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OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT FOUR

State of Wisconsin,

Plaintiff – Respondent,

vs.

APPEAL # 18 AP 2412

Aman Deep Singh,

Defendant – Appellant.

On Appeal From An Order Denying "Motions" Entered In The Dane County Circuit Court, The Honorable Nicholas McNamara Presiding.

(DANE COUNTY L.C. #04 CT 882)

Aman Deep Singh

Defendant – Appellant

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ISSUES PRESENTED

Did the summary reversal in Appeal #17AP1609 void the entire sentence and so permit the trial court to grant the relief Singh now requests (refund of the fine, plea withdrawal, dismissal of the case)? The trial court answered "No".

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Singh requests neither oral argument nor publication. This dispute here is primarily due to confusion over what exactly was decided in Appeal #1609 and what further proceedings were expected of the trial court on remand.

STATEMENT OF THE CASE

This is the third appeal in this case and the original facts are as summarized in the opinions from Appeals #15AP850 and #17AP1609.[R25] In January 2004, Singh was convicted of first offense operating a motor vehicle while intoxicated (OWI) by bench trial in Dane County. In May 2004, the Dane County district attorney successfully petitioned the circuit court to vacate the first offense conviction and recharged Singh with second offense OWI predicated on an alleged prior Illinois Implied Consent blood test refusal.[R1] Singh pled no contest and was sentenced to ten days in jail, a monetary fine, and his license was revoked for fifteen months.[R14]

In Appeal #15AP850, Singh petitioned for a writ of *coram nobis* arguing that the successive prosecutions violated Double Jeopardy. This court affirmed denial of relief holding that the claim was beyond the scope of the writ. In Appeal #17AP1609, Singh argued that the judgment of conviction should be vacated because the successive prosecutions violated the double jeopardy bar of §345.52 and relief under §973.13 was warranted.[R25] Based on the State's disregard of court orders and briefing deadlines, this court held that the State had abandoned its opposition and summarily reversed the circuit court's order denying Singh's motion to vacate the

judgment of conviction. On remand and after a hearing where there was confusion as to what was decided by the 17AP1609 summary reversal, the circuit court signed a generic order stating that any excessive sentence was void.[R38,R30] The circuit court did not file an amended judgment of conviction.

Singh filed these motions for the excessive fine to be refunded, the judgment of conviction be vacated, the plea withdrawn, and the case dismissed.[R29] Singh also requested the same relief on new grounds based on the recent Wisconsin Supreme Court opinion in *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120. The trial court denied all motions without a hearing.[R33] Singh appeals.[R36]

ARGUMENT

I. THE PRIOR APPEAL.

A. SUMMARY OF THE #17AP1609 OPINION.

> "It is axiomatic that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal. Accordingly, our November 6, 1990 opinion and order, summarily reversing the dismissal order, establishes the law of this case, which must be followed by the circuit court on remand and this court on subsequent appeals."
>
> *State ex rel. Blackdeer v. Township of Levis*, 176 Wis.2d 252, 261, 500 NW2d 339 (Ct.App.1993).

The main dispute here is over the meaning of this court's *Blackdeer* based summary reversal in Appeal #17AP1609.[1] "The situation before me is the same as in *Blackdeer*." *Singh* ¶9. Specifically, what exactly is the law of the case that the *Singh* summary reversal established? "Summary reversal results in an appellant winning and the respondent losing." *Raz v. Brown*, 2003 WI 29, ¶18, 260 Wis. 2d 614, 660 N.W.2d 647. On what factual and legal points did Singh win and the State lose?

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[1] Hereafter, the opinion in Appeal #17AP1609, State of Wisconsin v. Aman Deep Singh, will be referred to in this brief as *"Singh"*.

Singh concerned Singh's motion to vacate the judgment of conviction. "In his motion, Singh argued 'that a second offense OWI prosecution is not authorized by law after a first offense OWI trial has been completed, regardless of outcome or whether it was undercharged.' Singh based his argument on WIS. STAT. § 345.52(1). Singh claimed that he received an excessive sentence because his prosecution for second offense OWI was invalid and, thus, any sentence would be excessive." ¶3. Singh cited § 973.13, which voids any excess portion of a sentence. Singh argued that the **entire** sentence was void as excessive because the prosecution was statutorily barred by §345.52 in the first place. Singh moved for the judgment of conviction to be vacated.

