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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2023AP2079-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LES PAUL HENDERSON,

Defendant-Appellant.

ON APPEAL FROM AN AMENDED JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE SARAH B. O'BRIEN PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Henderson appeals an order denying his motion to vacate an amended judgment of conviction making him ineligible for programming in the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP).

At sentencing, the circuit court failed to state whether, in an exercise of its discretion, it would make Henderson eligible for programming. The clerk, however, filed a judgment of conviction that indicated that the court made Henderson eligible for both programs. The State later moved to vacate the judgment of conviction, arguing that the portions finding Henderson eligible for programming were incorrect. The circuit court, noting that the sentencing transcript was silent on the issue, issued an order finding Henderson ineligible for programming and entered an amended judgment of conviction.

Henderson filed a motion to vacate the amended judgment. He argued that the record, the original judgment of conviction and two other documents made by the clerk, showed that the circuit court had intended to make him eligible for programming, and the judgment of conviction should not have been amended absent an unambiguous contradiction with the court's statements at sentencing. After a hearing where the clerk who created the documents testified, the circuit court denied the motion. It found the clerk's testimony reliable that it created the documents that Henderson relied on without consulting the sentencing judge. It found that the sentencing court did not intend for Henderson to be eligible for programming. So, it denied Henderson's motion.

Henderson appeals. This Court should affirm. The circuit court properly exercised its discretion when it entered the amended judgment of conviction because it reviewed the record to determine the sentencing court's intent. The record

shows that the sentencing court specifically considered Henderson's rehabilitative needs, but only ordered sex offender treatment. The sentencing court therefore did not intend to make Henderson eligible for CIP and SAP.

STATEMENT OF THE ISSUE

Does the record establish that the sentencing court intended Henderson to be eligible for CIP and SAP programming?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

Henderson was charged with repeated acts of sexual assault against Ashley[1] ranging over a five-year period. (R. 1:1.) Ashley's mother dated Henderson, and he lived with her and her daughters during this period. (R. 1:1.) Ashley told her mother that Henderson repeatedly sexually assaulted her; he would grab Ashley, make her lay on top of him, and he would grab her buttocks. (R. 1:2.) Ashley also told police this herself. (R. 1:2.) Ashley said that Henderson would do this when her mother was at work. (R. 1:2.) Ashley said this

[1] Consistent with Wis. Stat. § (Rule) 809.86(4), the State refers to the victim in this case by a pseudonym.

happened approximately 20 times and Henderson would tell her not to tell her mother. (R. 1:2.)

During a forensic interview, Ashley confirmed these details and relayed specific details about four assaults that happened at various residences where her family lived. (R. 1:3–4.)

In a subsequent case, Henderson was charged with having sexual contact with Ashley's sister at about the same time as he began assaulting Ashley. (R. 34:1–3.) When Ashley's sister was alone, Henderson asked her to scratch his back, then he asked her to "scratch his 'private part' pointing to his front groin area." (R. 34:2–3.) Henderson "moved her hand to his groin area underneath the clothing and touching his skin." (R. 34:3.) The State moved to join these cases. (R. 34:6.)

Henderson pleaded guilty to causing mental harm to a child and fourth-degree sexual assault. (R. 61:1; 63:1.)[2] The State indicated its desire that Henderson receive sex offender registration and sex offender treatment. (R. 87:4–5.) The circuit court ordered a presentence investigation (PSI). (R. 49:1.)

An agent with the department of corrections submitted the PSI, which indicated that Henderson was not statutorily eligible for either the CIP or SAP. (R. 52:1–2.)

The PSI did not contain a recommendation, but the agent wrote that Henderson "needs to come to terms with his actions and the severity of his actions, as well as how he has horrifically victimized [Ashley and her sister] and their parents with his actions." (R. 52:27.) The agent felt he "needs

[2] This was part of a global resolution whereby Henderson pleaded guilty to an additional count of fourth-degree sexual assault in Dane County Case No. 2018CF1756. (R. 66:4.)

to be held accountable by the criminal justice system." (R. 52:72.)

At sentencing, the State recounted the plea deal, which capped the State's recommendation, but left the parties "free to argue extended supervision, restitution, sex offender registration and sex offender treatment." (R. 66:18.) The State did not mention CIP or SAP in its argument. (R. 66:19–27.) Henderson did not mention the programming either, asking for an imposed and stayed prison term for five years of probation. (R. 66:32–42.) He did, however, specifically "acknowledge[ ] the need for mental health treatment, even sex offender treatment." (R. 66:33, 41.) Defense counsel stated that Henderson was not interested in addiction treatment because "he had been pretty forthcoming with the [PSI] author that he did not have a substance abuse issue." (R. 66:8.)

