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COURT OF APPEALS

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2020AP100-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACK B. GRAMZA,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING EARLY RELEASE ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Section 346.65(2)(am)6. of the Wisconsin Statutes requires a circuit court to impose a minimum of three years of confinement on a person who is convicted of OWI-7th. Section 302.05 (3)(c)1.–3. requires a circuit court to order early release from prison within 30 days of the date it receives notice that an inmate has successfully completed the substance abuse program (SAP).

Jack Gramza was sentenced to three years of confinement for OWI-7th. Six months later the circuit court received notice that he had completed the SAP. Is Gramza required to serve the mandatory minimum of three years before release under the SAP statute?

The circuit court answered that Gramza was required to serve the mandatory minimum notwithstanding his successful completion of the SAP.

This court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument; the briefs adequately set forth the issues. The State requests publication because this case presents a question of law that is a recurring issue in state circuit courts.

INTRODUCTION

This is a statutory interpretation case involving two statutes that contain mandatory language for the circuit court. In factual situations such as Gramza's, the two mandates to the circuit court cannot both be followed at the same time. Under one of the statutes, he must serve a three-year mandatory minimum sentence. Under the other, he must be released within a month after he completes a treatment program even though he still has two and a half years left on

his mandatory minimum sentence. There is limited guidance from the statutory language, the legislative history, or the case law on how to apply the two statutes in this context.

The State concludes that the statutes permit Gramza's release only after he has served the mandatory minimum sentence for his offense. This analysis is based on the rules requiring courts to give a statute its "full, proper, and intended effect" and to harmonize statutes in a way that serves each statute's intended purpose. In *State v. Williams*,[1] the supreme court explained how the OWI graduated penalty structure with increasing mandatory minimums protects the public by keeping repeat OWI offenders confined for increasing periods of time. The graduated penalty structure is strong evidence that the legislature intended for mandatory minimum sentences to be fully served. If OWI mandatory minimum sentences are subject to being shortened by SAP early release, it would result, in some cases, in less time served on an OWI-7th than on an OWI-3rd. Legislative materials also reflect the legislative intent that a person sentenced to the mandatory minimum should actually serve it.

The only way to give full, proper, and intended effect to the mandatory minimum statute is to require Gramza to serve the mandatory minimum sentence and to allow his SAP release only upon completion of that sentence. Doing so does not prevent Gramza from participating in SAP treatment. The State's interpretation allows each statute to be construed in a manner that serves its intended purpose.

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[1] *State v. Williams*, 2014 WI 64, ¶ 6, 355 Wis. 2d 581, 852 N.W.2d 467.

STATEMENT OF THE CASE

The statutes at issue.

This case concerns a person convicted of OWI-7th and the application of three statutes to his prison sentence.

The mandatory minimum statute states that when sentencing a person convicted of an OWI-7th, OWI-8th, or OWI-9th, a circuit court "shall impose a bifurcated sentence under s. 973.01 and the confinement portion of the bifurcated sentence imposed on the person shall be not less than 3 years." Wis. Stat. § 346.65(2)(am)6. An earlier version of this statute—one that did not include the words "shall impose a bifurcated sentence"—was construed by the supreme court in *Williams*. Although the question in that case was whether probation was permitted for these offenses, the court's discussion of the statute's history and purpose sheds light on the question in this case.

The other two statutes concern a program known in the statutes as both the Earned Release Program and the Substance Abuse Program.[2] A circuit court exercises its discretion at sentencing to determine whether a defendant is eligible for the program while in prison. Wis. Stat. § 973.01(3g).

Upon a person's "successful completion" of the program, the statute requires three things:

1) "the department shall inform the court that sentenced the inmate";

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[2] *See* Wis. Stat. § 302.05 (Wisconsin substance abuse program) and Wis. Stat. § 973.01(3g) (earned release program); *see also* Brennan, Michael B., *The Pendulum Swings: No More Early Release*, 84 Wis. Lawyer 4 (Sept. 2011) (reviewing the history of Wisconsin sentencing law with particular focus on the early-release provisions of 2009 Act 28 and 2011 Act 38).

