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2019AP000432-CR

WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF DANE COUNTY
HONORABLE WILLIAM HANRAHAN

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
AMANUEL A. AYELE,
DEFENDANT-APPELLANT.

BRIEF AND ARGUMENT OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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ISSUE PRESENTED FOR REVIEW

- I. Whether the circuit court has the authority to create a conviction for the nonexistent crime of domestic abuse by agreeing to waive the domestic abuse surcharge but refusing to remove the phrase ‘domestic abuse assessment’ from the judgment of conviction.

Mr. Ayele was convicted in this case of misdemeanor battery. At the plea and sentencing hearing, the circuit court agreed to waive the domestic abuse assessment, pursuant to Wis. Stats. §973.055(4). However, the judgment of conviction failed to reflect that the domestic abuse assessment had been waived.

Mr. Ayele’s counsel wrote a letter to the court requesting that the apparent clerical error be corrected and the judgment of conviction amended to conform to the court’s oral ruling at the plea and sentencing hearing. The court rejected the request by letter to counsel, stating it did not have such authority.

Mr. Ayele filed a motion for postconviction relief, providing the court with legal authority to correct an erroneous judgment of conviction. The court denied the motion, stating that it had agreed to waive the surcharge but had not agreed to strike ‘domestic abuse

assessments' from the judgment of conviction. Mr. Ayele filed a timely Notice of Appeal.

STATEMENT OF REASONS FOR ORAL
ARGUMENT AND PUBLICATION

Mr. Ayele does not request oral argument and does not recommend that the opinion be published.

STATEMENT OF THE CASE

On July 14, 2017, a criminal complaint was filed in Dane County Circuit Court, charging Amanuel A. Ayele with one count of Misdemeanor Battery, Use of a Dangerous Weapon, with Domestic Abuse Assessments, contrary to Wis. Stats. §940.19(1), a class A misdemeanor; and one count of Criminal Damage to Property, Use of a Dangerous Weapon, with Domestic Abuse Assessments, contrary to Wis. Stats. §943.01(1), a class A misdemeanor.¹

Mr. Ayele subsequently entered a plea to count one (battery); count two (criminal damage) was dismissed. The dangerous weapon enhancer was also dismissed. The court withheld sentence and placed Mr. Ayele on probation for a period of two years.

¹ All references to Wisconsin Statutes are to the 2015-2016 Edition unless otherwise specified.

Pursuant to defense counsel's request, the court agreed to waive the domestic abuse assessment, pursuant to Wis. Stats. §973.055(4). However, the judgment of conviction did not reflect the court's oral agreement at the plea/sentencing hearing to waive the assessment.

Appellate counsel wrote a letter to the court, requesting that the erroneous judgment of conviction be amended to conform to the court's oral ruling. The letter requested that the domestic abuse assessment be removed from the judgment of conviction. The court replied by letter, denying the request and stating that while it had statutory authority to waive the domestic abuse surcharge, it had no authority to redact a public record in such a manner.

Appellate counsel filed a motion for postconviction relief, providing the court with authority under Wisconsin law for the court to correct a clerical error in the judgment of conviction. The motion also provided authority for the proposition that conflicts between a court's oral ruling and a written judgment of conviction must be resolved according to the oral ruling of the court. The motion requested that the court remove all references to the domestic abuse assessment in the judgment of conviction, to conform to the court's oral statements at the plea/sentencing hearing.

The circuit court denied the motion. The order denying the motion stated that the defendant could not avoid the collateral consequences of a conviction “of a crime of domestic abuse.” The court’s order advised Mr. Ayele that “the best way not to have a conviction for domestic abuse....is to not commit a crime of domestic abuse.”

Mr. Ayele subsequently filed a timely Notice of Appeal.

