

FILED
12-30-2022
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP001270-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHON S. GEIGER,

Defendant-Appellant.

Appeal from a Judgment of Conviction and an
Order Entered in the Barron County Circuit Court,
the Honorable Maureen D. Boyle, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender
State Bar No. 1085045

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
grotelueschenk@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

| | Page |
|--|------|
| ARGUMENT | 4 |
| The circuit court lacked authority to order Mr. Geiger to pay the costs of extraditing him for sentencing after revocation; the order must be vacated. | 4 |
| A. The order for extradition costs is improper as the costs to extradite a defendant for sentencing after revocation are not among those listed in § 973.06(1)(a). | 5 |
| B. The order for extradition costs in this case is improper as those costs were imposed in a separate order after both the sentencing and sentencing after revocation hearings. | 10 |
| CONCLUSION..... | 15 |

CASES CITED

| | |
|--|-------|
| <i>State ex. Rel. Kalal v. Circuit Court for Dane County,</i> 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110..... | 6 |
| <i>State v. Amato,</i> 126 Wis. 2d 212, 376 N.W.2d 75 (Ct. App. 1985) | 9, 11 |

| | |
|--|------------|
| <i>State v. Brown</i> , 2006 WI 131, 298 Wis. 2d 37, 725 N.W.2d 262 | 10 |
| <i>State v. Ferguson</i> , 202 Wis. 2d 233, 549 N.W.2d 718 (Wis. 1996) | 8, 9 |
| <i>State v. Grant</i> , 168 Wis. 2d 682, 484 N.W.2d 370 (Ct. App. 1992) | 13 |
| <i>State v. Perry</i> , 215 Wis. 2d 696, 573 N.W.2d 876 (Ct. App. 1997) | 12, 13, 14 |
| <i>State v. Peterson</i> , 163 Wis. 2d 800, 472 N.W.2d 571 (Ct. App. 1991) | 8, 9 |

STATUTES CITED

Wisconsin Statutes

| | |
|------------------------|------------|
| 973.06 | 5 |
| 973.06(1) | 8, 11 |
| 973.06(1)(a) | 5, 6, 7, 9 |
| 973.06(1)(b)-(j) | 8 |
| 973.06(1)(c) | 8 |

ARGUMENT

The circuit court lacked authority to order Mr. Geiger to pay the costs of extraditing him for sentencing after revocation; the order must be vacated.

The circuit court's order requiring Mr. Geiger to pay \$3,264.40 for extradition costs incurred after his conviction is contrary to statute. The circuit court lacked authority to enter an independent order, long after the sentencing and sentencing after revocation hearings, requiring Mr. Geiger to pay these fees. Consequently, the order must be vacated.

Due, in part, to his erroneous release from custody, Mr. Geiger did not appear at his sentencing after revocation hearing and was eventually arrested and extradited from Arizona.¹ At sentencing after revocation, the state requested that, "along with the costs that were previously set," the costs of the extradition "be included as costs set to judgment." (108:36). The circuit court noted that that was "a new issue" for her and expressed doubt as to whether the costs could be added to the judgment. (108:37). In

¹ The state asserts that Mr. Geiger had been provided a copy of the notice of hearing prior to his release from jail. That is not accurate. The record establishes that Ms. Hoff gave Mr. Geiger a copy of the cancellation of order to detain which has a small note about the sentencing after revocation hearing at the bottom of the page. (92; 124:7).

response, the state indicated that it would file something on the issue within ten days. (108:37).

Sentence was pronounced and a judgment of conviction after revocation was entered. (106; 108:33-34). Almost a month later, the state filed a motion to modify the judgment of conviction to include the costs of extradition. (109). After several hearings, the court entered an order granting that motion and amended the judgment of conviction. (128;130).

The circuit court's order imposing extradition fees was improper for two reasons: first, the costs of extradition for postconviction proceedings, such as sentencing after revocation, are not among those enumerated in the statute; second, the costs were not imposed at the time of sentencing.²

- A. The order for extradition costs is improper as the costs to extradite a defendant for sentencing after revocation are not among those listed in § 973.06(1)(a).

