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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

District I

Appeal No.: 2024-AP-1497

State of Wisconsin,

Plaintiff-Respondent,

vs.

L.C. Case No.: 14-CF-4879;
14-CF-5137

Benny E. Burgos,

Defendant-Appellant.

**Appeal from Decision and Order Denying Motion to Reconsider and Reverse Order
Entered on July 2, 2024 in the Milwaukee County Circuit Court The Honorable Paul R.
Grunsven Trial Court Case No. 14CF004879 and 14CF005137**

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

- I. Burgos Cannot be Held to Appeal from Either the January 4, 2004 Decision or the January 26, 2024 Decision Denying Burgos' Release Because Burgos Made No Motion Resulting in Said Orders Because Said Orders by the Circuit Court Were the Result of Communications Between the Department of Corrections and the Circuit Court.

On page 9 of its responsive brief, the State argues that the Motion to Reconsider and Reverse Order filed on June 26, 2024 are the same issues that were decided in the January 2024 orders of the circuit court. In those orders, the circuit court stated that a person who is returned to prison after revocation of extended supervision shall be incarcerated for the entire period of the time specified by the order of revocation.

The above-stated position of the plaintiff-appellee is correct; however, the State does not address the issue that Burgos should not be held to appeal within 90 days of a court order when the order did not respond to any motion brought by either Burgos or Burgos' attorney. Subsequent to sentencing in the year 2016, Burgos first entered the cases which are the subject of this appeal by a Notice of Appearance of his attorney on June 26, 2024. (45:1). Also on June 26, 2024, Burgos' attorney filed a Motion to Reconsider and Reverse Order. (46:1-6). Subsequent to that motion, which is attributable to Burgos, the circuit court issued a Decision and Order Denying Motion to Reconsider and Reverse Order on July 2, 2024. (52:1-2). Burgos then filed a pro se notice of appeal on July 26, 2024. (53:1-2). Burgos timely appealed the only motion attributable to him in a timely fashion. Therefore, this court has jurisdiction to hear this appeal.

On page 10 of its brief, the State cites Ver Hagen v. Gibbons, 55 Wis. 2d 21, 197 N.W.2d 752 (1972) as stating that if a motion to reconsider is the same as the motion that resulted in a court order, the motion to reconsider cannot extend the time to file a notice of

appeal. However, again the State does not answer whether Burgos can be bound to appeal from an order which resulted from a letter request of the DOC. Burgos maintains that he cannot be held to appeal an order denying a request by the DOC.

The State does not cite any connection between Burgos and the January 2024 decisions by the circuit court prior to the Motion to Reconsider and Reverse Order (46:1-6) filed by Burgos newly-retained attorneys on June 26, 2024. Nothing in the January 2024 decisions was the result of a motion or any action filed by Burgos or his counsel. The January 2024 decisions by the circuit court were the result of receiving a letter from the Department of Corrections. The State argues that if the circuit court order of January 26, 2024 must be appealed within 90 days, the appeal must be filed by April 25, 2024. Burgos cannot be held to appeal from a court order with which he had no legal connection.

II. Burgos was Entitled to Release Following the Successful Completion of the Earned Release Program (ERP) Pursuant to Wis. Stat 302.05(3)(b) During the Reconfinement Portion of the Sentence Based on DOC Expansion of ERP.

Both Burgos in his brief and the State in its brief made compelling arguments that the circuit court erred when it refused to modify Burgos' sentence.

Burgos argued that the position of the DOC as stated in its letter dated January 8, 2024 (41:1-2) was correct. The DOC letter argued that upon reincarceration, the department determined that Mr. Burgos should be provided the opportunity to enroll in ERP again. The letter explains that it is the mission of the DOC to provide opportunities for positive change and success. The department determined that Mr. Burgos should be provided an opportunity to complete ERP a second time due to his treatment needs. Mr. Burgos was identified to have a substance use disorder treatment need, and ERP is an avenue in which this need can be fulfilled. Mr. Burgos had ongoing treatment needs and, therefore, was given a second

opportunity to take ERP. He successfully completed his second course in ERP and, therefore, should be paroled pursuant to sec. 302.05(3)(b). Burgos further maintained that the sentencing court made him eligible for ERP, he successfully completed ERP a second time and then, according to statute, must be released.

On page 12 of its brief, the State argued that unless the sentence was imposed for convictions of a crime against life or bodily security or certain crimes against children, a court that imposes a bifurcated sentence must also decide whether the defendant will be eligible to participate in SAP (now known as ERP) while serving the confinement portion of his bifurcated sentence. Wis. Stat. § 973.01(3g). The State goes on to point out that after the successful completion of the ERP program, the inmate must be released. On page 13 of its brief, the State argues that where two statutes are in conflict, the specific statute controls over the general statute. The State goes on to argue that sec. 302.05(3)(c)(2) is more specific because it deals with a smaller subset of inmates than Wis. Stat. § 302.113(9)(b). The first cited statute deals with inmates who have completed the ERP whereas the second cited statute deals with a more general population of persons re-confined after extended supervision revocation. The State then makes a second argument as to why the court should have modified Burgos' sentence. At page 14 of its brief, the State argues that the legislature knew how to impose restrictions on program eligibility as it explicitly excluded inmates serving a sentence for convictions against life and bodily security or specific offenses committed against children. The State then points out that the legislature did not exclude all inmates whose extended supervision was revoked.

At page 15 of its brief, the State concludes that Burgos satisfied the two criteria of Wis. Stat. § 302.05(3)(a)(2): 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. The State points out that an inmate, after revocation of extended supervision, is still serving a bifurcated prison sentence. The State concludes by stating that if the court maintains jurisdiction to review the order denying Burgos' motion for reconsideration, the State concedes that reversal is warranted.

CONCLUSION AND RELIEF REQUESTED

The notice of appeal is timely in that Burgos' first entrance into this case, subsequent to sentencing on April 11, 2016, was the Motion to Reconsider and Reverse Order filed by his attorneys on June 26, 2024. Therefore, this court has jurisdiction of this appeal.

In the circuit court's Decision and Order Denying Motion to Reconsider and Reverse Order dated July 2, 2024 (52:2), the court stated:

The DOC's policy shift does not persuade the court to order its prior decision in this matter. If section 302.05(3)(c)(2) directs the circuit court to authorize an inmate's release from an administrative re-confinement order entered pursuant to section 302.113(9)(am), that direction must come from our state legislature or from the appellate courts of this state.

The DOC asked that Burgos be released in January of 2024. Now, thirteen months later, it is asked that this court of appeals direct the circuit court to release Burgos.

Dated this 28th day of February, 2025.

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Electronically signed by Robert N. Meyeroff

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is four pages, and 1,537 words.

Dated February 28, 2025

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