COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0847-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STERLING RACHWAL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Monroe County: MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Eich and Vergeront, JJ.

EICH, J. Sterling Rachwal appeals from an order of the Monroe County Circuit Court committing him to the Department of Health & Family Services after his negotiated plea of not guilty by reason of mental disease or

defect (NGI) to three charges of mistreatment of animals, and from an order denying his motion for postconviction relief.

After accepting the plea, the trial court imposed the maximum commitment permitted by law: two-thirds of the maximum sentences for the underlying crimes, or a total of nineteen years.[1] As stipulated by the parties, the court ordered that the commitment be served consecutive to Rachwal's existing commitment (which, like this one, had been ordered after his NGI plea to similar charges). The State concedes on appeal that the court lacked legal authority to order an NGI commitment to be served consecutively to an existing commitment.[2] It argues, however, that we should "carry out the intent of the trial court and set the maximum possible length for Rachwal's commitment that the law allows—which it calculates as twenty-four years. Rachwal, agreeing that the consecutive commitment was illegal, argues that we should remand for a new commitment hearing. Alternatively, he argues that his trial counsel was ineffective in failing to argue for something less than the maximum commitment.

We conclude that this is not a case like ***State v. Walker,*** 117 Wis.2d 579, 345 N.W.2d 413 (1984), where the supreme court, based on the trial court's

[1] Section 971.17(1), STATS., states that:

> When a defendant is found not guilty by reason of mental disease or defect, the court shall commit the person to the department … for a specified period not exceeding two-thirds of the maximum term of imprisonment that could be imposed … against an offender convicted of the same … crimes ….

[2] The circuit court's commitment authority is derived solely from the statutes, ***State ex rel. Helmer v. Cullen***, 149 Wis.2d 161, 164, 440 N.W.2d 790, 791 (Ct. App. 1989), and the applicable statute, § 971.17, STATS., does not contain any language authorizing consecutive commitments. There is authority for consecutive "sentence[s]," § 973.15(2)(a), but an NGI commitment is not a "sentence" within the meaning of that statute. ***State v. Harr***, 211 Wis.2d 584, 587, 568 N.W.2d 307, 308 (Ct. App. 1997).

comments at the sentencing hearing, was able to infer the court's intent and modify its "illegal" sentence into one compatible with applicable law. It is, rather, a case where the general rule applicable in such situations—a remand for resentencing/recommitment—should apply. We therefore reverse the orders and remand to the trial court for a new commitment hearing. Because we so hold, it becomes unnecessary to consider Rachwal's ineffective-assistance argument.

The ***Walker*** court, acknowledging that a remand for resentencing is the usual remedy where the trial court has imposed an illegal sentence, nonetheless went on to analyze the trial court's sentencing remarks, making several "assumptions" along the way, and eventually ascertained the trial judge's true "intent" and re-calculated the sentence itself, rather than remanding the case. The dispute in ***Walker*** concerned the trial court's ambiguous remarks with respect to granting the defendant credit for time served. The defendant, whose murder conviction had been reversed after he had spent three years and two months in prison, pled to a reduced charge of injury by conduct regardless of life (for the same acts). The trial court sentenced him to "three years," stating: (1) that it had "taken into consideration" the three years and two months the defendant had spent in prison in setting the three-year term; and (2) that, as a result "there will be no credit for time previously served." ***Id.*** at 581, 345 N.W.2d at 414 (emphasis added). The defendant appealed, claiming that the trial court erred by not granting the time-served credit against the (three-year) sentence it imposed. The effect of the argument, of course, would be to credit the three years-plus time served to the three-year sentence, essentially nullifying it.