2) "the court shall modify the inmate's bifurcated sentence" by "reduc[ing] the term of confinement in prison portion of the inmate's bifurcated sentence" and "lengthen[ing] the term of extended supervision imposed" such that the total length of the bifurcated sentence originally imposed does not change and such that the inmate is released "within 30 days of the date on which the court receive[d] the information from the department"; and

3) "the department shall release the inmate within 6 working days" of receiving the court's order.

Wis. Stat. § 302.05 (3)(c)1.–3.

Gramza's mandatory minimum sentence.

Gramza pled guilty and was convicted of OWI-7th. (R. 37:5, 9.) The conviction carries a maximum penalty of twelve and a half years' imprisonment; it also is subject to a mandatory bifurcated sentence with a mandatory confinement portion of at least three years. (R. 2:1.) Pursuant to the plea agreement, the State recommended the mandatory minimum; the defense made the same recommendation. (R. 37:2, 9.) The circuit court followed the recommendation and imposed the mandatory minimum sentence. (R. 37:29.)

Gramza's eligibility for and successful completion of the SAP/ERP.

The sentencing court also made Gramza eligible for the Substance Abuse Program (SAP)/Earned Release Program (ERP). (R. 24:2; 37:29.) The circuit court imposed no conditions on Gramza's eligibility for SAP. Gramza was remanded to custody on the day of sentencing, March 27, 2019. (R. 24:2; 37:30.)

Six months later, on October 1, 2019, the Department of Corrections (DOC) filed a letter in the circuit court informing the court that Gramza had "completed the Earned

Release Program" and requesting that the circuit court authorize DOC to release Gramza and convert his remaining confinement time to extended supervision. (R. 27.) It enclosed an Amendment to Judgment of Conviction and Order for the court's signature. (R. 27.) The letter noted the requirement that Gramza be released within 30 days of the date the court received notice that he completed the program. (R. 27.)

The parties' arguments.

The circuit court sought briefing from DOC and the State on the question of its "authority under the law to sign an order releasing a person mandated by the legislature to serve a three year mandatory minimum sentence for drunk driving" before the person had actually served the three years. (R. 29.)

DOC's brief argued that the circuit court "has the authority to sign an order effectuating the early release of a person serving a prison sentence" even if it means that the person does not serve the sentence that was imposed under the OWI mandatory minimum statute. (R. 30:1.) It stated that early release was an incentive for treatment and that a person who completes treatment "should hopefully have reduced their risk" of re-offending. (R. 30:5.)

DOC argued that "[t]he statute does not require the person to serve a minimum of three years of confinement, only that the court impose a confinement term of three years." (R. 30:4.) Thus, it argued, the two statutes could be reasonably construed as requiring the circuit court to *impose* the mandatory minimum at sentencing and also to *release* the person within 30 days of notification that the person has completed SAP—regardless of when that happens. (R. 30:3.) Otherwise, DOC argued, courts "ignore one statutory mandate in favor of another." (R. 30:5.) DOC did not take a position, however, on "whether the court must or should" order Gramza's release. (R. 30:1.)

The State's brief took no position on the question of the circuit court's authority to release Gramza before he served the mandatory sentence. (R. 32:2.) The State's brief stated that under Wis. Stat. § 302.05(3)(c)2., "modification of the sentence after successful completion of the program appears to be non-discretionary." (R. 32:2.)

Gramza's brief argued that the SAP statute "*requires* the circuit court to reduce the confinement term of an inmate to provide for release to extended supervision within 30 days of notification by the DOC that the inmate has successfully completed SAP." (R. 33:2.) Its argument rested on the same interpretation of the statute advocated by DOC: that under the plain language of the two statutes, a court is required to impose a mandatory minimum confinement of three years *and* to release the inmate who completes a treatment program without regard to whether the mandatory minimum has been served. Gramza's brief also argued that failing to release him pursuant to the SAP statute would constitute "redoing a sentence months later after commencement of the sentence" and would violate his constitutional protection against double jeopardy. (R. 33:5.)

At the hearing, counsel for DOC provided an overview of the criteria for placement into the treatment program. (R. 38:10–15.) Defense counsel provided information on the 12-week treatment program. (R. 38:30.) She described it as "in-custody treatment where they are in classes every day pretty much all of the day" and stated that it has "a pretty high rate of success in terms of the skills that are taught." (R. 38:30–31.)

