STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP0859-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

LYNNE M. SHIRIKIAN,

Defendant-Respondent.

ON APPEAL FROM AN ORDER DENYING THE STATE'S MOTION FOR RESENTENCING ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE JENNIFER DOROW, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

In 2019, the Wisconsin Legislature amended the statute governing the penalty for operating a motor vehicle while under the influence of an intoxicant (OWI) as a fifth or sixth offense. The amended statute, Wis. Stat. § 346.65(2)(am)5., requires that a court "shall impose a bifurcated sentence under s. 973.01," and it requires that "the confinement portion of the bifurcated sentence . . . shall be not less than one year and 6 months." The statute provides for an exception, allowing a court to "impose a term of confinement that is less than one year and 6 months," provided that the court explains on the record why it "finds that the best interests of the community will be served and the public will not be harmed." Wis Stat. § 346.65(2)(am)5.

The issues in this case concern whether a court can place a person on probation for OWI as a fifth or sixth offense, without requiring the person to serve a term of initial confinement in prison. The circuit court concluded that by allowing a "term of confinement" of less than one year and six months, Wis. Stat. § 346.65(2)(am)5. allowed it to impose a bifurcated sentence, stay the sentence, and place Lynne M. Shirikian on probation with condition time of less than one year and six months. And in denying the State's motion for resentencing, the circuit court concluded that resentencing Shirikian would violate her right to be free from double jeopardy because she has a legitimate expectation of finality in the sentence the court imposed.

This Court should reverse because Wis. Stat. § 346.65(2)(am)5. requires a circuit court to impose a bifurcated sentence, which necessarily requires a minimum term of one year of initial confinement in prison. When a defendant is required to serve a minimum term of initial confinement in prison, a court may not stay the sentence and may not place the person on probation. Resentencing is the

proper remedy and will not violate Shirikian's right to be free from double jeopardy because she has no legitimate expectation of finality in an illegal sentence.

ISSUES PRESENTED

1. Does Wisconsin Stat. § 346.65(2)(am)5. authorize a circuit court sentencing a person for OWI as a fifth or sixth offense to stay a bifurcated sentence and place the person on probation?

The circuit court answered "yes." It concluded that the statute required it only to impose a term of confinement, so it was authorized to place Shirikian on probation for her fifth offense OWI.

This Court should answer "no." The plain language of the statute requires a court to impose a bifurcated sentence with a mandatory minimum term of initial confinement in prison. And it is well established that when a person is required to serve a term of initial confinement in prison, a court is prohibited from staying the sentence and placing the person on probation.

2. If a circuit court imposes a bifurcated sentence under Wisconsin Stat. § 346.65(2)(am)5. but improperly stays the sentence and places the person on probation, may the court resentence the person?

The circuit court answered "no." It concluded that Shirikian has a legitimate expectation of finality in her sentence, so resentencing her would violate her right to be free from double jeopardy.

This Court should answer "yes," and reverse. Shirikian was not sentenced in accord with the law, and she has no legitimate expectation of finality in an illegal sentence. Resentencing will therefore not violate her right to be free from double jeopardy.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The State requests publication of this Court's opinion to provide guidance to courts and parties throughout Wisconsin on whether Wis. Stat. § 346.65(2)(am)5. authorizes a court to impose and stay a sentence for OWI as a fifth or sixth offense and place the person on probation.

STATEMENT OF THE CASE AND FACTS

On May 27, 2020, police were dispatched to a retail store on a report that an intoxicated woman had stolen bottles of alcohol from the store and was driving. (R. 9:3.) Police spoke to three witnesses. A loss prevention officer at the store told police that he had confronted the woman (later identified as Shirikian) in the parking lot and observed that an odor of alcohol was emanating from her. (R. 9:3.) A second witness told police that Shirikian had been staggering and swaying in the alcohol aisle of the store and then in the parking lot. (R. 9:3.) A third witness told police that she was driving behind a vehicle, later identified as Shirikian's, that was swerving and that drove over the curb, and then stopped at a gas station. (R. 9:3.)

