, the legislature has the authority to offer probation and the judiciary has the authority to impose probation. *Id.* at 648. There is no reason that the judiciary, possessing inherent authority to modify sentences, must cede that authority to the legislature in probation.

The State claims that *Hayes* distinguished probation modification from sentence modification. Resp. Br. at 27. It did not, it merely noted that it had previously misconstrued a Supreme Court case regarding a federal court's authority to remove an existing sentence and replace it with probation. *Hayes*, 46 Wis. 2d at 101. The issue in that case, whether a federal probation statute allowed a court to impose probation after first imposing a sentence, is irrelevant to whether

Wisconsin circuit courts have inherent authority. *See United States v. Murray*, 275 U.S. 347, 356-358 (1928).

The State also argues that probation is purely statutory whereas the power to prescribe penalties for crimes was not exclusively a legislative power at the time our constitution was adopted. State's Brief at 27 (citing *State v. Borrell*, 167 Wis. 2d 749, 769-70, 482 N.W.2d 883 (1992)). *Borrell* holds that the legislature can provide courts with power to determine parole eligibility dates because prescribing sentences was not purely a legislative function at the time of the constitution. 167 Wis. 2d at 769-70. Unlike *Borrell*, *Hayes* did not merely return a power courts had at the time the constitution was adopted. When the constitution was adopted the common law did not permit courts to modify a sentence after execution of the sentence or expiration of their term. *Hayes*, 46 Wis. 2d at 100. Further, the common law and common law penalties were abolished in 1955, so at the time of *Hayes* probation and sentencing fell within the same power-sharing arrangement that exists now.

Neither *Hayes* nor any of this Court's other opinions have determined whether the judiciary must cede its sentence modification powers in probation cases. In *Drinkwater v. State,* 69 Wis. 2d 60, 230 N.W.2d 126 (1975), the Court rejected the State's attempt to extend *Hayes* to give courts inherent authority to impose a sentence after revocation consecutive to an existing sentence. It did not decide if courts have inherent authority to modify a judgment of probation. *Id.* at 66 n. 1. The Court has declined to extend *Hayes* to a sex crimes commitment because the procedure under the sex crimes act left the court no sentencing discretion. *State v. Machner*, 101 Wis. 2d 79, 83, 303 N.W.2d 633 (1981). In contrast, the Court later suggested that circuit courts have inherent authority to modify probation when there is a new factor that frustrates the purpose of the probation order. *See Sepulveda*, 119 Wis. 2d at 559-60.

Further, the judiciary's power to impose probation includes the power to modify probation. In the context of sentencing, the Court has said that "a circuit court's power to impose a sentence embraces the court's power to modify the sentence." *State v. Stenklyft*, 2005 WI 71, ¶ 91, 281 Wis. 2d 484, 697 N.W.2d 769 (Abrahamson, C.J., concurring in part and dissenting in part in an opinion that, along with an opinion by Crooks, J., represents the majority of the Court).

To summarize, if there is a reason the judiciary must cede its inherent power to modify sentences when it comes to probation, that reason is not found in the area of separation of powers. Further, the Court has never held that the judiciary must surrender its inherent authority in probation cases.

C. Wis. Stat. § 973.09(3)(d) Does Not Affect the Circuit Courts' Inherent Authority to Modify a Judgment of Probation

The legislature has the authority to offer probation and the judiciary has authority to impose probation. *Horn*, 226 Wis. 2d at 648. In an area of shared power, neither branch may unduly burden or substantially interfere with the powers of the other. *State v. Friedrich*, 192 Wis. 2d 1, 14, 531 N.W.2d 32 (1995). If Wis. Stat. § 973.09(3)(d) eliminates the circuit courts' inherent powers to modify probation, then it substantially interferes with the circuit courts' ability to fairly administer justice. However, the statute does not relate to the courts' inherent authority, instead it increases the courts' statutory authority over probation. Therefore, the statute and the courts' inherent authority co-exist harmoniously.

If the statute restricts the circuit courts' inherent authority to reduce the length of probation then it impedes their ability to impose probation fairly and effectively. The courts must be able correct an errant exercise of discretion, reliance on inaccurate information, or the imposition of illegal probationary terms. *See*

supra subsection I(A). Any statute which prevents the judiciary from correcting these errors substantially interferes with the judiciary's duty to fairly administer justice. Similarly, a restriction on the judiciary's power that prevents courts from ensuring that they impose probation orders that serve the purposes of probation would substantially interfere with both the judiciary's power to impose probation and its duty to fairly administer justice.

However, Wis. Stat. § 973.09(3)(d) and the circuit courts' inherent authority are co-existent because the statute does not relate to the judiciary's inherent authority. In the most recent change to the statute, the legislature added to the judiciary's statutory authority to reduce the length of probation. The prior version gave the Department of Corrections unilateral statutory authority to end probation. Wis. Stat. § 973.09(3)(d) (2009-10). The legislature amended it to limit the executive branch's authority and gave the circuit courts new statutory authority to approve or reject the Department's request. Wis. Stat. § 973.09(3)(d). In sum, the statute does not affect the courts' inherent authority, it expands their statutory authority. *Cf. State v. Trujillo*, 2005 WI 45, ¶ 23 n. 13, 279 Wis. 2d 712, 694 N.W.2d 933 (stating that change to sentencing law which gave courts statutory authority to reduce sentences did not affect the courts' inherent authority), *abrogated on other grounds by Harbor*, 2011 WI 28, ¶ 47.

