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COURT OF APPEALS

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

Case No. 2024AP1497-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

BENNY E. BURGOS,
Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION
FOR RECONSIDERATION, ENTERED IN THE CIRCUIT
COURT FOR MILWAUKEE COUNTY, THE HONORABLE
PAUL R. VAN GRUNSVEN, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN W. KELLIS
Assistant Attorney General
State Bar #1083400

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
(608) 294-2907 (Fax)
kellisjw@doj.state.wi.us

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ISSUES PRESENTED

When informed that a prison inmate has completed the Wisconsin Substance Abuse Program, a circuit court is statutorily required to modify his bifurcated sentence to allow for earlier release. In this case, the court refused to modify Defendant-Appellant Benny E. Burgos's sentence because it believed another statute prohibited it from doing so. Rather than appeal that adverse order, Burgos allowed his appellate deadline to lapse before filing a motion for reconsideration that raised no issue not already addressed by the court.

1. Does this Court have jurisdiction to review the order denying Burgos's motion for reconsideration?

This Court should answer no and dismiss this appeal.

2. Was the circuit court required to modify Burgos's bifurcated sentence upon notice of his successful completion of the Wisconsin Substance Abuse Program?

The circuit court answered no.

Should this Court decide that it maintains appellate jurisdiction, it should answer yes and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State seeks neither oral argument nor publication because this appeal can be decided based on the briefs and well-established legal principles. Should this Court conclude that it maintains jurisdiction, however, publication may be warranted to provide guidance to circuit courts concerning whether an inmate confined following revocation of extended supervision is statutorily ineligible for early release through completion of the Wisconsin Substance Abuse Program.

STATEMENT OF THE CASE

Burgos was sentenced to prison after pleading guilty to possessing a firearm as a felon and conspiring to commit possession with the intent to deliver between 10 and 50 grams of heroin as a second or subsequent offense. (R. 13:1; 15; 23; 27; 30:1–2, 5.) He was released to extended supervision after completing his consecutive terms of initial confinement, only to be returned to prison after the Division of Hearings and Appeals revoked his extended supervision and ordered him reconfined for five years, three months, and 17 days. (R. 39:3.)

Before Burgos had served half of that ordered time, the Wisconsin Department of Corrections (“DOC”) sent a letter to the circuit court, requesting that it authorize Burgos’s release to extended supervision due to his completion of the Wisconsin Substance Abuse Program (“SAP”). (R. 37.) The court denied that request by written order, concluding that Wis. Stat. § 302.113(9)(b) mandated an inmate serve the entire period of reconfinement ordered after revocation of extended supervision. (R. 40.)

Weeks later, the court received another letter from the Department asking that it reconsider its decision. (R. 41.) The letter recounted how Burgos was sentenced to prison in July 2015, was released from prison in 2020 after completing the SAP, was reconfined in June 2022 following his extended supervision revocation, was allowed to again enroll in the same program, and completed it in December 2023. (R. 41:1.) Without addressing the court’s statutory basis for rejecting the prior request, the letter’s author explained that the Department had changed its policies to allow persons such as Burgos the chance to participate in the SAP more than once. (R. 41:1.) Because Burgos had again completed the program, the letter’s author asked the court to reconsider its earlier denial of Burgos’s release. (R. 41:1.)

The court issued a written decision and order denying the Department's request for reconsideration. (R. 42.) It held that the Department's request to order Burgos's release defied Wis. Stat. § 302.113(9)(b), which it quoted as providing, "A person who is returned to prison after revocation of extended supervision shall be incarcerated for the *entire* period of time specified by the order under par. (am)." (R. 42:2.) The court went on to observe that "[w]hile the Department may have determined that the defendant is a suitable candidate for program completion during his term of reconfinement, the Department's request to the court exceeds the authority granted to it by the legislature." (R. 42:3.)

Months later, Burgos, by newly retained counsel, filed his own "Motion to Reconsider and Reverse Order." (R. 46.) There, Burgos conceded that the circuit court had previously declined the Department's request to authorize his release to extended supervision based on its interpretation of Wis. Stat. § 302.113(9)(b). (R. 46:3.) Still, he insisted that he be released based on a policy change by DOC, at the governor's direction, to allow inmates to complete the Substance Abuse Program multiple times for the same underlying case. (R. 46:3–4.)

The circuit court again declined to authorize Burgos's extended supervision release. (R. 52.) As it had done in its prior order, the court held that Wis. Stat. § 302.113(9)(b) prevented it from authorizing Burgos's release to extended supervision as that statute required that a person returned to prison after revocation of extended supervision "shall be incarcerated for the entire period of time specified by the" revocation order. (R. 52.) And as it had also explained in its prior order, the court held that DOC's policy change to permit inmates to complete the Substance Abuse Program more than once did not refute that conclusion. (R. 52:2.)