City of Oconomowoc Police Officer Adam Germanis encountered Shirikian at the gas station. (R. 9:3–4.) He observed a very strong odor of alcohol emanating from Shirikian, and that her eyes were bloodshot, her face was flushed, and her speech was heavily slurred. (R. 9:3–4.) After Shirikian admitted to drinking, and the officer observed the

maximum number of clues on each field sobriety test, he arrested Shirikian for OWI. (R. 9:4.) After Shirikian refused to provide a blood sample under the implied consent law, the officer obtained a search warrant and Shirikian's blood was drawn. (R. 9:4.) A test revealed an alcohol concentration of .299. (R. 8; 9:4.) Because Shirikian had four countable convictions for OWI or operating a motor vehicle with a prohibited alcohol concentration (PAC), the State charged her with OWI and PAC as fifth offenses. (R. 9.)

The State and Shirikian reached a plea agreement under which Shirikian pleaded guilty to OWI as a fifth offense, and the PAC was dismissed. (R. 38:1–13, A-App. 102–14.) The circuit court, the Honorable Jennifer R. Dorow, presiding, accepted Shirikian's guilty plea (R. 38:12–13, A-App. 113–14) and imposed sentence (R. 38:20–36, A-App. 121–37.). The court noted that the maximum potential sentence was ten years of imprisonment, including five years of initial confinement, and the applicable statute provided for a presumptive minimum of one year and six months of initial confinement. (R. 38:4, 9, A-App. 105, 110.) The court imposed and stayed a bifurcated sentence of five years of imprisonment, consisting of three years of initial confinement and two years of extended supervision. (R. 38:28, A-App. 129; R. 3, A-App. 140–42.) The court placed Shirikian on probation for three years with nine months of condition time, to be spent in the county jail. (R. 38:28–29, A-App. 129–30.) The court found that the best interests of the community would be served and the public would not be harmed by placing Shirikian on probation rather than requiring her to serve the statutory minimum term of confinement, and it explained its reasoning on the record. (R. 38:29, A-App. 130.)

Immediately after the court explained the sentence, the prosecutor asserted that the State believed the court was required to impose a sentence with at least one year in prison. (R. 38:32, A-App. 133.) The court disagreed, stating the statute "just says I can impose a term of confinement that is less than one year and 6 months. Doesn't say initial confinement. Just says confinement." (R. 38:32, A-App. 133.) After examining the statute, the court concluded that the Legislature's use of the word "confinement" rather than "initial confinement" allowed a court to impose a term of probation and condition time that's less than one year and six months." (R. 38:35, A-App. 136.) The court said that the term of confinement "could be anything from a day, to - - obviously up to the maximum here." (R. 38:35, A-App. 136.) The court therefore affirmed that it was imposing and staying the sentence it had announced and placing Shirikian on probation. (R. 38:36, A-App. 137.)

The State moved for resentencing, asserting that Wis. Stat. § 346.65(2)(am)5. required the court to impose a bifurcated sentence with a mandatory minimum of one year and six months of initial confinement, with an exception that authorized the court to impose a bifurcated sentence with as little as one year in prison. (R. 29, A-App. 143–49.) The Department of Corrections also requested that the circuit court review Shirikian's sentence, because it read Wis. Stat. § 346.65(2)(am)5. as requiring a bifurcated sentence with at least one year and six months of initial confinement. (R. 32.) The circuit court denied the State's motion for resentencing, concluding that it had properly sentenced Shirikian, that she is entitled to finality in her sentence, and that resentencing her "would violate her double jeopardy protection." (R. 34, A-App. 101.) The State now appeals. (R. 36.)

STANDARD OF REVIEW

The proper interpretation and application of statutory language are questions of law that an appellate court reviews independently. *State v. Lickes*, 2021 WI 60, ¶ 14, __Wis. 2d __, 960 N.W.2d 855.

"Whether an individual's constitutional right to be free from double jeopardy has been violated is a question of law that this court reviews de novo." *State v. Robinson*, 2014 WI 35, ¶ 18, 354 Wis. 2d 351, 847 N.W.2d 352 (quoting *State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998)).

