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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II

Case No. 2021AP859-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

REPLY BRIEF OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

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ARGUMENT

I. The circuit court impermissibly stayed Shirikian's sentence, placed her on probation, and ordered her confined for only nine months in jail rather than at least one year in prison.

A. Wisconsin Stat. § 346.65(2)(am)5. requires a bifurcated sentence with at least one year of initial confinement in prison.

Under Wis. Stat. § 346.65(2)(am)5., a court sentencing a person for operating a motor vehicle while under the influence of an intoxicant (OWI) as a fifth or sixth offense “shall impose a bifurcated sentence under s. 973.01.” The statute provides a presumptive minimum term of initial confinement of one year and six months in prison. Wis. Stat. § 346.65(2)(am)5. The term of extended supervision must be at least four and one-half months. *See* Wis. Stat. § 973.01(2)(d) (the term of extended supervision must be at least 25% of the term of initial confinement). The shortest possible bifurcated sentence is therefore 22 and one-half months, including 18 months of initial confinement in prison and four and one-half months of extended supervision.

Wisconsin Stat. § 346.65(2)(am)5. contains an exception. If a court finds that it is in the best interests of the community and will not harm the public, it may impose “a term of confinement that is less than one year and 6 months.” Wis. Stat. § 346.65(2)(am)5. Since the court is still required to impose a bifurcated sentence, the “term of confinement” portion of the bifurcated sentence must be at least one year in prison. Wis. Stat. § 973.01(2)(b) (“[T]he portion of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year.”). And the term of extended supervision must be at least three months, for a total of at least fifteen months of imprisonment.

B. A court cannot stay the sentence, place the person on probation, or allow the person to serve the confinement in jail rather than prison.

The circuit court imposed a five-year bifurcated sentence including three years of initial confinement and two years of extended supervision. But the court stayed the sentence and placed Shirikian on probation with nine months in jail. Shirikian's sentence was illegal because the court was not authorized to (1) stay the sentence; (2) place her on probation; or (3) allow her to serve nine months in jail rather than one year in prison.

Unless a statute prohibits probation, a sentencing court may withhold sentence or impose and stay a sentence and place the person on probation. Wis. Stat. § 973.09(1)(a). But 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. *State v. Lalicata*, 2012 WI App 138, ¶¶ 14–15, 345 Wis. 2d 342, 824 N.W.2d 921. In *State v. Williams*, 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467, 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 recognized that under *Lalicata*, “a mandatory minimum bifurcated sentence is inconsistent with permitting probation.” *Id.* ¶ 34.

Wisconsin Stat. § 346.65(2)(am)5. requires a court to impose a bifurcated sentence with at least one year of initial confinement. Under *Lalicata* and *Williams*, a court may not withhold sentence or stay the sentence and place the person on probation. And a court may not allow the confinement to be served in jail because bifurcated sentences “necessarily involve time in prison.” *Williams*, 355 Wis. 2d 581, ¶ 35.

C. Contrary to Shirikian’s assertion, the circuit court was not authorized to stay her sentence, place her on probation, and allow her to serve nine months in jail rather than at least one year in prison.

Shirikian acknowledges that even when a court makes the required findings to allow it to impose a term of initial confinement shorter than the presumptive minimum, it is required to impose a bifurcated sentence. (Shirikian’s Br. 8, 18–19.) But she asserts that the exception in Wis. Stat. § 346.65(2)(am)5. “ultimately permits a court to order probation instead of imposing mandatory prison time.” (Shirikian’s Br. 32.) She is incorrect.

1. Wisconsin Stat. § 973.15(8)(a)1. does not authorize a court to stay the bifurcated sentence required under Wis. Stat. § 346.65(2)(am)5.

Shirikian claims that the circuit court was authorized to stay her sentence for “legal cause” under Wis. Stat. § 973.15(8)(a)1. (Shirikian’s Br. 19–21.) She argues that Wis. Stat. § 973.15(8)(a)1. provides legal cause to stay a sentence under Wis. Stat. § 346.65(2)(am)5. because Wis. Stat. § 346.65(2)(am)5. authorizes a court to impose a term of confinement that is less than one year and six months. (Shirikian’s Br. 21.)