The State ignored multiple court orders, warnings, and statutory briefing and response deadlines. ¶5-6. As a result, the issues were deemed conceded. "This court can only conclude that the State has abandoned its position in this appeal." ¶9. "It is not this court's role to serve as an advocate on behalf of any party. To do so would be to abandon this court's responsibility as a neutral magistrate." ¶10 "Thus, the order of the circuit court denying Singh's motion to vacate the judgment of conviction is summarily reversed." ¶11.

Had this court ended its decision here, there would be no ambiguity. It would have been clear that Singh won the appeal and the judgment of conviction should be vacated as had been requested and briefed. Unfortunately, this court muddied the waters by, *sua sponte* and unbriefed, suggesting reasons why the judgment of conviction might not be vacated. ¶11. Finally, this court remanded for unspecified further proceedings. ¶12.

To summarize, *Singh* summarily reversed an order denying a motion to vacate the judgment of conviction but also suggested reasons to not vacate the judgment of conviction, hinted that everything might be moot, and then failed to specify exactly what was expected from further proceedings upon remand. At a bare minimum, *Singh* does appear to hold that the entire sentence that was originally imposed is void as excessive.

B. THE FINAL THREE SENTENCES OF *SINGH* ¶11 SHOULD BE TREATED AS DICTA.

> "¶11 Thus, the order of the circuit court denying Singh's motion to vacate the judgment of conviction is summarily reversed. In doing so, however, I note that the statute invoked by Singh on appeal, WIS. STAT. § 973.13, provides only one remedy: voiding any penalty in excess of the statutory maximum. The statute does not provide for vacation of the conviction or relief from the valid portion of the sentence. Since the penalties were fully served many years ago, and Singh has not moved for withdrawal of his no contest plea, this limited remedy may render the matter moot."

"Language broader than necessary to determine the issue before the court is dicta." *State ex rel. Schultz v. Bruendl*, 168 Wis. 2d 101, 112, 483 N.W.2d 238 (Ct. App. 1992). The final three sentences of ¶11 appear to be dicta. They are unnecessary to the resolution of the case, which was a summary reversal sanction instead of deciding on the merits. Indeed, the court said that it was not taking a position on the merits. ¶10 ("This court cannot decide this appeal on the record alone.") They also appear to contradict the court's stated intention to remain neutral and not advocate on behalf of the State. Unfortunately, the final three sentences of *Singh* ¶11 may also be an inaccurate statement of the law. Since the State never responded in the appeal, this court did not have the benefit of full briefing as to the scope of § 973.13.

If the circumstances here did not allow for vacating the conviction, the *Singh* appeal should have been affirmed on that basis – that vacating the conviction is not legally permitted in the context of a §973.13 motion. The State failed to brief this argument. However, this very question has previously been addressed head on and this court held that § 973.13 is not limited only to commutation:

> "On the issue before us, § 973.13, STATS., is more remarkable for what it does not say than what it does. The statute clearly invalidates the excess portion of an enhanced repeater sentence which is not properly proven. As such, the statute serves to correct and reduce the duration of an improperly imposed enhanced repeater sentence. However, the statute does not otherwise address other components or conditions of the sentence which do not directly bear upon the duration of the term imposed. .... [W]e see nothing in the statute which bars a sentencing court from addressing other aspects or conditions of the sentence to which the statute does not speak."
>
> *State v. Holloway*, 202 Wis. 2d 694, 698-700, 551 N.W.2d 841 (Ct. App. 1996)

In *Holloway*, the court determined that merely commuting the excess frustrated the premise and goals of the original sentencing, and then approved of

resentencing as an alternative remedy in that case. In 17AP1609, Singh argued that the entire sentence was excessive. Therefore, commuting the excess was the same as voiding the entire sentence – there is simply no valid portion of the sentence remaining here. After an original sentence has been 'reversed, vacated or nullified' and resentencing is possible, plea withdrawal is also available as a remedy if 'fair and just reason' standard is met. See *State v. Manke*, 230 Wis. 2d 421, 425-427, 602 N.W.2d 139 (Ct. App. 1999). Relief related to §973.13 is neither limited to mere commutation, nor prevents relief from any remaining valid portion of the sentence. This is especially the case in a situation like this where the court voided the entire sentence as excessive so there is no valid portion remaining.

