

The Wisconsin Court of Appeals District IV

2021AP2053CR

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CLERK OF COURT OF APPEALS OF WISCONSIN

State of Wisconsin  
Plaintiff-Respondent

v.

Ricky Rodriguez  
Defendant-Appellant

Appeal from The Circuit Court of SAUK  
The Honorable Michael P. Srenock, presiding

Brief of Appellant Ricky Rodriguez

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## Statement of the Issues

The basic question is where there has been a determination by a trial judge to put a defendant on probation, may he thereafter, following the revocation of that probation order the sentence to commence sometime in the future, consecutive to a term imposed following the creation of a probation status and commencing prior to revocation of the probation?

## Statement on Oral Argument and Publication

Oral Argument and publication are not requested in this case.

## Statement of Facts and the Case

In Mr. Rodriguez case (2015CM318), a global resolution as to all matters was reached, the plea recommendation, with negotiations, were as follows. Upon a plea to Count 1, battery, and Count 3, bail jumping, the state agreed to dismiss and read in Count 2 and dismiss 16CM608, recommending a withheld sentence for two years of probation, \$443 costs times two, a DNA sample, AODA and all other treatment deemed appropriate, anger management counseling. (Plea + Sent. 2: 14-23). The court accepted the recommendation and withheld sentence and placed Mr. Rodriguez on probation. (Plea + Sent. 7: 20-25). The court then asked the state its offer in support of the joint recommendation (Plea + Sent. 10: 7-25). The court then, again reiterated the withholding of sentence. (Plea + Sent. 14: 12-16).

The court then set forth Additional conditions for Mr. Rodriguez probation. (Plea Sent. 15:8-12).

Subsequently, on May 14<sup>th</sup>, 2017, Mr. Rodriguez committed the offenses of 1<sup>st</sup> degree Reckless injury, Possession of Firearm, and Possession w/intent - THC, CASE No. (2017CF2397), and his probation was revoked. A Revocation Order and Warrant signed and dated June 18<sup>th</sup>, 2018, stated that Mr. Rodriguez return to the Noted Wisconsin Court(s) for sentencing pursuant to 973.10(2). The matter was set for a sentence after revocation hearing on July 19<sup>th</sup>, 2018. On July 23<sup>rd</sup>, 2019 an arrest warrant was issued for Mr. Rodriguez. On August 23<sup>rd</sup>, 2019, Mr. Rodriguez was sentenced on case No. (2017CF2397), and received at Dodge Correctional Institution on September 11<sup>th</sup>, 2019. A Request for Prompt Disposition was filed on September 26<sup>th</sup>, 2019 indicating that Mr. Rodriguez is incarcerated at Dodge Correctional Institution. On October 8<sup>th</sup>, 2019, a sentencing after revocation was held as to Mr. Rodriguez sentence of revocation. The court then asked the state's recommendation and the state's position was to have Mr. Rodriguez revocation ran concurrent with Milwaukee County case 2017CF2397. (Sent. After Rev. 5:7-25), (Sent. After Rev. 6:1-10). The court then ordered such sentence be ran consecutive after his completion of his 2017CF2397 case. (Sent. After Rev. 8:21-24), (Sent. After Rev. 10:1-6). The Wisconsin Department of Corrections sent the court a letter stating the Revocation Order and appears to

recommend more credit than awarded by the court. The court denied the request. Mr. Rodriguez filed a Motion for Sentence Modification on May 28<sup>th</sup>, 2021, this motion was denied by the circuit court on July 6<sup>th</sup>, 2021. Mr. Rodriguez then filed a Motion to Reconsider on October 14<sup>th</sup>, 2021. On October 15<sup>th</sup>, 2021 the State responded to Mr. Rodriguez motion to reconsider. On November 18<sup>th</sup>, 2021 the court denied Mr. Rodriguez motion to reconsider. A timely Notice of Appeal was filed.

## Argument

### I. Standard of Review

Upon revocation of probation, a trial judge has no authority to order that sentence upon conviction for which probation was granted be made consecutive to another prison term, whether sentence was initially withheld or was imposed and stayed; rather, sentence upon revocation of probation must commence immediately. *Drinkwater v. State*, 69 Wis.2d 60 (1975). The statute to be applied with respect to sentence upon revocation of probation is the probation revocation statute, which provides that term of sentence shall begin on the date prisoner enters prison, and not the general sentencing statute, which allows for consecutive sentences. Wis. Stat. 973.10(2).

