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STATE OF WISCONSIN
C O U R T O F A P P E A L S
D I S T R I C T I I

Case No. 2023AP1371-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANGELA R. JOSKI,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING SENTENCE
ADJUSTMENT ENTERED IN WALWORTH COUNTY
CIRCUIT COURT, THE HONORABLE
DANIEL STEVEN JOHNSON PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

INTRODUCTION 4

ISSUE PRESENTED..... 5

POSITION ON ORAL ARGUMENT AND PUBLICATION 5

STATEMENT OF THE CASE 5

ARGUMENT 9

This Court’s interpretation of the mandatory minimum sentence statute requires that Joski serve her three-year term of initial confinement in full..... 9

A. Standard of review..... 9

B. Where a statute’s application would conflict with the mandatory minimum statute, the mandatory minimum statute must be given full effect. 9

C. Under *Gramza*’s interpretation of the mandatory minimum statute, Joski must fully serve the required three years in prison regardless of the sentence adjustment statute. 10

CONCLUSION..... 13

TABLE OF AUTHORITIES

Page(s)

Cases

Kramer v. City of Hayward,
57 Wis. 2d 302, 203 N.W.2d 871 (1973) 9, 10

State v. Cole,
2003 WI 59, 262 Wis. 2d 167, 663 N.W.2d 700..... 9

<i>State v. Gramza</i> , 2020 WI App 81, 395 Wis. 2d 215, 952 N.W.2d 836	4, 6, 10, 11
<i>State v. Shirikian</i> , 2023 WI App 13, 406 Wis. 2d 633, 987 N.W.2d 819	6, 11
<i>State v. Stenklyft</i> , 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769.....	7
<i>State v. Szulczewski</i> , 216 Wis. 2d 495, 574 N.W.2d 660 (1998)	9, 10
<i>State v. Torres</i> , 2003 WI App 199, 267 Wis. 2d 213, 670 N.W.2d 400.....	7
<i>State v. Trujillo</i> , 2005 WI 45, 279 Wis. 2d 712, 694 N.W.2d 933.....	7
<i>State v. Williams</i> , 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467.....	6, 11, 12
Statutes	
Wis. Stat. § 302.05	4
Wis. Stat. § 346.63(1).....	5
Wis. Stat. § 346.65(2)(am)6.	5, 10
Wis. Stat. § 973.195	5, <i>passim</i>
Wis. Stat. § 973.195(1g).....	6, 8
Wis. Stat. § 973.195(1r)	8
Wis. Stat. § 973.195(1r)(a) and (b)	7
Wis. Stat. § 973.195(1r)(c) and (f)	7
Wis. Stat. § 973.195(1r)(g).....	6

INTRODUCTION

This is a statutory interpretation case involving two statutes that cannot simultaneously be given effect on these facts. For OWI-7th offenses, a circuit court is required by statute to impose a three-year prison term. A circuit court is authorized by a second statute, the sentence adjustment statute, to release an inmate who has served 75 percent of her sentence if it concludes that “it is in the public interest” to do so. Here, Defendant-Respondent Angela R. Joski, who had not fully served the three-year mandatory prison term for her OWI-7th offense, was granted early release under the sentence adjustment statute.

Can a court grant an inmate early release under that statute when she has not fully served her mandatory prison term? This Court has not specifically addressed the question, but it has held, in a virtually identical case, that “the most reasonable interpretation of these statutes, when considered in conjunction with each other under these circumstances, is that the mandatory minimum term of initial confinement of the OWI-7th statute *must be served in full . . . regardless of*” the inmate’s eligibility for release under the second statute.¹ This Court concluded that “granting . . . early release to extended supervision” under Wis. Stat. § 302.05 would conflict with “the OWI-7th statute’s requirement of serving the full three year term of initial confinement.”²

Same here. Joski is required to “serve[] in full” the mandatory minimum for an OWI-7th “regardless of” her eligibility for early release under the sentence adjustment statute. This Court should reverse the circuit court’s grant of early release.

