COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3000-CR
2006AP3001-CR

Cir. Ct. Nos. 2004CF1748
2004CF4781

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH EMLYN MORGESE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Joseph Emlyn Morgese appeals from an order denying his motion for resentencing and from an order denying his motion for reconsideration. Because we determine that Morgese is not entitled to a resentencing, we affirm.

BACKGROUND

¶2 Morgese pled guilty in case no. 2004CF1748 to three felony counts of failure to pay child support. In case no. 2004CF4781, Morgese pled guilty to one count of bail jumping. A fourth count of failure to support child was dismissed, but read in for purposes of sentencing. He was sentenced to consecutive sentences of five years' imprisonment each on two of the three failure to support child counts, each sentence comprised of four years of initial confinement and one year of extended supervision. On the third count, he was sentenced to one and a half years' initial confinement and two years' extended supervision (the maximum under TIS-II). On the felony bail-jumping conviction, Morgese was sentenced to six years' imprisonment, comprised of three years each of initial confinement and extended supervision, to run consecutively with his sentences in 2004CF1748. His sentences on all four counts were stayed and he was given concurrent ten-year probation terms for each count. In its decision, the trial court specifically found "that the sentence that's appropriate here in order to accomplish the primary purpose of the sentencing is probation." It then, however, went on to note:

> I find that with a gentleman as glib and nimble in dodging the law and his obligations as he is, that the maximum sentence needs to be imposed on each count in order to help him to appreciate both the wrongfulness of his conduct and what awaits him if he continues to blow off as he has for some years now his financial obligations to his children.
>
> ….
>
> [The conditions of probation] also provide for adequate punishment and deterrence I think with the maximum imposed and stayed sentences should he decide that his old ways are more appealing for some reason to him.

¶3 After Morgese's probation was revoked, he moved the trial court[1] for resentencing pursuant to WIS. STAT. § 973.13 (2005-06),[2] alleging that he was sentenced on two of the failure to support child counts to more than the maximum sentence allowed under WIS. STAT. § 948.22(2) (1999-2000) (underlying acts were committed between October 1, 2002 and January 1, 2003). The trial court agreed, and in its decision and order denying the motion for resentencing and order amending judgment of conviction, it commuted the confinement portion of Morgese's sentence on each of these two counts from five years' initial confinement to two years' initial confinement. In its denial of Morgese's motion for a complete resentencing, the trial court noted:

> The court declines to resentence the defendant because commuting the confinement time on these counts does not frustrate the purpose of the prior sentence. A review of the sentencing transcript reveals that Judge DiMotto intended the defendant to serve maximum sentences for the child support and bail jumping offenses. Reducing the confinement time on counts one and two in 04CF001748 to two years, the maximum amount of confinement for a Class E felony, does not frustrate that purpose. Arguably, the court would have ordered three years of extended supervision on each [of] these counts if it had known that the maximum confinement term was two years. The transcript shows that the court was not particularly focused on the length of extended supervision when it structured these sentences, and therefore, the court finds that it does not undermine the premise and goals of the original sentence that the total term of imprisonment for these offenses is being reduced.

[1] Morgese was originally sentenced by the Honorable Jean W. DiMotto. Due to judicial rotation, the Honorable Timothy G. Dugan presided over Morgese's motion for resentencing.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Morgese moved for reconsideration, and the trial court denied his motion. Morgese appeals both his judgment of conviction and the two orders denying resentencing.

DISCUSSION

¶5 Sentencing is within the sound discretion of the trial court. ***State v. Holloway***, 202 Wis. 2d 694, 697, 551 N.W.2d 841 (Ct. App. 1996). Whether a sentencing court correctly interpreted and applied a statute, however, is a question of law which we review *de novo*. ***Id.***

¶6 The remedy for a defendant who has been given an excessive sentence is set forth in WIS. STAT. § 973.13.[3] Pursuant to § 973.13, a court may, in its discretion, commute the excessive portion of a sentence without reopening the entire sentencing process, *if the sentencing court's original intent is not frustrated*. *See* ***State v. Church***, 2003 WI 74, ¶26, 262 Wis. 2d 678, 665 N.W.2d 141.

¶7 Morgese cites a number of court of appeals decisions in support of his argument that he is entitled to resentencing on all three felony failure to support child counts, as well as on his felony bail-jumping conviction. Morgese first cites ***State v. Volk***, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24, as support for his argument that he must be resentenced on all counts. ***Volk*** involved

[3] WISCONSIN STAT. § 973.13 states:

> **Excessive sentence, errors cured.** In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

the improper imposition of a penalty enhancer to the extended supervision portion of a bifurcated sentence. ***Id.***, ¶2. The court of appeals determined that the case did not fall within WIS. STAT. § 973.13, which allows for a commutation, without further proceedings, to the new lower maximum penalty. ***Volk***, 258 Wis. 2d 584, ¶47. Accordingly, the court of appeals noted that resentencing was necessary to ensure that the sentence produced was not "based on mathematics, [but] rather [was] an individualized sentence based on 'the facts of the particular case and the characteristics of the individual defendant.'" ***Id.***, ¶48 (quoting ***Holloway***, 202 Wis. 2d at 699-700). The court of appeals then directed the trial court to resentence Volk only on the one count of aggravated battery, and not on both counts for which he was convicted and sentenced. ***Id.***, ¶¶15, 50. Accordingly, ***Volk*** also does not support Morgese's premise that he should be resentenced on all counts.

