

FILED
05-02-2022
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STATE OF
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COURT OF
APPEALS

DISTRICT
IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2021AP2053-CR
Circuit Court Case No. 2015CM318

vs.

Ricky Rodriguez,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED ON
NOVEMBER 18, 2021, IN THE CIRCUIT COURT
FOR SAUK COUNTY, BRANCH I,
THE HONORABLE MICHAEL P. SCRENOCK PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF FACTS

On June 30, 2015, the State charged Ricky Rodriguez, the defendant-appellant, in a three count criminal complaint.¹ Specifically, the State charged Rodriguez with one count of misdemeanor battery (Count 1), one count of disorderly conduct (Count 2), and one count of misdemeanor bail jumping (Count 3).² On February 23, 2017, Rodriguez pled no contest to Count 1 and Count 3.³ Upon entry of the plea, the Circuit Court withheld sentence and placed Rodriguez on probation for two years of probation, concurrent to any other sentence.⁴

On June 18, 2018, the Wisconsin Department of Corrections filed a Revocation Order and Warrant in Sauk County Case 2015CM318.⁵ On October 8, 2019, at a sentencing on revocation hearing, the Circuit Court sentenced Rodriguez to nine months of jail on each count, concurrent to each other, but consecutive to any other sentence in Sauk County Case 2015CM318.⁶ Between June 18, 2018, and October 8, 2019, Rodriguez

¹ R. 2.

² *Id.* at 1.

³ R. 29.

⁴ *Id.*

⁵ R. 34.

⁶ R. 47.

was convicted in Milwaukee County Case 2017CF2397 and sentenced to prison.⁷

On May 28, 2021, Rodriguez filed a motion for sentence modification with the Circuit Court.⁸ Rodriguez's motion asked the Circuit Court to modify the sentence to order Sauk County Case 2015CM318 to be concurrent to Milwaukee County Case 2017CF2397.⁹ On July 6, 2021, the Circuit Court denied Rodriguez's motion without a hearing.¹⁰ In the Circuit Court's written decision it noted that Rodriguez's facts outlined in his motion did not constitute a new factor for sentence modification purposes.¹¹ Additionally, the Circuit Court noted that even if the facts in Rodriguez's motion constituted a new factor, those facts would not have changed the sentence imposed by the Circuit Court.¹²

On October 14, 2021, Rodriguez filed a motion for reconsideration with the Circuit Court.¹³ In his motion for reconsideration, Rodriguez asserted that the Circuit Court lacked the authority to order Sauk County Case 15CM318 to be consecutive to Milwaukee County Case

⁷ See e.g., R. 52:1–2; and R. 55:1–2.

⁸ R. 52.

⁹ *Id.* at 1.

¹⁰ R. 53.

¹¹ *Id.* at 2.

¹² *Id.*

¹³ R. 55.

2017CF2397 because Wis. Stat. § 973.10(2) and *Drinkwater v. State*¹⁴ require a sentence ordered after revocation to immediately commence.¹⁵ On October 15, 2021, the State filed a letter responding to Rodriguez's motion for reconsideration asking the Circuit Court to deny the motion without a hearing.¹⁶ The State's letter noted that Rodriguez's motion reliance on *Drinkwater* was misplaced because *Drinkwater* interpreted an older version of Wis. Stat. § 973.15 that no longer controlled the outcome in Rodriguez's case.¹⁷ On November 18, 2021, the Circuit Court filed a written order denying Rodriguez's motion for reconsideration without a hearing.¹⁸ The Circuit Court's order relied on the authority of Wis. Stat. § 973.15(2)(a) to deny Rodriguez's motion.¹⁹

ARGUMENT

I. This Court Lacks Jurisdiction to Review

For reasons set forth below, the Court of Appeals lacks the jurisdiction to evaluate Rodriguez's appeal of both his motion for sentence modification, and his motion for reconsideration. Accordingly, Respondent asks this Court to deny Appellant's claims.

¹⁴ 69 Wis. 2d 60, 230 N.W.2d 126 (1975)

¹⁵ R. 55:2.

