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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023AP002079-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LES PAUL HENDERSON,

Defendant-Appellant.

Appeal from an Order Entered in the
Dane County Circuit Court,
the Honorable Sarah B. O'Brien, Presiding

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

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ISSUE PRESENTED

Mr. Henderson was sentenced in January 2020. While the sentencing court did not discuss his eligibility for the substance abuse or challenge incarceration programs on the record, the minute sheet, written explanation of determinate sentence, and judgment of conviction all indicated that Mr. Henderson had been found eligible. Three and a half years later, the state filed a motion asking that the “clerical error” be corrected and that an amended judgment of conviction reflecting ineligibility be filed. The circuit court granted that motion without a hearing or response from the defense. Mr. Henderson then filed a motion to vacate the order amending the judgment of conviction. After a hearing, the circuit court denied that motion, finding that the record demonstrated the sentencing court’s intent to make Mr. Henderson ineligible.

Was the circuit court’s denial of the motion to vacate the order and amended judgment of conviction erroneous?

The circuit court denied Mr. Henderson’s motion.

This court should reverse.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The briefs should adequately set forth the arguments and publication will likely be unwarranted as the issue presented can be decided on the basis of well-established law.

STATEMENT OF THE CASE AND FACTS

In a complaint filed on August 28, 2018, the state charged Les Paul Henderson with one count of repeated sexual assault of a child. (1:1).

On October 14, 2019, an amended information was filed and Mr. Henderson entered into a plea agreement with the state. (46). Pursuant to the agreement, Mr. Henderson pled guilty to amended charges of causing mental harm to a child and fourth degree sexual assault, a presentence investigation report (PSI) was ordered, and the state agreed to cap its sentencing recommendation at five years of initial confinement. (46; 48; 87:3-5, 15-16).

Sentencing was held on January 3, 2020. (66). After hearing arguments, the circuit court, the Honorable Jill J. Karofsky presiding, sentenced Mr. Henderson to five years of initial confinement and five years of extended supervision on Count 1, and nine months jail on Count 2, concurrent. (61; 63; 66:52-54)(App.3, 14-16). Although it wasn't discussed at

sentencing, the judgment of conviction and written explanation of determinate sentence filed after the hearing stated that Mr. Henderson was eligible for the substance abuse and challenge incarceration programs (hereinafter, “SAP,” “CIP,” “programs” or “programming”). (61:2; 64)(App.4-5).

Three and a half years later, on July 10, 2023 – after Mr. Henderson began treatment in the substance abuse program – the state filed a motion to “correct the judgment of conviction.” (67; 85:30)(App.47). The state asserted that there was a clerical error and that the judgment of conviction should be corrected to state that Mr. Henderson was not eligible for programming. (67).

Two days later, an amended judgment of conviction, indicating ineligibility for the programs, was filed. (69:2). The next day, a second amended judgment of conviction was filed, this one stating that the first amended judgment of conviction had been vacated. (71). Thereafter, on July 18, 2023, an order, along with a third amended judgment of conviction reflecting ineligibility for programming, were filed. (72; 74)(App.6-7). The order, entered by the Honorable Mark Frankel, stated:

Because the sentencing transcript does not contain a reference to approval for eligibility to either the Challenge Incarceration Program or the Substance Abuse Program, the Court orders that the Defendant is NOT currently eligible for the Challenge Incarceration Program or the Substance Abuse Program.

(72).

Mr. Henderson subsequently filed a motion to vacate the order amending the judgment of conviction, arguing that the unambiguous records – the minute sheet, written explanation of determinate sentence, and judgment of conviction – demonstrate the court’s intent to find him eligible and are controlling in this case. (75).

On August 10, 2023, the circuit court, now by the Honorable Sarah O’Brien,¹ held a hearing on Mr. Henderson’s motion. (85)(App.18-60). The court began the hearing by reciting the procedural history of the case and then indicating that it was taking judicial notice of the fact that the clerk made the marks on the written explanation of determinate sentence and “they were not made by a Judge or approved by a Judge.” (85:4-7)(App.21-24). Defense counsel objected to the circuit court taking judicial notice of such information, so the clerk – Casee Trickel – was called to testify. (85:8)(App.25).

Ms. Trickel explained that her role at the sentencing hearing was to fill out the minute sheet and send it down for a different clerk to draft the judgment of conviction. (85:11)(App.28). With respect to this case, she testified that she could not remember if she had a conversation with Judge Karofsky about whether Mr. Henderson was found eligible for

¹ For ease of reading, Mr. Henderson will refer to Judge Karofsky as the sentencing court and Judge O’Brien as the circuit court.

programming. (85:11-13)(App.28-30). She may have marked the boxes based on her belief that the defendant was statutorily eligible, or she may have had a conversation with the judge about it – she could not recall for sure. (85:11-13, 22)(App.28-30, 39).