However, there is no “legal cause” to stay a sentence to comply with Wis. Stat. § 346.65(2)(am)5. “[L]egal cause” under Wis. Stat. § 973.15(8)(a)1. is “tied to institutional functions” such as “a stay pending appeal” or “a stay to consolidate sentencing matters.” *State v. Szulczewski*, 216 Wis. 2d 495, 506, 574 N.W.2d 660 (1998) (citing *Reinex v. State*, 51 Wis. 152, 8 N.W. 155 (1881); *Weston v. State*, 28 Wis. 2d 136, 146, 135 N.W.2d 820 (1965)). A stay “to achieve the objectives of § 971.17” for an NGI committee is legal cause. *Szulczewski*, 216 Wis. 2d at 507–08. But a stay to personally

accommodate a defendant is not for legal cause. *Id.* at 506 (citing *State v. Braun*, 100 Wis. 2d 77, 85, 301 N.W.2d 180 (1981)).

Wisconsin Stat. § 346.65(2)(am)5. requires a court to impose a bifurcated sentence with at least the presumptive mandatory minimum term of initial confinement, or, if it makes the required findings, the mandatory minimum term of initial confinement. Nothing in the statute requires or even allows a court to stay the sentence and order probation.

In *Szulczewski*, the supreme court recognized that “[t]he simple reason for the circuit court’s limited powers is that upon sentencing, the essence of the judicial process is complete and nothing remains for the court to do but to turn the defendant over to the executive authority for incarceration.” *Szulczewski*, 216 Wis. 2d at 506 n.12. Here, the circuit court infringed upon the executive’s power to incarcerate Shirikian and then supervise her on extended supervision. As the Department of Corrections noted in its letter to the circuit court, 2019 Wis. Act 106 and Wis. Stat. § 346.65(2)(am)5. allow for “a lesser initial confinement term under certain circumstances,” but “an offender convicted of OWI 5th or 6th under § 346.65(2)(am)5 is not eligible to be ordered for a term of probation and instead is subject to a bifurcated prison sentence under Wis. Stat. § 973.01.” (R. 32.) Staying that sentence is not “tied to an institutional function.” There is no legal cause to stay a bifurcated sentence that requires a mandatory term of initial confinement in prison.

2. Wisconsin Stat. § 973.15(8)(a)2. does not authorize a court to stay a bifurcated sentence required under Wis. Stat. § 346.65(2)(am)5.

Shirikian asserts that the circuit court was authorized to stay her sentence under Wis. Stat. § 973.15(8)(a)2., which authorizes a court to stay a sentence “under s. 973.09(1)(a).”

(Shirikian's Br. 22–24.) Section 973.09(1)(a) provides that unless “probation is prohibited for a particular offense by statute,” a court “may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation.”

Wisconsin Stat. § 973.09(1)(a) does not apply because a statute requiring that a court “shall” impose a particular sentence prohibits a court from withholding sentence. *Lalicata*, 345 Wis. 2d 342, ¶ 15. And if a court cannot withhold sentence, it cannot stay a sentence it imposes. *Id.* Since Wis. Stat. § 346.65(2)(am)5. requires a bifurcated sentence with a mandatory minimum term of initial confinement, probation is prohibited. “[A] mandatory minimum bifurcated sentence is inconsistent with permitting probation.” *Williams*, 355 Wis. 2d 581, ¶ 34.

Shirikian argues that *Williams* does not apply because Wis. Stat. § 346.65(2)(am)5. contains a sentencing exception. (Shirikian's Br. 32.) But she acknowledges that the sentencing exception still requires a bifurcated sentence with a mandatory minimum term of confinement. (Shirikian's Br. 8, 18–19.) Probation is therefore prohibited. *Williams*, 355 Wis. 2d 581, ¶ 34. Shirikian argues that *Williams* does not apply here because the circuit court imposed a bifurcated sentence. (Shirikian's Br. 32.) But that is no distinction. Under *Williams*, when a court imposes a bifurcated sentence with a mandatory minimum term of initial confinement it may not place the person on probation.