The ¶11 final sentence about possible mootness should also be viewed as dicta. If the matter was moot, the court should have affirmed the appeal on that basis instead of summarily reversing. By summarily reversing, the law of the case is that the matter is not moot. If this court had concluded the matter was moot, it should not have remanded for further proceedings since no further proceedings would be necessary. Because the summary reversal voided the entire sentence, saying 'the penalties were fully served many years ago' is meaningless. A void sentence is a legal nullity. If there is no longer any valid sentence, the matter is not moot because this case is no longer 'closed' - it has returned to a pre-sentence open case posture in want of a final legal sentence. To repeat, Singh's position is that this is not a closed case because there is no valid sentence. [R33,p.10,12-25]

C. THE REMAND HEARING.

A hearing was held on September 21, 2018, after remittitur at which there was confusion over the meaning of the *Singh* remand mandate. [R38]

> THE COURT: I'm not real sure what exactly we're supposed to do. [p3, 20-21] ... I guess I'm thinking I'm supposed to commute the sentence to, perhaps, no sentence, but, but that's confusing to me because the statute only talks about reducing beyond a maximum penalty. And Mr. Singh wasn't given the maximum penalty in any way whatsoever. So I'm not real sure what we do there. [p4, 2-9]

THE DEFENDANT: But there's no sentence in this case right now.

THE COURT: There is no sentence today over the statutory maximum. What that means, I don't know.

THE DEFENDANT: But that's what the further proceedings are. What does that mean? To me it means that there's no sentence.

THE COURT: So I've granted you the relief and I've voided any part of the sentence that exceeds the statutory maximum. If there is nothing, that's your relief. Your void in excess of the statutory maximum is granted. [p12,17 – p13,6]

....

THE DEFENDANT: Just one question, What is the sentence on the judgment of conviction then? I mean, what is my sentence in this case?

THE COURT: The judgment will say that on the judgment of conviction that pursuant to 973.13 any penalty in excess of statutory maximum is void.

THE DEFENDANT: Without any indication of what that even means?

THE COURT: I'm following the law as directed by Judge Sherman and as provided by 973.13. If you want a different remedy, you have other channels. This is the remedy that you've sought and you've prevailed. [p14, 2-16]

The court signed a generic order stating that any sentence in excess of the statutory maximum is void, but did not amend the judgment of conviction.[R33]

With the preceding in mind, Singh filed the present motion requesting the following relief:

II. THE EXCESSIVE FINE SHOULD BE REFUNDED TO SINGH.

Singh's motion requests that the fine that was ordered as a penalty and paid in full should be refunded.[R29,p.2] The mandate of the *Singh* summary reversal granted Singh relief from an excessive sentence under §973.13. This statute voids any excess penalty, not merely terms of confinement. Fines are criminal penalties.[2]

[2] 939.12 Crime defined. A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.

Therefore, if the fine imposed upon Singh exceeded the maximum permitted by law, the excess is void and must be refunded to Singh.

Singh argued in 17AP1609 that the entire sentence imposed was excessive because the prosecution itself was barred by §345.52. Since the appeal was summarily reversed, the law of this case is that any sentence imposed on Singh is excessive and void under §973.13. That necessarily includes any fine that was imposed. This excessive fine should be refunded to Singh.

