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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2020AP000100-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACK B. GRAMZA,

Defendant-Appellant.

On Notice of Appeal from an Order Denying Release
Entered in Milwaukee County Circuit Court,
the Honorable David Borowski Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Where a sentencing court has granted eligibility for a repeat OWI offender's participation in the Substance Abuse Program, modification of the sentence as provided by Wis. Stat. §302.05(3)(c)2 is permitted upon successful completion of the program, notwithstanding the minimum confinement provision of Wis. Stat. §346.65(2)(am)6.

A. The State's proposed interpretation ignores the plain statutory language and fails to give full effect to both the OWI penalty and SAP statutes.

While the State accurately describes a court's objective in statutory interpretation as striving to give statutes their "full, proper, and intended effect," its argument ignores basic statutory interpretation principles in favor of conjecture regarding legislative intent and public safety concerns. (State's Br. at 8-11). The State's response fails to make any assertion that the statutory language of either Wis. Stat. §§346.65(2)(am)6 or 302.05(3)(c)2 is ambiguous such that the principles of plain language interpretation should not control, *see State ex rel. Kalal v. Circuit Court of Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

Contrary to the State's assertion (State's Br. at 1, 11), the statutory mandates of both Wis. Stat. §§346.65(2)(am)6 and 302.05(3)(c)2 can be followed and given "full effect" in a situation like Mr.

Gramza's, where the sentencing court has imposed the minimum sentence provided, and also granted SAP eligibility. The plain language of the OWI penalty statute does not mandate, as the State repeatedly suggests (State's Br. at 1, 10, 12), that an offender must *serve* the minimum confinement term, but rather requires only that the court *impose* the minimum term. Wis. Stat. §346.65(2)(am)6. As this Court has recognized, "[w]hen interpreting the language of a statute, '[i]t is reasonable to presume that the legislature chose its terms carefully and precisely to express its meaning.'" *Graziano v. Town of Long Lake*, 191 Wis. 2d 812, 822, 530 NW.2d 55 (Ct. App. 1995).

It is presumed that the legislature "'says in a statute what it means and means in a statute what it says,'" and this Court must give statutory language its common, ordinary, and accepted meaning, with the exception of technical or specially-defined words. *Kalal,* ¶¶39, 45 (quoted source omitted). If the language is plain, the court's inquiry ends. *Id*. Further, "[o]ne of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." *State v. Fitzgerald,* 2019 WI 69, ¶30, 387 Wis. 2d 384, 929 N.W.2d 165 (quoting *Fond du Lac Cty. v. Town of Rosendale*, 149 Wis. 2d 325, 334, 440 N.W.2d 818 (Ct. App. 1989)).

Rather than rewrite the statute to effectuate what the State wishes the legislature had written, this Court must presume that the legislature chose the term "impose" instead of the term "serve" "carefully and precisely to express its meaning." *See Graziano*, 191 Wis. 2d at 822. Had, as the State

asserts, the legislature intended that an offender must in fact *serve* the minimum term specified, without regard to the SAP early release provisions, it could have specifically provided that "the offender serve" or that "the offender shall be confined" or "shall be imprisoned" for the minimum term specified.[1] Instead, the statute simply requires that the circuit court "impose" the specified minimum term at sentencing.

Further, the State fails to explain why its interpretation is "the more reasonable construction," particularly given its acknowledgment that its construction does not give "full effect" to both statutes in a situation like Mr. Gramza's where, under the State's proposed construction, an offender would not be released as required under Wis. Stat. §302.05(3)(c)2 upon successful completion of the SAP. (State's Br. at 11). Additionally, the State's interpretation renders superfluous the SAP's early release provision – a "significant" purpose of the program, as this Court has recognized. *State v. Lynch*, 2006 WI App 231, ¶18, 297 Wis. 2d 51, 725 N.W.2d 656. Thus, similar to its violation of the plain language principle, the State's proposed interpretation also contradicts basic rules of statutory construction that require that "effect is to be given to every word of a statute if possible, so that no portion of the statute is rendered superfluous."

[1] Indeed, the minimum sentence language for lesser-number OWI offenses, rather than specify simply that the court shall "impose" a minimum term, instead provides that an offender "shall be imprisoned" for the minimum jail term specified. *See* Wis. Stat. §§346.65(2)(am)2., 3., 4., 4m., 5.

Lake City Corp. v. City of Mequon, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997).