The circuit court questioned DOC counsel about why Gramza had been admitted to the program so early in his sentence, how the question of public safety is factored into DOC decision-making, and how releasing Gramza, a repeat drunk driver, after a few months of confinement could be safe for the public, especially in light of the fact that Gramza

already had "mandatory programming for his first, second, third, fourth, fifth, and sixth OWI." (R. 38:7, 9–10, 14, 18.)

The circuit court denies the request for release.

In a written ruling, the circuit court denied the DOC request to authorize Gramza's release. (R. 34:6.) It rejected the argument that the mandatory minimum statute is satisfied so long as the sentencing court imposes the minimum sentence regardless of whether the defendant actually serves it or not: "That interpretation makes no sense to this court." (R. 34:3.) The crux of its analysis was that the Legislature intended that the person *serve* the mandatory minimum. (R. 34:3.) It therefore concluded that to construe the statutes in a manner that serves each statute's purposes, the SAP early release statute should be read as *subject to* the mandatory minimum statute. (R. 34:5.) It determined that the later-adopted mandatory minimum statute was the more specific of the two and therefore under statutory interpretation rules controls over the more general SAP early release statute. (R. 34:4.) Gramza is required to serve the mandatory minimum, the circuit court held, because it was "the legislature's intent" that he do so and because it was necessary "to protect the public from what the court believes is a very high risk for reoffending." (R. 34:6.)

The circuit court also rejected Gramza's double jeopardy claim on the grounds that Gramza had no "legitimate expectation of serving *less* than the mandatory minimum period of confinement." (R. 34:5.)

Gramza appeals.

ARGUMENT

I. Construing the statutes to permit Gramza to participate in the SAP and to be released after serving the mandatory minimum sentence serves the purposes of both statutes.

A. Standard of review.

This case presents a question of statutory interpretation and the application of law to undisputed facts, which this court reviews *de novo*. *State v. Wiskerchen*, 2019 WI 1, ¶ 1–3, 385 Wis. 2d 120, 921 N.W.2d 730.

B. Principles of statutory interpretation.

"Under the ordinary rules of statutory interpretation statutes should be reasonably construed to avoid conflict." *State v. Szulczewski*, 216 Wis. 2d 495, 503–04, 574 N.W.2d 660 (1998). "When two statutes conflict, a court is to harmonize them, scrutinizing both statutes and construing each in a manner that serves its purpose." *Id.* (citations omitted).

A court's objective in interpreting a statute is to give it "its full, proper, and intended effect." *State v. Williams*, 2014 WI 64, ¶ 38 n.17, 355 Wis. 2d 581, 852 N.W.2d 467.

C. The OWI mandatory minimum statute is part of a graduated penalty structure with the purposes of punishment, treatment, and protecting the public from repeat OWI offenders.

In 2014, the Wisconsin Supreme Court construed an earlier version of section 346.65(2)(am)6.[3] *Williams*, 355

[3] The question before the court in *Williams* was whether the Legislature intended—by not explicitly requiring that the

Wis. 2d 581, ¶ 3. The court considered whether the provision should be read, based on the graduated penalty structure in the surrounding statutes, as requiring the circuit court to impose a bifurcated sentence. The court stated that "provisions for probation and treatment and the escalating mandatory minimums" are evidence of the legislative purposes of "punishment, treatment, and protecting the public from repeat OWI offenders." *Williams*, 355 Wis. 2d 581, ¶ 36. It stated that all three purposes would be served by "a graduated penalty structure with increasing mandatory minimums." *Id.* Such a scheme would "impose greater punishment for more serious offenses" and "allow for treatment during confinement." *Id.* "[T]he graduated penalty structure would protect the public by keeping repeat offenders confined for longer periods of time." *Id.*

The court rejected Williams' interpretation—that a prison sentence was permitted but not required for OWI-7th through OWI-9th offenses—in part because that interpretation "less effectively protects the public because *it allows courts to release someone* who just committed a seventh or higher OWI offense." *Id.* ¶ 38 (emphasis added). The court noted that prison sentences "leave[ ] room for treatment" but also "protect[ ] the public by confining repeat offenders for longer periods." *Id.* Importantly, the court noted, requiring a bifurcated sentence with a three-year confinement portion for OWI 7th through 9th offenses "*maintains the graduated penalty structure* and punishes more serious crimes with increased confinement." *Id.* The court's construction

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sentencing court "shall impose a bifurcated sentence"—to give circuit courts the discretion to impose probation-only sentences for OWI 7th through 9th offenses. *Williams*, 355 Wis. 2d 581, ¶ 21. The legislature subsequently added the "shall impose a bifurcated sentence" language. *Id.* ¶¶ 57–59 (Abrahamson, C.J., dissenting). Otherwise, the pre- and post-*Williams* versions of the statute are identical.

maintained the fairness of penalties such that the penalty for an OWI-7th would be higher than the penalty for an OWI-3rd.