Burgos appeals. (R. 53.)

ARGUMENT

I. This Court lacks jurisdiction to review the order denying Burgos's motion for reconsideration.

A. Standard of Review

Whether this Court maintains jurisdiction over an appeal is a question of law that this Court independently decides. *State v. Scaccio*, 2000 WI App 265, ¶ 4, 240 Wis. 2d 95, 622 N.W.2d 449.

B. A party must raise new issues in a motion for reconsideration for this Court to have jurisdiction over the order denying it.

To give this Court jurisdiction over a final order, the appellant must file the notice of appeal within the time proscribed by statute. *See Helmricks v. Helmricks*, 95 Wis. 2d 554, 557, 291 N.W.2d 582 (Ct. App. 1980). Dismissal of an appeal is required when the Court lacks jurisdiction over the order appealed from. *See Smith v. Plankinton de Pulaski*, 71 Wis. 2d 251, 255–56 & nn.3–4, 238 N.W.2d 94 (1976).

For an order denying reconsideration to be appealable, the motion for reconsideration must have presented issues other than those determined by the original final order or judgment. *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972). Inversely, this Court lacks jurisdiction over an order denying reconsideration where the only issues raised in the reconsideration motion are those disposed of by the original order or judgment. *State v. Edwards*, 2003 WI 68, ¶ 8, 262 Wis. 2d 448, 665 N.W.2d 136.

Therefore, this Court must compare the issues raised in the motion for reconsideration with those disposed of in the original order to determine whether it has jurisdiction over the reconsideration order. *Harris v. Reivitz*, 142 Wis. 2d 82, 87, 417 N.W.2d 50 (Ct. App. 1987).

C. This Court lacks appellate jurisdiction over the order denying Burgos's motion for reconsideration because that motion raised no new issue.

A comparison of Burgos's motion for reconsideration and the January 2024 order denying DOC's request for reconsideration reveals that Burgos raised no new issues in the former that were not already disposed of in the latter. By operation of the "new issues" test laid out *Ver Hagen*, this Court lacks jurisdiction over this present appeal and should therefore dismiss it. *Edwards*, 262 Wis. 2d 448, ¶ 8.

Burgos's motion for reconsideration asked the circuit court to authorize his prison release to extended supervision on the ground that he successfully completed the Substance Abuse Program. (R. 46:1.) In his motion, he accurately noted that the court was previously asked to authorize his release to extended supervision after his completion of the Substance Abuse Program but that the court denied that request based on its interpretation of Wis. Stat. § 302.113(9)(b). (R. 46:3.)

In other words, Burgos's own motion acknowledged that the circuit court already addressed the very issue which he wanted it to examine—whether he was entitled to be released from prison after completing the Substance Abuse Program—yet he asked the court to reconsider that decision based on his rehabilitative success and a recent policy change by DOC and Governor Tony Evers to allow for those serving prison sentences to enroll in and complete the Substance Abuse Program more than once. (R. 46:4–6.)

That Burgos's motion for reconsideration offered more policy considerations fueling its request did not bring a new *issue* before the court. The issue he raised in his motion for reconsideration was the same one examined and decided by the circuit court's January 2024 order: whether he was again entitled to extended supervision release following completion of the Substance Abuse Program. Moreover, Burgos's motion

did not identify any issue unaddressed by the court's original order for it to resolve on reconsideration. *See Edwards*, 262 Wis. 2d 448, ¶¶ 10–13 (court of appeals had jurisdiction over reconsideration order where State had asked court to address whether the dismissal was with or without prejudice, an issue not addressed in the original order). Thus, because Burgos raised no new issues in his motion for reconsideration that were not already decided by the circuit court's January 2024 order, this Court must dismiss this appeal for lack of jurisdiction. *Id.* ¶ 8.

Burgos disagrees, but his arguments are unpersuasive. He asserts first that this Court has jurisdiction over the order denying his motion for reconsideration because he “was not the author or a knowing party-appellant” to DOC's preceding request for the circuit court to authorize his release. (Burgos's Br. 6.) But whether an order denying a proffered motion for reconsideration is appealable does not hinge on who filed the motion that prompted the court's order. Again, the relevant inquiry is whether the issues Burgos raised in his motion were the same as those disposed of by the circuit court's earlier order. *Ver Hagen*, 55 Wis. 2d at 25. They were, and Burgos offers no authority allowing him to overcome *Ver Hagen* just because it was a pleading filed by DOC that prompted the order he wanted the circuit court to reconsider.

