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STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT IV
Case Nos. 2019AP1832-CR & 2019AP1833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. YAKICH,

Defendant-Appellant.

Appeal from Decisions and Commitment Orders
in Waupaca County Circuit Court,
the Honorable Vicki L. Clussman, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Mr. Yakich's two NGI¹ commitment orders cannot run consecutive to one another.

The circuit court lacks the authority to order one NGI commitment order consecutive to another.

The state's argument relies solely upon *State v. C.A.J.*, 148 Wis. 2d 137, 434 N.W.2d 800 (Ct. App. 1988). In doing so, it acknowledges the version of Wis. Stat. § 971.17 at issue in *C.A.J.* is not the same as the version at issue here. Wis. Stat. § 971.17(4) (1987-88), compared with Wis. Stat. § 971.17(1)(a)-(d) (2017-18). However, the state argues the changes to § 971.17 “implicitly refer[]” to Wis. Stat. § 973.15(2) - which allows criminal sentences to run consecutive to one another - and the legislature “implicitly approved” of *C.A.J.*'s holding that the maximum commitment order involves consecutive terms.

To be clear, § 973.15(2), does not apply to NGI commitment orders. It states, “the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive *to any other sentence* imposed at the same time or previously.” (Emphasis added).

¹ “NGI” is an acronym that refers to instances where criminal defendants are found not guilty by reason of mental disease or defect and subsequently committed under Wis. Stat. § 971.17.

NGI commitment orders are not sentences. *State v. Harr*, 211 Wis. 2d 584, 587, 568 N.W.2d 307 (Ct. App. 1997). Therefore, § 973.15(2) does not directly apply to NGI commitment orders and no similar statute authorizes the trial court to order consecutive NGI commitment orders. “Trial courts have only such sentencing powers as the legislature has granted.” *Harr*, 211 Wis. 2d at 587 (citing *Grobarchik v. State*, 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981)).

Section 973.15(2) also does not “implicitly” apply to the current version of § 971.17 because *C.A.J.* was decided prior to the changes the legislature made to § 971.17.

First, the changes to § 971.17 were substantive as related to this issue. The court addressed § 973.15 in *C.A.J.* It stated,

Under sec. 973.15(2), Stats., the sentencing court may impose in multiple offense situations consecutive sentences if it so desires. To construe “maximum period” to include multiple offenses and the possibility of consecutive terms is consistent with the rules of statutory interpretation.

C.A.J., 148 Wis. 2d at 140 (quotation in original). The current statute does not include the term “maximum period,” as it did when *C.A.J.* was decided.

The version at issue in *C.A.J.* stated,

When the *maximum period* for which a defendant could have been imprisoned if convicted of the offense charged has elapsed, subject to s. 53.11 and the credit provisions of s. 973.155, the court shall order the defendant discharged subject to the right of the department to proceed against the defendant under ch. 51. If the department does not proceed, the court may order such proceeding.

Wis. Stat. § 971.17(4) (1987-88). (emphasis added).
The relevant portion of § 971.17 now states,

(1) Commitment period. (a) *Felonies committed before July 30, 2002.* Except as provided in par. (c), when a defendant is found not guilty by reason of mental disease or mental defect of a felony committed before July 30, 2002, the court shall commit the person to the department of health services for a specified period not exceeding two-thirds of the maximum term of imprisonment that could be imposed against an offender convicted of the same felony, including imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

(b) *Felonies committed on or after July 30, 2002.* Except as provided in par. (c), when a defendant is found not guilty by reason of mental disease or mental defect of a felony committed on or after July 30, 2002, the court shall commit the person to the department of health services for a specified period not exceeding the maximum

term of confinement in prison that could be imposed on an offender convicted of the same felony, plus imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

(c) *Felonies punishable by life imprisonment.* If a defendant is found not guilty by reason of mental disease or mental defect of a felony that is punishable by life imprisonment, the commitment period specified by the court may be life, subject to termination under sub. (5).