III. THE JUDGMENT OF CONVICTION SHOULD BE AMENDED.

Singh alleges that the trial court has yet to comply with the remand mandate from *Singh* because it has yet to enter an amended judgment of conviction. Every previous time this court has granted § 973.13 relief, it has remanded for entry of an amended judgment of conviction to reflect what the valid portion of the sentence is.[3]

Furthermore, § 973.12(3) requires the judgment of conviction to list the valid sentence. "However, subsec. (3) of this statute sets out what a judgment of conviction must recite: "A judgment of conviction shall set forth the plea, the verdict or finding,

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[3] See *State v. Spaeth*, 206 Wis. 2d 135, 156, 556 N.W.2d 728 (1996) ["We therefore reverse and remand to the circuit court, commuting the defendant's sentence to the maximum permitted by law. On remand, the circuit court is directed to enter an amended judgment of conviction consistent with this opinion."]. *State v. Zimmerman*, 185 Wis. 2d 549, 559, 518 N.W.2d 303 (Ct. App. 1994) ["In such a case, the sentence shall be commuted without further proceedings to the maximum permitted by the law.... Upon remand, the court is directed to enter an amended judgment of conviction accordingly."]. *State v. Schwebke*, 2001 WI App 99, ¶31, 242 Wis. 2d 585, 627 N.W.2d 213, aff'd, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666. ["Therefore, we commute Schwebke's sentence to the total allowable term of probation.... We reverse the imposition of consecutive probation terms and direct the trial court to enter an amended judgment of conviction accordingly."] *State v. Wilks*, 165 Wis. 2d 102, 112-113, 477 N.W.2d 632 (Ct. App. 1991) ["We reverse this portion of the sentence as void.... All other provisions of the sentence, including the probation term, are confirmed. Upon remand, the court is directed to enter an amendment judgment of conviction in accord with this decision."] *State v. Goldstein*, 182 Wis. 2d 251, 262, 513 N.W.2d 631 (Ct. App. 1994) ["We reverse the enhanced sentencing provisions of the judgment and the order denying postconviction relief. We commute Goldstein's sentences to the maximums permitted for the two offenses of which he stands convicted. We remand with instructions that the trial court enter an amended judgment in accord with this decision."] *State v. Theriault*, 187 Wis. 2d 125, 133, 522 N.W.2d 254, 258 (Ct. App. 1994) ["Section 973.13, STATS., provides that where a penalty is imposed in excess of that permitted by law, the excess portion of the sentence is void and the sentence is commuted without further proceedings. Therefore, we commute Theriault's sentence to the maximum permitted for each charge... Upon remand, the court is directed to enter an amended judgment of convictions accordingly."]

the adjudication and sentence ...." Section 972.13(3). Obviously, a judgment of conviction cannot be entered until these events have occurred. Indeed, subsec. (6) of the statute sets out a model form for a judgment of conviction and it includes all of the provisions required by subsec. (3). See § 972.13(6), STATS." *Mikrut v. State*, 212 Wis. 2d 859, 868-69, 569 N.W.2d 765 (Ct. App. 1997). Singh's judgment of conviction still lists the same invalid sentence this court ruled was void in *Singh*. It should be amended to reflect a valid sentence. Except, there is no valid sentence here. The *Singh* remand held that the entire sentence was void as excessive. There is no sentence at all, so Singh should not be subject to the invalid original written JOC.

IV. THE JUDGMENT OF CONVICTION SHOULD BE VACATED.

Singh's motion requests the judgment of conviction be vacated. [R29,p.3] The *Singh* opinion held the entire sentence originally imposed is void as excessive. There is no valid portion of the original sentence left intact. "If a judgment is void, it cannot acquire validity because of the lapse of time, and the judgment should be treated as legally ineffective in a subsequent proceeding.... A party attacking a judgment as void need show no meritorious claim or defense or other equities on his behalf; he is entitled to have the judgment treated for what it is, a legal nullity[.]" *Neylan v. Vorwald*, 124 Wis.2d 85, 97, 368 N.W.2d 648 (1985) "A void judgment cannot create a right or obligation, as it is not binding on anyone." *Kett v. Cmty. Credit Plan*, 222 Wis.2d 117, 127-28, 586 N.W.2d 68 (Ct.App.1998).

A valid judgment of conviction must include a valid sentence. "However, subsec. (3) of this statute sets out what a judgment of conviction must recite: "A judgment of conviction shall set forth the plea, the verdict or finding, the adjudication and sentence ...." Section 972.13(3). Obviously, a judgment of conviction cannot be entered until these events have occurred. Indeed, subsec. (6) of the statute sets out a model form for a judgment of conviction and it includes all of the provisions required

by subsec. (3). See § 972.13(6), STATS." *Mikrut v. State*, 212 Wis. 2d 859, 868-69, 569 N.W.2d 765 (Ct. App. 1997).

