STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP001943-CR

Racine County Circuit Case No. 2020CF000528

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMMIE L. BLOUNT,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF AND JUDGEMENT OF CONVICTION ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE MAUREEN M. MARTINEZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

PATRICIA J. HANSON
District Attorney, Racine County

DIANE M. DONOHOO
Assistant District Attorney
State Bar #1018090
Attorneys for Plaintiff-Respondent

Racine County District Attorney's Office
730 Wisconsin Avenue
Racine, Wisconsin 53403
262.636.3172
diane.donohoo@da.wi.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute cited

ISSUES PRESENTED

Blount appeals the trial court's denial of his motion to modify his sentence. Blount's claim that the trial court erroneously exercised its discretion during sentencing was forfeited when he failed to object and preserve the issue. The trial court clearly articulated its sentencing goals. The court stated an intended length of probation, ordered the term of probation to be consecutive to a term of prison, then immediately thereafter ordered that it be concurrent to a term of extended supervision. When the court then realized that it could not order probation concurrent to extended supervision, the trial court had not only the authority, but the duty, to correct its misstatement. The trial court then acted properly when it ordered the probationary term to be served consecutively to a prison sentence, even if doing so lengthened the probationary term beyond that which may have been originally contemplated by the court.

Was any alleged error forfeited by failing to object?

The post-conviction court did not answer this question.

This Court should say: No.

Was the circuit court's sentencing decision an erroneous exercise of discretion?

The circuit court answered: No.

Did Blount present a new factor warranting sentence modification?

The circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication as the issues presented can be decided on the basis of well-established law.

STATEMENT OF FACTS

The State agrees with the statement of facts Blount included. However, Blount omitted one important statement made by the trial court during the sentencing hearing. Blount correctly noted that the prosecutor asked the court if the probation term was to be concurrent or consecutive to the prison sentence. (Blount Br. P. 5). Blount asserts that the trial court responded by saying, "it will be concurrent with his ES, but then it [will] last farther than his ES. Its one more year than his ES is going to be. Because his ES will be two years." (Blount Br. P. 5). However, a closer reading of the transcript reflects that in fact the trial court first said, "It's consecutive to the prison." (R:69:29). The trial court then continued and made the statements Blount quoted. (R:69:29).

STANDARD OF REVIEW

Whether a claim is forfeited or adequately preserved for appeal is a question of law which this court will review de novo. *State v. Coffee*, 2020 WI 1, ¶ 17, 389 Wis. 2d 627, 641, 937 N.W.2d 579, 586.

Whether the trial court's sentence was appropriate is reviewed for an erroneous exercise of discretion with an emphasis on reviewing whether the reasons for the sentence are adequately set forth on the record. *State v. Gallion*, 2004 WI 42, ¶ 8, 270 Wis. 2d 535, 546, 678 N.W.2d 197, 202.

Whether a defendant has presented a new factor for a sentence modification is a question of law which this court will review independently. The question as to whether a new factor merits a sentence modification is reviewed for an erroneous exercise of discretion. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 71, 797 N.W.2d 828, 837.

ARGUMENT

I. Any error, if one existed, was forfeited as Blount failed to object at the time of sentencing.

No sentencing error occurred. But even if error occurred, Blount forfeited it by failing to timely object.

The rule of forfeiture applies when certain rights are not timely asserted, a situation which is applicable in this case. "The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." *State v. Coffee*, 2020 WI 1, ¶ 19, 389 Wis. 2d 627, 642, 937 N.W.2d 579, 586. (citations omitted) In *Coffee*, the issue was whether Coffee forfeited his right by failing to object to the introduction of inaccurate information at sentencing. The Wisconsin Supreme Court held that the forfeiture rule did not apply in that situation, but affirmed the sentence after finding the error to be harmless. *Id.*, ¶ 39.

Coffee is distinguishable from the case at hand. In *Coffee*, the Court held that when defense counsel was faced with what turned out to be inaccurate information, "defense counsel does not know what defense counsel does not know".

Id. ¶ 29. Thus, Coffee could not be deemed to have forfeited an objection not reasonably known by counsel to be made.

By contrast, Blount has not alleged that he was sentenced based upon inaccurate information. Nor does Blount claim ineffective assistance of counsel. It is readily apparent that trial counsel's sentencing arguments demonstrated an understanding of the law on sentencing. (R:69:16-22). Also, defense counsel was given a chance to comment after the court stated that the probation term was to be consecutive to the prison sentence. Rather than raising an objection, he merely recited, "So the three of the probation consecutive to the sentence." (R:69:30). If any objection was to be had, that was the time to make it. By failing to do so, any alleged error was forfeited. The State further submits that in light of the authority cited below in Parts II and III, had an objection been made, it would have been unsuccessful.