The circuit court began its sentence by considering the victims of Henderson's crimes; they were two girls in his care, "who looked up to" Henderson. (R. 66:49–50.) It noted the seriousness of the offense. (R. 66:50.) Despite the reduction in the charges for the plea agreement, "these were kids that [Henderson preyed] on; they were children in [his] care; even more than that, these were children who loved" him. (R. 66:50.) The court described Henderson's behavior attempting to dissuade his victims from telling their mother about the assaults as "grooming behavior . . . predatory behavior" which was "incredibly grave and serious." (R. 66:50.)

The circuit court considered Henderson's character, especially his history as a victim. (R. 66:50–51.) But, he had also picked up new charges in Milwaukee while on bail in this case. (R. 66:51.) The court also did not accept his explanation that he was "lonely and working crazy hours and stressed out." (R. 66:51.)

The circuit court found a high need to protect the public from Henderson's type of behavior. (R. 66:51–52.) The court could not "think of a place where we need to protect our children more than in their own homes." (R. 66:51–52.)

The circuit court followed the State's recommendation and sentenced Henderson to five years of initial confinement and five years of extended supervision on causing mental harm to a child. (R. 66:52, 54.) On the fourth-degree sexual assault, the court imposed nine months in jail concurrent to the first count. (R. 66:54; 63:1.) The court ordered "sex offender registration, sex offender treatment, a mental health assessment," and a no contact order with the victims and their family. (R. 66:52.) The court also ordered that Henderson be banned from "all schools in" the city where the victims lived; it also ordered that he not have any unapproved contact with minors. (R. 66:53.)

None of the parties raised the issue of Henderson's eligibility for SAP or CIP after the circuit court pronounced the sentence. (R. 66:54–55.)

A judgment of conviction was entered as to the felony count of causing mental harm to a child.[3] (R. 61:1.) This judgment of conviction indicated that the circuit court made Henderson eligible for both the CIP and SAP. (R. 61:2.) A written explanation of determinate sentence form created the day of sentencing also indicated that Henderson was eligible for the programs. (R. 64.)

Three years later, after the victims' mother received a notice from the department of corrections that Henderson was going to start programming, the State moved to correct the judgment of conviction. (R. 67:1; 85:30.) It asserted that the

[3] A separate judgment of conviction was entered as to the misdemeanor fourth-degree sexual assault of a child. (R. 63:1.) That document has not been amended.

sentencing transcript did not show that the circuit court found Henderson eligible for either program. (R. 67:1.) The State asserted that his eligibility on the judgment of conviction was a clerical error that the court had the inherent authority to correct. (R. 67:1.)[4]

The circuit court issued an order granting the State's motion. (R. 72.) It reviewed the sentencing transcript, and, because the transcript did "not contain a reference to approval for eligibility to either the Challenge Incarceration Program or the Substance Abuse Program," it ordered that Henderson was not eligible for either. (R. 72.) However, it allowed Henderson to "file a motion seeking eligibility for either of these programs, together with supporting basis for the motion." (R. 72.) The circuit court filed an amended judgment of conviction reflecting the order, indicating that Henderson was not eligible for either program. (R. 74:1–2.)

Henderson filed a motion to vacate the amended judgment of conviction. (R. 75:1.) He argued that the record "unambiguous[ly]" demonstrated the circuit court's intention to make him eligible. (R. 75:1–3.) He pointed to three documents: the judgment of conviction, the written explanation of determinate sentence, and the minutes sheet from sentencing hearing. (R. 75:2–3.) Henderson argued that the sentencing court's silence on programming eligibility as compared to the three documents making him eligible is not a "clear inconsistency between the oral pronouncement of the sentence and the judgment of conviction." (R. 75:4.)

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[4] The circuit court initially entered an amended judgment of conviction reflecting that Henderson was not made eligible for programming. (R. 69:1–2.) However, the next day, a second amended judgment of conviction was entered returning to the initial judgment of conviction—that is, reflecting eligibility for programming. (R. 71:1–2.) Both were superseded by the amended judgment of conviction that accompanied the circuit court's written order on the State's motion. (R. 72; 74:1.)

The State responded by quoting the portions of the sentencing transcript showing the circuit court's weighing of the most important factors—the gravity of the offense and the vulnerability of the victims. (R. 76:1–2.) The State argued that the sentencing pronouncement was unambiguous—at no point did the sentencing court find Henderson eligible for programming, and no reasonable person could have interpreted it as finding him eligible. (R. 76:3.)