STATEMENT OF FACTS

On July 12, 2017, City of Madison Police Officer Lindsey, along with other officers, was dispatched to 6833 Chester Drive #C in the City of Madison. (DOC 1:2; Appendix B:2). Dispatch had received a call from A.A.G. in which he stated that his son was trying to kill him. (DOC 1:2:Appendix B:2). Upon arrival, Officer Lindsey made contact with A.A.G. (DOC 1:2; Appendix B:2). A.A.G. had a laceration on his arm and his shirt was torn; he was yelling, crying, and having difficulty breathing. (DOC 1:2; Appendix B:2).

A.A.G. advised that on the previous day, his son, identified as the defendant, Amanuel A. Ayele, had broken the television in their apartment. (DOC 1:2; Appendix B:2). A.A.G. reported that today the internet was not working, so he called Charter to come and fix it. (DOC 1:2; Appendix B:2). A.A.G. stated that after

Charter left, the defendant came downstairs with a metal pipe. (DOC 1:2; Appendix B:2). The defendant began to strike the television with the pipe, and then began hitting A.A.G. “all over.” (DOC 1:2; Appendix B:2). A.A.G. fell to the ground, and the defendant began kicking him. (DOC 1:3; Appendix B:3). When A.A.G. attempted to call 911, the defendant kicked the phone out of his hand. (DOC 1:3; Appendix B:3). A.A.G. was eventually able to flee and run to the apartment complex office and call 911. (DOC 1:3; Appendix B:3).

Officer Joswiak arrived at the apartment and the defendant was taken into custody. (DOC 1:3; Appendix B:3).

APPELLANT’S ISSUE ON APPEAL

- I. Whether the circuit court has the authority to create a conviction for the nonexistent crime of domestic abuse by agreeing to waive the domestic abuse surcharge but refusing to remove the phrase ‘domestic abuse assessment’ from the judgment of conviction.

A. Summary of the Argument

Mr. Ayele submits that the circuit court does not have the authority to waive the domestic abuse assessment surcharge but have it remain on the

judgment of conviction as a descriptor of the offense of conviction.

In essence, the circuit court has attempted to create a conviction for the nonexistent crime (in Wisconsin) of domestic abuse. Although the court agreed to waive the domestic abuse assessment at the plea and sentencing hearing, the court refused to remove it from the judgment of conviction. In its order denying Mr. Ayele's motion for postconviction relief, the circuit court expressly stated that although it had "waived the requirement that the defendant pay the domestic abuse surcharge" under Wis. Stats, §973.055(4), the court would not strike the term from the record or the judgment of conviction.

Mr. Ayele respectfully submits that there is no authority for the circuit court's action. There is no separate offense of "domestic abuse" in the Wisconsin statutes. The domestic abuse assessment, set forth in Wis. Stats. §973.055(1), is a monetary surcharge that attaches to a defendant when certain criteria are met. It is not an adjective that functions to describe the underlying offense, such as battery.

At the plea and sentencing hearing in the present case, the circuit court agreed to waive the assessment – the requirement that Mr. Ayele pay the surcharge – under the authority provided in Wis. Stats. §973.055(4).

Once the assessment is waived, there is no basis for its appearance on the judgment of conviction. There is no authority in Wis. Stats. §973.055 or anywhere else that permits the court to use “domestic abuse” as an adjective to describe the underlying offense and impose “collateral consequences.” However, it is clear from the order denying the motion for postconviction relief that the circuit court intended such a result.

B. Standard of Review

The issue of judicial authority is a question of law that that the reviewing court reviews independently. State v. Schwind, 2019 WI 48, ¶11 (2019); State v. Henley, 2010 WI 97, ¶29, 328 Wis. 2d 544, 787 N.W.2d 350 (2010).

C. Relevant Law

Regarding judgments of conviction, “the law is clear that a court has the power to correct clerical errors at any time.” State v. Prihoda, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (2000). That authority also extends beyond clerical errors. State v. Prihoda, 2000 WI 123, ¶22, 239 Wis. 2d 244, 618 N.W.2d 857 (2000); Mikrut v. State, 212 Wis. 2d 859, 868, 569 N.W.2d 765 (Ct. App. 1997).