(d) *Misdemeanors.* When a defendant is found not guilty by reason of mental disease or mental defect of a misdemeanor, the court shall commit the person to the department of health services for a specified period not exceeding two-thirds of the maximum term of imprisonment that could be imposed against an offender convicted of the same misdemeanor, including imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

Wis. Stat. § 971.17(1)(a)-(d) (2017-18).

The applicable section in this case is § 971.17(1)(b). It requires the court to enter an NGI commitment order “for a specified period not exceeding the maximum term of confinement in prison.”

The relevant amended language - “maximum term of confinement in prison” - is defined by section 973.01, where the legislature describes bifurcated

sentences. A bifurcated sentence is described as “a sentence that consists of a ‘term of confinement in prison’ *followed by* a term of extended supervision.” Wis. Stat. § 973.01(2) (emphasis added). The legislature chose “term of confinement in prison” to describe an inmate’s initial confinement and it does not include extended supervision.

The legislature chose language with specific statutory meaning. An NGI commitment order can be as long as the maximum initial confinement possible for that offense. It did not include consecutive terms of initial confinement.

The legislature added language about sentence enhancers, “plus imprisonment authorized by any applicable penalty enhancement statutes.” This means the legislature specifically authorized the court to order a commitment term that does not exceed the potential initial confinement for the criminal charge plus any penalty enhancers. Yet, the legislature said nothing about consecutive NGI commitment orders. The legislature chose precise language and chose not to include the option for consecutive NGI commitment orders.

Statutory interpretation focuses primarily on the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, ¶ 44, 681 N.W.2d 110. If the meaning of the statute is plain, the inquiry ordinarily stops. *Id.* at ¶ 45.

However, the plain meaning of the statute is also discerned from context and purpose. *Id.* at ¶ 46. “Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.* If scope, context, and purpose are ascertainable from the text and structure of the statute itself then it is relevant to a plain-meaning interpretation. *Id.* at ¶ 48.

The court, however, should not consult extrinsic sources, such as legislative history, unless the statute is ambiguous. *Id.* at ¶ 50. When the statute is unambiguous, legislative history may be used only “to confirm or verify a plain-meaning interpretation.” *Id.* Still, the court cannot disregard the plain, clear words of the statute. *Id.* at ¶ 46.

The plain, clear words of the statute here do not include consecutive NGI commitment orders, even though the legislature carved out clear language regarding penalty enhancers.

Thus, the current version of § 971.17 does not encompass the rationale used in *C.A.J.* and therefore did not implicitly refer to § 973.15(2).

If the legislature wanted to allow consecutive NGI commitment orders, it would have said so. This is especially true given reviewing courts in Wisconsin have stated non-sentences cannot run consecutively to sentences or non-sentences without specific

statutory authority. Prior to the changes to § 971.17, the courts repeatedly stated § 973.15(2) does not apply to non-sentences, such as NGI commitments. *See Harr*, 211 Wis. 2d at 587-88 (sentence cannot run consecutive to an NGI commitment); *State v. Woods*, 173 Wis. 2d 129, 137, 496 N.W.2d 144 (Ct. App. 1992) (adult sentence cannot run consecutive to juvenile disposition); *State v. Szulczewski*, 209 Wis. 2d 1, 7, 561 N.W.2d 781 (Ct. App. 1997) (“a sentence cannot be ordered consecutive to an NGI commitment order”); *State v. Schwebke*, 2001 WI App 99, ¶¶ 27-29, 242 Wis. 2d 585, 627 N.W.2d 213, *affirmed on other grounds*, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666 (probation terms cannot run consecutive to one another).

Therefore, as explained here and in the brief-in-chief, the court erred when it ordered consecutive commitment terms, and as such, the commitment order should run concurrently.

CONCLUSION

Mr. Yakich respectfully requests that this court reverse the circuit court's imposition of consecutive terms of commitment in 18-CF-169 and 18-CF-301 and remand to the circuit court with instructions to amend the commitment orders to reflect that they run concurrent to one another.

Dated this 2nd day of March, 2020.

Respectfully submitted,

Electronically signed by Katie York

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,483 words.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 2nd day of March, 2020.

Signed:

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