And, in cases in which the sentencing court denies SAP eligibility, or in which it grants SAP eligibility but the offender fails to successfully complete the program, he or she will then serve the three-year minimum confinement term as imposed by the sentencing court consistent with Wis. Stat. §346.65(2)(am)6. Thus, in those situations, as well as situations like Mr. Gramza's where SAP eligibility is granted and successfully completed, "full effect" can be given to both statutes.

B. *Williams* does not address the interplay of the statutes at issue in this case, and in any event, its recognition that early release programs may shorten an imposed confinement term supports Mr. Gramza's position.

Additionally, and again without addressing the plain language of the statutes or claiming ambiguity, the State erroneously asserts that the legislative materials referenced by the Wisconsin Supreme Court in *Williams* demonstrate that the legislature intended for Wis. Stat. §346.65(2)(am)6 to require a person to serve the minimum period of confinement, regardless of successful completion of an early release program. (State's Br. at 12-13). *Williams,* however, simply did not address the interplay between Wis. Stat. §§346.65(2)(am)6 and 302.05, but rather focused only on whether Wis. Stat. §346.65(2)(am)6 forecloses a sentencing court from imposing probation instead of a bifurcated sentence with a minimum period of initial confinement. *State v. Williams*, 2014 WI 64,

355 Wis. 2d 581, 852 N.W.2d 467. The Court in *Williams* answered in the negative, based on its conclusion that immediate release to probation would not advance the statute's purpose to punish repeat OWI offenders with confinement, would less effectively protect the public, and that a prison term would allow treatment. *Id.*, ¶38.

In this case, the issue is not whether a sentencing court can impose something other than the minimum confinement term – clearly the court did that here, in compliance with both Wis. Stat. §346.65(2)(am)6 and *Williams*. Rather, the question is whether a repeat OWI offender sentenced to the minimum confinement term, who the sentencing court determined was eligible for participation in SAP, is entitled to release upon successful completion of that program, as required by Wis. Stat. §302.05(2)(3)(c)2. This issue was not addressed in *Williams,* and is not addressed by the legislative materials referenced in *Williams* and quoted by the State.

And, if anything, *Williams* supports Mr. Gramza's position that early release from confinement pursuant to SAP completion is not precluded by Wis. Stat. §346.65(2)(am)6, as the Supreme Court in *Williams* recognized that successful completion of an earned release program was a mechanism by which an offender might not serve the entire term of a bifurcated sentence under truth in sentencing. *See Williams*, ¶28 (truth in sentencing requires that a person serve the entire confinement term ordered by the court "unless the person qualifies for a sentence adjustment *or successfully completes an earned release program*.").

Moreover, as the goal of the SAP is to enhance community safety by providing a full-time intensive treatment program designed to reduce the incidence of future criminal behavior[2], offenders who successfully complete it are presumably rendered less dangerous and thus safer to release from confinement to extended supervision, in contrast to an offender who was simply sentenced to probation, as in *Williams*.

Furthermore, while the State asserts that the OWI graduated penalty structure recognized by *Williams* is contravened if a minimum sentence imposed under Wis. Stat. §346.65(2)(am)6 can be shortened by successful SAP completion, it fails to acknowledge that the legislature has not excluded OWI offenders – even those subject to minimum sentences – from SAP participation. Had the legislature intended to exclude OWI offenders from participation in SAP, it could have specifically excluded them, as it has done for other types of offenders. Indeed, the legislature has done just that, not only in its passage of Wis. Stat. §973.01(3g)[3], which foreclosed eligibility for offenders convicted of the specified offenses, but in two subsequent statutory amendments, the legislature has excluded additional offenses from SAP eligibility. *See* 2005 Wis. Act 277 and 2007 Wis. Act 116 (amending Wis. Stat. §973.01(3g) to exclude newly-created offenses

[2] Wisconsin Department of Corrections Opportunities and Options Resource Guide (December 2018) at 6-7; https://doc.wi.gov/Documents/AboutDOC/AdultInstitutions/OpportunitiesOptionsResourceGuideEnglish.pdf (last accessed 7/15/2020).

[3] 2003 Wis. Act. 33.

under Wis. Stat. §§948.085 and 948.051, respectively, from eligibility). Such amendments reflect the legislature's awareness of its ability (and willingness) to amend Wis. Stat. §973.01(3g) to exclude additional offenses when desired.

