

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. Screnock, presiding

Reply Brief of Appellant Ricky Rodriguez

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Statement of Facts AND the Case

The State AND Mr. Rodriguez ARE IN disagreement AS to the factual AND procedural history of this case. The State fails to Admit the original sentencing ON revocation WAS set for July 19, 2018 for case No. 2015CM318, After the June 18, 2018 Revocation Order AND WARRANT WAS filed by the Department of Corrections. The State failed to produce Mr. Rodriguez for the initial sentencing After revocation hearing set for July 19, 2018 while Mr. Rodriguez WAS INCARCERATED At the Milwaukee County Jail from May 14, 2018 until Setember 10, 2019 when Mr. Rodriguez WAS ON August 23, 2019 in case No. 2017CF2391 AND transferred to Dodge Correctional Institution ON September 11, 2019 where Mr. Rodriguez filed A request for prompt disposition AND ON October 8, 2019, A second sentencing After revocation WAS held.

Argument

I. This Court has Jurisdiction to Review

The standards of review for Appellate challenges to sentences ARE well settled AND familiar. There is A dispute between the State AND Mr. Rodriguez AS to the controlling legal standards.

A. The State AND Mr. Rodriguez ARE IN Agreement that this court cannot review the denial of Mr. Rodriguez motion for sentence modification.

B. Mr. Rodriguez Motion for Reconsideration was timely and not barred.

Mr. Rodriguez filed his motion for reconsideration on October 14, 2021, and the circuit court denied Mr. Rodriguez motion for reconsideration on November 18, 2021 ruling on the merits of the motion. While the State argues in its brief that Mr. Rodriguez motion for reconsideration was not timely under Wis. Stat. 805.17(3), the State did not raise that argument in the circuit court, instead, it simply argued that Mr. Rodriguez was required to appeal from the July 6, 2021 order. The State therefore forfeited its right to raise any argument on appeal that the reconsideration motion was untimely under 805.17(3). See *State v. Van Camp*, 213 Wis.2d 131, 441, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed forfeited). Even if the State had not forfeited its argument regarding Wis. Stat. 805.17(3), Mr. Rodriguez argues that statute only applies to judgments entered following trials to the court. Because no trial to the court was held in this case, the twenty-day time limit in 805.17(3) is inapplicable.

Although Mr. Rodriguez moved for reconsideration, the motion did not affect the time for appealing because it was not filed after a trial to the court or other evidentiary hearing. See *Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.*, 175 Wis.2d 527, 533-35, 499 N.W.2d 282 (Ct. App. 1993) (Wis. Stat. 805.17(3) does not apply to

RECONSIDERATION MOTIONS IN A SUMMARY JUDGMENT CONTEXT.

The State forfeited their rights to appeal the issue because they failed to first raise the issue in the circuit court, as a general matter, an issue must be raised in the trial court to be eligible for review upon appeal. *Schinner v. Schinner*, 143 Wis.2d 81, 94 N.5, 420 N.W.2d 381 (Ct. App. 1998) (citing *Zeller v. Northrup King Co.*, 125 Wis.2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985)). This Court should find it has jurisdiction to review Mr. Rodriguez motion for reconsideration.

C. Mr. Rodriguez Motion for Reconsideration Presents A New Issue, This Court has Jurisdiction.

State v. Edwards, 262 Wis.2d 448, 665 N.W.2d 136, 2003 WI 68, the court stated; the court of Appeals has liberally applied the new issue test for determining whether an order denying reconsideration is appealable. *Harris v. Reivitz*, 142 Wis.2d 82, 88, 417 N.W.2d 50 (Ct. App. 1987). In *Harris*, the court of Appeals concluded that the test should be liberally applied based on this court's liberalization of appealability in adopting the new issues test in *Ver Hagen*. The court also reasoned that a liberal application of the *Ver Hagen* new issues test is consistent with the policy favoring reconsideration. The Supreme Court encourages litigants to request the trial courts for reconsideration as a method of correcting errors. *Id.* At 89, 417 N.W.2d 50 (citing *Kochel v. Hartford Accident & Indem. Co.*, 66 Wis.2d

405, 418, 225 N.W.2d 604 (1975)).