There, as here, the State conceded error, and the supreme court agreed that the trial court had not followed the procedures of § 973.155(2), STATS., which requires the court, "*after* the imposition of the sentence," to "make

and enter a specific finding of the number of days for which sentence credit is to be granted." ***Id.*** at 583, 345 N.W.2d at 415 (emphasis added). Then, framing the issue as "what remedy the defendant is entitled to in order to correct the sentence," the supreme court began by noting that, while resentencing is usually considered the proper remedy where the sentence imposed is illegal—or in a case where "the appellate court would have to infer what sentence the trial court would have imposed had it proceeded on a proper understanding of the applicable law"—the court noted that, in at least one prior case, it had "modified the sentence to carry out the intent of the trial court while bringing the sentence into accordance with the applicable law,"[3] and went on to conclude that what the trial judge had really intended was to sentence the defendant to six years and two months, and then to give him credit for the three years and two months he had spent in prison. ***Id.*** at 583-84, 345 N.W.2d at 415-16.[4] The supreme court then "modified" the defendant's sentence accordingly. ***Id.*** at 586, 345 N.W.2d at 417.

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[3] *See* ***Struzik v. State***, 90 Wis.2d 357, 279 N.W.2d 922 (1979).

[4] The court reasoned as follows:

> The trial judge apparently decided that a sentence of six years and two months was appropriate for the charge of injury by conduct regardless of life; the judge then, without explicitly stating, subtracted the amount of time served to reach the three-year sentence which was actually imposed. When the trial judge represented that no credit was to be given for time served, we assume he only meant to imply that he had already subtracted that amount when he announced the three-year sentence. If that time had already been subtracted, it would have been accurate to state that no *further* time-served credit would be given because otherwise it would amount to a double credit.
>
> From this record, we conclude that the trial judge intended to impose a sentence of six years and two months …. In his comments … the trial judge repeatedly noted the serious nature of the crime and … that … [the defendant's] previous incarceration had not deterred him from further criminality. Thus, we may presume the trial judge intended that the

(continued)

In this case, there was a plea agreement that was only sketchily conveyed to the trial court. At the commencement of the hearing, the prosecutor simply stated:

> It's my understanding … that the defendant would … plead no contest to Count 2, 3 and 4 as an habitual criminal and that we would stipulate that he is not guilty by reason of mental disease or defect. That there would be -- that the time be consecutive to his NGI sentence in the other case.

As may be seen, the statement makes no reference to the length of the commitment. In any event, defense counsel, responding to the court's inquiry, agreed that "that [was] the understanding." The court then engaged the defendant in a lengthy plea colloquy, at one point explaining to him the possible maximum length of the commitment.

> THE COURT: Do you understand that the maximum sentences for these offenses would be as to Count 2, up to 8 years in prison, and as to Counts 3 and 4 -- well, wait a second, I may have the wrong penalty provision there.
>
> MR. BELZER [defense counsel]: Judge, I think it's eight, eight and three.
>
> THE COURT: Do you agree with that Mr. Matousek?

> defendant be subject to further incarceration …. A sentence of six years and two months was reasonable under these circumstances. To accept the defendant's argument that the trial judge intended only a three-year sentence, which would be nullified by the time-served credit, would be entirely inconsistent with the trial judge's intention revealed at sentencing. We conclude that, although the manner in which the trial judge enunciated the sentence was inartful and did not comport with … sec. 973.155 … the intended sentence itself was valid and did not constitute an abuse of the trial judge's sentencing discretion.

State v. Walker, 117 Wis.2d 579, 584-85, 345 N.W.2d 413, 416 (1984).

….

MR. MATOUSEK [prosecutor]: Correct.

THE COURT: Okay, you're looking at eight, eight and three and my understanding … is that if the Court goes along with this agreement to impose the consecutive term on a finding of not guilty by reason of mental disease or defect, that you *could be* incarcerated for treatment purpose *for up to* eight additional years, is that correct?

MR. BELZER: No, he can be incarcerated for up to two-thirds of 19 years.

THE COURT: Additionally, okay, so it's the total --

MR. MATOUSEK: Total.

THE COURT: Okay, it's not; my belief is erroneous, then. I thought he can just receive the maximum for the most serious offense. It's the maximum for all three offenses.

MR. MATOUSEK: That's correct.