The plain language of the statute is unambiguous. At sentencing, a circuit court is allowed to impose costs for the “fees and disbursements” related to the extradition of a defendant in connection with his “arrest, preliminary examination and trial.”

² The state argues that the circuit court properly exercised its discretion when ordering Mr. Geiger to pay the fee. Mr. Geiger, however, did not assert that the circuit court erroneously exercised its discretion – only that the circuit court exceeded the scope of authority granted by § 973.06.

Wis. Stat. § 973.06(1)(a). The events that the costs must be incurred for are listed in chronological order and end with the trial of the defendant; the statute mentions nothing about costs incurred in relation to the sentencing of a defendant, before or after, revocation of probation.

The state attempts to steer this court away from the real issue in the case by asserting that the statute does not limit the permissible costs to the initial arrest of the defendant. That, however, was not Mr. Geiger's position on appeal. Nor does that assertion address Mr. Geiger's arguments about the plain language of the statute.

The statute is clear; it allows for the imposition of extradition costs related to, not only the initial arrest, but the arrest, preliminary hearing, and trial of the defendant. Wis. Stat. § 973.06(1)(a). Under the plain language of the statute, if a defendant is in custody in another state after arrest, but prior to trial, the costs associated with transporting him to Wisconsin for trial are allowed. Noticeably absent from the statute, however, is any reference to costs related to sentencing after revocation, or sentencing.

The state's argument focuses solely on the word "arrest" and ignores the words that follow. When interpreting statutory language, however, this court does not read words in isolation, but as part of a whole. *State ex. Rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

The relevant portion of the costs statute, § 973.06(1)(a), in full, states:

Except as provided in s. 93.20, the costs, fees, and surcharges taxable against the defendant shall consist of *the following items and no others*:

- (a) The necessary disbursements and fees of officers allowed by law and incurred *in connection with the arrest, preliminary examination and trial* of the defendant, including, in the discretion of the court, the fees and disbursements of the agent appointed to return a defendant from another state or country.

Wis. Stat. § 973.06(1)(a)(emphasis added). Thus, when read as a whole, it is apparent that the statute allows for costs incurred by officers to arrest and bring the defendant to trial – those related to the arrest, preliminary hearing, and trial – including the costs of extradition from another state or country. It does not allow for costs incurred by officers in connection with sentencing, or sentencing after revocation, as such costs are not specifically enumerated therein.

If the legislature had intended to allow the imposition of costs incurred in connection with the sentencing of a defendant, it would have said so. It would have been simple to add that event by writing, “[t]he necessary disbursements and fees of officers allowed by law and incurred in connection with the arrest, preliminary examination, trial *and sentencing* of the defendant.” It did not do so.

While the state recognizes that this court is not to read words into a statute that are not there, that is exactly what it is asking this court to do. (Response Br. 9). It is asking this court to read the words “sentencing” and “sentencing after revocation,” into the statute when the legislature clearly set forth the events for which related costs could be imposed, concluding with trial. The statute already contains the limiting language the state claims to be missing – “the costs, fees, and surcharges taxable against the defendant shall consist of *the following items and no others.*” Wis. Stat. § 973.06(1)(emphasis added);(See Response 9-10).

Moreover, as set forth in the initial brief, and not addressed by the state, the legislature’s intent to limit the imposition of costs to those costs incurred up and through trial is further evidenced by the other subsections of § 973.06(1). The other costs which may be imposed are those incurred in connection with the prosecution of a defendant up and through trial; none are costs incurred for sentencing. See Wis. Stat. § 973.06(1)(b)-(j).