¹⁶ R. 56.

¹⁷ *Id.* at 1.

¹⁸ R. 57.

¹⁹ *Id.*

a. This Court Cannot Review the Denial of the Rodriguez's Motion for Sentence Modification

In the current case, an appeal to the Court of Appeals must be initiated within 90 days.²⁰ In the current case, the Circuit Court denied Rodriguez's motion for sentence modification on July 6, 2021. Based on Wis. Stat. § 808.04(1), Rodriguez had 90 days from July 6, 2021, to initiate his appeal; those 90 days ended on October 4, 2021. Thus, this Court is correct in finding it lacks jurisdiction to review the Circuit Court's denial of Rodriguez's motion for sentence modification.

b. Rodriguez's Motion for Reconsideration Was Not Timely and is Thus Barred

As mentioned previously, Wis. Stat § 808.04(1) requires that an appeal to the Court of Appeals must be initiated within 90 days in the current case. Rodriguez filed his motion for reconsideration on October 14, 2021. Again, the Circuit Court's order denying Rodriguez's motion for sentence modification occurred on July 6, 2021. Rodriguez filed his motion for reconsideration on October 14, 2021. A motion for reconsideration must be made "not later than 20 days after the entry of judgment."²¹ Rodriguez's motion for reconsideration was therefore not timely and could have been denied by the Circuit Court on that

²⁰ See Wis. Stat. § 808.04(1): "An appeal to the court of appeals must be initiated within ... 90 days of entry if notice is not given[.]"

²¹ Wis. Stat. § 805.17(3).

procedural basis alone. Based on the fact that Rodriguez's motion for reconsideration was not timely, this Court should find it lacks jurisdiction to review the Circuit Court's denial of Rodriguez's motion for reconsideration.

c. Rodriguez's Motion for Reconsideration Does Not Present a New Issue; Therefore, This Court Lacks Jurisdiction

If, however, the Court of Appeals finds the motion for reconsideration to be timely, the Court of Appeals should still deny reviewing Rodriguez's appeal on his motion for reconsideration based on the *Marsh/Ver Hagen* rule.

No right of appeal exists from an order denying a motion to reconsider which presents the same issues as those determined in the order or judgment sought to be reconsidered.²² "An order denying reconsideration is not appealable since it does not prevent an appeal from the original order or judgment."²³ "The *Marsh* and *Ver Hagen* Courts were concerned that a motion for reconsideration should not be used as a ploy to extend the time to appeal from an order or judgment when the time to appeal had expired."²⁴ The "new issues" test announced

²² *Marsh v. Milwaukee*, 104 Wis. 2d 44, 46, 310 N.W.2d 615, 616 (1981); *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 26, 197 N.W.2d 752, 754–55 (1972).

²³ *Silverton Enters., Inc. v. General Cas. Co.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988).

²⁴ *Id.*

in *Ver Hagen* requires the party to present “issues other than those determined by the order or judgment for which review is requested in order to appeal from the order entered on the motion for reconsideration.”²⁵

Rodriguez’s appeal fails the *Marsh/Ver Hagen* rule because the issue in Rodriguez’s motion for sentence modification is the same issue in Rodriguez’s motion for reconsideration. Both of Rodriguez’s motions request the Circuit Court modify Rodriguez’s sentence in Sauk County Case 2015CM318 to be concurrent to Milwaukee County Case 2017CF2397. Thus, there is no “new issue” between the motions, and the Court of Appeals does not have jurisdiction to consider Rodriguez’s appeal of the Circuit Court’s denial of his motion for reconsideration.

The sole issue in Rodriguez’s motion for sentence modification is whether the Circuit Court could modify Rodriguez’s sentence from consecutive to concurrent. More specifically in the Rodriguez’s motion for sentence modification, he moved “the Court to exercise its inherent authority and modify his 9month [*sic*] jail sentence from consecutive to concurrent [*sic*] to his Milwaukee Case#172397 [*sic*].”²⁶ While not the clearest, Rodriguez’s motion relied on Wis. Stat. § 973.19 and alleged

²⁵ *Ver Hagen*, 55 Wis.2d at 26.