For all of these reasons, this Court should deem any claim of error to have been forfeited.

II. The trial court's sentence was lawful and valid.

The trial court in this case articulated the general sentencing objectives early in its comments and how it prioritized those objectives. (R:69:24). After describing the facts of the case and how they relate to the sentencing objectives, (R:69:24-27), the court decided that prison was necessary to effectuate its objectives. (R:69:27). The court then agreed that probation was also needed and when asked, stated that the probation would be "consecutive to the prison." (R:69:29). The court followed that statement by saying, "it will be concurrent with his ES." (R:69:29). Upon being advised that it must be concurrent or consecutive to the entire prison sentence, and not just concurrent to one part of a bifurcated sentence, the court restated its sentencing objectives and once again ordered the probation to be served consecutively. (R:69:30).

In *State v. Gruetzmacher*, 2004 WI 55, 271 Wis. 2d 585, 679 N.W.2d 533, a case directly on point, the trial court sentenced the defendant on multiple counts in multiple files on February 19, 2002. *Id.* ¶¶ 6-7. Later the same day, the *Gruetzmacher*, trial court realized that an error occurred as it imposed a sentence that exceeded the statutory maximum on one count. *Id.* ¶ 8. The trial court notified the parties but could not conduct a hearing until two days later when the parties were available. *Id.* ¶ 8. The trial court notified the sheriff that Gruetzmacher was not to be transported to prison until after the next hearing and entered a temporary stay in effect until the next sentencing hearing. *Id.* ¶ 9.

The *Gruetzmacher* trial court held a second sentencing hearing on March 5, 2002, wherein it reiterated its sentencing objectives and rendered a new sentence consistent with its goals. *Id.* ¶ 10. Gruetzmacher subsequently filed a motion with the trial court claiming double jeopardy barred the trial court from correcting its sentence structure by giving Gruetzmacher confinement time after first ruling that probation was appropriate. *Id.* ¶ 12. The court granted Gruetzmacher's motion and held a third sentencing hearing on September 16, 2002. *Id.* ¶ 13. The Gruetzmacher trial court then ordered probation on that count and the State appealed. *Id.* ¶ 13.

Noting that "our jurisprudence has placed a premium on ensuring finality of judgments and not subjecting defendants to endless prosecutions or multiple punishments", the Supreme Court analyzed the line of cases which addressed sentences which have been commenced to be served versus ones not yet begun at the time a correction of a sentencing error was made. *Id.* ¶¶ 23-34. The Court held that "the fact that the justice system as a whole had not yet begun to act upon the circuit court's sentence is an important fact that bears emphasis." *Id.* ¶ 38. The Court concluded that Gruetzmacher did not have an expectation of finality in the

original sentence imposed at the February hearing. *Id.* ¶ 40. The trial court would have corrected its error *the same day* if the parties had been available. *Id.* ¶ 38. The Court found that by conducting the September resentencing hearing, the trial court made an error of law and erroneously exercised its discretion granting Gruetzmacher's motion for resentencing. *Id.* ¶ 39. Thus, the Supreme Court reversed and reinstated the March 5, 2022, sentence. *Id.* ¶¶ 40-41.

If the *Gruetzmacher* trial court did not commit error by correcting its sentence almost two weeks after originally imposing an incorrect sentence, the trial court in Blount's case clearly acted properly by clarifying its intended sentencing structure within a matter of seconds. (R:69:29-30). When asked if the probation term imposed was to be concurrent to or consecutive to the prison sentence, the trial court initially said, "It's consecutive to the prison." (R:69:29) The judge followed with "Well, it will be concurrent with the ES, but then it [will] last farther than his ES." (R:69:29). Once the parties pointed out that the term of probation could not run concurrent to only the extended supervision part of a bifurcated sentence, the court reiterated its sentencing objectives and once again order that the term of probation be served consecutive to the prison sentence. The trial court stated, "Okay. Well, my thoughts were, is that he needs time to engage in the culinary school, and they can help him with all of that on probation. So I'm going to say it's consecutive." (R:69:30).

The flaw in Blount's argument is the mistaken belief that the trial court was precluded from correcting the misstatement made during the sentencing hearing in any way other than in his favor. Rendering a sentence is one of the most critical and solemn aspects in all of our criminal justice system. It is not, as Blount's argument implies, akin to a game where the rules require that we must accept the trial court's first answer. If that were the case, it is clear that the

first utterance by the court on the issue was to order the probation term to be served *consecutively* to his prison sentence. (R: 69:29).

Once the trial court realized its misstatement, it immediately cured any error. Blount had obviously not yet started to serve his sentence and thus had no expectation that his sentence was final. Not only was the ink not yet dry on the judgment of conviction, the sentencing hearing had not concluded for the clerk to prepare the document.