When questioned by the circuit court, however, Ms. Trickel testified that she had admitted to her supervisor that she had checked the boxes on the form in this case without consulting the sentencing judge. (85:22)(App. 39). Defense counsel tried to clarify, and Ms. Trickel acknowledged that if eligibility were not addressed on the record, she would usually ask the judge for clarification and not just check the boxes on her own. (85:23)(App.40). Further, while she stated that after reviewing the transcript she knew that she had not asked for clarification in this case, she could not explain what about the transcript led her to that conclusion or why she could remember what she did in this case specifically. (85:23-24)(App.40-41).

After testimony, the circuit court heard arguments from the parties. It then issued an oral ruling, denying the motion to vacate. (85:38-40)(App.55-57). The circuit court acknowledged that Ms. Trickel's testimony was ambiguous, but stated that it found her statement "that she, in fact, filled out [the written explanation of determinate sentence] without consulting the judge," to be reliable. (85:39)(App.56). The circuit court also held as follows:

I agree with [prosecutor] that there is nothing in this record that suggests that Judge Karofsky considered those programs. I find

it interesting that the PSI said that he was ineligible. I don't want to speculate that that's why Judge Karofsky didn't address it and defense counsel didn't address it or the State; none of them addressed it at the time of the hearing. But it is part of the record here.

I am satisfied that the evidence is strong that Judge Karofsky intended that the defendant not be eligible for those programs. And that the correct judgment of conviction has now been entered by Judge Frankel --

(85:39-40)(App.56-57).

A written order denying Mr. Henderson's motion was filed. (83)(App.8).

This appeal follows.

ARGUMENT

The circuit court erred in denying Mr. Henderson's motion to vacate the amended judgment of conviction as the sentencing court had not found him ineligible for programming.

The sentencing court did not consider Mr. Henderson's eligibility for either the substance abuse program, or the challenge incarceration program, when it sentenced him on January 3, 2020. The record, however, contains three unambiguous documents reflecting the court's intent to make Mr. Henderson eligible. Because the sentencing court's oral pronouncement was silent on the issue, those written documents control and Mr. Henderson's

eligibility for programming should not have been taken away. Alternatively, should this court determine that those documents were entered in error, the record as a whole demonstrates that the sentencing court simply failed to make the required determination about Mr. Henderson's eligibility for SAP and CIP. In either case, Mr. Henderson's motion to vacate the order and amended judgment of conviction – indicating that he was found ineligible for programming – should have been granted.

A. Legal standards and standard of review.

This court determines ambiguity in sentencing in the same manner that it resolves statutory construction disputes – it asks whether the sentencing court's language “is capable of being understood by reasonably well-informed persons in two or more different ways.” *State v. Oglesby*, 2006 WI App 95, ¶19, 292 Wis. 2d 716, 715 N.W.2d 727. Whether a sentence is ambiguous is a question of law this court review de novo. *Id.*, ¶19; *State v. Peterson*, 2001 WI App 220, ¶¶12-13, 247 Wis. 2d 871, 634 N.W.2d 893.

Further, where a sentencing court's unambiguous oral pronouncement conflicts with an equally clear statement on the judgment of conviction, the oral pronouncement controls. *Oglesby*, 2006 WI App 95, ¶27. Where the oral pronouncement is ambiguous, however, this court turns to “the record as a whole” to determine the sentencing court's intent. *Id.*, ¶¶20, 27 (quoting *State v. Brown*, 150 Wis. 2d 636, 640-41, 443 N.W.2d 19 (Ct. App. 1989)). Specifically,

“when an omission in an oral pronouncement creates an ambiguity, the appellate court is required to determine the trial court’s sentencing intent from other parts of the record, including the judgment of conviction.” *Id.*, ¶20.

B. The sentencing court’s oral pronouncement was ambiguous.

The sentencing court’s failure to consider Mr. Henderson’s eligibility for programming on the record, at the time of sentencing, resulted in an ambiguity in its oral pronouncement.

This case is similar to *State v. Lipke*, 186 Wis. 2d 358, 521 N.W.2d 444, in which this court found the circuit court’s oral pronouncement of sentence to be ambiguous based on an omission. In that case, the circuit court, unaware that Lipke had just been sentenced to jail by a different judge, failed to specify whether the jail sentence it imposed was concurrent or consecutive to any other sentence. *Lipke*, 186 Wis. 2d 358 at 362. The judgment of conviction entered the same day, however, stated that the sentence was “consecutive to any previously or simultaneously imposed sentence.” *Id.* Lipke challenged the consecutive nature of the sentence, arguing that because the court’s pronouncement was silent, his sentences had to run concurrently. *Id.* This court disagreed.