Shirikian argues that *Lalicata* does not apply because it concerned Wis. Stat. § 973.09(1)(a). She claims that Wis. Stat. § 973.09(1)(d) applies here. (Shirikian's Br. 23–24.) Under Wis. Stat. § 973.09(1)(d), “If a person is convicted of an offense that provides a mandatory or presumptive minimum period of one year or less of imprisonment, a court may place the person on probation under par. (a),” so long as “the court requires, as a condition of probation, that the person be

confined under sub. (4) for at least that mandatory or presumptive minimum period.” Wis. Stat. § 973.09(1)(d). Shirikian claims that Wis. Stat. § 973.09(1)(d) “*expressly authorize[s]* probation here.” (Shirikian’s Br. 23.)

Shirikian’s reliance on Wis. Stat. § 973.09(1)(d) is misplaced for two reasons. First, Wis. Stat. § 973.15(8)(a)2. authorizes a court to stay a sentence “under s. 973.09(1)(a).” It does not authorize a court to stay a sentence under Wis. Stat. § 973.09(1)(d). If Wis. Stat. § 973.09(1)(d) applies, and Wis. Stat. § 973.09(1)(a) does *not* apply, then Wis. Stat. § 973.15(8)(a)2. does not authorize a stay of the sentence.

Second, Wis. Stat. § 973.09(1)(d) applies only to offenses with “a mandatory or presumptive minimum period of one year or less of *imprisonment*.” Wis. Stat. § 973.01(1)(d). “Under the ‘truth-in-sentencing’ law, a sentence to imprisonment consists of a ‘term of confinement’ and a ‘term of extended supervision.’” *State v. Volk*, 2002 WI App 274, ¶ 28, 258 Wis. 2d 584, 654 N.W.2d 24. Wisconsin Stat. § 346.65(2)(am)5. requires a mandatory minimum of one year of *initial confinement*. A court also must impose at least three months of extended supervision (25% of the term of initial confinement) for a total of 15 months of imprisonment. Since the minimum period of imprisonment is longer than one year, section 973.09(1)(d). does not apply.

3. The “term of confinement” required under Wis. Stat. § 346.65(2)(am)5. is initial confinement in prison.

Shirikian argues that a court may stay the bifurcated sentence required under the exception in Wis. Stat. § 346.65(2)(am)5. because the “term of confinement” it is required to impose is not initial confinement in prison. (Shirikian’s Br. 26–32.) She claims that since Wis. Stat. § 973.09(4)(a) refers to confinement in prison, the county jail, a Huber facility, a work camp, or a tribal jail, the “term of

confinement” under the exception in Wis. Stat. § 346.65(2)(am)5. can be served in any of those places. (Shirikian’s Br. 26.)

However, a bifurcated sentence is “a sentence that consists of a term of confinement in prison followed by a term of extended supervision.” Wis. Stat. § 973.01(2). The first sentence in Wis. Stat. § 346.65(2)(am)5. requires a court to impose a bifurcated sentence and specifies “the confinement portion of the bifurcated sentence,” which plainly is confinement in prison. The second sentence (the exception) states that the “term of confinement” may be less than one year and six months. The “term of confinement” is plainly the “term of confinement in prison” that is part of the bifurcated sentence because every bifurcated sentence includes a term of initial confinement in prison. Wis. Stat. § 973.01(2).

Shirikian relies on various unrelated statutes that require a bifurcated sentence and use the phrase “confinement *in prison*.” (Shirikian’s Br. 27–31 (emphasis added).) She argues that under the State’s reading of “confinement” in Wis. Stat. § 346.65(2)(am)5. as meaning “confinement in prison,” each of these statutes refer to “confinement in prison in prison.” (Shirikian’s Br. 26–27.)

However, even if a statute that requires a bifurcated sentence does not say that the term of confinement must be served “in prison,” the confinement must be served in prison. For instance, Wis. Stat. § 939.616(1r) requires that for certain child sexual assaults, a court “shall impose a bifurcated sentence under s. 973.01,” and “[t]he term of confinement *in prison* portion of the bifurcated sentence shall be at least 25 years.” Wis. Stat. § 939.616(1r). If this statute did not say “term of confinement *in prison* portion of the bifurcated sentence,” a court would obviously not be authorized to impose the mandatory term of “at least 25 years” of confinement in the county jail, a Huber facility, a work camp, or a tribal jail. The term of confinement could only be served

in prison. *See* Wis. Stat. § 973.02 (“[I]f a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment . . . a sentence of more than one year shall be to the Wisconsin state prisons . . .”).

