

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017 AP 677-CR and 678-CR

STATE OF WISCONSIN,

Plaintiff-Respondent ,

vs.

LANCE P. HOWARD,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

**Appealed from Sentencing After Revocation Entered in the Circuit
Court of Sheboygan County, Wisconsin on November 6, 2012 and
reconsidered on May 14, 2014, the Honorable Judge Terence Bourke,
presiding; and the Denial for a new Sentencing Hearing on
January 7, 2017, the Honorable Rebecca Persick presiding.
Trial Court Case Nos. 2012 CM 411/412**

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STATEMENT OF THE ISSUE

Whether Defendant-Appellant Lance P. Howard's due process rights were violated when the Circuit Court denied his request for a new sentencing hearing in an Order dated January 7, 2017.

The trial court answered: **NO**

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument is necessary in this case because the issues raised on appeal will be fully developed in the briefs submitted to the Court. The state also believes that publication is not necessary because the issues involve no more than the application of well-settled law to a common fact situation.

STATEMENT OF THE CASE

On June 7, 2012, the Defendant-Appellant Lance P. Howard entered "guilty" pleas to a total of three criminal misdemeanor charges (with repeater enhancers) in Sheboygan County Case Nos. 2012 CM 411 and 2012 CM 412. There was a single conviction for Misdemeanor Theft as a repeater in 2012 CM 411, and convictions for Misdemeanor Battery and Bail Jumping, both as repeaters, in 2012 CM 412. An additional charge of Disorderly Conduct as a repeater was dismissed and read

in to 2012 CM 412. An additional charge of Misdemeanor Bail jumping as a repeater was dismissed and read in to 2012 CM 411.

Sheboygan County Branch 4 Circuit Judge Terence Bourke withheld sentence in both cases and placed Howard on concurrent terms of probation in the cases, with some conditional jail time imposed in Case No. 2012 CM 412.

Howard's probation was revoked for both cases in short order, and on November 6, 2012, Judge Bourke sentenced Howard to consecutive terms of one year Initial Confinement and one year Extended Supervision for the single count of Misdemeanor Theft as a repeater in 2012 CM 411 and for the count of Misdemeanor Battery as a repeater in 2012 CM 412. On the same date, Judge Bourke also sentenced Howard to a one-year term of Initial Confinement followed by one year of Extended Supervision for the remaining count of Misdemeanor Bail Jumping as a repeater in 2012 CM 412, but ordered that the sentence for Bail Jumping be served concurrently with the sentence imposed for the Battery conviction. Sentence credit was calculated at the time, but Howard subsequently moved for a rehearing on the sentences, and a hearing was held on May 14, 2014 before Judge Bourke. The Judge recalculated the sentence credit in the cases, to reflect 572 days credit on 2012 CM 411 and 678 days credit on 2012 CM 412 (Def. Appendix 112, line 10). At the same time, Judge Bourke reviewed his rationale for his original Sentences After Revocation

imposed on November 6, 2012, reaffirmed his intent that the sentences be served consecutively.

“As I look at the original sentence and the reasons why I did it, again, because of your failure on probation, because of your repeated criminal activity, I thought going to prison was about the only option I had.” (Def. Appendix 116, lines 4-8)

Judge Bourke particularly reemphasized the concurrent/consecutive nature of the sentences in the two cases, noting that

“on Count Number 1 of 12 CM 412, which is the battery, I’ll sentence you to one year of initial confinement followed by one year of extended supervision. And on Count 3, which is the bail jumping, I will sentence you to one year of initial confinement followed by one year of extended supervision. Those will run concurrent with each other but consecutive to that in 12 CM 411.” (Def. Appendix 116, lines 14-20)

Howard appealed the sentence, the case was sent back to the trial court for filing a post-conviction motion, and a scheduling conference concerning the sentence and sentence credit was conducted on December 13, 2016 by Judge Rebecca Persick, who had succeeded Judge Bourke in Branch 4 following Judge Bourke’s retirement. The discussion of the issues ranged far afield, and included whether Howard’s original sentence after revocation had been “vacated” on May 14, 2016, as seemed recorded on the Judgment of Conviction, or whether the original Judgment of Conviction had simply been “amended” to conform to what the actual mathematical calculation of the sentence credit should have been in the first place.

(Def. Appendix p. 121-128) Judge Persick found that the latter held true, and that therefore Howard had suffered no due process deprivation as a result of the process which had unfolded in Branch 4 concerning his sentences after revocation for the two misdemeanor cases. Judge Persick signed an Order on January 7, 2017 formally denying Howard's Motion for a new Sentencing Hearing.

This appeal followed, raising for the first time the claim that the sentences after revocation initially imposed by Judge Bourke for these two misdemeanors should have been ordered to run concurrently rather than consecutively.

ARGUMENT

Nothing in the record supports Howard's current claim that Judge Bourke intended to impose concurrent sentences in both 2012 CM 411 and 2012 CM 412. The record, in fact, is clear to the contrary.

As a threshold matter, however, the State asks the Court of Appeals to first consider whether Lance Howard effectively forfeited or abandoned his right to appeal these cases when he fled the Court's jurisdiction and committed new crimes in another state.

