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**COURT OF APPEALS**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023AP002079-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LES PAUL HENDERSON,

Defendant-Appellant.

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

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REPLY BRIEF OF  
DEFENDANT-APPELLANT

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## ARGUMENT

**The circuit court erred in denying Mr. Henderson's motion to vacate the amended judgment of conviction; the record does not reflect the sentencing court's intent to make Mr. Henderson ineligible for programming.**

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. Contrary to the state's assertions, and the circuit court's findings, the record does not demonstrate the sentencing court's intent to deny Mr. Henderson eligibility for the Substance Abuse Program (SAP) or Challenge Incarceration Program (CIP).

The state and Mr. Henderson agree that the sentencing court's oral pronouncement was ambiguous. (Response 14, 17). As has been acknowledged by all who have reviewed the transcript, the sentencing court simply failed to address Mr. Henderson's eligibility for SAP and CIP during the sentencing hearing. (72; 85:39)(Response 14). The parties part ways, however, on whether the sentencing court's intent can be determined from the record and, if so, what that intent was.

The judgment of conviction (JOC) and associated documents clearly reflect the sentencing court's intent to make Mr. Henderson eligible. Setting those aside, at worst, the record reflects the court's

failure to consider the issue at all. In either case, the circuit court's orders denying the motion to vacate and amending the JOC to reflect ineligibility must be reversed.

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

The sentencing court's oral pronouncement is ambiguous when it comes to Mr. Henderson's eligibility for SAP and CIP. The record, however, clearly demonstrates its intent to find Mr. Henderson eligible. The state asserts otherwise. The state's entire argument, however, is built on a faulty premise: that the lack of a finding of eligibility equates to an intent to make the defendant ineligible.

The state argues that because the sentencing court stated that it had considered Mr. Henderson's treatment needs and did not order any substance abuse treatment as a condition of extended supervision, it must have intended to make Mr. Henderson ineligible for programming while serving his term of initial confinement. (Response 15). It cites no legal authority to support its position and instead attempts to sway this court by reciting the negative facts underlying Mr. Henderson's offenses. (Response 5-6, 14-15).

Moreover, the state asserts that the sentencing court's intent "is clear" and can be discerned by reading the transcript. But if the sentencing court's intent can be clearly determined from its remarks at

sentencing, why did the state concede that the oral pronouncement is ambiguous? Both cannot be true.

Rather, the state was correct in conceding that the sentencing court's oral pronouncement of sentence is ambiguous when it comes to eligibility for programming. The sentencing court was required to specifically state, on the record, whether it was making Mr. Henderson eligible or ineligible for SAP and CIP. *See* Wis. Stat. § 973.01(3g)&(3m). It failed to do so, maybe because the presentence investigation report incorrectly stated that Mr. Henderson was statutorily ineligible, or because neither party mentioned it during their sentencing arguments, or maybe because it just forgot. In any case, the sentencing court's failure to make the required determination means that the oral pronouncement of sentence cannot be relied upon to determine its intent on this issue.

This is not a situation in which silence on the issue automatically results in eligibility or ineligibility, as a court's silence on concurrent or consecutive sentences does. Rather, if no determination is made, a defendant can petition the sentencing court to make such determination. *See* Wis. Stat. § 973.01(3g)&(3m). Thus, the sentencing court's silence during the sentencing hearing does not, alone, indicate an intent to make Mr. Henderson ineligible.

The state seems to rely on *State v. Brown*, 150 Wis. 2d 636, 443 N.W.2d 19 (Ct. App. 1989), to support its position that review of the sentencing transcript is appropriate when the court's oral pronouncement is ambiguous. In that case, however, this court noted that when the oral pronouncement of sentence is ambiguous, and does not conflict with the written judgment, "it is proper to look to the written judgment to ascertain the court's intention." *Id.* at 641 (quoting *United States v. Purcell*, 715 F.2d 561, 563 (11<sup>th</sup> Cir. 1983)). The court then went on to review the oral pronouncement of sentence to ensure that it did not conflict with the judgment of conviction's indication that the sentence was to be consecutive. In concluding that there was no conflict, it noted that there was a joint sentencing recommendation for a consecutive sentence stated on the record, that the circuit court stated that the sentence would be as stated on the record, and that the court had imposed the same terms as the joint recommendation, but simply failed to clearly state consecutive on the record. *Id.* at 642.

Here, resort to the judgment of conviction to determine the sentencing court's intent is similarly appropriate. The sentencing court's silence on the issue created ambiguity and nothing in the court's oral pronouncement conflicts with the judgment of conviction's unambiguous statement of eligibility. There was no joint sentencing recommendation and the parties had no agreement as to Mr. Henderson's eligibility or ineligibility for programming. In fact, neither party mentioned SAP or CIP at all. It's this

silence which aligns Mr. Henderson's case with the facts of *State v. Lipke*, 186 Wis. 2d 358, 521 N.W.2d 444.