Where a conflict exists between a court's oral pronouncement of sentence and a written judgment, the oral pronouncement controls; any uncertainty is to be

resolved in favor of the defendant. State v. Perry, 136 Wis.2d 92, 114-115, 401 N.W.2d 748 (1987).

D. Argument

The present case presents a somewhat unusual set of facts and resulting legal issue. At the plea and sentencing hearing, the circuit court agreed to waive the domestic abuse assessment (DOC 70:17; Appendix C:17), but then, declined to remove the actual language from the judgment of conviction. (DOC 59:1; Appendix E:1)(DOC 61:12; Appendix G:1-2).

In the initial letter to the circuit court, Mr. Ayele had assumed that the inclusion of the ‘domestic abuse assessment’ language on the judgment of conviction was a clerical error in light of the clear waiver of the surcharge at the plea and sentencing hearing. Accordingly, Mr. Ayele asked the court to correct the error. (DOC 58:1; Appendix D:1). In its letter reply, the circuit court stated that it did not have the authority to “redact public records” in the manner requested by Mr. Ayele. (DOC 59:1; Appendix E:1).

In the motion for postconviction relief, Mr. Ayele directly addressed the reasoning set forth in the court’s letter. Mr. Ayele advised that he was not making a broad request for the redaction of a public record.(DOC 60:2; Appendix F:2). Mr. Ayele provided the circuit court with caselaw authority indicating that the court

has the authority to amend a judgment of conviction, including the authority to correct clerical errors. (DOC 60:2; Appendix F:2). Mr. Ayele provided persuasive authority in the form of an unpublished opinion that the court could specifically amend a judgment of conviction to remove references to the domestic abuse “enhancer.” (DOC 60:3; Appendix F:3). Mr. Ayele also provided caselaw authority that when there is a conflict between an oral pronouncement and a written judgment of conviction, the oral pronouncement controls. (DOC 60:3; Appendix F:3).

In its order denying the motion for postconviction relief, the circuit court maintained that although it waived payment of the surcharge, it did not order that the term “domestic abuse surcharge” be stricken from the record. (DOC 61:1; Appendix G:1).

The circuit court appeared to operate under the premise that in Wisconsin the circuit court can essentially create something called a “crime of domestic abuse” that exists separately from the “domestic abuse surcharge.” In its order denying Mr. Ayele’s motion for postconviction relief, the circuit court expressly distinguished between paying the surcharge and having a conviction for a crime of domestic abuse. (DOC 61:1-2; Appendix G:1-2). Under the circuit court’s theory, the court could waive payment of the surcharge but still

include the words “domestic abuse assessments” on the judgment of conviction.

Mr. Ayele would respectfully submit that the circuit court’s view of the law is erroneous. Mr. Ayele submits that the court could either waive the surcharge or impose the assessment, but that it cannot do both. There is no assessment apart from the surcharge. In essence, the circuit court has attempted to create a conviction for a “crime of domestic abuse” apart from the application of the surcharge.

In its order denying the postconviction motion, the circuit court made it fairly clear that Mr. Ayele should suffer the collateral consequences of committing a crime of domestic abuse apart from not having to pay the surcharge by including the language “domestic abuse assessments” on the judgment of conviction. (DOC 61:2; Appendix G:2). However, Mr. Ayele submits that there is no authority for the circuit court’s action.

1. Plea and sentencing hearing

The parties gathered for the plea and sentencing hearing on August 2, 2018. At the outset, the state advised the court that the state would be moving to dismiss the domestic abuse assessment. (DOC 70:4; Appendix C:4). The circuit court wondered aloud what it means to dismiss the domestic abuse assessment.

(DOC 70:5; Appendix C:5). The court stated that it did not know how that would change the fact that the contents of the complaint indicated that Mr. Ayele had battered his father, a person with whom he resided. (DOC 70:5; Appendix C:5).

The court reviewed the statute, and concluded that Wis. Stats. §973.055(1) was mandatory – “it’s a factual finding.” (DOC 70:7; Appendix C:7). Significantly, the circuit court noted that “it’s not an enhancer. It enhances nothing. It’s a surcharge, simply a surcharge.” (DOC 79:7; Appendix C:7).