It has recently come to this attorney's attention that while Howard's appeal of these two misdemeanors has been pending in one form or another since 2013, requiring exorbitant expenditures of time and consideration on behalf of both the Court of Appeals and the attorneys for both parties, Howard had absconded

from supervision on December 23, 2015 and left Wisconsin, only to be charged with his first Indiana felony on January 19, 2016.

In support of this new information, I am attaching a memo dated December 19, 2017 from Probation & Parole Agent Damon Boustany verifying both the date that Howard absconded from supervision, and the fact that had he stayed in Wisconsin, he would have discharged from his only remaining case, 2012 CM 412, on June 13, 2016. (Appendix A-1) I am also attaching a collection of Indiana circuit court documents provided to me by email from Mackenzie Ash, the Chief Administrative Officer in the Office of the Madison, Indiana County Prosecutor. (Appendix A-2 through A-19) These documents establish that Howard was charged with one count of felony battery in Madison County, Indiana on January 19, 2016 and then two more felony counts (“criminal confinement”—which appears to be the functional equivalent of Wisconsin’s “false imprisonment” statute—and another felony battery) from an incident date of July 4, 2016. A plea agreement was reached which called for Howard to plead to both of the later counts, and the first case was dismissed. Howard was subsequently sentenced on June 5, 2017 to several years in prison and is currently incarcerated in the State of Indiana.

Under these circumstances, I submit that Howard effectively forfeited or abandoned his appeal of the sentences in these two misdemeanor cases.

In the event that the Court of Appeals prefers to see this appeal to a conclusion on the issues, the State answers as follows:

Howard has raised but a single issue on appeal: that the trial court erred by imposing consecutive sentences when it should have ordered that Howard receive concurrent sentences (Def. Brief p. 4).

The record in this case indicates with clarity that Judge Terence Bourke fully intended to make two of Howard's sentences after revocation run consecutively while the sentence for the third charge would be concurrent.

Howard did not provide the District Attorney's office with a transcript of the first sentencing hearing after Howard's probation was revoked, occurring on November 6, 2012. It is my understanding that the transcript has been sent with the rest of the case file from the Sheboygan County Clerk of Courts to the Court of Appeals. Nonetheless, a review of electronic records kept by the Wisconsin Circuit Court Access Program notes with no ambivalence or equivocation that Judge Bourke sentenced Howard in 2012 CM 412 to a term of Initial Confinement followed by Extended Supervision on the charge of Misdemeanor Battery as a repeater to run consecutively to the term of Initial Confinement followed by Extended Supervision imposed in 2012 CM 411. The sentence for the second misdemeanor charge in 2012 CM 412 was to run concurrently. At the subsequent rehearing

on May 5, 2014 during which Judge Bourke recalculated the sentence credit for the two cases, he put his reasons on the record as to the prison sentences and his reasons for imposing them consecutively. Essentially, Judge Bourke's reasons boiled down to Howard's previous criminal history and demonstrated lack of compliance with the rules of probation.

“As I look at the original sentence and the reasons why I did it, again, because of your failure on probation, because of your repeated criminal activity, I thought going to prison was about the only option I had. And I'll make the same sentence knowing you're going to get out in a month. ... On Count Number 1 of 12 CM 412, which is the battery, I'll sentence you to one year of Initial Confinement followed by one year of Extended Supervision. And on Count 3, which is the bail jumping, I will sentence you to one year of initial confinement followed by one year of Extended Supervision. Those will run concurrent with each other *but consecutive to that in 12 CM 411 (emphasis added)*.” (Def. Appendix p. 116, lines 4-20).

Judge Bourke's reasoning at the May 5, 2014 sentencing rehearing was both thoughtful and sound, and gives no reason to believe that he somehow intended to make Howard's sentences all run concurrently.

For this reason, the State respectfully asks the Court of Appeals to deny Howard's request to convert his consecutive sentences in 2012 CM 411 and 412 to

concurrent terms, effectively discharging him from the need to return to Wisconsin to complete his remaining Extended Supervision when his sentence is fulfilled in Indiana.

CONCLUSION

Howard effectively abandoned his right to challenge the sentences in these cases when he fled from the Court's jurisdiction and committed new crimes in the state of Indiana. However, there is also no reason in the record of these cases to think that Judge Bourke improperly or inadvertently imposed consecutive prison terms, justifying adjusting the sentences to run concurrently. The State respectfully asks the Court of Appeals to affirm the sentences of the trial court.

Respectfully submitted, this 22th day of December, 2017.

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CERTIFICATION

I certify that this brief and appendix conform to the rules contained in Wis. Stats., § 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch; 13 point body text; 11 point text for quotes and footnotes; leading of min. 2 points; maximum of 60 characters per full line of body text. The length of this brief is 2,252 words.

I further certify that filed with this brief, either as a separate document or as part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat § 809.19(3)(b).

I further certify that the electronic copy of this brief is identical to the paper copy of the brief which has been filed with the Wisconsin Court of Appeals.

I also 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 22nd day of December, 2017.

Signed:

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APPENDIX OF PLAINTIFF-RESPONDENT

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