THE COURT: And then two-thirds of that because he's entitled to the mandatory release, correct?

MR. BELZER: That's correct (emphasis added).

Then, at the conclusion of the discussion, the court stated to Rachwal:

THE COURT: All right, do you understand if the Court … approves this agreement, then I'll be entering an order that will provide that you be subject to an additional period of commitment for *up to* 19 years, is that right; eight and eight and three?

> MR. BELZER: Two-thirds of 19 years.
>
> THE COURT: Two-thirds of 19 years, do you understand that?
>
> THE DEFENDANT: Yes (emphasis added).

The court then discussed its reasons for accepting the NGI plea and, with respect to the actual sentence, had only this to say:

> [T]he court will order that he be committed to Winnebago, that he be subject to a consecutive term of commitment not to exceed eight, eight and three on the three offenses; a total of 19 years subject … to the mandatory release provisions which apply by law. Which would [require] him … to serve a maximum, of two-thirds of that 19 year time period.

As indicated, we have been referred to only a single case—***State v. Walker***—for the proposition that we should calculate the maximum possible commitment Rachwal could face under the applicable statutes and impose that commitment ourselves. We note first that in the fifteen years since ***Walker's*** release, it has never been cited to justify a specific modification of a trial court's sentence by either this court or the supreme court. Indeed, one of its few citations anywhere has been for the proposition that "[r]esentencing is generally the proper method of correcting a sentencing error." ***State v. Holloway***, 202 Wis.2d 694, 700, 551 N.W.2d 841, 844 (Ct. App. 1996). Second, the ***Walker*** court arrived at its conclusion as to the sentencing court's intent in that case based on its analysis of the courts sentencing remarks, which apparently were fairly extensive.[5] In this

[5] The ***Walker*** court commented, for example, that it could presume that the trial judge intended that the defendant be subjected to substantial incarceration because, among other things, "[I]n its comments at the sentence hearing, the ... judge repeatedly noted the serious nature of the (continued)

case, as we have indicated above, the "plea agreement" set forth by the prosecutor at the commencement of the hearing made no mention of the length of the commitment—whether there was a joint recommendation, or whether the parties were free to argue the issue. And the trial court, in the course of the plea colloquy, discussed the maximum commitment with Rachwal in terms of possibilities: that it "could" commit him for a total of nineteen years; that he would be subject to an additional period of commitment "up to" nineteen years. Then, after a brief discussion of the reasons why it was accepting the NGI plea rather than taking the case to trial, the court, without any elaboration or statement of reasons, committed Rachwal to the maximum term.

Given the commitment hearing record, we are satisfied that this is not a proper case for us to "assume," "presume" or "infer" what the trial court intended, as the ***Walker*** court was apparently able to do on the record before it in that case. *See* ***Walker***, 117 Wis.2d at 584-85, 585, 345 N.W.2d at 415-16. Given the sparse nature of the record in this case, we believe the best course is to remand for a new sentencing/commitment hearing.[6]

By the Court.–Orders reversed and cause remanded with directions.

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crime and also … that the defendant had shown by his actions that [a] previous incarceration had not deterred him from further criminal activity." ***Id***., 117 Wis.2d at 585, 345 N.W.2d at 416.

[6] In ***Robinson v. State,*** 102 Wis.2d 343, 306 N.W.2d 668 (1981), the trial court treated the "concealment-of-identity" penalty enhancer to the armed robbery statute as a separate offense, sentencing the defendant to ten years for armed robbery, and two and one-half years for concealing identity, ordering the sentences to run consecutively. In that sense, the situation is not dissimilar to that facing us here. The ***Robinson*** court, accepting the state's concession of error, declined its invitation to "modify" the sentences to a single twelve-and-one-half-year sentence by "infer[ring]" that is what the trial court had intended, and remanded to the trial court—"the proper court to resentence the defendant under a correct application of the law." ***Id***. at 356, 306 N.W.2d at 675.

Not recommended for publication in the official reports.