ARGUMENT

I. Under Wis. Stat. § 346.65(2)(am)5., the circuit court was required to impose a bifurcated sentence with at least a year of initial confinement; the court erred by staying Shirikian's bifurcated sentence and placing her on probation.

A. A reviewing court interprets statutory language to give the statute its full, proper and intended effect.

The primary issue in this case requires the interpretation of Wis. Stat. § 346.65(2)(am)5. "The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State v. Buchanan*, 2013 WI 31, ¶ 23, 346 Wis. 2d 735, 828 N.W.2d 847 (quoting *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238) (additional citations omitted).

When a reviewing court interprets a statute, it "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49). "[S]tatutory 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 of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. In determining the plain language meaning of a statute, a court may consider the scope, context, and purpose of the statute, so long as they "are ascertainable from the text and structure of the statute itself." *Id.* ¶ 48.

"[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *State v. Dorsey*, 2018 WI 10, ¶ 30, 379 Wis. 2d 386, 906 N.W.2d 158 (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). A court may examine the legislative history to discern the meaning of an ambiguous statute. *State v. Williams*, 2014 WI 64, ¶ 19, 355 Wis. 2d 581, 852 N.W.2d 467.

B. By its plain language, Wis. Stat. § 346.65(2)(am)5. requires a court to impose a bifurcated sentence with a minimum term of initial confinement for OWI as a fifth or sixth offense.

The statute that governs sentencing for OWI as a fifth or sixth offense, Wis. Stat. § 346.65(2)(am)5., provides that any person who violates Wis. Stat. § 346.63(1) "is guilty of a

Class G felony and shall be fined not less than $600."[1] Wis. Stat. § 346.65(2)(am)5. The statute establishes how a court is required to sentence the person:

> The 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 one year and 6 months. The court may impose a term of confinement that is less than one year and 6 months if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record.

Wis. Stat. § 346.65(2)(am)5.

There can be no serious question about the meaning of the first sentence. A court "shall impose a bifurcated sentence." And the "confinement portion" of that bifurcated sentence "shall be not less than one year and 6 months."

The issue in this case concerns the second sentence, which provides an exception for cases in which a sentencing court "finds that the best interests of the community will be served and the public will not be harmed." A court that makes those findings and places its reasons on the record, "may impose a term of confinement that is less than one year and 6 months."

The State's position is that the statute is unambiguous. The statute requires a court to impose a bifurcated sentence. A "bifurcated sentence" is defined as "a sentence that consists of a term of confinement in prison followed by a term of extended supervision." Wis. Stat. § 973.01(2). The "term of confinement" portion of a bifurcated sentence "may not be less than one year." Wis. Stat. § 973.01(2)(b).

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[1] The maximum penalty for a Class G felony is ten years of imprisonment and a $25,000 fine. Wis. Stat. § 939.50(3)(d).

Wisconsin Stat. § 346.65(2)(am)5. requires that the term of confinement portion of the bifurcated sentence for OWI as a fifth or sixth offense generally must be longer than the usual one year required as a minimum for a bifurcated sentence: it must be not less than one year and 6 months. The statute provides for an exception when a court finds "that the best interests of the community will be served and the public will not be harmed." Wis. Stat. § 346.65(2)(am)5. In such a case, the term of confinement portion of the bifurcated sentence may be less than one year and six months. However, since a bifurcated sentence "may not be less than one year," Wis. Stat. § 973.01(2)(b), the term of initial confinement portion of the bifurcated sentence may be less than one year and 6 months if the court makes the required findings, but it may not be less than one year.

The circuit court read Wis. Stat. § 346.65(2)(am)5. as not requiring a court to impose a bifurcated sentence with a minimum term of initial confinement if it makes the requisite findings. (R. 38:35, A-App. 136.) The court concluded that by using the word "confinement," the statute allows a court to impose a term of confinement of less than one year and six months and place a person on probation with as little as one day of condition time in jail. (R. 38:35, A-App. 136.)

But the statute does not say that a court is not required to impose a bifurcated sentence. Instead, the first sentence in the statute explicitly says that a court "shall impose a bifurcated sentence" with a minimum term of confinement. Wis. Stat. § 346.65(2)(am)5. And the second sentence says that the "term of confinement" may be shorter than the listed minimum if the court makes the requisite findings.