²⁶ R. 52:1.

“new factors” to request the Circuit Court to modify the sentence from consecutive to concurrent.²⁷

Similarly, the sole issue in Rodriguez’s motion for reconsideration is whether the Circuit Court could modify Rodriguez’s sentence from consecutive to concurrent. Specifically, in his motion Rodriguez asserted that the Circuit Court had “no statutory Authority [*sic*] to order that the sentence then imposed be made consecutive to his other sentence.”²⁸ Rodriguez relied on the holding in *Drinkwater* to contend that the Circuit Court could not order Rodriguez’s sentence to be consecutive.²⁹ Thus, Rodriguez’s implicit argument was that the Circuit Court must modify the sentence to be concurrent.

The sole issue in each motion is whether the Circuit Court could modify Rodriguez’s sentence from a consecutive to a concurrent sentence. Rodriguez does not change the relief sought in each motion. He merely changes how he seeks the relief, offering the same issue for analysis in each motion. Thus—based on the rationale of the *Marsh* and *Ver Hagen* courts—the Court of Appeals again lacks the jurisdiction to consider Rodriguez’s appeal of the Circuit Court’s denial of his motion for reconsideration.

²⁷ R. 52:2–4.

²⁸ R. 55:2.

²⁹ *Id.* at 1–2.

II. The Circuit Court had the Authority to Order the Sentence in Sauk County Case 2015CM318 to be Consecutive to any Other Sentence

Assuming, *arguendo*, that the Court of Appeals finds it has jurisdiction to review Rodriguez's appeal, the Circuit Court had the authority to order the sentence in Sauk County Case 2015CM318 to be consecutive to any other sentence. Therefore, the Court of Appeals should affirm the Circuit Court's November 18, 2021, decision denying Rodriguez's motion for reconsideration.

a. Standard of Review

The Court of Appeals reviews a trial court's decision on a motion for reconsideration under the erroneous exercise of discretion standard.³⁰ More specifically, "exercising discretion contemplates a reasoned application of proper principles of law to the facts of the case."³¹ A court's "authority for determining proper sentences is governed by Wis. Stat. Ch. 973."³² Resolving Rodriguez's contentions on appeal requires the Court of Appeals to interpret and apply the sentencing statutes to the

³⁰ *State v. Alonzo R.*, 230 Wis. 2d 17, 21, 601 N.W.2d 328 (Ct. App. 1999).

³¹ *Id.*

³² *State v. Cole*, 2000 WI App 52, ¶ 3, 233 Wis. 2d 577, 608 N.W.2d 432.

facts at hand.³³ Statutory interpretation is a question of law that the Court of Appeals reviews *de novo*.³⁴

b. Wis. Stat. § 973.15(2)(a) Gave the Circuit Court the Authority to Order Sauk County Case 2015CM318 to be Consecutive to any Other Sentence

Rodriguez's arguments in his motion for reconsideration and appeal rely upon out-of-date case law to such an extent that his arguments have no merit. The plain language of Wis. Stat. § 973.15(2)(a) allowed the Circuit Court to order Rodriguez's case to be consecutive to any other sentence; therefore, the Court of Appeals should affirm the Circuit Court's November 18, 2021, decision.

To begin, the primary authority Rodriguez relies upon in his arguments is *Drinkwater v. State*,³⁵ and that case is no longer good law. *Drinkwater* involved the Wisconsin Supreme Court interpreting a previous version of Wis. Stat. § 973.10(2) to determine whether a sentencing court could order—after the revocation of probation—a sentence to be served consecutively to a sentence imposed on a conviction arising between imposition and revocation of the probation.³⁶ However, *Drinkwater* was based on a previous version of Wis. Stat. §§ 973.10(2)

³³ *Cole*, 2000 WI App 52, ¶ 3.

³⁴ *Id.*

³⁵ 69 Wis. 2d 60, 230 N.W.2d 126 (1975).