Noting that the circuit court had not been informed of Lipke’s other sentence, this court held that “[t]he court’s understandable failure to specify at

sentencing whether the sentence would therefore be concurrent or consecutive creates an ambiguity because the statute obliges the court to make a selection.” *Id.* at 364-365. Because the oral pronouncement was ambiguous, this court turned to the record – specifically the unambiguous judgment of conviction – and found that the circuit court intended the sentence to be consecutive. *Id.* at 365.

The sentencing court in this case had a similar statutory obligation – it was required to determine, on the record, whether Mr. Henderson was eligible for SAP and CIP. Pursuant to § 973.01(3g)&(3m), when imposing a prison sentence for an offense, other than a disqualifying offense, “the court *shall*, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible to participate” in the substance abuse and challenge incarceration programs during the term of initial confinement imposed. (emphasis added). Mr. Henderson was convicted of causing mental harm to a child, contrary to § 948.04(1), which is not among the enumerated disqualifying offenses. *See* Wis. Stat. § 973.01(3g)&(3m). Consequently, he is statutorily eligible for programming and the sentencing court was required to exercise its discretion and state whether Mr. Henderson would be able to participate in either or both programs.²

² *See State v. Steele*, 2001 WI App 160, ¶12, 246 Wis. 2d 744, 632 N.W.2d 112 (“While an offender must meet the eligibility requirements of WIS. STAT. § 302.045(2) to participate in the challenge incarceration program, pursuant to

The sentencing court failed to fulfill this obligation, resulting in ambiguity. As noted by the circuit court, the sentencing court failed to consider Mr. Henderson's eligibility for SAP or CIP. (72; 85:39)(App.56) ("the sentencing transcript does not contain a reference to approval for eligibility to either [program]"; "there is nothing in this record that suggests that Judge Karofsky considered those programs"). While – just as in *Lipke* – the sentencing court's failure to comply with its statutory requirement is understandable given that the PSI incorrectly stated that Mr. Henderson was ineligible, and neither party mentioned programming in their sentencing arguments, the omission still resulted in an ambiguous oral pronouncement. (52:2; 66:17-42).

The sentencing court's intent regarding programming cannot be determined from its statements at the sentencing hearing; if it is to be found, it must be found from the record, including the judgment of conviction.

WIS. STAT. § 973.01(3m), the trial court must also determine if the offender is eligible for the program, in the exercise of its sentencing discretion."); *See also State v. Owens*, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187 ("the trial court must state whether the defendant is eligible or ineligible for the program.").

- C. The record reflects the sentencing court's intent to make Mr. Henderson eligible for programming.

Due to the sentencing court's ambiguous oral pronouncement, this court must turn to the record to determine its intent. "The intent of the sentencing judge controls the determination of the terms of a sentence." *Brown*, 150 Wis. 2d at 642. When the judge's oral pronouncement is ambiguous, "it is proper to look at the written judgment to ascertain the court's intention." *Lipke*, 186 Wis. 2d at 364. Contrary to the circuit court's findings, the record in this case unambiguously demonstrates the sentencing court's intent to make Mr. Henderson eligible for SAP and CIP.

There are three separate documents in the record which clearly state that Mr. Henderson was made eligible for programming. The first is the minute sheet from the sentencing hearing on which the "Eligible" box for each program was checked. (60:2). Next is the written explanation of determinate sentence. (64). On that document, the boxes for "You are eligible for the [Challenge Incarceration Program][Substance Abuse Program]" are checked. (64). Finally, and most importantly, the judgment of conviction also contains check marks in the boxes indicating Mr. Henderson's eligibility for SAP and CIP. (61:2)(App. 4). These documents, filed the day of, and shortly after sentencing, unambiguously demonstrate the circuit court's intent. *See Lipke*, 186 Wis. 2d at 365 ("the judgment of conviction, issued

the same day as the oral ruling, is unambiguous. The judgment clearly expresses the court's intent that the sentence is to be consecutive to any previously or simultaneously imposed sentence.”).

Because the record demonstrates the sentencing court's intent that Mr. Henderson be eligible for programming, the circuit court erroneously exercised its discretion in denying the motion to vacate the order amending the judgment of conviction. The circuit court's ruling was based on Ms. Trickel's testimony and its conclusion that there was “strong” evidence “that Judge Karofsky intended that the defendant not be eligible for [] programs.” (85:39-40)(App.56-57). The circuit court's decision to conduct an evidentiary hearing, or take judicial notice of Ms. Trickel's testimony, is itself questionable. This court has repeatedly stated that if the oral pronouncement is ambiguous, the ambiguity is resolved by looking at the record as a whole. Mr. Henderson is unaware of any case in which introduction of facts outside the record has been approved. Putting that aside, the circuit court's reliance on Ms. Trickel's testimony is itself problematic.