The circuit court erroneously read the word "confinement" in the second sentence to mean any form of confinement, including condition time in jail. (R. 38:35, A-App. 136.) But the express text and structure of the statute shows that "term of confinement" in the second sentence

refers to the "confinement portion of the bifurcated sentence" used in the first sentence.

Under the circuit court's interpretation of Wis. Stat. § 346.65(2)(am)5. the word "confinement" means something different in the first sentence than in the second sentence. In the first sentence, "confinement" plainly means "initial confinement," because the statute refers to "the confinement portion of the bifurcated sentence." But under the court's interpretation, in the second sentence "confinement" somehow "include[s] probation and condition time." (R. 38:35, A-App. 136.) The State can discern no reason that the Legislature would have used the word "confinement" in the second sentence to mean something entirely different than what is meant by the same word in the first sentence. The only reasonable interpretation of "term of confinement" in a statute that explicitly calls for a bifurcated sentence is that the "term of confinement" is the "term of confinement" portion of a bifurcated sentence, which, along with a period of extended supervision, comprises a bifurcated sentence.

Additionally, the State is unaware of any statute or case which defines or uses "term of confinement" in the manner the circuit court did. Instead, a bifurcated sentence is defined 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). Other statutes use "term of confinement" in the same manner. For instance, "All consecutive sentences . . . shall be computed as one continuous sentence. The person shall serve any term of extended supervision after serving all *terms of confinement* in prison." Wis. Stat. § 302.113(4) (emphasis added). Some statutes say, "term of confinement in prison portion of a bifurcated sentence." *See, e.g.*, Wis. Stat. § 939.617(1). But the State is unaware of any statute that uses the phrase "term of confinement" to mean something other than term of confinement in prison.

The Wisconsin Supreme Court has recognized that the term of initial confinement that is part of a bifurcated sentence is a "term of confinement." *See, e.g., State v. Cole*, 2003 WI 59, ¶ 6, 262 Wis. 2d 167, 863 N.W.2d 700 ("The circuit court thus sentenced the defendant to a bifurcated sentence including a term of confinement of three years followed by a three-year period of extended supervision."); *State v. Jackson*, 2004 WI 29, ¶ 15, 270 Wis. 2d 113, 676 N.W.2d 872 ("Wis. Stat. § 973.01(1) requires a circuit court to impose a bifurcated sentence consisting of a term of confinement followed by a term of extended supervision whenever it sentences a person to 'imprisonment.'") The State is unaware of any case interpreting the phrase "term of confinement" to mean something other than term of confinement in prison.

The structure, context, and purpose of Wis. Stat. § 346.65(2)(am)5. strongly support the plain language meaning of the statute. As the supreme court recognized in *Williams*, "Even a cursory glance at the structure of Wis. Stat. § 346.65(2)(am) reveals a pattern: the mandatory minimum sentences generally increase with the number of OWIs." *Williams*, 355 Wis. 2d 581, ¶ 32. But under the circuit court's interpretation of Wis. Stat. § 346.65(2)(am)5., the mandatory minimum would not increase for a fifth or sixth offense—there would be either no minimum or a minimum of one day in jail.

The minimum term of imprisonment for a person convicted of OWI as a second offense is 5 days. Wis. Stat. § 346.65(2)(am)2. For a third offense, the minimum is 45 days. Wis. Stat. § 346.65(2)(am)3. For a fourth offense, the minimum is 60 days. Wis. Stat. § 346.65(2)(am)4. For a seventh, eighth or ninth offense, the minimum is three years of initial confinement in prison. Wis. Stat. § 346.65(2)(am)6. For a tenth or subsequent offense, the minimum is four years. Wis. Stat. § 346.65(2)(am)7. And for a fifth or sixth offense, the minimum is one year and 6 months. Wis. Stat.

§ 346.65(2)(am)5. Except, under the circuit court's interpretation of the statute, there is no minimum term of confinement for a fifth or sixth offense if the court makes the requisite findings. An interpretation of Wis. Stat. § 346.65(2)(am)5. as requiring no minimum term of confinement (or a one-day minimum term) would be inconsistent with the structure of Wis. Stat. § 346.65(2)(am).