Furthermore, a judgment of conviction that shows a sentence void in its entirety can cause prejudice because without a valid sentence, this prosecution cannot count as a prior offense for OWI enhancement. "A conviction under WIS. STAT. § 343.307 must meet the requirements of WIS. STAT. § 972.13(3). In order to be a valid judgment of conviction, a sentence must have been imposed." *State v. Skibinski*, 2001 WI App 109, ¶10, 244 Wis. 2d 229, 629 N.W.2d 12. "We have also concluded that "a conviction does not occur until a sentence is imposed" for the purposes of calculating the number of convictions for operating while intoxicated." *State v. Johnson*, 2005 WI App 202, ¶18, 287 Wis. 2d 313, 704 NW2d 318. (citing *State v. Matke*, 2005 WI App 4, ¶ 12, 278 Wis. 2d 403, 692 N.W.2d 265) The JOC from 2005 appears to imply that a valid sentence was imposed, and could be used to count as a prior offense when *Singh* ruled that the sentence was void in its entirety.

While Singh is subject to a guilty plea, he is not subject to a sentence here because the sentence that was imposed has been ruled void in *Singh*. The judgment of conviction, which implies a valid sentence, does not comply with statutory requirements. "§ 972.13(3) recites what a judgment of conviction must include; and (3) § 972.13(6) sets out a model judgment of conviction form. Thus, a valid judgment of conviction cannot be entered against a defendant until all of these necessary ingredients exist. The amended judgment of conviction in case No. 85-CF-240 attempts to recite a judgment of conviction against Mikrut based upon his plea alone. As our analysis of the statute reveals, this is impossible. Therefore, even if the amended judgment were judicially sanctioned, it was incorrect." *Mikrut v. State*, 212 Wis. 2d 859, 869-70, 569 N.W.2d 765 (Ct. App. 1997).

As in *Mikrut*, Singh's guilty plea may arguably still be valid, but his sentence as listed on the written judgment of conviction is void. Therefore, the judgment of conviction is not judicially sanctioned.

V. PLEA WITHDRAWAL AND DISMISSAL SHOULD BE GRANTED.

Singh's moved that the plea be withdrawn and the case dismissed.[R29,p.4] *Singh* ruled that the entire sentence originally imposed is void under §973.13. Relief under § 973.13 is not limited solely to commutation. See *State v. Holloway*, 202 Wis. 2d 694, 698-700, 551 N.W.2d 841 (Ct. App. 1996) Normally, when an entire sentence is voided or nullified, re-sentencing is permitted. "As a general rule, resentencing is the proper method to correct a sentence which is not in accord with the law." *State v. Maron*, 214 Wis.2d 384, 388, 571 NW2d 454, 456 (Ct.App.1997). "In previous cases, we have held that resentencing is the appropriate remedy where the sentence was "legally impermissible" or "unlawful,", or where the sentence "is not in accord with the law."" *State v. Walker*, 117 Wis. 2d 579, 583-584, 345 N.W.2d 413 (1984).

However, no re-sentencing can occur here. Any resentence is excessive because the law of the case in *Singh* is that §345.52 bars this second prosecution. No valid sentence can be imposed in this case. Because *Singh* voided the entire sentence originally imposed, this case has returned to the pre-sentencing posture and a plea withdrawal motion is permitted under the fair and just reason standard. See *State v. Manke*, 230 Wis. 2d 421, 425-427, 602 N.W.2d 139 (Ct. App. 1999)

There is no sentence in this case because the law of the case from *Singh* is that §345.52 bars the imposition of any sentence .... The law of the case here is that the statutory maximum sentence for a second offense OWI after a first offense prosecution for the same offense is no sentence at all. Since no valid sentence could have ever been imposed, plea withdrawal is warranted under any standard, both a fair and just reason as well as a manifest injustice.