The circuit court held a motion hearing. (R. 85:1.) The court started by noting that "there are checkmarks [indicating Henderson was] eligible for Challenge Incarceration and Substance Abuse Program." (R. 85:5.) "However, the transcript of that hearing does not show that the sentencing Judge made [Henderson] eligible for either of those and is silent on that matter." (R. 85:5.) The court went on to say that it "since learned . . . that the clerk, believing this to be merely a scrivener's decision [sic] and knowing that the defendant was under 40 and not convicted of a 940 offense, the clerk made those marks on the written explanation of determinate sentence." (R. 85:5.) The court took judicial notice of "how those marks got made, and they were not made by a Judge or approved by a Judge." (R. 85:5.)

The court called the clerk, Casee Trickel, as a witness, under oath, to make a record. (R. 85:9–10.) Ms. Trickel was the clerk for that circuit court branch, including at Henderson's sentencing hearing. (R. 85:10–11.) She took the in-court minutes from the hearing on a minute sheet, which was then sent to another part of the office of the clerk to be made into the judgment of conviction. (R. 85:11, 19.) She also filled out the written explanation of determinate sentence. (R. 85:14–15.) She did not recall any conversations with the sentencing judge about Henderson's programming eligibility. (R. 85:11.) When asked for the reason she marked Henderson eligible for programming, she stated that, based on her training, "if the defendant is under 40 years old and not

serving a prison sentence under a 940, [she] was told that they would be eligible." (R. 85:11–12.) She believed she marked Henderson eligible based on her belief and understanding, and not because the judge had made an eligibility determination. (R. 85:12.) She did not recall the sentencing judge ever making Henderson eligible for either program. (R. 85:12.) Ms. Trickel testified that when the State filed its motion to correct the judgment of conviction, she learned from the circuit court then that the court has to make the determination, so she would then ask the court for clarification before checking the boxes. (R. 85:20–21.) She said she admitted to her supervisor that she checked the eligible boxes in this case without the court's permission after looking at the transcript in this case. (R. 85:21–22.)

Henderson argued that Ms. Trickel's testimony, years after the fact, was that she could not remember and that the record would not have shown whether she conversed with the sentencing court about eligibility off the record. (R. 85:24–25.) He complained that this alleged error in the judgment of conviction went without objection for years. (R. 85:25.) He referred again to the three documents in the record which all agree as to his eligibility and contended there was no unambiguous contradiction between the sentencing court's oral pronouncement and the written records. (R. 85:25–26.) He contended that silence is inadequate to create an unambiguous contradiction. (R. 85:32.) He argued that this was not a case of a scrivener's error, but "a clerk acting extra judicially [sic], without judicial authority." (R. 85:25.)

The State asserted again that clerical errors in the judgment of conviction can be corrected at any time. (R. 85:28.) The State emphasized that oral transcripts control over written records, and the sentencing court clearly did not make Henderson eligible for programming. (R. 85:28–29.) Ms. Trickel's testimony was clear that all of the documents Henderson pointed to originated from her mistaken belief

that his age and the type of charge made him eligible. (R. 85:29.) The State indicated that it filed its motion to correct the judgment when it did because the victims' mother received a notice from the department of corrections that Henderson was going to start programming. (R. 85:30.)

The circuit court first determined that the State's motion to amend the judgement of conviction was timely. (R. 85:37.) It noted that the sentencing court did not make any finding that Henderson "needed an AODA assessment or treatment." (R. 85:38.) As to Henderson's reliance on the three documents in the record indicating his eligibility, the court found that all three originated from the clerk, "[s]o it's not like these are three separate findings or occasions on which this subject was visited." (R. 85:39.) It found that it was the clerk's decision to "fill out the boxes" making Henderson eligible. (R. 85:39.) The court found "her testimony as a whole to be reliable, that she, in fact, filled out that document without consulting the Judge." (R. 85:39.)

The court found that "the evidence is strong that [the sentencing judge] intended that [Henderson] not be eligible for those programs." (R. 85:40.) The court stated it would not revoke or change the amended judgment of conviction.[5] (R. 85:40.)

Henderson asked the circuit court to make him eligible for programming "based on the evidence that the Department of Corrections believed he was appropriate and already began the programming." (R. 85:40.) The court, however, declined because no motion to modify his sentence was filed. (R. 85:41.)

The circuit court entered a written order. (R. 82.) Henderson appeals. (R. 88:1.)