In *Williams*, the supreme court concluded that interpreting Wis. Stat. § 346.65(2)(am)6. as not requiring at least a minimum term of confinement "would not advance the contextually manifest purpose to punish repeat offenders because a court could decline to order any period of confinement for someone who committed a seventh, eighth, ninth, or higher OWI offense." *Williams*, 355 Wis. 2d 581, ¶ 38. The same is true of Wis. Stat. § 346.65(2)(am)5. An interpretation of the statute as allowing a court to impose no confinement for fifth or sixth offense OWI "would not advance the contextually manifest purpose to punish repeat offenders because a court could decline to order any period of confinement." *Williams*, 355 Wis. 2d 581, ¶ 38. In fact, such a reading would be *contrary* to the textually manifest purpose of the statute; it is therefore unreasonable.

In addition, as the supreme court also recognized in *Williams*, in Wis. Stat. § 346.65(2)(am), "the place of imprisonment moves from jail to prison as the number of OWIs increases." *Williams*, 355 Wis. 2d 581, ¶ 35. In *Williams*, the supreme court noted under the version of the statute at issue in that case, Wis. Stat. § 346.65(2)(am)6.–7. (2009–10) were "the only subdivisions to mention bifurcated sentences specifically, which necessarily involve time in prison." *Williams*, 355 Wis. 2d 581, ¶ 35. Under the version of Wis. Stat. § 346.65(2)(am) at issue in this case, subdivision 5. now requires a bifurcated sentence.

Finally, if the Legislature had intended to allow a court to place a person convicted of OWI as a fifth or sixth offense on probation, without serving the mandatory minimum term of initial confinement, it could easily have accomplished that goal. For instance, Wis. Stat. § 939.617 provides a mandatory minimum sentence for certain child sex offenses. It states that for the applicable offenses, "Except as provided in subs. (2) and (3) . . . The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years for violations of s. 948.05 or 948.075 and 3 years for violations of s. 948.12." Wis. Stat. § 939.617(1). The statute then sets forth an exception that allows a court to not impose the mandatory minimum sentence:

> (2) If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, *the court may impose a sentence that is less than the sentence required under sub. (1) or may place the person on probation under any of the following circumstances*: . . .

Wis. Stat. § 939.617(2) (emphasis added). The Legislature explicitly stated in Wis. Stat. § 939.617(1) that a court may deviate from the minimum term of confinement that it is generally required to impose, and that it may place a person on probation, under the specified circumstances.

If the Legislature had intended to allow a court to place a person on probation under Wis. Stat. § 346.65(2)(am)5., it could have done exactly what it did in Wis. Stat. § 939.617—explicitly authorize a court to place a person on probation. As this Court has recognized, "§ 939.617 shows that the legislature knew very well how to create exceptions allowing probation for crimes that ordinarily trigger a minimum sentence of confinement." *State v. Lalicata*, 2012 WI App 138, ¶ 12, 345 Wis. 2d 342, 824 N.W.2d 921. That the Legislature did not explicitly create an exception in Wis. Stat. § 346.65(2)(am)5. allowing probation for OWI as a fifth or

sixth offense indicates that it did not intend to authorize a court to place a person on probation without serving the mandatory minimum term of confinement in prison.

C. The legislative history of Wis. Stat. § 346.65(2)(am)5. also confirms the plain language meaning of the statute.

Under the plain language of Wis. Stat. § 346.65(2)(am)5., a circuit court is required to impose a bifurcated sentence for a person convicted of violating the statute. The court is generally required to impose at least one year and six months of initial confinement as part of the bifurcated sentence, but if it makes the requisite findings a court can impose as little as one year of initial confinement as part of the bifurcated sentence. The legislative history of the statute confirms this plain language meaning.