The hearing moved on, and the court went through the plea colloquy, eventually adopting the joint sentencing recommendation by withholding sentence and placing Mr. Ayele on probation for two years. (DOC 70:15; Appendix C:15). Near the end of the hearing, defense counsel proposed that the court waive the domestic abuse assessment pursuant to Wis. Stats. §973.055(4). (DOC 70:15-16; Appendix C:15-16). The court agreed – “Yeah. I’ll waive that surcharge.” (DOC 70:16; Appendix C:16).

2. Letter and postconviction motion

However, the judgment of conviction did not reflect the fact that the court had waived the surcharge. It appeared that the \$100 surcharge had been imposed, and the words “domestic abuse assessments” were

attached to the description of count one. (DOC 52:1; Appendix A:1).

Appellate counsel wrote a letter to the court, asking the court to correct what appeared to be a clerical error. (DOC 58:1; Appendix D:1). The court responded in a letter, denying the request. (DOC 59:1; Appendix E:1). The court indicated that although it had statutory authority to waive the surcharge, it was unaware of any authority that would allow the court to redact public records in the manner requested. (DOC 59:1; Appendix E:1).

Mr. Ayele filed a motion for postconviction relief, arguing that the court does have the authority to amend a judgment of conviction for the purpose of correcting a clerical error. (DOC 60:2; Appendix F:2).

The motion provided caselaw authority that in the event of a conflict between a written judgment of conviction and an oral ruling/pronouncement, the oral ruling controls. (DOC 60:2-3; Appendix F:2-3). The motion also provided persuasive authority in the form of an unpublished opinion that the court has the specific authority to strike the domestic abuse “enhancer” from a judgment of conviction. (DOC 60:2-3; Appendix F:2-3). The motion asserted that the reference to the assessment prejudices the defendant, and requested that the circuit court correct the judgment of conviction and remove all

references to the domestic abuse assessment. (DOC 60:3-4; Appendix F:3-4).

The circuit court denied the motion without a hearing. In its order denying the motion, the court indicated that although it had waived payment of the surcharge, it had not ordered that the term “domestic abuse surcharge” be stricken from the record. (DOC 61:1; Appendix G:1). The circuit court chided Mr. Ayele, advising him that if he did not want to suffer the collateral consequences of a conviction for a crime of domestic abuse, he should not commit crimes of domestic abuse. (DOC 61:2; Appendix G:2).

3. The decision of the circuit court is erroneous, and the action taken by the circuit court is not authorized by Wisconsin law or inherent judicial authority.

Mr. Ayele respectfully submits that the circuit court simply does not have the authority to include the phrase “domestic abuse assessments” on the conviction portion of the judgment of conviction after agreeing to waive the domestic abuse assessment/surcharge. To the extent that the circuit court had a change of heart after its oral pronouncement at the plea and sentencing hearing, the oral pronouncement controls.

Perhaps the circuit court was dissatisfied with the fact that in Wisconsin, there is no specific crime of domestic abuse. (DOC 70:6; Appendix C:6). As the circuit court noted, the domestic abuse assessment is a surcharge.² (DOC 70:7; Appendix C:7).

Since the domestic abuse assessment is nothing more than a surcharge, there is no basis for including the term on the judgment of conviction after the court has waived payment of the surcharge. The circuit court maintains that it is proper for that language to be included in the conviction description portion of the judgment of conviction. (DOC 61:1; Appendix G:1). Mr. Ayele disagrees.

In State v. Bush, 185 Wis.2d 716, 725, 519 N.W.2d 645 (Ct.App.1994), the court of appeals made it clear that a defendant's status as a repeater is not an aspect of the crime of conviction. The domestic abuse assessment is not a status, but a surcharge. Similarly, however, it is not an aspect or element of the offense of conviction. Once that surcharge/assessment has been waived, there is no legal basis for its inclusion on Mr. Ayele's judgment of conviction.