The court was required to render a lawful sentence that fully and accurately reflected its stated sentencing objectives. When the remarks of the trial court are taken in context, it is clear that Blount's ultimate sentence as ordered on January 22, 2021, was what the court intended in order to achieve its stated sentencing objectives. It was lawful. It was valid. It should be the sentence served.

III. Blount failed to present a new factor that warrants sentence modification.

To prevail on a motion to modify sentence, "the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." *State v. Harbor*, 2011 WI 28, ¶ 38, 333 Wis. 2d 53, 73, 797 N.W.2d 828, 838. Blount has not proven either prong.

Blount concedes that "the trial court properly exercised its discretion when it meted out the *original* sentence." (Blount Br. P. 10) (Emphasis added). The State agrees. Originally, the court ordered the probation term to be served consecutively to his prison sentence. (R: 69:29) When the trial court was prompted that it could not run probation concurrent to extended supervision, it reiterated its 'original' sentence as the order of the court. Blount now argues that the trial court "misunderstood the law governing sentencing structure." (Blount Br. P. 6). The State submits that Blount's accusations that the trial court did not understand the law is

misplaced and that the trial court merely made a misstatement which was immediately corrected. Even if for the few seconds when the court may have thought it could run probation concurrent to extended supervision, that was not the 'original' sentence. The original proclamation was for probation consecutive to prison. (R:69:29).

The State posits that Blount does not cite a new factor at all, he merely recounts what happened historically. (Blount Br. p. 10), and he assumes he is entitled to sentence modification because he identifies a preferred sentencing structure. (Blount Br. p. 8-13). Blount had an opportunity at the sentencing hearing to convince the trial court that his sentencing structure was appropriate. (R:69:16-22). The court rejected his argument in part by ordering a prison sentence in the case not on appeal. (R:69:27-30).

Blount has not identified any new fact not known to the court *at the time of sentencing* nor has he offered a set of facts that were overlooked. *Harbor,* ¶ 40. The court was well aware of its options. Once the trial court's misstatement was identified, the court clarified its intent and rendered a legal and valid sentence. This was all done *at the time of sentencing*, nothing was overlooked. Blount is not entitled to relief just because he does not like his sentence.

For all of the above stated reasons, Blount's assertion that a new factor has been presented, and proven to the required level of proof, should be rejected by this court.

IV. The trial court lacked the authority to reduce Blount's probation.

Not only is Blount not legally entitled to the relief he seeks because it is not a new factor, he is not entitled to a reduction of the term of probation at all. Blount is not asking for the *conditions* of probation to be modified, nor is he asking for the length to be *extended*. He is asking for something the

trial court cannot legally grant to him—a reduction in the length of the probation term.

The trial court lacked the authority to reduce the term of probation once the valid sentence was imposed, and the sentence began to be served. The Wisconsin Supreme Court has held that the court's authority to modify a term of probation is limited to modifying the conditions and terms, but not shortening the length. *See* Wis. Stat. §973.09(3)(a). It would be an error as a matter of law to have shortened the length of probation in this case. *State v. Dowdy*, 2012 WI 12, ¶ 42, 338 Wis. 2d 565, 586–87, 808 N.W.2d 691, 702; *See also State v. Schwind*, 2019 WI 48, ¶ 33, 386 Wis. 2d 526, 546–47, 926 N.W.2d 742, 752 (courts do not have the inherent authority to reduce a term of probation).

This court should reject Blount's position which implicitly means if a trial court makes a misstatement, even one corrected within seconds, that the defendant should win some sort of benefit from such a minor human error. Such an unreasonable expectation would put a trial court in the untenable position of mandating perfection in every utterance spoken. That cannot be the standard expected for any participant in the criminal justice system.

CONCLUSION

For all of the reasons stated herein, this Court should affirm the circuit court's order denying Blount's motion to modify his sentence.

Dated this 21st day of April 2022.

Respectfully submitted,

Patricia J. Hanson
District Attorney, Racine County

Electronically signed by:

Diane M. Donohoo
Diane M. Donohoo
Assistant District Attorney
State Bar #1018090

Attorneys for Plaintiff-Respondent

Racine County District Attorney's Office
730 Wisconsin Avenue
Racine, Wisconsin 53403
262.636.3172
diane.donohoo@da.wi.gov

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 3023 words.

Dated this 21st day of April 2022.

Electronically signed by:

Diane M. Donohoo
Diane M. Donohoo
Assistant District Attorney
State Bar #1018090

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 21st day of April 2022.

Electronically signed by:

Diane M. Donohoo
Diane M. Donohoo
Assistant District Attorney
State Bar #1018090