Burgos also appears to argue that this Court maintains jurisdiction to review the order denying his motion for reconsideration because DOC's request for reconsideration presented different issues than DOC's initial request for the circuit court to authorize his release. (Burgos's Br. 6.) But that would only establish appellate jurisdiction for this Court to review the circuit court's order denying DOC's letter seeking reconsideration, not his own motion for reconsideration. Here, Burgos appeals from the order denying *his* motion, not the order denying DOC's request for reconsideration. (R. 53.) Thus, even assuming DOC's filings raised different issues,

that still does not establish jurisdiction to review the order denying Burgos's motion for reconsideration that *did not* raise any new issues. *Ver Hagen*, 55 Wis. 2d at 25.

Burgos also cites no authority permitting him to avoid *Ver Hagen*'s holding simply because he did not recognize or understand the appellate deadlines that he needed to abide by. (Burgos's Br. 6–7.) The order refusing to authorize his release was plainly adverse to Burgos, even if it was prompted by a DOC filing, and nothing stopped him from pursuing an appeal if he so wished. *See* Wis. Stat. §§ (Rules) 809.10(4) (an appeal may be taken from a final order adverse to the appellant), 809.30(1)(c) (defining postconviction relief). And while he complains that he was oblivious to the ongoing litigation in his case, he concedes that he was aware of it as early as February 2024 but failed to appeal the court's order, instead waiting another month to secure legal counsel. (Burgos's Br. 6–8.)

Finally, Burgos's grievances with his recently retained counsel have no bearing on this Court's jurisdiction. (Burgos's Br. 8–9.) While he may have had a legitimate gripe had he received deficient legal representation when he was entitled to constitutionally effective counsel, he had no such right in collateral proceedings like this one. *Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987) (holding that States have no obligation to provide counsel to indigent defendants during a collateral attack on a conviction after direct appellate review); *Evitts v. Lucey*, 469 U.S. 387, 396 n.7 (1985) (where there is no right to counsel, there is no right to the effective assistance of counsel). In short, whether he felt that his retained counsel swindled him out of his money is irrelevant for purposes of assessing whether this Court has jurisdiction over the order denying his motion for reconsideration.

If Burgos wished to seek relief from the circuit court's refusal to authorize his extended supervision release, he should have appealed the court's adverse order rather than

waiting months to file a motion for reconsideration raising the same issues addressed and rejected by the circuit court in its earlier order. Because he failed to do so, this Court should dismiss this appeal for lack of jurisdiction.

II. If this Court concludes that it has jurisdiction, the State concedes that the circuit court erred when it refused to modify Burgos's sentence.

A. Standard of Review

Whether the circuit court was authorized or required to order Burgos's extended supervision release following his completion of the Substance Abuse Program presents a question of statutory interpretation, which this Court reviews de novo. *State v. Gramza*, 2020 WI App 81, ¶ 15, 395 Wis. 2d 215, 952 N.W.2d 836.

B. Barring one exception, a circuit court is statutorily required to modify the sentence of an inmate who has completed the SAP.

Except for a conviction for which life imprisonment must be ordered, "whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony committed on or after December 31, 1999, or a misdemeanor committed on or after February 1, 2003, the court shall impose a bifurcated sentence." Wis. Stat. § 973.01(1). Unless that sentence is imposed for convictions of a crime against life or bodily security or certain crimes against children, a court that imposes a bifurcated prison sentence must also decide whether the defendant will be eligible to participate in the SAP while serving the confinement portion of his bifurcated sentence. Wis. Stat. § 973.01(3g).

The Legislature has mandated certain actions after an inmate successfully completes the SAP. First, DOC must inform the circuit court of the inmate's successful program completion. Wis. Stat. § 302.05(3)(c)1. Second, within 30 days

of receiving notice from DOC, the circuit court “shall reduce the term of confinement in prison portion of the inmate’s bifurcated sentence in a manner that provides for the release of the inmate to extended supervision” and “lengthen the term of extended supervision imposed so that the total length of the bifurcated sentence originally imposed does not change.” Wis. Stat. § 302.05(3)(c)2.a.–b.

While those actions are typically mandatory, this Court in *Gramza* concluded that those requirements gave way to statutes requiring a court to impose a mandatory minimum initial confinement term upon conviction. *Gramza*, 395 Wis. 2d 215, ¶¶ 16, 26. Reconciling the two statutes—one mandating that a court impose a minimum of three years’ initial confinement for a defendant convicted of his seventh drunk driving offense and another requiring the court to modify the sentence of a defendant who successfully completes the SAP—this Court “conclude[d] 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 SAP.” *Id.* ¶ 26.