Wisconsin Stat. § 346.65(2)(am)5. was amended by 2019 Wis. Act 106. (A-App. 150.) The statute had previously provided that a person who violated Wis. Stat. § 346.63(1) as a fifth or sixth offense was guilty of Class G felony "and shall be fined not less than $600 and imprisoned for not less than 6 months." Wis. Stat. § 346.65(2)(am)5. (2017–18). Under the amended statute, a fifth or sixth offense remains a Class G felony. But the statute now provides that "The 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 one year and 6 months." Wis. Stat. § 346.65(2)(am)5. The Legislature allowed courts to deviate from the requirement of one year and six months of initial confinement, authorizing them to impose "a term of confinement that is less than one year and 6 months if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record." Wis. Stat. § 346.65(2)(am)5.

The Act amending the statute arose from 2019 Senate Bill 6. The initial version of the bill stemmed from a request by Senator Alberta Darling for a bill that "Increased [the] minimum period of imprisonment for 5th and 6th OWI." 2019 Drafting Request, January 3, 2019. (A-App. 151.) The instructions on the drafting request were to "redraft" 2017 Assembly Bill 99 "requiring 1.5 year minimum sentence for 5th and 6th OWI." (A-App. 151.) The original bill did not contain an exception—it required a court to impose a bifurcated sentence with at least one year and six months of confinement in prison. 2019 S.B. 6 (original bill). (A-App. 152–53.) An analysis of the initial version of the bill by the Legislative Reference Bureau states that "Under this bill, for a fifth or sixth OWI offense, a sentencing court is required to impose a sentence that orders the person to spend at least 18 months confined in prison." 2019 S.B. 6 (original bill) (A-App. 152–53.).

Senator Darling then requested that the bill be amended to "Change the 18 month mandatory minimum sentence to a presumptive minimum if the judge makes the determination [on the record] that there is good cause for sentencing less than 18 months, and states that cause on the record." 2019 Drafting Request, September 9, 2019. (A-App. 154.) The amended bill said that "The court may impose a *sentence* that is less than one year and 6 months if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record." Senate Amendment 1, to Senate Bill 6 (emphasis added) (A-App. 155.). Senator Darling then requested that the word "sentence" be changed to "term of confinement." 2019 Drafting Request, October 30, 2019. (A-App. 156.) Senate Amendment 2, to Senate Bill 6, changed "sentence" to "term of confinement." (A-App. 157.)

A Legislative Council Amendment Memo indicated that "2019 Senate Bill 6 changes the mandatory term of imprisonment for operating under the influence of an intoxicant or other drug (OWI) 5th and 6th offense. Under current law, a person who is convicted of OWI 5th and 6th offense is guilty of a Class G felony and shall be fined not less than $600 and imprisoned for not less than six months." Wisconsin Legislative Council Amendment Memo, November 6, 2019. (A-App. 158.) The Amendment Memo added that "Senate Bill 6 eliminates the mandatory six-month period of imprisonment and instead requires the court to impose a bifurcated sentence, the confinement portion of which shall be not less than one year and six months." (A-App. 158.) The Amendment Memo indicates that Senate Amendment 2 "allows a court to impose a term of confinement that is less than one year and six months if the court finds that the best interest[s] of the community will be served and the public will not be harmed and if the court places its reasons on the record." (A-App. 158.)

2019 Senate Bill 6 became 2019 Wis. Act 106. (A-App. 150.) A Wisconsin Legislative Council Act Memo for 2019 Wis. Act 106 confirms the plain language meaning of the amended Wis. Stat. § 346.65(2)(am)5. It says that "2019 Wisconsin Act 106 changes the mandatory term of imprisonment for operating under the influence of an intoxicant or other drug (OWI) 5th and 6th offense." Wisconsin Legislative Council Act Memo for 2019 Wis. Act 106, March 3, 2020. (A-App. 159.) The Act Memo adds that "Act 106 eliminates the mandatory six-month period of imprisonment and instead requires the court to impose a bifurcated sentence, the confinement portion of which shall be not less than one year and six months." (A-App. 159.) And the Act Memo explains that "Under the act, a court may impose a term of confinement that is less than one year and six months if the court finds that the best interest of the community will

be served and the public will not be harmed and if the court places its reasons on the record." (A-App. 159.)