³⁶ *Id.* at 65.

and 973.15 and does not govern this Court's analysis under the present statutes.

At the time of *Drinkwater*, Wis. Stat. § 973.10(2) provided in part that:

If a probationer violates the conditions of his probation, the department may order him brought before the court for sentence which shall be imposed without further stay or if he has already been sentenced, may order him to prison; and the term of the sentence shall begin on the date he the enters prison.³⁷

Drinkwater relied on this old version of the statute to hold that “the sentencing judges exceeded their powers when, upon revocation of probation, they made the sentences on the original convictions consecutive to the sentences on intervening convictions.”³⁸

The current version of Wis. Stat. § 973.10(2) provides in part that:

...If probation is revoked, the department shall:

(a) If the probationer has not already been sentenced, order the probationer brought before the court for sentence which shall then be imposed without further stay under s. 973.15; or

(b) If the probationer has already been sentenced, order the probationer to prison, and the term of the sentence shall begin on the date the probationer enters the prison.³⁹

³⁷ Wis. Stat. § 973.10(2) (1975).

³⁸ *Drinkwater*, 69 Wis. 2d at 76.

³⁹ Wis. Stat. § 973.10(2) (1975).

Unlike the *Drinkwater* era version of the statute, the current version of Wis. Stat. § 973.10(2) refers the reader directly to Wis. Stat. § 973.15 and Wis. Stat. § 973.15 has changed markedly since *Drinkwater*.

As mentioned previously, the court’s analysis in *Drinkwater* relied on a previous version of Wis. Stat. § 973.15; thus the holding in *Drinkwater* does not govern the court’s current analysis.⁴⁰ The language in Wis. Stat. § 973.15 has been amended since *Drinkwater* and no longer requires that consecutive sentences run with another sentence a defendant was “then serving.”⁴¹ The key language of Wis. Stat. § 973.15(2)(a) is that the court may impose a sentence “consecutive to any other sentence imposed at the same time or previously.”⁴²

In the current case, the Circuit Court clearly had the authority via Wis. Stat. § 973.15(2)(a) to order Rodriguez’s Sauk sentence to be consecutive to the Milwaukee sentence. On August 23, 2019—in Milwaukee County Case 2017CF2397—Rodriguez was sentenced to prison. On October 8, 2019—in Sauk County Case 2015CM318—the Circuit Court sentenced Rodriguez to nine months of jail on each count, concurrent to each other, but consecutive to any other sentence. At the time of sentencing in Sauk County Case 2015CM318, Rodriguez had a

⁴⁰ See e.g., *Cole*, 2000 WI App 432.

⁴¹ See *State v. Thompson*, 208 Wis. 2d 253, 257, 559 N.W.2d 917 (Ct. App. 1997).

⁴² *Cole*, 2000 WI App 432, ¶ 8.

previously imposed sentence in Milwaukee County Case 2017CF2397. As noted in the Circuit Court's order on November 18, 2021, Rodriguez "does not dispute that he was sentenced in Case No. 2017CF2397 prior to the sentence after revocation in this present matter."⁴³ Thus under the plain language of Wis. Stat. § 973.15(2)(a) the Circuit Court could order the sentence in Sauk County Case 2015CM318 to be consecutive to Milwaukee County Case 2017CF2397. Accordingly, the Court of Appeals should affirm the Circuit Court's November 18, 2021, order.

⁴³ R. 57.

CONCLUSION

To conclude, the Court of Appeals lacks jurisdiction to review Rodriguez's appeal of the Circuit Court's November 18, 2021, Order. If the Court of Appeals finds it has jurisdiction to review the Circuit Court's November 18, 2021, Order, the Court of Appeals should affirm the Circuit Court's order because Wis. Stat. § 973.15(2)(a) gave the Circuit Court authority to order the sentence in Rodriguez's Sauk County case to be consecutive to Rodriguez's Milwaukee County case.

Dated this 2nd day of May 2022

Respectfully submitted,

Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,402 words.

CERTIFICATION 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 a copy of the above document was mailed on May 2, 2022, to:

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