² Or as the court of appeals characterized it in a prior decision, it is a court cost that may be waived. See State v. Baker, 2005 WI App 45, ¶12, 280 Wis. 2d 181, 694 N.W.2d 415 (Ct.App.2005).

Respectfully, it is not up to the circuit court to make a determination that Mr. Ayele should suffer collateral consequences associated with domestic abuse. The circuit court made its intent clear in its order denying Mr. Ayele's motion.

The circuit court cites the case of Koll v. Department of Justice, 2009 WI App 74, 317 Wis. 2d 753, 769 N.W.2d 69 (Ct.App 2009). The circuit court describes the Koll opinion as one that "takes direct aim at those who would seek to avoid the collateral consequences of a conviction for a crime of domestic abuse." (DOC 61:2; Appendix G:2). Mr. Ayele submits that the Koll v. DOJ majority opinion does not support the court's decision in the present case.

The Koll v. DOJ case involved an application of the Federal Gun Control Act. In that case, the Department of Justice denied the defendant's application for a handgun permit. The basis for the denial was the defendant's prior conviction for "non domestic" disorderly conduct. The court of appeals concluded that, based on the Supreme Court decision in United States v. Hayes, 555 U.S. 415, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), the Department of Justice had correctly concluded that the defendant had been convicted of a misdemeanor crime of domestic violence *within the meaning of the Federal Gun Control Act*.

Koll v. Department of Justice, 2009 WI App 74, ¶1, 317 Wis. 2d 753, 769 N.W.2d 69 (Ct.App 2009)(Emphasis added). The court of appeals relied on the underlying charging documents rather than the description of the offense (i.e. non domestic disorderly conduct) to uphold the determination made by the Department of Justice. Koll v. Department of Justice, 2009 WI App 74, ¶1, 317 Wis. 2d 753, 769 N.W.2d 69 (Ct.App 2009).

However, the present case is not about any specific collateral consequence, and does not involve the application of the Federal Gun Control Act or a determination by the Department of Justice. The majority opinion in Koll v. DOJ certainly does not stand for the proposition that a circuit court, after waiving the domestic abuse assessment pursuant to Wis. Stats. §973.055(4), may nonetheless attach that phrase as a description of the offense of conviction on the judgment of conviction itself.

Contrary to the circuit court's view, this case is not about whether Mr. Ayele committed a crime of domestic abuse or whether Mr. Ayele should suffer some collateral consequences for his offense. Rather, this is a case about a circuit court purporting to have the authority to, in effect, create a crime of domestic abuse when none exists in the Wisconsin Statutes. The circuit court provided no authority for such action.

Notably, the concurring opinion in Koll v. DOJ makes the following statement:

Circuit courts are not empowered to label crimes in an attempt to help a party avoid collateral consequences. It is for the legislature to decide if different types of disorderly conduct should be treated differently. Koll v. Department of Justice, 2009 WI App 74, ¶15, 317 Wis. 2d 753, 769 N.W.2d 69 (Ct.App 2009)(P.J. Anderson, concurring opinion).

We can apply the flipside of that statement directly to the present case – circuit courts are not empowered to label crimes *in an attempt to ensure* that a party suffers collateral consequences. As the concurring opinion observed, it is up to the legislature to decide if certain types of battery should be treated differently. As it applies to this case, the only thing the legislature has done to treat battery that occurs between parties with a domestic relationship differently is to impose a \$100 surcharge on the person who commits the offense.³ The legislature has not created a separate crime of domestic abuse, and it is not up to the circuit court to try to create one by labelling the offense on the judgment of conviction after waiving the surcharge.

³ In addition, the legislature has provided that individuals who have been assessed that surcharge on multiple occasions within a specified period of time may have their sentences enhanced. See Wis. Stats. §939.621; 2017-2018 Edition. However, that provision is not applicable to the present case.