Nothing in the legislative history indicates that the Legislature intended to authorize a court to *not* impose a bifurcated sentence, or to impose and stay a bifurcated sentence, and place a person on probation. And nothing indicates that the Legislature intended to reduce the six-month mandatory term of imprisonment under the old version of the statute. After all, the point of the legislation was to increase the minimum period of confinement in prison.

The amendments to the original draft of the bill confirm that there was no intent to allow a court to impose a sentence with, as the circuit court suggested in this case, as little as "a day" of confinement. (R. 38:35.) The first amendment, which allowed for a sentence of less than one year and six months, may have authorized such a sentence. But the second amendment made it clear that the Legislature did not intend to authorize a *sentence* of less than one year and six months, but *confinement in prison* less than one year and six months. Nothing in the legislative history indicates that the Legislature intended to allow a court to ignore the requirement that a court "shall impose a bifurcated sentence." And nothing indicates that the Legislature, in a bill whose purpose was to *increase* the minimum period of confinement, actually intended to *decrease* the existing minimum six-month period of confinement to zero.

The legislative history supports the plain language of the statute. A court "shall impose a bifurcated sentence." The initial confinement portion of the bifurcated sentence shall be at least one year and six months, except that if the court makes the requisite findings, the initial confinement portion of the bifurcated sentence may be less than one year and six months but no less than one year.

D. When a court is required to impose a bifurcated sentence with a minimum term of confinement, it may not stay that sentence; a bifurcated sentence is inconsistent with probation.

The circuit court in this case imposed a five-year bifurcated sentence with three years of initial confinement and two years of extended supervision. (R. 38:28, A-App. 129.) But the court stayed the sentence and placed Shirikian on probation. (R. 38:28, A-App. 129.) However, because the court was required to impose a sentence with a mandatory minimum term of initial confinement it could not properly stay the sentence and place Shirikian on probation.

Under Wisconsin law, unless a statute prohibits probation, a sentencing court may withhold sentence or impose sentence but stay its execution and place a person on probation. Wis. Stat. § 973.09(1)(a). In *Lalicata*, 345 Wis. 2d 342, ¶ 14, this Court concluded that a statute that requires a court to impose a bifurcated sentence including a mandatory minimum term of confinement prohibits the court from staying the sentence and placing the person on probation.

In *Lalicata*, this Court addressed the statute relating to possession of child pornography, Wis. Stat. § 939.616(1r), which required that a court "shall" impose a term of confinement of at least 25 years. *Id.* This Court concluded that because the statute states that a court "shall" impose a particular sentence, it does not allow a court to withhold sentence. *Id.* ¶ 15. And if a court cannot withhold sentence, it follows that a court also cannot stay a sentence it imposes. *Id.* This Court concluded that by requiring a court to impose a sentence with a minimum period of confinement, Wis. Stat. § 939.616(1r) prohibits probation.

In *Williams*, 355 Wis. 2d 581, the Wisconsin Supreme Court applied *Lalicata* in the context of Wis. Stat. § 346.65(2)(am)6., the statute prescribing the sentence for OWI as a seventh, eighth, or ninth offense. It noted that under *Lalicata*, "a mandatory minimum bifurcated sentence is inconsistent with permitting probation." *Id.* ¶ 34. And the court recognized that bifurcated sentences "necessarily involve time in prison." *Id.* ¶ 35.

The statute at issue in this case, Wis. Stat. § 346.65(2)(am)5., requires that a court "shall impose a bifurcated sentence." And it requires that the mandatory minimum term of confinement of the sentence is "not less than one year and 6 months," except that if the court makes the requisite findings, it may impose a term of confinement that is less than one year and 6 months. *Id.* Under the reasoning of *Lalicata* and *Williams*, Wis. Stat. § 346.65(2)(am)5. requires a court to impose a bifurcated sentence with at least a minimum term of confinement. The court may not withhold sentence, and it may not stay the sentence and place the person on probation.

II. Resentencing Shirikian would not violate her right to be free from double jeopardy because she did not have a reasonable expectation of finality in an illegal sentence.