In a careful look at the legislative history, the *Williams* court quoted the Legislative Reference Bureau (LRB) analysis of the amendment to 2009 S.B. 66, the amendment that created section 346.65(2)(am)6.:

> The substitute amendment requires *a person* who commits a seventh, eighth or ninth OWI-related offense *to serve a minimum period of confinement* [of] three years in prison . . . and requires *a person* who commits a tenth or subsequent OWI-related offense *to serve a minimum period of confinement* of four years in prison[.]"

Williams, 355 Wis. 2d 581, ¶ 40 (emphasis added). The court also quoted the Wisconsin Legislative Council's Act Memo, noting that 2009 Wisconsin Act 100 changed the mandatory minimum confinement period for OWI-7th from 48 hours to three years. *Id.* ¶¶ 43–44.

Based on the statutory text and the legislative history, the court concluded that the Legislature intended to require mandatory minimum bifurcated sentences for OWI 7th through 9th offenses. The same legislative history also supports the conclusion that a purpose of the mandatory minimum statute is that persons who are convicted of these offenses actually "*serve*" the time.

D. The purposes of the SAP statute are to encourage inmates to participate in treatment and to reduce confinement time.

Addressing a challenge to the SAP statute in another case, this Court described the purposes of that statute: "While one purpose of the earned release program is undoubtedly to encourage inmates to participate in treatment for substance abuse, it is also significant that the result of successful participation is a reduction in the time a convicted person must serve in confinement." *State v. Lynch*, 2006 WI App 231,

¶ 18, 297 Wis. 2d 51, 724 N.W.2d 656. "In effect, participation in the program is an opportunity to have a lesser punishment than that originally imposed." *Id.*

E. Where a defendant who has received the minimum sentence required by law completes the SAP treatment, it serves the purposes of each statute to require him to serve the mandatory minimum before allowing release under the SAP statute.

The task when two statutes conflict is to harmonize them, "scrutinizing both statutes and construing each in a manner that serves its purpose." *Szulczewski*, 216 Wis. 2d at 503. The point is to give each statute "its full, proper, and intended effect." *Williams*, 355 Wis. 2d 581, ¶ 38 n.17.

It is admittedly not possible to give "full . . . effect" both to a statute that requires confinement and to one that requires release from confinement. It is possible, though, in many cases, to serve the purposes of both statutes by permitting early release for SAP defendants after they have completed serving the mandatory minimum sentence. In cases where a person receives a longer than minimum sentence, the SAP statute can be given full effect without violating the mandatory minimum sentence statute. In cases where only the minimum sentence is imposed, as here, the inmate's SAP benefits will not include early release, but will primarily consist of the value of the treatment itself, perhaps reinforced, as the circuit court suggested here, by a sustained period of sobriety while incarcerated. (R. 38:27.)

This is a more reasonable construction than the alternative advanced by Gramza. To make the mandatory minimum statute subordinate to the SAP mandatory release statute, as Gramza advocates, creates untenable outcomes.

Most significantly, if SAP mandatory release is untethered from the mandatory minimum sentence statute,

there is no longer any coherence to the "graduated penalty structure with increasing mandatory minimums" that was created by the Legislature and recognized by *Williams*. *See Williams*, 355 Wis. 2d 581, ¶ 36. As the circuit court noted in this case, construing the early release provision of the SAP statute to require release in this case would have resulted in a sentence for an OWI-7th that would be less than the average sentence for an OWI-3rd, which the court noted "is not even a felony." (R. 38:6.)

As *Williams* noted, the graduated penalty structure "impose[s] greater punishment for more serious offenses," allows for different levels of treatment as the number of offenses increases, and "protect[s] the public by keeping repeat offenders confined for longer periods of time." *Williams*, 355 Wis. 2d 581, ¶ 36. Those recognized purposes are contravened if a sentence imposed under the mandatory minimum statute for a more serious offense can be shortened beneath that minimum amount by a defendant's completion of the SAP.