The same is true of Wis. Stat. § 346.65(2)(am)5., which requires a bifurcated sentence. Even when a court imposes “a term of confinement that is less than one year and six months” under the exception, it must impose at least one year of confinement. And like under any bifurcated sentence, the confinement portion of the bifurcated sentence must be served in prison.

4. The legislative history affirms that a court shall impose a bifurcated sentence with a mandatory minimum of one year of initial confinement in prison.

Shirikian asserts that if this Court finds Wis. Stat. § 346.65(2)(am)5. ambiguous, it should consider the legislative history and interpret the statute in her favor under the rule of lenity. (Shirikian’s Br. 33–39.)

However, the statute is not ambiguous. It requires a bifurcated sentence with at least one year and six months of initial confinement in prison, or, if the court makes the required findings, with as little as one year of initial confinement in prison. A court cannot, as the circuit court suggested, impose as little as one day of confinement in jail. (R. 38:35.) And it cannot, as Shirikian argues, allow a person to serve the confinement portion of the bifurcated sentence in the county jail, a Huber facility, a work camp, or a tribal jail.

Because this statute is not ambiguous, the rule of lenity does not apply. *See State v. Guarnero*, 2015 WI 72, ¶ 27, 363 Wis. 2d 857, 867 N.W.2d 400 (if a statute is not ambiguous applying the rule of lenity is unnecessary). And there is no need to consider the legislative history behind 2019 Wis. Act

106, which amended the statute to its current form. (A-App. 150.) But as the State explained in its opening brief, the legislative history confirms the plain meaning of the statute. Shirikian asserts that the three drafting requests that led to 2019 Wis. Act 106 do “not reflect a legislative intent to mandate at least a one-year prison term.” (Shirikian’s Br. 35–36.) But they do. The first drafting request was for a bill “requiring 1.5 year minimum sentence for 5th and 6th OWI.” (A-App. 151.) As the Legislative Reference Bureau recognized, “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).

The second drafting request was for the exception, to “[c]hange 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 19, 2019 (A-App. 154). The amended bill said, “The court may impose a *sentence* that is less than one year and 6 months if the court” makes the required findings. Senate Amendment 1, to Senate Bill 6 (emphasis added) (A-App. 155).

The third drafting request was to change “sentence” to “term of confinement.” 2019 Drafting Request, October 30, 2019 (A-App. 156). Senate Amendment 2, to Senate Bill 6, did exactly that. (A-App. 157.)

These drafting requests demonstrate that the Legislature intended to increase the minimum six months of imprisonment under the previous law and require a bifurcated sentence with a presumptive minimum of at least one year and six months of initial confinement in prison, and a mandatory minimum of at least one year in prison. By mandating a bifurcated sentence, which necessarily requires initial confinement in prison, the Legislature prohibited

withholding or staying the sentence and placing the person on probation.

II. Resentencing Shirikian would not constitute double jeopardy because she had no reasonable expectation of finality in her illegal sentence.

Shirikian argues that resentencing her would violate her right to be free from double jeopardy. (Shirikian's Br. 39–41.) She relies on *State v. Willett*, 2000 WI App 212, 238 Wis. 2d 621, 618 N.W.2d 881. (Shirikian's Br. 39.) But *Willett* is inapplicable because it concerns resentencing after a court imposes a lawful sentence. *Id.* ¶ 6. Shirikian's sentence was not lawful. She therefore had no legitimate expectation of finality. *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 sentence."); *United States v. Jackson*, 903 F.2d 1313, 1316 (10th Cir. 1990) ("A defendant can acquire no legitimate expectation of finality in an illegal sentence."); *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992) (The defendant "lacked a reasonable expectation of finality in his original illegal sentencing."). And since Shirikian had no legitimate expectation of finality in her sentence, resentencing her would not constitute double jeopardy. *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980).

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 this 29th day of August 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

FORM AND LENGTH 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 2,999 words.

Dated this 29th day of August 2022.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General

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.

Dated this 29th day of August 2022.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General