[5] Referring to R. 74.

STANDARD OF REVIEW

Whether a sentence is ambiguous is a question of law. *See State v. Peterson*, 2001 WI App 220, ¶¶ 12–13, 247 Wis. 2d 871, 634 N.W.2d 893.

To determine the sentencing court's intent, this Court reviews the record as a whole de novo. *State v. Oglesby*, 2006 WI App 95, ¶ 21, 292 Wis. 2d 716, 715 N.W.2d 727.

ARGUMENT

The circuit court correctly looked to the entire record to determine the sentencing court's intent on whether Henderson should be eligible for programming.

A. Defendant's sentences are dictated by the sentencing court's intent, not by written documents that may contain scrivener's errors.

The trial court's intent at sentencing, and not the judgment of conviction, determines the sentence. *State v. Brown*, 150 Wis. 2d 636, 642, 443 N.W.2d 19 (Ct. App. 1989).

When the trial court's unambiguous oral pronouncement at sentencing conflicts with an equally unambiguous pronouncement in the judgment of conviction, the oral pronouncement controls. *State v. Lipke*, 186 Wis. 2d 358, 364, 521 N.W.2d 444 (Ct. App. 1994). When the court's oral pronouncement at sentencing is unambiguous, it controls over an ambiguous judgment. *State v. Prihoda*, 2000 WI 123, ¶ 33, 239 Wis. 2d 244, 618 N.W.2d 857.

The test for ambiguity in sentencing asks whether "reasonably well-informed persons could construe the trial court's sentencing remarks" in "two or more different ways." *Oglesby*, 292 Wis. 2d 716, ¶ 19. If the sentence is ambiguous, this Court must review the full record to discern the circuit court's sentencing intent. *Id.* ¶¶ 20–21.

"[A]n *omission* in the oral pronouncement could create an ambiguity which would require the appellate court to determine the court's intent from other parts of the record, including the judgment of conviction." *Lipke*, 186 Wis. 2d at 364; *Brown*, 150 Wis. 2d at 642. In *Lipke*, the sentencing court did not state whether the sentence would be consecutive or concurrent to a separate jail sentence, and this Court looked to the record to discern the sentencing court's intent that it be consecutive. *Lipke*, 186 Wis. 2d at 364–65.

Similarly, in *Brown*, the sentencing court did not state whether the sentence was consecutive or concurrent. *Brown*, 150 Wis. 2d at 642. This Court looked at the record and, noting that the court followed the parties' joint recommendation in all other respects, found that the court intended a consecutive sentence, as recommended by the parties. *Id.*

B. The record demonstrates the sentencing court's intent that Henderson not be eligible for CIP or SAP.

Here, because the sentencing court did not state whether it was making Henderson eligible for the programming, the oral pronouncement is ambiguous. (R. 66:52–54.) *See Lipke*, 186 Wis. 2d at 364; *Brown*, 150 Wis. 2d at 642. Therefore, this Court must examine the entire record to discern the sentencing court's intent. *Brown*, 150 Wis. 2d at 642. The record is clear: the sentencing court did not intend for Henderson to be eligible for these programs.

The circuit court considered this a serious, aggravated offense. Henderson's victims were two girls in his care, "who looked up to" him. (R. 66:49–50.) "[T]hese were kids that you prayed on; they were children in [his] care; even more than that, these were children who loved" him. (R. 66:50.) The court described Henderson's behavior attempting to dissuade his victims from telling their mother about the assaults as

"grooming behavior . . . predatory behavior" which was "incredibly grave and serious." (R. 66:50.) The court also did not accept his explanation that he was "lonely, working crazy hours and stressed out." (R. 66:51.)

Another aggravating factor was that Henderson had picked up new charges in Milwaukee while on bail. (R. 66:51.)

The circuit court found a high need to protect the public from Henderson's type of behavior. (R. 66:51–52.) The court could not "think of a place where we need to protect our children more than in their own homes." (R. 66:51–52.)

The only programming either the parties, the PSI, or the circuit court mentioned was sex offender programming. (R. 52:28; 66:8–9, 19, 25–26, 33, 41, 52.) However, the circuit court specifically stated that it was considering the "rehabilitation needs of the offender." (R. 66:49.) By only ordering sex offender treatment, the court's intent is clear that it did not intend from him to be eligible for CIP or SAP.

The record that was before the circuit court also includes the PSI. This document goes over Henderson's specific treatment needs and did not specifically recommend either programming. (R. 52:28.)