Thus, the lack of any legislative amendment either excluding OWI offenders altogether, or excluding repeat OWI offenders who are subject to imposition of minimum sentences, supports that the legislature did not intend to exclude individuals like Mr. Gramza from SAP eligibility and its early release provisions. *See State v. Delaney*, 2003 WI 9, ¶¶22-23, 259 Wis. 2d 77, 658 N.W.2d 416 (where the legislature specifically enumerates exceptions to a statute, it intended to exclude others, under the well-established canon of *expressio unius est exclusion alterius*). Any exclusion of OWI offenders subject to minimum confinement provisions of Wis. Stat. §346.65(2)(am)6 from SAP eligibility must come from the legislature, not the courts.

II. Where a sentencing court has granted eligibility for early release through SAP participation, the subsequent denial of release upon successful completion of the program violates double jeopardy.

The State makes a conclusory assertion that Mr. Gramza's expectation of release prior to serving the entire three-year minimum confinement term is not legitimate. (State's Br. at 14). Other than to state the obvious, however – that the sentencing court imposed the minimum three-year confinement term that the parties recommended – the State fails to acknowledge that the Court *also* granted Mr.

Gramza SAP eligibility which, under the provisions of Wis. Stat. §302.05(3)(c)2, required the court to authorize his early release from confinement to extended supervision upon its successful completion.

As this Court has recognized, while one purpose of the SAP program is 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." *Lynch*, 2006 WI App 231, ¶18. "In effect, participation in the program is an opportunity to have a lesser punishment than that originally imposed." *Id.*

Thus, based on the sentencing court's grant of SAP eligibility and the specific statutory provisions for that program, Mr. Gramza had every reason to believe that he would be released to extended supervision upon his successful completion, as required by Wis. Stat. §302.05(3)(c)2. And, the Department of Corrections' submission of an order to the court requesting that it authorize sentence modification, as well as the position it took in the circuit court that the court had authority to authorize early release, only confirms the legitimacy of Mr. Gramza's expectation. (27; A-App.107; 30; 38).

Consequently, there was clear reliance both by Mr. Gramza, who began serving the sentence, and by the Department of Corrections, which executed its terms, on the sentence imposed by the sentencing court. Mr. Gramza had a legitimate expectation of finality in the sentence imposed, which prevented the circuit court from attempting, in effect, to redo his sentence after he had already commenced serving it

and after his successful completion of the SAP for which the sentencing court granted him eligibility. Nothing in Wis. Stat. §§302.05 or 973.01(3g) authorizes a circuit court to, in effect, "revisit, impose new requirements, or otherwise reverse its decision" to grant SAP eligibility. *See State v. Hemp*, 2014 WI 129, ¶24, 359 Wis. 2d 320, 856 N.W.2d 811 (circuit court cannot subsequently reverse a sentencing determination that found defendant eligible for expungement).

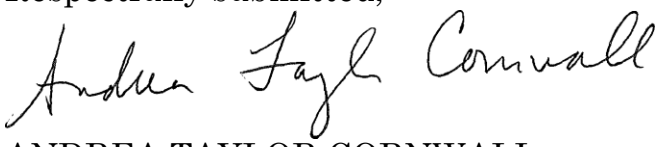
The circuit court's subsequent refusal to effectuate Mr. Gramza's release as required under Wis. Stat. §302.05(3)(c)2 in effect lengthens the confinement term Mr. Gramza expected to serve under the specific terms of the sentence imposed, which granted him the "significant" benefit of early release upon successful completion of the Substance Abuse Program. *See Lynch*, ¶18. Such action infringes upon Mr. Gramza's legitimate expectation of finality in his sentence, and violates the constitutional protection against double jeopardy contained in the Fifth Amendment to the United States Constitution, and Art. 1, §8 of the Wisconsin Constitution. The circuit court's order denying modification of the sentence to effectuate Mr. Gramza's release under Wis. Stat. §302.05(3)(c)2 must therefore be reversed.

CONCLUSION

As argued herein and in his opening brief, Wis. Stat. §§346.65(2)(am)6 and 302.05(3)(c)2 can be plainly read and harmonized to give effect to both statutes, and the circuit court's refusal to modify Mr. Gramza's sentence to effectuate his release violates double jeopardy. This Court should reverse the circuit court, and remand the case with directions that the circuit court immediately enter an order modifying Mr. Gramza's sentence based on his successful completion of the Substance Abuse Program, as required by Wis. Stat. §302.05(3)(c)2.

Dated this 16th day of July, 2020.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

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 2,194 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this 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 16th day of July, 2020.

Andrea Taylor Cornwall

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