¹ *State v. Gramza*, 2020 WI App 81, ¶ 26, 395 Wis. 2d 215, 952 N.W.2d 836 (emphasis added).

² *Id.* ¶ 24.

ISSUE PRESENTED

Is Joski required to fully serve the mandatory minimum of three years in prison under Wis. Stat. § 346.65(2)(am)6, even if a circuit court finds her eligible for early release under Wis. Stat. § 973.195?

The circuit court answered no.

This Court should answer yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The State requests publication because there is no published guidance on the application of the sentence adjustment statute to a defendant who is subject to a mandatory minimum prison sentence.

STATEMENT OF THE CASE

The two statutes at issue.

The first statute imposes a mandatory minimum prison sentence. A person who violates Wis. Stat. § 346.63(1), operating while intoxicated, is guilty of a Class F felony if the conviction is for her seventh, eighth or ninth such offense. Wis. Stat. § 346.65(2)(am)6. “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 3 years.” *Id.*

Interpreting this statute, this Court has held that “the most reasonable interpretation” requires a defendant to “serve[] in full” the sentence he or she received, “regardless of” eligibility for early release under a separate statute:

We therefore conclude that the most reasonable interpretation of these statutes, when considered in conjunction with each other under these circumstances, is that the mandatory minimum term

of initial confinement of the OWI-7th *statute must be served in full by Gramza, regardless of his successful completion of the [substance abuse program].*

State v. Gramza, 2020 WI App 81, ¶ 26, 395 Wis. 2d 215, 952 N.W.2d 836 (emphasis added).

Where a separate early release statute applied to a sentence that is governed by the mandatory minimum statute, this Court held that it was “not possible to construe the [early release] statute to exercise its full effect—granting [the inmate] early release to extended supervision—while still meeting the OWI-7th statute’s requirement of serving the full three year term of initial confinement.” *Id.* ¶ 24.

The mandatory minimum statute was also addressed in *Shirikian*, which addressed the interplay of the mandatory minimum statute with statutes authorizing a court to impose and stay a sentence for probation. *State v. Shirikian*, 2023 WI App 13, ¶¶ 35–36, 406 Wis. 2d 633, 987 N.W.2d 819. This Court held that “a mandatory minimum bifurcated sentence is inconsistent with permitting probation[.]” *Id.* (quoting *State v. Williams*, 2014 WI 64, ¶ 34, 355 Wis. 2d 581, 852 N.W.2d 467. It rejected the defendant’s argument that the separate statutes operated to authorize a stay where a defendant was subject to a mandatory minimum sentence. *Shirikian*, 406 Wis. 2d 633, ¶¶ 35–36.

The second statute involved in this case is Wis. Stat. § 973.195(1g), (1r)(g)., the sentence adjustment statute. It provides that an inmate who has been convicted of a Class F felony and has served 75 percent of her prison sentence may petition the circuit court to convert the remainder of her prison time to extended supervision. She may cite as grounds for her petition her “conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs since . . . she was sentenced” or may assert that “[s]entence adjustment is

otherwise in the interests of justice.” Wis. Stat. § 973.195(1r)(a) and (b).

The sentence adjustment statute has twice been interpreted by the Wisconsin Supreme Court.

The first time the court addressed the statute, it did so in a case that concerned sentence adjustments sought on the basis of a post-sentencing change in the law. The Wisconsin Supreme Court held that section 973.195 “provides the procedure for judicial review of a sentence when the law relating to sentencing changes.” *State v. Trujillo*, 2005 WI 45, ¶ 25, 279 Wis. 2d 712, 694 N.W.2d 933, *abrogated on other grounds by State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting *State v. Torres*, 2003 WI App 199, ¶ 7, 267 Wis. 2d 213, 670 N.W.2d 400).