Therefore, there are two options for reducing the length of probation. The Department of Corrections can petition the courts to exercise statutory authority. Probationers, the State, or a court on its own motion, can appeal to the circuit courts' inherent authority.

II. The Court Should Adopt The Cause Standard.

The State argues that the cause standard is more difficult to apply than the new factor standard, does not promote finality, and will burden the courts. First, the cause standard merely requires the same type of discretionary decision that courts would make as the second prong of the new factor standard. Second, regardless of this case the probation statute makes finality impossible. Finally, the cause standard will not burden court calendars because only the most deserving cases will get a hearing, the rest can be denied without a hearing.

It is easier to apply the cause standard. The new factor standard doesn't actually avoid the cause standard, it just makes it the second part of the litigation. *See Harbor*, 2010 WI 28, ¶ 37 (explaining that once a defendant establishes a new factor the circuit court then determines whether that new factor "justifies modification of the sentence."). The new factor standard just adds another prong to litigate and appeal. That additional prong creates confusion and an abundance of appellate litigation. *See id.*, ¶¶ 46-48 (resolving conflict between two lines of cases with varying interpretations of the new factor prong).

The cause standard is more workable. Courts have been applying a cause standard in the probation context since 1969. *See* Wis. Stat. § 973.09(3) (1969). As noted, courts already apply a similar discretionary standard in new factor cases. *See Harbor*, 2010 WI 28, ¶ 37.

As to finality, the legislature adopted a probation system that makes finality unattainable. A court can modify the terms and conditions of probation at any time for cause. Wis. Stat. § 973.09(3)(a). A court can extend the length of probation at any time for cause. *Id.* The Department of Corrections can petition to discharge most probationers who have served half of their term. Wis. Stat. 973.09(3)(d). A probationer can refuse probation at any

time for any reason. *State v. McCready*, 2000 WI App 68, ¶ 6, 234 Wis. 2d 110, 608 N.W.2d 762. Finality comes only with discharge or revocation.

The State speculates that a cause standard will "open the floodgates of sentenced defendants petitioning for meritless modification." Resp. Br. at 39. But meritless motions can be denied without a hearing. Even motions that have merit can be denied if the court finds, in its discretion, that the facts stated in the motion, even if true, do not establish cause to modify probation. *See Harbor*, 2011 WI 28, ¶¶ 62-63 (holding circuit court had discretion to deny defendant's motion for sentence modification without a hearing regardless of whether it established a new factor). Only the most deserving cases will make it to a hearing.

There are other reasons to doubt the State's floodgate argument. First, filing this type of motion is risky, it might uncover violations that lead to an extension or more burdensome conditions. Second, most probationers will strategically wait for the Department to petition since those petitions are usually approved. Third, probationers can already file motions to modify the conditions of probation under Wis. Stat. § 973.09(3)(a) and that has not opened any floodgates. Finally, some circuit courts have previously operated under the assumption they possessed this authority. *State v. Dowdy*, 2012 WI 12, ¶ 81, 338 Wis. 2d 565, 808 N.W.2d 691 (Abrahamson, C.J., dissenting).

In conclusion, the cause standard is tested, workable, relevant to probation, and will take up a court's valuable time in only the most deserving cases. Therefore, the Court should adopt the cause standard.

III. If The Court Agrees That Circuit Courts Have Inherent Authority to Reduce The Length of Probation, Then Regardless Of What Standard Applies The Court Should Remand The Matter To The Circuit Court.

The State argues that if the Court applies any standard other than the sentence modification standard it should remand the case for further proceedings in the circuit court. Resp. Br. at 44-45. The State argues this is required because the circuit court did not exercise its discretion, and this discretionary decision must be made by the circuit court. Resp. Br. at 45. Schwind agrees, but remand is appropriate regardless of what standard the Court chooses, including the sentence modification standard. As the State notes, the exercise of inherent authority to modify a sentence is left to the discretion of the circuit court, and the circuit court denied Schwind's motion solely because he could not meet the statutory criteria. Thus, it did not conduct a new factor analysis or address any other standard that would govern a court's exercise of its inherent authority, so it is proper to remand so that the circuit court can exercise its discretion. *See State v. Noll*, 2002 WI App 273, ¶ 7, 258 Wis. 2d 573, 653 N.W.2d 895.

CONCLUSION

For these reasons, as well as those stated previously, Schwind respectfully requests that the Court overrule the court of appeals and 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. Regardless of what standard applies, 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 14th day of December, 2018.

_____

Andrew R. Walter
Attorney for Defendant-Appellant-Petitioner
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 2,949 words.

Dated this 14th day of December, 2018.

_____

Andrew R. Walter
Attorney for the Defendant-Appellant-Petitioner
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 14th day of December, 2018.

_____

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