Henderson argues that he is statutorily eligible for SAP and CIP. (Henderson's Br. 12.) The State acknowledges that he is, on the felony count.[6]

The record is nonetheless clear that the sentencing court did not intend to find him eligible. Arguing to the contrary, Henderson, as he did in the circuit court, points to the same three documents as his being eligible. (Henderson's Br. 14.)

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[6] Henderson was statutorily ineligible on the misdemeanor offense, but not on the felony offense. *See* Wis. Stat. § 973.01(3g), (3m).

However, his reliance on these documents is misplaced. As the circuit court found, these were produced by the clerk without input from the sentencing judge. (R. 85:39.) It specifically found that "it's not like these are three separate findings or occasions on which this subject was visited." (R. 85:39.) Henderson argues this finding of fact is clearly erroneous. (Henderson's Br. 15–17.) A "trial court's findings of fact are only upset when clearly erroneous." *State v. Owens*, 148 Wis. 2d 922, 929, 436 N.W.2d 869 (1989). A finding of fact is clearly erroneous when "it is against the great weight and clear preponderance of the evidence." *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (quoting *State v. Sykes*, 2005 WI 48, ¶ 21 n.7, 279 Wis. 2d 742, 695 N.W.2d 277).

Where the circuit court must draw inferences from established evidentiary facts, an appellate court must accept a reasonable inference drawn by a trial court from established facts where more than one reasonable inference may be drawn. *Pfeifer v. World Service Life Ins. Co.*, 121 Wis. 2d 567, 571, 360 N.W.2d 65 (Ct. App. 1984).

The circuit court's finding that the clerk produced those three documents without input from the sentencing court is not clearly erroneous. The clerk herself testified that she was marking defendants as eligible without the circuit court telling her to. (R. 85:11–12.) Her testimony was clear that she took the in-court minutes from the hearing on a minute sheet, which was made into the judgment of conviction. (R. 85:11, 19.) She also filled out the written explanation of determinate sentence. (R. 85:14–15.) The circuit court specifically found her testimony reliable. (R. 85:39.) Therefore, there is evidence deemed credible in the record showing that these documents do not demonstrate the sentencing court's intent to make Henderson eligible for programming; this Court should accept these facts as not clearly erroneous.

Henderson argues that the circuit court's finding that the sentencing record demonstrated its intent was to deny eligibility is also erroneous. (Henderson's Br. 17.) He argues that there was no intent either way because of the sentencing court's silence. (Henderson's Br. 17.) But that is precisely what makes the oral pronouncement ambiguous. *Lipke*, 186 Wis. 2d at 364; *Brown*, 150 Wis. 2d at 642.

Henderson's entire argument that the record demonstrates that the sentencing court intended to make him eligible for programming rests on the three documents. (Henderson's Br. 15–17.) But as stated, those were made by the clerk without any input from the judge, so they do not demonstrate the court's intent.

On the other hand, the sentencing court considered this an aggravated offense that involved minors in his care. (R. 66:49–50.) It specifically stated it was considering his rehabilitative needs. (R. 66:49.) It ordered sex offender programming. (R. 66:52.) By expressly considering Henderson's rehabilitative needs but then not making him eligible for SAP or CIP, the sentencing court's intent is clear—that he should not be eligible.

Finally, Henderson, for the first time on appeal, argues that the sentencing court's silence regarding CIP and SAP eligibility was error. He further argues that, by vacating the original judgment of conviction, the circuit court deprived him of his ability to petition for an eligibility determination under Wis. Stat. § 973.01(3g) and (3m). (Henderson's Br. 18–19.) Henderson did not seek to vacate the amended judgment of conviction on this basis before the circuit court. (R. 75:5.) Arguments are generally deemed waived if raised for the first time on appeal. *State v. Bollig*, 222 Wis. 2d 558, 564, 587 N.W.2d 908 (Ct. App. 1998). Also, Henderson cites no law for the argument that the circuit court should have filed a judgment of conviction with neither box checked and allowed him to petition for a determination, but regardless, the circuit

court followed what the law commanded—to search the record to determine the sentencing court's intent. *Lipke*, 186 Wis. 2d at 364; *Brown*, 150 Wis. 2d at 642. Because the circuit court correctly determined the sentencing court's intent, this Court should affirm.

CONCLUSION

This Court should affirm the circuit court's order denying Henderson's motion to vacate the amended judgment of conviction.

Dated this 4th day of April 2024.

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 4,089 words.

Dated this 4th day of April 2024.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN

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.

Dated this 4th day of April 2024.

Electronically signed by:

John D. Flynn
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