C. The circuit court should have modified Burgos’s sentence once it was informed that he had completed the SAP.

Though the circuit court acknowledged that Wis. Stat. § 302.05(3)(c)2. imposed a statutory requirement to modify an inmate’s sentence upon completion of the SAP, it nevertheless held that it was precluded from doing so given the language of Wis. Stat. § 302.113(9)(b), which states, “A person who is returned to prison after revocation of extended supervision shall be incarcerated for the entire period of time specified by the order under [Wis. Stat. § 302.113(9)(am)].” (R. 52:1.)

While it appreciates the circuit court's rationale for its decision, the State nevertheless believes that reasoning was flawed. Admittedly, at first blush, Wis. Stat. § 302.113(9)(b) would suggest that once a defendant returns to prison after his extended supervision is revoked, there is no way for him to avoid serving the entire period of reconfinement ordered by the division of hearings and appeals.

But there is a problem with that interpretation: it defies firmly established principles of statutory interpretation. To that end, “the general rule of statutory construction in Wisconsin where two statutes relate to the same subject matter is that the specific statute controls over the general statute.” *Gottsacker Real Est. Co. v. State, Dep't of Transp., Div. of Highways*, 121 Wis. 2d 264, 269, 359 N.W.2d 164 (Ct. App. 1984). Here, Wis. Stat. § 302.05(3)(c)2. is arguably more specific as it provides clear, explicit direction for circuit courts when confronted with the smaller subset of inmates who have completed the SAP, whereas Wis. Stat. § 302.113(9)(b) sets a more general requirement that a person reconfined after extended supervision revocation “shall be incarcerated for the entire period of time” ordered.

To the extent that this Court disagrees about which statute is more specific, even looking outside of the statutory text, the Legislature's intent appears evident from its choice to institute restrictions from the SAP for some but not others. The Legislature clearly knew how to impose restrictions on program eligibility: it explicitly excluded inmates serving sentences for convictions of crimes against life and bodily security or specific offenses committed against children, though it did not also exclude all inmates whose extended supervision was revoked. Wis. Stat. § 302.05(3)(a). The Legislature could have made clear its intent that those similarly situated to Burgos be precluded from participating in the SAP, yet, in a policy choice, it stopped short of doing so. *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d

245 (1998) (“It is for the legislature to make policy choices, ours to judge them based not on our preference but on legal principles and constitutional authority.”).

On the contrary, Wis. Stat. § 302.05(3)(a)2. makes clear that an inmate is eligible to participate in the SAP as long as he satisfies two criteria: (1) he is not serving a sentence for one of the listed offenses; and (2) he is serving a bifurcated prison sentence for which the court previously decided at sentencing that he was eligible to participate in the program. However, particularly relevant here, an inmate confined after revocation of extended supervision is still serving a bifurcated prison sentence. As Wis. Stat. § 304.072(4) makes clear, a person released from prison after serving the reconfinement ordered under Wis. Stat. § 302.113(9)(am) resumes his prior bifurcated sentence, and the statute creates no special status, distinct from a bifurcated sentence, for those confined after his extended supervision is ordered revoked.

In short, if the Legislature sought to exempt inmates from participating in the SAP after revocation of his extended supervision, it could have imposed this requirement. Instead, it left open the door to allow those like Burgos an opportunity to participate in the program, even after returning to prison following revocation of extended supervision, while creating no exemption to allow a court to decline to modify the sentence of an inmate who successfully completes the program. Thus, should this Court conclude that it maintains jurisdiction to review the order denying Burgos’s motion for reconsideration that raised no new issues that were not already addressed by the circuit court’s preceding order, the State concedes that reversal is warranted.

CONCLUSION

This Court should dismiss this appeal for lack of jurisdiction or, if it maintains jurisdiction, reverse the order denying Burgos's motion for reconsideration.

Dated this 10th day of January 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

John W. Kellis
JOHN W. KELLIS
Assistant Attorney General
State Bar #1083400

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
(608) 294-2907 (Fax)
kellisjw@doj.state.wi.us

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 3,058 words.

Dated this 10th day of January 2025.

Electronically signed by:

John W. Kellis

JOHN W. KELLIS

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 January 10, 2025 to:

Benny E. Burgos #435497
Marshall E. Sherrer Correctional Center
1318 North 14th Street
Milwaukee, WI 53205-2596

Dated this 10th day of January 2025.

Electronically signed by:

John W. Kellis

JOHN W. KELLIS