Finally, contrary to the state’s claim, the case law cited by Mr. Geiger does support his argument. Both *State v. Ferguson*, 202 Wis. 2d 233, 549 N.W.2d 718 (Wis. 1996) and *State v. Peterson*, 163 Wis. 2d 800, 472 N.W.2d 571 (Ct. App. 1991), clearly hold that a circuit court may only impose those costs enumerated in § 973.06(1). *Ferguson*, 202 Wis. 2d at 238 (“By its plain language, then, the costs taxable against a defendant under Wis. Stat. § 973.06(1)(c) are limited

to the items enumerated therein.”); *Peterson*, 163 Wis. 2d at 804 (“The clear and unambiguous language of this statute provides for the taxation of costs against the defendant only if the costs fit within one of the categories enumerated in the statute.”). The statute specifically allows for costs incurred in connection with the “arrest, preliminary examination and trial” of the defendant; it mentions nothing about sentencing, let alone sentencing after revocation. Just as in *Ferguson*, “[t]he legislature has given no indication that it intended to exercise [its] discretion to impose the costs sought by the State,” and this court should “not exercise [that] discretion on the legislature’s behalf.” *Ferguson*, 202 Wis. 2d at 244.

This court has noted that “[t]he right to recover costs is not synonymous with the right to recover the expense of litigation. Such right is statutory in nature, and to the extent that the statute does not authorize the recovery of specific costs, they are not recoverable.” *State v. Amato*, 126 Wis. 2d 212, 217, 376 N.W.2d 75 (Ct. App. 1985). The plain language of § 973.06(1)(a) does not authorize the imposition of costs related to extradition in connection with sentencing after revocation. Consequently, such costs are not recoverable and the order requiring Mr. Geiger to pay them must be vacated.

- B. The order for extradition costs in this case is improper as those costs were imposed in a separate order after both the sentencing and sentencing after revocation hearings.

The state concedes that, “[i]f the circuit court orders costs, it must to do so at the time of sentencing.” (Response Br. 11). It then attempts to save the order in this case – entered after both sentencing and sentencing after revocation – by arguing that the 2021 sentencing after revocation hearing was a continuation of the 2015 sentencing hearing, and that the sentencing after revocation was “continued” for the court to determine the issue of costs. (Response Br. 11-12). Neither argument is supported by fact or law.

With respect to the imposition of costs, a sentencing after revocation is not the equivalent of a sentencing hearing. First, the state’s implication that whether a proceeding is a sentencing hearing depends on the disposition ultimately imposed, is clearly wrong. There can’t be any real dispute that a defendant is placed on probation at a sentencing hearing after the court hears arguments regarding sentencing. Second, contrary to the state’s assertion, *State v. Brown*, 2006 WI 131, ¶21, 298 Wis. 2d 37, 725 N.W.2d 262, notes only that when reviewing a reconfinement sentence for a proper exercise of discretion, the reconfinement hearing may be treated as a continuum of the sentencing hearing if the same judge presided over both, not that this court “generally

considers a sentencing after revocation as a continuation of the first sentencing.” (Response Br. 12).

More importantly, however, this court has recognized that “[c]osts and conditions of probation are routinely imposed against a convicted defendant as separate components of a criminal case disposition.” *Amato*, 126 Wis. 2d at 216. In practice, costs are imposed at the sentencing proceeding regardless of whether the defendant is placed on probation or sentenced to prison, and, in fact, payment of costs is frequently listed as a condition of probation. Further, just as was done in this case, unpaid court costs are routinely reduced to judgment at sentencing after revocation hearings. (146:34). The requirement that costs be imposed at sentencing means that they be imposed at the original sentencing proceeding, not at a sentencing after revocation hearing that may or may not occur.

Even if this court were to find that the sentencing and sentencing after revocation hearings are the same for purposes of the imposition of costs under § 973.06(1), however, the state’s argument glosses over the fact that the extradition costs imposed in this case were imposed in an independent order entered months after the sentence after revocation was imposed – something this court has already held to be improper.

In *Perry*, this court held that “payment of costs not imposed at sentencing cannot be ordered at a later time.” *State v. Perry*, 215 Wis. 2d 696, 700, 573 N.W.2d 876 (Ct. App. 1997). After losing at trial, Perry was sentenced to twenty years of imprisonment and ordered to pay statutory court costs. *Id.* at 703. A “judgment of conviction containing those terms was entered” five days after the sentencing hearing. *Id.* During the sentencing hearing, the circuit court had also ordered payment of restitution upon the state’s submission of a proposed restitution order unless objected to by Perry. *Id.* The state filed its proposed order, which included extradition costs, and Perry objected; consequently, a restitution hearing was held. *Id.* Prior to hearing evidence on the restitution matter, the circuit court ordered “as part of the judgment of conviction that Mr. Perry pay costs of extradition.” *Id.* at 704. An amended order for restitution, directing payment of restitution as well as extradition costs, was then entered. *Id.*