Gramza argues that a plain reading of the two statutes allows them to be easily harmonized because the statutes create no impossibility. The circuit court shall "impose" a mandatory three-year sentence under Wis. Stat. § 346.65(2)(am)6. Then, when it receives notification of the inmate's successful completion of the SAP, the court shall "modify" the inmate's sentence pursuant to Wis. Stat. § 302.05 (3)(c)1.–3. (Gramza's Br. 12, 13.)

But as noted above, legislative materials quoted by the *Williams* court are fatal to the argument that the circuit court's obligation to impose a mandatory minimum sentence is disconnected from the inmate's obligation to actually serve it. The statute requires a person "to *serve* a minimum period of confinement." *Williams*, 355 Wis. 2d 581, ¶ 40 (emphasis added). The conflict between the statutes that arises in cases such as Gramza's cannot be resolved by construing the statute

to mean that an "imposed" sentence need not be "served" because that approach is at odds with the legislative history. Unequivocally, the Legislature intended for minimum confinement not only to be *imposed* but also to be *served*. *See id.*

Gramza's interpretation also results in an outcome that is less protective of public safety. One reason the *Williams* court rejected the statutory construction advocated by the defendant in that case was that his interpretation "less effectively protects the public because *it allows courts to release someone* who just committed a seventh or higher OWI offense." *Id.* ¶ 38. Gramza's construction is similarly problematic. Although *Williams* was referencing the use of probation, not post-SAP release such as Gramza's, the underlying concern about the public safety risk posed by repeat OWI offenders is the same in both cases. This consideration was an overriding concern of the circuit court at the hearing and in its written order denying release. (R. 38:7; 34:6.)

Gramza points to language from *Williams* that describes the typical application of the SAP statute to shorten a sentence. (Gramza's Br. 13.) The court described how Wisconsin had "eliminate[d] parole and require[d] that when a court orders a person to serve a bifurcated sentence, the person must serve the entire term *unless the person qualifies for a sentence adjustment or successfully completes an earned release program*." *Williams*, 355 Wis. 2d 581, ¶ 28 (emphasis added). But *Williams* did not address the question presented here about the intersection of *mandatory minimums* and the early release statutes, so there is little clarity to be gleaned from this language. The statement concerns bifurcated sentences generally, not bifurcated sentences affected by early release provisions that would effectively negate a mandatory minimum sentence. Nothing in this language

suggests that the Court was holding that *mandatory minimums* could be shortened by statutory earned release.

The SAP statute's purposes can be served if it is made subject to the OWI mandatory minimum statute even if there are some cases like Gramza's where the sentence is too short to give effect to its confinement-reducing purposes. The OWI mandatory minimum statute can be "its full, proper, and intended effect" only if Gramza serves it.

II. There is no double jeopardy violation because Gramza did not have a legitimate expectation of serving less than the mandatory minimum to which he was sentenced.

Gramza argues that failing to release him based on the SAP statute constitutes a double jeopardy violation because it is in effect increasing a sentence in which he had a legitimate expectation of finality. (Gramza's Br. 16 (citing *United States v. DiFrancesco*, 449 U.S. 117 (1980)).) Gramza's claimed expectation of release before serving his mandatory sentence is not legitimate.

The plea and sentencing transcript (R. 37) reflects that all parties to the hearing understood the mandatory minimum being imposed and revealed that neither the parties nor the court expected anything other than a three-year period of confinement. Further, during the motion hearing, the circuit court repeatedly emphasized the extraordinarily unusual fact that Gramza was seeking release within six months of starting his sentence because he had been granted access to SAP during the first few months of his sentence rather than waiting "three, three and a half" years as is typical. (R. 38:8–10.) Finally, Gramza's argument is premised on the incorrect assumption that he is entitled to a sentence other than the mandatory minimum he received.

CONCLUSION

This Court should affirm the circuit court's order denying the DOC's request for authorization to release Gramza because he is statutorily required to serve the mandatory minimum of three years of confinement to which he was sentenced.

Dated this 25th day of June 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,760 words.

Dated this 25th day of June 2020.

_____
SONYA BICE LEVINSON
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 25th day of June 2020.

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