As set forth in the initial brief, the circuit court in *Lipke* had not been informed that the defendant had just been sentenced to jail by a different judge and, therefore, failed to state whether the sentence it imposed would be concurrent or consecutive to that sentence. *Lipke*, 186 Wis. 2d 358 at 362. The judgment of conviction entered the same day, however, stated that the sentence was consecutive. *Id.* This court found that the omission in the oral pronouncement rendered it ambiguous and it was therefore proper to rely on the unambiguous judgment of conviction to determine that the circuit court had intended that the sentence be consecutive. *Id.* at 364-365.

The same can be said in this case. The sentencing court understandably failed to address Mr. Henderson's eligibility for SAP or CIP. This omission resulted in an ambiguous oral pronouncement and it is therefore proper for this court to rely on the unambiguous written judgment of conviction entered shortly after sentencing to determine that the circuit court intended to make Mr. Henderson eligible for both programs.

Perhaps recognizing this, the state next asserts that Mr. Henderson's reliance on the judgment of conviction and associated documents is misplaced because the circuit court found that the clerk had completed those forms, making Mr. Henderson eligible



for SAP and CIP, without consulting the sentencing court. It argues that, contrary to Mr. Henderson's assertion, that finding was not clearly erroneous because that is a reasonable inference that could be drawn from Ms. Trickel's testimony. (Response 16).

The clerk's testimony, however, was far from clear. What it boils down to is that Ms. Trickel could not remember, one way or the other, whether she had a conversation with the sentencing judge about Mr. Henderson's eligibility for programming as it had been three and a half years since the sentencing hearing. (85:11,13, 22). Because she could not remember and could not say for sure that she entered those documents without consulting the judge, the circuit court's finding was clearly erroneous.

Moreover, one can assume that the sentencing court would have reviewed at least one of the three documents when they were entered. (One would hope that the circuit court reviews those documents to ensure they are accurate). And thus, the fact that the judgment of conviction was not corrected immediately thereafter demonstrates that it accurately reflected the sentencing court's intent to find Mr. Henderson eligible for programming.

Because the record reflects the circuit court's intent to allow Mr. Henderson to participate in SAP and CIP, the circuit court's orders denying the motion to vacate and amending the judgment of conviction must be reversed.

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

The circuit court's order denying Mr. Henderson's motion to vacate the amended judgments of conviction must be reversed as there is nothing in the record which unambiguously demonstrates the sentencing court's intent to make Mr. Henderson ineligible for SAP and CIP. If the documents reflecting eligibility are found to be entered in error, the record with respect to eligibility is simply silent. No conclusion can be reached about the sentencing court's intent because the sentencing court failed to exercise its discretion and make the statutorily required finding.

The state misrepresents Mr. Henderson's argument on this issue and then argues that Mr. Henderson waived it by not raising it below. Apparently concluding that waiver would be accepted, the state then opts not to address the argument at all.

Mr. Henderson, however, is not arguing that he is entitled to relief in this case because "the sentencing court's silence regarding CIP and SAP eligibility was error," or because the amended judgment of conviction deprived him of his ability to petition for an eligibility determination. (*See* Response 17). Rather, he clearly argues that the circuit court's order denying his motion to vacate was erroneous because the record does not demonstrate the sentencing court's intent to make him ineligible for programming. At best, it

shows that the sentencing court simply failed to address the issue and that a determination must be made.

In the circuit court, just as on appeal, Mr. Henderson's primary argument was that the record, including the unambiguous written judgment of conviction, demonstrated the sentencing court's intent to make him eligible for programming. At the time he filed his motion to vacate, Mr. Henderson had no knowledge of the information Ms. Trickel eventually testified to. When confronted with that information at the motion hearing, Mr. Henderson maintained his position but also acknowledged that the circuit court could find that the record was silent. (85:26-27). He also asked that the circuit court then make a finding that Mr. Henderson was eligible for programming. (85:27-28). Thus, Mr. Henderson did raise this issue below.

Moreover, the circuit court was clearly alerted to the fact that it was required to search the record to determine the sentencing court's intent. The state argued the record demonstrated an intent to make him ineligible, while Mr. Henderson argued the opposite. The circuit court was not required to accept either position. For that reason, should this court find that the argument has been forfeited, Mr. Henderson asks that this court disregard the forfeiture and address the merits. *See Davis v. Circuit Court for Dane County*, 2024 WI 14, ¶22, \_\_ Wis. 2d \_\_, \_\_ N.W.2d\_\_.

Mr. Henderson's legal argument here is no different than that made in the section above – the oral pronouncement of sentence is ambiguous because the sentencing court failed to address Mr. Henderson's eligibility at the time of sentencing. While Mr. Henderson believes that the judgment of conviction unambiguously reflects the circuit court's intent to make him eligible, he argues that if this court does not accept that conclusion, the record is simply silent on the issue. Under either theory, the circuit court's orders denying the motion to vacate and amending the judgment of conviction to reflect ineligibility must be reversed, as the record does not demonstrate an intent to make Mr. Henderson ineligible for programming.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the initial brief, 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 16<sup>th</sup> day of April, 2024.

Respectfully submitted,

*Electronically signed by*

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### **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 1,966 words.

Dated this 16<sup>th</sup> day of April, 2024.

Signed:

*Electronically signed by*

*Kathilynne A. Grotelueschen*

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