Mr. Rodriguez motion for reconsideration requested that the circuit court address whether 2015 CM 318 commencement be made effective in the future upon completion of his other sentence for case 2017 CF 2397, which raised a new issue that was not disposed of by the original order or judgment. And, therefore, Mr. Rodriguez presented a new issue and this court has jurisdiction.

A motion for reconsideration must present issues other than those determined by the order or judgment for which review is requested in order to appeal from the order entered on the motion for reconsideration. *Silverton Enters, Inc. v. General Cas. Co.*, 143 Wis.2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988).

This means that the only issue the Court of Appeals have jurisdiction to address is whether the circuit court erroneously exercised its discretion by applying the general sentencing statute 973.15, when the proper controlling statute to be applied 973.10(2), probation revocation statute, which provides that term of sentence shall begin immediately.

II. The State and Mr. Rodriguez are in agreement the circuit court had the authority to order the sentence in Sauk County case 2015 CM 318 to be consecutive to Milwaukee County case 2017 CF 2397, but, Mr. Rodriguez disputes the commencement of case 2015 CM 318,

being made effective in the future upon completion of his 2017CF2397 case,

Mr. Rodriguez reconsideration motion is not arguing about his 2015CM318 case being consecutive to his 2017CF2397 case, Mr. Rodriguez is in total agreement with the sentence being consecutive, he argues the commencement of case 2015CM318 being made effective in the future upon completion of his 2017CF2397 case, when upon revocation the consecutive 2015CM318 sentence should have commenced immediately.

When upon revocation the consecutive 2015CM318 sentence should have commenced immediately. Therefore, the Court of Appeals should reverse the circuit court's November 18, 2021 decision denying Mr. Rodriguez motion for reconsideration.

A. Standard of Review

To prevail on a motion for reconsideration, a party must either present newly discovered evidence or establish a manifest error of law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd*, 2004 WI App 129, ¶144, 275 Wis.2d 397, 685 N.W.2d 853. A manifest error of law occurs when the circuit court disregards, misapplies, or fails to recognize controlling precedent.

The Court of Appeals reviews a circuit court's denial of a motion for reconsideration to determine if the court properly exercised its discretion. *Id.*, ¶16. A circuit court erroneously exercises its discretion if that exercise is based on an error of law, *State v. Davis*, 2001 WI 136, ¶128, 248 Wis.2d 986, 637 N.W.2d 62, and the court of Appeals review questions of law de novo. See *State v. Kramer*, 2001 WI 132, ¶17, 248 Wis.2d 1009, 637 N.W.2d 35. The issue of the correct legal standard presents a question of law. *Id.* Thus, the Court of Appeals review de novo whether the court's denial of the motion for reconsideration was based on an error of law in that it did not apply controlling precedent.

b. The State and Mr. Rodriguez are in agreement that Wis. Stat. 973.15(2)(A) gave the circuit court the authority to order Sauk County Case 2015CM318 to be consecutive to any other sentence, but disputes Wis. Stat. 973.15(2)(A) being the controlling precedent when it is clearly established that Wis. Stat. 973.10(2) is the controlling precedent over sentence upon revocation of probation.

This means that the only issue the Court of Appeals have jurisdiction to address is whether the circuit court erroneously exercised its discretion by applying the general sentencing statute Wis. Stat 973.15, when the proper statute to be applied Wis. Stat 973.10(2) probation statute, which provides that term of sentence shall commence immediately.

Statutory interpretation begin with the language of the statute. See *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶145, 271 Wis.2d 633, 681 N.W.2d 110. When interpreting multiple statutes, we are to harmonize them in a way to give effect to each statute. See *State v. O'Brien*, 2014 WI 54, ¶170, 354 Wis.2d 753, 850 N.W.2d 8. If the statutes conflict, the more specific one controls, though we attempt to avoid an interpretation that results in conflict. See *State v. Anthony D.B.*, 2000 WI 94, ¶11, 237 Wis.2d 1, 614 N.W.2d 435.