This court struck down the order imposing extradition costs, finding that the circuit court “lacked authority to impose these additional costs after Perry had been sentenced.” *Id.* at 712. In doing so, it expressly rejected the state’s argument that the hearing was simply a continuation of the sentencing hearing, finding that the record proved otherwise:

Perry was sentenced to prison and ordered to pay \$300 in court costs on June 14, 1996, and a judgment of conviction containing those terms was entered on June 19, 1996. During the June 14th hearing, the court granted the State’s

request for restitution but left amount open, instead ordering the State to submit a proposed restitution order within forty-five days. The court indicated that it would enter the order for the amount requested unless Perry objected. There is no indication in the record of the sentencing hearing that Perry's sentencing was continued for any purpose. Had the State not filed a proposed restitution order, or had Perry not objected to it, no further court proceedings would have ensued.

Id. Further, this court noted that at the subsequent hearing, the circuit court acknowledged that it was a restitution hearing, and had not held the hearing "for the purpose of a continued sentencing hearing." *Id.*

The state fails to admit that the procedural history of this case is identical to that in *Perry*, and therefore, its assertion that the order imposing extradition costs was allowed as it was merely a continuation of the sentencing hearing, fails.³ Just as in *Perry*, there is nothing in the record to support the state's claim that the sentencing after revocation hearing in this case was continued.

As was done in *Perry*, the circuit court pronounced sentence at Mr. Geiger's sentencing after revocation hearing and a judgment of conviction containing that sentence was entered about a week

³ The facts of this case are also comparable to those in *State v. Grant*, 168 Wis. 2d 682, 484 N.W.2d 370 (Ct. App. 1992). Just as in that case, the circuit court here entered the order for extradition costs "on a post-sentence motion by the prosecutor," and "was entered separate from the sentence." *See Grant*, 168 Wis. 2d 682, 683.

later. (106). Further, just as the state brought up restitution in *Perry*, the prosecutor raised the issue of extradition costs at the sentencing after revocation hearing in this case. In neither case did the circuit court make a final decision on the issue; rather, resolution required further action by the state. Had the state not filed its motion for extradition costs in this case, no additional proceedings would have been held.⁴ Moreover, the circuit court here acknowledged that the subsequent hearings in this case were held to determine the state's motion for extradition costs, and "not for the purpose of a continued sentencing hearing." (143:2; 144:2; 145:2; 147:2-3). *Perry*, 215 Wis. 2d at 712. There is simply no support for the state's claim that the sentencing after revocation hearing had been continued.

"[T]he payment of costs not imposed at sentencing cannot be ordered at a later time." *Id.* at 700. Just as it did in *Perry*, this court must vacate the order requiring Mr. Geiger to pay the costs of extradition as it is an independent order entered years after sentencing and months after the sentencing after revocation hearing.

⁴ The Department of Correction did file a letter regarding sentence credit that was ultimately addressed at the subsequent hearings, but it is unclear whether a hearing would have been held if only that letter, and not the state's motion, had been filed. (115; 147:2-3).

CONCLUSION

For the reasons set forth above, as well as those in the initial brief, Mr. Geiger respectfully requests that this court reverse the circuit court's order requiring the payment of extradition costs and remand the case with directions that the judgment of conviction be amended to remove that requirement.

Dated this 30th day of December, 2022.

Respectfully submitted,

Electronically signed by

Kathilynne A. Grotelueschen

KATHILYNNE A. GROTELUESCHEN

Assistant State Public Defender

State Bar No. 1085045

Office of the State Public Defender

Post Office Box 7862

Madison, WI 53707-7862

(608) 267-1770

grotelueschenk@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,662 words.

Dated this 30th day of December, 2022.

Signed:

Electronically signed by

Kathilynne A. Grotelueschen

KATHILYNNE A. GROTELUESCHEN

Assistant State Public Defender