¶8 Morgese next cites ***State v. Groth***, 2002 WI App 299, 258 Wis. 2d 889, 655 N.W.2d 163, *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, in support of his claim that he must be resentenced on all four counts included in two separate but related cases, 2004CF1748 and 2004CF4781. In ***Groth***, the defendant claimed he was sentenced based upon inaccurate information. ***Id.***, ¶2. Because the court of appeals determined that the record supported Groth's claim that the trial court relied on the inaccurate information in sentencing him on all counts for which the jury convicted him, it ordered Groth to be resentenced to preserve "the integrity of the sentencing process." ***Id.***, ¶34. Unlike Morgese's characterization, ***Groth*** did not involve the imposition of an illegal sentence, and did not hold that a "successful challenge to one sentence requires resentencing on all counts." *See* ***id.***

¶9 Finally, Morgese cites to ***State v. Thums***, 2006 WI App 173, 295 Wis. 2d 664, 721 N.W.2d 729. ***Thums*** involved the improper sentencing of a defendant under TIS-I when some of the elements of the crime for which he was convicted (stalking with a dangerous weapon), did not occur until after TIS-II was in effect. ***Id.***, ¶11. The issue was whether Thums was entitled to be resentenced, *on that one count*, as to *both components* of his bifurcated sentence, because the maximum confinement portion of his sentence exceeded the maximum allowed under TIS-II. ***Id.***, ¶14. Because the entire sentencing scheme (maximum allowed for both confinement and extended supervision components) was modified under TIS-II, the parties agreed, and the court concurred, that Thums was entitled to be resentenced on that one count. ***Id.*** The court of appeals also noted that in the process of resentencing, the trial court "*may* also revisit whether the companion charges should be concurrent or consecutive as the court sees fit." ***Id.*** (emphasis added). The court of appeals did not, however, direct the trial court to do so, and further, specifically did not direct the trial court to reopen the sentencing on all of the other counts. ***Id.*** Accordingly, ***Thums*** is not supportive of Morgese's position that the trial court must resentence him on all four counts.

¶10 The State cites to ***Church*** in support of its position that Morgese is not entitled to a complete resentencing. The supreme court, in ***Church***, addressed whether, if one or more counts of a conviction are vacated, a defendant is entitled to a complete resentencing on all remaining convictions. ***Id.***, 262 Wis. 2d 678, ¶4. ***Church*** involved an appellate challenge as multiplicitous to convictions on two charges of child enticement. ***Id.***, ¶2. On appeal, one of the convictions was vacated as being multiplicitous and, as a consequence, the court of appeals remanded for resentencing on the four remaining convictions. ***Id.***, ¶3. The State petitioned the supreme court and the supreme court reversed,

> conclud[ing] that resentencing on convictions that remain intact after an appellate court reverses and vacates one or more counts in a multi-count case is not always required [and that w]here … the vacated count did not affect the overall dispositional scheme of the initial sentence, resentencing on the remaining counts is unnecessary and therefore not required.

Id., ¶4. Key to the supreme court's conclusion was its determination that where the vacated count "disturbs the overall sentence structure or frustrates the intent of the original dispositional scheme," "resentencing is procedurally and constitutionally permissible," but if it has "no affect at all on the overall sentence structure," then resentencing is not necessary. ***Id.***, ¶26.

¶11 In this case, the original sentencing court sentenced Morgese to the maximum sentence it believed it was allowed to impose. Upon a challenge to that sentence, the trial court determined that the sentence imposed on two of the failure to support child counts exceeded the maximum allowed by statute. Under WIS. STAT. § 973.13, "where the court imposes a maximum penalty in excess of that authorized by law," a sentence "shall stand commuted without further proceedings" "to the extent of the maximum term authorized by statute." Under the supreme court's holdings in ***Church***, further proceedings are only warranted if the original sentencing intent is frustrated by this commutation. *See* ***Church***, 262 Wis. 2d 678, ¶26. Here, Morgese was sentenced to the maximum sentence the trial court believed it could impose for each of the three failure to support child counts, with each to run consecutively to one another and to his sentence on the felony bail-jumping. The commutation of two of the four counts reduces Morgese's entire sentence by four years of confinement. The commutation does not frustrate the original sentencing court's intent to sentence Morgese to the maximum sentence it could impose. It merely shortens Morgese's confinement to the maximum allowed under the law by a total of four years. We agree with the

trial court that there is nothing in the record of the original sentencing court to suggest that this commutation frustrates the original intent of the sentencing court. *See* ***id.***

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.