Mr. Rodriguez argues that the two statutes must be read together and, because Wis. Stat. 973.15(2)(A) provides that a sentence may be consecutive, it was wrong of the circuit court to make his 2015 CM 318 sentence to be completed in the future after completion of his 2017 CF 2391 sentence.

Mr. Rodriguez argues that his 2015 CM 318 sentence should have commenced immediately after entry to prison with his 2017 CF 2391 sentence to follow; the procedures regarding sentence after revocation of probation are legislative facts because those facts are established by statute. See Wis. Stat. 973.10(2); Control and Supervision of Probationers.

It is impossible for Mr. Rodriguez to serve a sentence with the counts concurrent with 2015 CM 318 and consecutive with the 2017 CF 2391 sentence given that; (i) the 2015 CM 318 sentence and 2017 CF 2391 sentence are consecutive to one

Another, And (2) the 2017 CF 2391 sentence has to be served before the 2015 CM 318 sentence because it was the first sentence imposed. The only way Mr. Rodriguez sentence in this case could be conceivably be served would be by splitting the initial confinement portion of the sentence, or in the alternative, serve the 2015 CM 318 sentence first. See *State v. Bagnall*, 61 Wis.2d 297, 212 N.W.2d 122 (1973).

The circuit court lacked authority to make Mr. Rodriguez 2015 CM 318 sentence to be served in the future upon completion of Mr. Rodriguez 2017 CF 2391 sentence. The circuit court should have accepted Mr. Rodriguez motion for reconsideration to modify an illegal sentence. The structure of the way the circuit court imposed sentence was an impossibility, and, therefore, illegal.

Our Supreme Court has stated that circuit courts have authority to modify a sentence to correct formal or clerical errors or an illegal or a void sentence at anytime. See *State v. Crochiere*, 2004 WI 78, ¶ 12, 273 Wis.2d 57, 681 N.W.2d 524 (quoted source omitted), abrogated on other grounds by *State v. Harbor*, 2011 WI 28, 333 Wis.2d 53, 797 N.W.2d 828; see also *Harbor*, 333 Wis.2d 53, ¶ 35 n. 8 (A circuit court has authority to modify a sentence even though no new factor is presented, such as when the court determines that the sentence is illegal or void).

Mr. Rodriguez consecutive sentence as originally imposed is an illegal sentence because it is not possible to serve

Such a sentence. It is impossible to serve the 2015CM318 sentence in future that is consecutive to the completion of Mr. Rodriguez 2017CF2391 sentence first.

It is true that the statutory language provides that the circuit court may impose any sentence consecutive with any other sentence imposed. But it is not reasonable to read this language, as the State seemingly does, to mean that any sentence may be imposed consecutive to any other sentence previously imposed regardless of the factual context. For example, it would be unreasonable and absurd to read the statute to mean a new sentence imposed in 2020 made consecutive with a sentence completed in 2018, even though the literal language of the statute might seem to authorize this result. We interpret statutes to avoid absurd, unreasonable, or implausible results. See *Force ex rel. Welkenbach v. American Family Mut. Ins. Co.*, 2014 WI 82, ¶30, 356 Wis.2d 582, 850 N.W.2d 866.

CONCLUSION

This Court, therefore, should consider Wis. Stat. 973.15(2)(A) in the context of the entirety of 973.10(2), the statute of which it is a part and which creates and defines sentencing of revocation, and the Court of Appeals should remand the circuit court's order denying Mr. Rodriguez motion for reconsideration.

Respectfully Submitted,

[Signature]

Form And Length Certification

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b)(6m), And (c). The length of this brief is 1,768 words.

Certificate of Compliance with Rule 809.19(12)

I hereby certify that I have submitted a copy via mail of this brief, excluding the Appendix to the court of Appeals