In its decision denying the State's motion for resentencing, the circuit court concluded that it was authorized to stay Shirikian's sentence and place her on probation, and that even if it had not been authorized to do so, resentencing her would violate her right to be free from double jeopardy. (R. 34, A-App. 101.) As explained above, the court was prohibited from staying Shirikian's sentence and placing her on probation. And resentencing Shirikian will not violate her right to be free from double jeopardy because she did not have a reasonable expectation of finality in an illegal sentence.

The double jeopardy clause of the Fifth Amendment protects a person against "a second prosecution for the same offense after acquittal," against "a second prosecution for the same offense after conviction," and against "multiple punishments for the same offense." *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (quoted source omitted). While the double jeopardy clause prohibits a second prosecution after an acquittal, it does not always prohibit resentencing a defendant. *Id.* at 135. To determine whether resentencing is prohibited, a court must determine whether the defendant had "a legitimate expectation of finality in his original sentence." *Id.* at 137.

The circuit court relied on *State v. Willett*, 2000 WI App 212, 238 Wis. 2d 621, 618 N.W.2d 881, as prohibiting it from resentencing Shirikian. However, the circuit court's reliance on *Willett* was misplaced. In *Willett*, the sentencing court imposed concurrent sentences because it mistakenly believed that it could not impose consecutive sentences. *Id.* ¶ 1. Four months later, the court realized that it could have imposed consecutive sentences, and it changed the sentences to consecutive. *Id.* This Court held that the circuit court erred by changing the sentences from concurrent to consecutive. It concluded that the circuit court had originally imposed "a valid, concurrent sentence," and that the defendant had a legitimate expectation of finality in the sentences the circuit court originally imposed. *Id.* ¶ 6.

Here, unlike in *Willett*, the circuit court did not sentence Shirikian in accordance with the law. The court imposed a legal bifurcated sentence but stayed the sentence and placed Shirikian on probation. The court had no authority to stay the sentence and not require Shirikian to serve at least one year and six months of initial confinement (or one year if the court made the requisite findings). And the court had no authority to place Shirikian on probation.

It is well established that a defendant does not have a legitimate expectation of finality in an illegal sentence that he has not fully served. *See, e.g.*, *United States v. Kane*, 876 F.2d 734, 737 (9th Cir. 1989) ("Generally, a defendant can acquire no expectation of finality in an illegal sentencing, which remains subject to modification."); *United States v. Jackson*, 903 F.2d 1313, 1316 (10th Cir.) ("A defendant cannot acquire a legitimate expectation of finality in a sentence which is illegal, because such a sentence remains subject to modification."); *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992) (concluding that the defendant "lacked a reasonable expectation of finality in his original illegal sentencing.")

When a sentence is "not in accord with the law," resentencing is "the proper method" to correct it. *Grobarchik v. State*, 102 Wis. 2d 461, 470, 307 N.W.2d 170 (1981). A defendant is not entitled to benefit from a sentence that is not in accord with the law: "A sentencing proceeding is not a game, and when a trial judge mistakenly fashions a criminal disposition that is not authorized in the law, the result should not be a windfall to the defendant." *Id.* at 471 (citing *State v. Upchurch*, 101 Wis. 2d 329, 336, 305 N.W.2d 57 (1981)).

Here, contrary to the circuit court's decision on resentencing, Shirikian had no legitimate expectation in her bifurcated sentence being stayed, and in being placed on probation, because the circuit court was not authorized to stay her sentence and place her on probation. Resentencing is the proper method of correcting the improper sentence and does not violate Shirikian's right to be free from double jeopardy.[2]

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[2] The State does not believe it would be appropriate to simply remove the stay on the bifurcated sentence the circuit court imposed, because the circuit court explicitly stated that if it were unable to stay Shirikian's sentence and place her on probation, "I would be doing something very different than simply be imposing a 5-year sentence. I want the parties to know that." (R. 38:33.)

CONCLUSION

This Court should reverse the circuit court's order denying the State's motion for resentencing and remand the case to the circuit court for resentencing.

Dated: September 24, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6205 words.

Dated: September 24, 2021.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that three copies of the above document were mailed on September 24, 2021, to:

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Dated this 24th day of September 2021.

Electronically signed by:

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