Singh's plea was not knowing nor voluntary because the court improperly informed him that he would be subject to second offense minimum and maximum penalties, and not that he was subject to no criminal penalties at all. Singh's counsel was ineffective under *Strickland v. Washington*, 466 US 668 (1984) for failing to inform Singh or the court that § 345.52 barred this second offense prosecution. Had

Singh known that he should not be subject to criminal penalties, he would never have pled guilty. No defendant would ever plead guilty to a crime if they knew in advance that no conviction and sentence was legally permitted.

VI. §973.13 RELIEF, PLEA WITHDRAWAL, AND DISMISSAL SHOULD BE GRANTED PURSUANT TO *STATE V. DALTON*, 2018 WI 85.

While the above proceedings were pending, the Wisconsin Supreme Court issued its decision in *State v. Dalton*, 2018 WI 85, 914 N.W.2d 120. As a result, Singh has new and independent grounds for relief. *Dalton* held that OWI sentences cannot be enhanced based on the refusal to submit to an Implied Consent blood test. "In sum, *Birchfield* dictates that criminal penalties may not be imposed for the refusal to submit to a blood test. 136 S.Ct. at 2185. A lengthier jail sentence is certainly a criminal penalty.... It was thus definitive in its intent to give Dalton a longer sentence for the sole reason that he refused to submit to a blood test. This is a violation of *Birchfield*. Pursuant to the circuit court's unequivocal sentencing remarks, Dalton was criminally punished for exercising his constitutional right. Established case law indicates that this is impermissible." *Id* at ¶59-61. "The State attempts to avoid this conclusion by contending that refusal to submit to a blood test is not a stand-alone crime in Wisconsin. It also asserts that any increase in a sentence within the statutorily prescribed range does not morph a sentencing consideration into a criminal penalty. We find each of these contentions unconvincing." *Id* at ¶62.

Singh's alleged prior violation, the belated discovery of which led the State to recharge Singh as a second offense, was a driver license suspension from Illinois for refusal to submit to a blood test. Under *Dalton*, this could not be used to enhance Singh's OWI conviction anyways. Singh's OWI penalties cannot be lengthened premised on a refusal to submit to a blood test. Since the refusal cannot count as a predicate prior offense, Singh was not guilty of second OWI as a matter of law.

An improperly applied penalty enhancer is the usual scenario for § 973.13 relief. *State v. Hanson*, 2001 WI 70, 244 Wis. 2d 405, 628 N.W.2d 759. Singh should

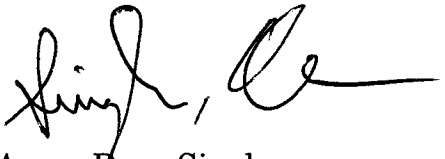
never have been charged or convicted as a second offense because an OWI sentence enhancement cannot be predicated on a blood test refusal. Therefore, the conviction and sentence should be commuted under §973.13 to a first offense. However, Singh has already been fully prosecuted to completion for first offense OWI by Dane County. "Because civil forfeitures are not crimes, sec. 939.12, Stats., the constitutional prohibition against multiplicity derived from the double jeopardy clause is not directly controlling. However, a similar analysis may be used. A person cannot be subject to a double forfeiture if his conduct constituted a single violation, even if his conduct is not a crime." *State v. Braun*, 103 Wis. 2d 617, 630, 309 N.W.2d 875, 882 (Ct. App. 1981). Furthermore, we still have the law of the case from *Singh*, that this second prosecution violates § 345.52. Under either *Braun* or *Singh*, even after a commutation to a first offense OWI because of an improperly applied repeater, Singh moves for vacating the judgment and dismissal of the case as a matter of law.

Alternatively, Singh instead moves for plea withdrawal, on the grounds that he would never have knowingly and intelligently pled guilty of a criminal second offense OWI had been given proper advice by the court as well as counsel that the prior refusal could not be used to enhance his present sentence and therefore Singh should not have been facing criminal penalties here.

CONCLUSION

Since there is no valid sentence in this case, the fine should be refunded, the JOC amended or vacated, the plea withdrawn and the case dismissed.

Dated this 25th day of August 2019,



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