The circuit court expressly waived the domestic abuse assessment/surcharge at the plea and sentencing hearing. (DOC 70:16; Appendix C:16). Under the law in Wisconsin, the circuit court's oral pronouncement at the plea and sentencing hearing is controlling. State v. Perry, 136 Wis.2d 92, 114-115, 401 N.W.2d 748 (1987). The circuit court's insistence that despite its clear waiver the judgment of conviction should describe the offense of conviction as one of "domestic abuse" is without legal authority. The single case cited by the circuit court does not support the court's action.

Although a circuit court has certain inherent authority, such authority does not extend to a legislative-type action that has the effect of creating an offense of domestic abuse. See State v. Schwind, 2019 WI 48, ¶2, ¶12 (2019)(inherent authority of courts consists of only those powers that are necessary for the judiciary to accomplish its constitutionally mandated functions and preserve its role as a coequal branch of government). The domestic abuse assessment, like probation, is a statutory creation. The statute that provides the circuit court with the authority to waive the assessment, Wis. Stats. §973.055(4), does not provide for inclusion of the assessment on the judgment of conviction after waiver, and the purported power to go beyond the statute is not necessary for courts to

accomplish their constitutionally mandated functions.

See State v. Schwind, 2019 WI 48, ¶2 (2019).

The circuit court’s action in the present case does not fall within the three areas in which Wisconsin courts have generally exercised inherent authority - (1) to guard against actions that would impair the powers or efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice.⁴ See State v. Schwind, 2019 WI 48, ¶16 (2019).

Indeed, inherent authority of the court derives from the principle of separation of powers; defined too broadly, “we risk infringing upon the authority of the legislative or executive branches by replacing their policy preferences with our own.” See State v. Schwind, 2019 WI 48, ¶14 (2019). “We continue construing the judiciary’s inherent authority narrowly.” State v. Schwind, 2019 WI 48, ¶33 (2019)

⁴ The fair administration of justice is not a license for the circuit court to do whatever it thinks is fair at any given point. See State v. Henley, 2010 WI 97, ¶75, 328 Wis. 2d 544, 787 N.W.2d 350 (2010).

In the present case, the circuit court appears to be acting in a manner that elevates its own policy preferences over those of the legislature in terms of how to treat criminal offenses that involve acts of domestic violence or abuse. The legislature has expressed its policy preference in Wis. Stats. § 973.055, and has indicated how such offenses are to be treated in Wisconsin. A monetary assessment/surcharge shall be imposed unless it is expressly waived. Consistent with the legislative policy expressed in Wis. Stats. § 973.055, once that assessment has been waived, there is no basis for the words “domestic abuse assessments” to appear on Mr. Ayele’s judgment of conviction.

Neither Wisconsin caselaw nor the circuit court’s inherent authority provide a basis for the circuit court’s action in this case. Under Wisconsin law, the circuit court does not have the authority to waive the domestic abuse assessment pursuant to Wis. Stats. §973.055(4) but include that term as a descriptor of the offense on the judgment of conviction.

CONCLUSION TO BRIEF AND ARGUMENT

Mr. Ayele respectfully requests that this court reverse the denial of his postconviction motion and order the circuit court to amend the judgment of conviction to remove all references to the domestic

abuse assessment, consistent with the court's oral pronouncement at the plea and sentencing hearing.

Dated this 23rd day of May, 2019.

Respectfully submitted,

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Certification of Brief Compliance with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4105 words.

Electronic Filing Certification pursuant to Wis. Stats. §809.19(12)(f).

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Certification of Appendix Compliance with Wis. Stats.
§ Wis. Stats. 809.19(2)(a).

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an Appendix that complies with Wis. Stats. § 809.19(2)(a) and contains: (1) a table of content; (2) the findings or opinions of the trial court; (3) a copy of any unpublished opinion cited under Wis. Stats. § 809.23(3)(a) or (b); and (4) portions of the record essential to the understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 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 juveniles and parents of juveniles, with a notation that the portion of the record has been so reproduced as to preserved confidentiality and with appropriate references to the record.