The second time, it addressed the constitutionality of the statute. *State v. Stenklyft*, 2005 WI 71, ¶ 128, 281 Wis. 2d 484, 697 N.W.2d 769. The legislature conditioned an inmate’s release under this statute on the acquiescence of the district attorney, *see* Wis. Stat. § 973.195(1r)(c) and (f), but the state supreme court held that in order to “preserve the statute[s] . . . constitutional[ity], it must be construed [to give] the circuit court discretion to . . . reject an objection from the district attorney” and grant a petition to which the State objects. *Id.* ¶ 28.

The circuit court imposed the mandatory three-year prison term for Joski’s OWI-7th conviction, then granted her petition for early release.

A jury found Joski guilty of OWI as a 7th offense in 2021, and her bifurcated sentence for the conviction included the required three-year term of initial confinement. (R. 33:1; 101:1.)

On June 2, 2023, Joski filed a petition for sentence adjustment under Wis. Stat. § 973.195 requesting that the final 25 percent of her prison sentence be converted to extended supervision. (R. 178:1.) She checked the box on the petition form indicating that her petition was supported by her “conduct, efforts at and progress in rehabilitation,” and she attached a letter and certificates showing her completion of prison programming. (R. 178:1, 3–8.) Filed on the same day as her petition was a Department of Corrections form dated May 30, 2023, stating that Joski had at that point served “2 years, 3 months, 7 days in confinement.”³ (R. 179:1.)

The circuit court then notified the State of the petition (R. 180), and the district attorney filed a timely objection five days later, noting that “this was a serious case and the three years of confinement that were ordered represents the mandatory minimum for the charge” (R. 181:1).

Two days later, the circuit court granted the petition, checking the box on Form CR-260 indicating that “[t]he Petition for Sentence Adjustment is . . . **granted** because it is in the public interest.” (R. 182:1–2, A-App. 3–4.)

The State appeals.

³ The record does not contain the date of Joski’s release from prison, but the fact that Joski served 75 percent of the confinement portion of her sentence by the time of her release, consistent with the dictates of Wis. Stat. § 973.195(1g), (1r), is not in dispute.

ARGUMENT

This Court's interpretation of the mandatory minimum sentence statute requires that Joski serve her three-year term of initial confinement in full.

A. Standard of review.

This case presents a question of statutory interpretation and the application of law to undisputed facts, which this Court reviews *de novo*. *State v. Cole*, 2003 WI 59, ¶ 12, 262 Wis. 2d 167, 663 N.W.2d 700.

B. Where a statute's application would conflict with the mandatory minimum statute, the mandatory minimum statute must be given full effect.

Resolution of the issue in this case requires interpretation of the statute that sets the mandatory minimum sentence for an OWI 7th offense and the statute that permits a court to grant early release to a person convicted of a Class F felony and convert the last quarter of the prison term to extended supervision.

“Under the ordinary rules of statutory interpretation statutes should be reasonably construed to avoid conflict.” *State v. Szulczewski*, 216 Wis. 2d 495, 503, 574 N.W.2d 660 (1998). “When two statutes conflict, a court is to harmonize them, scrutinizing both statutes and construing each in a manner that serves its purpose.” *Id.* (citations omitted). In such situations, a court gives the specific statute effect over the general statute. *Kramer v. City of Hayward*, 57 Wis. 2d 302, 311, 203 N.W.2d 871 (1973).

When the application of a statute would conflict with the application of the mandatory minimum sentence statute and would result in an inmate serving less than the statutory minimum prison term, the mandatory minimum sentence

statute must be given effect and the inmate must serve the statutorily required prison term in full. *Gramza*, 395 Wis. 2d 215, ¶¶ 24, 26.

C. Under *Gramza*'s interpretation of the mandatory minimum statute, Joski must fully serve the required three years in prison regardless of the sentence adjustment statute.

When statutes that deal with the same subject matter are deemed to be in conflict, a court is required to “construe[] each in a manner that serves its purpose,” *Szulczewski*, 216 Wis. 2d at 503 (citations omitted), and give the specific statute effect over the general statute, *Kramer*, 57 Wis. 2d at 311.