II. A trial judge has no authority to revoke probation and impose sentence to commence consecutive to another prison term, and its commencement cannot be made effective in the future.

upon completion of Another prison term.

It is the Argument of Mr. Rodriguez, that upon revocation of probation the trial judge has no statutory Authority to order that the sentence then imposed be made consecutive to his other sentence and be completed in the future After the completion of his prison term. The sentence ordered After revocation must commence immediately, and that, therefore, its commencement cannot be made effective in the future upon completion of his other prison term case No. 2017CF2397. See Smith v. State, 85 Wis.2d 650, 271 N.W.2d 20 (1978).

(The holding, then, of Drinkwater is that A sentence imposed upon A revocation of probation cannot be made consecutive to A sentence previously imposed for AN intervening conviction, because the sentence newly imposed or allowed to go into effect cannot begin on the date the defendant enters prison.)

Mr. Rodriguez would've been sentenced first on his Sauk County case had the Sauk County DA not failed to issue A writ to have Mr. Rodriguez produced for the July 19<sup>th</sup>, 2018 hearing. The State provided the court inaccurate information At the canceled hearing in July, that Mr. Rodriguez had been released from custody, when in fact, Mr. Rodriguez continual custody in the Milwaukee County Jail from his arrest on May 14<sup>th</sup>, 2018 until his reception at Dodge Correctional Institution on September 11<sup>th</sup>, 2019, which is reflected in the Revocation Order.

The court exceeded its power when it made its revocation

of sentence on case No. 2015CM318 consecutive to Mr. Rodriguez 2017CF2397 sentence which is the intervening conviction. A sentencing judge exceeds their power when upon revocation of probation, they made the sentence on the original conviction consecutive to the sentence on the intervening convictions. Those portions of the sentencing judgments which provide that the terms are to be consecutive are void. *Drinkwater v. State*, 69 Wis.2d 60 (1975).

Under the rationale of *Drinkwater v. State*, 69 Wis.2d 60, 230 N.W.2d 126 (1975), it was beyond the statutory authority of the sentencing court to impose or allow to be put into effect consecutive sentences following revocation of probation. *Smith v. State*, 85 Wis.2d 650, 271 N.W.2d 20 (1978).

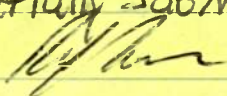
In *Drinkwater*, we held that a court's sentencing authority was controlled by statute and that, in the circumstances of *Drinkwater* (and *Trotter*, which was incorporated in *Drinkwater*), consecutive sentences could not be imposed or put into effect following the revocation of probation. In the *Drinkwater - Trotter* situation, each of the defendants was found guilty and sentenced to prison for a separate offense which intervened between his original of probation and the subsequent revocation of probation. The *Drinkwater* case was based upon the express legislative direction which appears in Section 973.10(2). In the instant case, at hand, Mr. Rodriguez was serving an intervening conviction upon sentence of revocation.

The LACUNA in the Authority granted to the trial judge upon Sentencing following revocation that was found to be fatal in Drinkwater is not the failure of the statute to authorize the court to make the sentences imposed following revocation consecutive to each other, but rather is the lack of Authority given to the court to postpone the term of the sentences to a later date by making them consecutive to an existing prison term. Smith v. State, 85 Wis. 2d 650, 271 N.W. 2d 20 (1978).

In sum, The court, after the revocation of Mr. Rodriguez probation, cannot order the sentence be served on a later date in the future, consecutively to a intervening sentence imposed arising between imposition and revocation of the probation. Since there had already been a prison sentence imposed, a sentence consecutive to one previously imposed would begin at a time later than the date he enters the prison. Therefore, it is argued, a consecutive sentence cannot be imposed.

### Conclusion

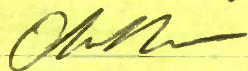
Mr. Rodriguez respectfully requests this court to find his sentence of revocation to commence consecutive to his intervening prison sentence, cannot be made effective in the future upon completion of his intervening sentence and remand to the circuit court for resentencing.

Respectfully Submitted,  




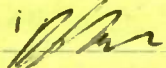
Certificate of Compliance with Rule 809.19(8) I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix. The length of this brief is 1,284 words.

Ricky Rodriguez



Certificate of Compliance with Rule 809.19(2) I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(A) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

Ricky Rodriguez



I further certify that a copy of this certificate has been served with this brief filed with the court.

Ricky Rodriguez



I further certify that a copy of this certificate has been served with this appendix filed with the court.

Ricky Rodriguez