The circuit court's finding that Ms. Trickel had checked the boxes without consulting the judge was clearly erroneous. As the circuit court itself noted, Ms. Trickel's testimony was “somewhat ambiguous.” (85:39)(App.56). Ms. Trickel testified that she was the clerk at Mr. Henderson's sentencing hearing three and half years prior, and that she filled out the written explanation of determinate sentence, but she did not

remember if she had any conversation with the judge about Mr. Henderson's eligibility for programming. (85:11, 15)(App.28, 32). When asked if she marked the boxes based on her "belief that eligibility was determined by the statutory factors as opposed to a Judge making a determination under the statute," she stated, "Yeah, I think so." (85:12)(App.29). She also admitted that she did not remember one way or the other whether Judge Karofsky had told her to check the boxes making Mr. Henderson eligible. (85:12-13)(App.29-30). Specifically, the following exchange occurred:

Q. She could have told you to make him eligible, correct?

A. Possibly, yeah.

Q. She could have told you not to?

A. Possibly, yeah.

(85:13)(App.30).

While Ms. Trickel responded to the circuit court's questions by stating that she had admitted to her supervisor that she checked the boxes without the judge's permission, she said she did so after looking at the transcript and seeing that the judge did not state anything about eligibility on the record. (85:22)(App.39). She then went on to contradict herself and state that, if eligibility was not addressed at the time of sentencing, she usually sought clarification from the judge, and that such a conversation would not appear in a transcript. (85:23-24)(App.40-41). Bottom line, Ms. Trickel admitted that she didn't remember what the sentencing judge said or didn't say with

respect to Mr. Henderson's eligibility for programming in this case. (85:22)(App.39). Her testimony does not support the circuit court's conclusion that the documents reflecting eligibility were entered without the sentencing court's approval.

Finally, the circuit court's finding that there was strong evidence showing the sentencing court's intent to deny eligibility is clearly erroneous. As noted above, the sentencing court did not address Mr. Henderson's eligibility for SAP or CIP on the record. It made no mention of the programs or whether Mr. Henderson's participation in them would be appropriate. There is nothing in the sentencing transcript that would illustrate an intent to make him eligible, or ineligible – that's why the oral pronouncement is ambiguous. And aside from the above mentioned documents which state Mr. Henderson was eligible for programming, there is nothing in the record which would demonstrate the sentencing court's intent. The record, other than those documents, is simply void of any mention of programming. There is no evidence, let alone strong evidence, to show that the circuit court intended to deny eligibility.

Because the record as a whole demonstrates the sentencing court's intent to make Mr. Henderson eligible for programming, the circuit court's order denying Mr. Henderson's motion to vacate the order revoking his eligibility must be reversed.

D. Alternatively, the sentencing court failed to make the required eligibility determination.

Should this court determine that the minute sheet, written explanation of determinate sentence, and original judgment of conviction indicating that Mr. Henderson was eligible for programming were all entered in error, it must still reverse the circuit court. As stated above, the circuit court's finding that the sentencing court intended to make Mr. Henderson ineligible for programming was clearly erroneous. And, if the documents are ignored, the record would only show that the sentencing court did not make any findings regarding Mr. Henderson's eligibility for the programs. The judgment of conviction, therefore, should not have been amended to reflect ineligibility.

There is nothing in the record demonstrating that the sentencing court intended to deny Mr. Henderson eligibility for SAP and CIP. If the documents reflecting eligibility are not considered, this court is left with an entirely silent record. The sentencing court simply failed to exercise its discretion and make the statutorily required finding.

At most, the judgment of conviction should have been amended to reflect the lack of a determination on eligibility – none of the boxes should have been checked – and Mr. Henderson should have been allowed to petition the court for a determination under § 973.01(3g)&(3m). *See* Wisconsin Circuit Court Form CR-263, available online at

<https://www.wicourts.gov/forms1/circuit/ccform.jsp?Category=8>. But that's not what was done. Instead, the judgment of conviction was erroneously amended to incorrectly state that Mr. Henderson had been found ineligible for SAP and CIP. Mr. Henderson's motion to vacate the amended judgment of conviction, therefore, should have been granted.

CONCLUSION

The record reflects the sentencing court's intention to make Mr. Henderson eligible for the substance abuse and challenge incarceration programs. Alternatively, the record is silent as to his eligibility. In either case, the circuit court erred in denying Mr. Henderson's motion to vacate the amended judgment of conviction. Mr. Henderson respectfully requests that this court reverse the circuit court's order denying his motion and vacate all of the amended judgments of conviction. Should the court deny that request, Mr. Henderson requests that this court reverse the circuit court and remand the case for a determination of his eligibility for programming.

Dated this 25th day of January, 2024.

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 S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,194 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of January, 2024.

Signed:

Electronically signed by

Kathilynne A. Grotelueschen

KATHILYNNE A. GROTELUESCHEN

Assistant State Public Defender