Here, as in *Gramza*, the sections in question relate to the same subject matter: sentences.

Here, as in *Gramza*, the specific statute is the one targeted at specific OWI offenses, while the general statute relates to early release that applies to inmates generally. Here, section 973.195 is a general statute that governs all persons convicted of certain classes of felony; and section 346.65(2)(am)6. is a specific statute that governs only those persons convicted of the felony of operating while intoxicated as a seventh, eighth or ninth offense. The specific statute must be given effect. *See Kramer*, 57 Wis. 2d at 311.

Thus, under *Gramza*, Joski must fully serve the required term of initial confinement prescribed by section 346.65 “regardless of” the early release option under the sentence adjustment statute. *Gramza*, 395 Wis. 2d 215, ¶ 24.

Gramza's interpretation is consistent with other Wisconsin cases that have addressed the interplay of the mandatory minimum statute with other statutes that authorize circuit courts to stay a prison sentence and grant early release to certain prisoners. In each case, the courts have held that the specific requirement of the mandatory

minimum must be given effect. *See Shirikian*, 406 Wis. 2d 633, ¶¶ 35–36; *Williams*, 355 Wis. 2d 581, ¶ 34.

It is true that in the sentence adjustment statute, the legislature gave authority to circuit courts to grant early release for a Class F felony to an inmate who has served 75 percent of her sentence. But requiring Joski to fully serve her sentence does not violate this statute. As this Court stated in *Gramza*, when considering a different early release statute, there are cases in which both statutes can be given full effect:

[A] defendant convicted of an OWI-7th who receives a term of initial confinement that is *longer* than the mandatory minimum would be able to benefit from the SAP statute’s early release provision. In other words, there are conditions under which the requirements of both statutes could be applied which would allow for both statutes to fully serve their purposes.

Gramza, 395 Wis. 2d 215, ¶ 25.

That reasoning applies here: “[T]here are conditions under which the requirements of” the mandatory minimum and sentence adjustment statutes “could be applied which would allow for both statutes to fully serve their purposes.” *Id.* ¶ 25. A defendant convicted of OWI-7th who receives a term of initial confinement that is longer than the mandatory minimum would be able to benefit from the sentence adjustment statute’s early release provision.

Gramza’s holding means that when the circumstances of a case prevent giving effect to two statutes at once, “the most reasonable interpretation of these statutes, when considered in conjunction with each other,” is the one that requires the defendant to fully serve the imposed mandatory minimum sentence before early release to extended supervision. *Id.* ¶ 26. And it means that some defendants—those who receive sentences that don’t exceed the statutory minimum prison term for their offense—don’t have the kind of sentence that can be adjusted under another statute. They

have already received the minimum prison term, below which a court cannot lawfully go.

It is also true that the mandatory minimum statute does not contain an explicit prohibition on early release under other statutes, but under supreme court precedent, an explicit prohibition is not needed because there is an implicit one. In a case that also involved the OWI mandatory minimum statute, the defendant argued that because the mandatory minimum statute at issue “does not explicitly prohibit probation, the sentencing court retains the option to order it.” *Williams*, 355 Wis. 2d 581, ¶ 34. But the Wisconsin Supreme Court rejected that argument, holding that a sentencing court retained that option “*only if* [the statute] does not impose a mandatory minimum sentence of three years initial confinement.” *Id.* (emphasis added). Thus, the mandatory minimum statute has been construed to contain an implicit prohibition on early release. That prohibition would preclude granting early release under section 973.195.

Because Joski did not fully serve the three-year mandatory term of initial confinement for her OWI-7th conviction, the circuit court improperly granted early release.

CONCLUSION

This Court should reverse the circuit court's order.

Dated this 14th day of November 2023.

Respectfully submitted,

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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 2,320 words.

Dated this 14th day of November 2023.

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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 Appellate Court 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 November 14, 2023 to:

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