COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2381-CR **Cir. Ct. No. 2006CF240**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CAROL ANN CREWZ,

DEFENDANT-APPELLANT.

APPEAL from an amended judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Amended judgment affirmed in part and reversed in part; order reversed and cause remanded with directions.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Carol Ann Crewz has appealed from an amended judgment entered in the trial court on February 16, 2007, convicting her of uttering

a forgery as a repeat offender in violation of WIS. STAT. § 939.62(1)(b) and § 943.38(2) (2005-06),[1] and sentencing her to six years in prison, consecutive to a sentence she was then serving in Waukesha county circuit court case No. 2000CF853.[2] Crewz has also appealed from an order denying her postconviction motion for sentence modification. We reverse the order and the portion of the amended judgment providing that the forgery sentence for count one is consecutive to the sentence in Waukesha county circuit court case No. 2000CF853. We remand the matter with directions to enter a new amended judgment providing that the forgery sentence for count one is concurrent to the sentence in Waukesha county circuit court case No. 2000CF853.[3]

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

[2] In December 2006, while this case was pending in Ozaukee county, Crewz was ordered reconfined for a period of ten months and twenty-five days following revocation of extended supervision in Waukesha county circuit court case No. 2000CF853.

[3] As discussed in this decision, on February 14, 2007, a written judgment was entered sentencing Crewz to six years for this offense, consisting of two years of initial confinement and four years of extended supervision. On February 16, 2007, an amended judgment was entered, sentencing Crewz to six years for this offense, consisting of two years of initial confinement and four years of extended supervision, consecutive to the sentence she was serving in Waukesha county circuit court case No. 2000CF853.

The record reveals that in response to a March 8, 2007 letter from the Wisconsin Department of Corrections indicating that the maximum period of extended supervision for this offense was three years, the trial court ordered that the judgment of conviction be further amended to state that Crewz was sentenced to two years of initial confinement followed by three years of extended supervision, for a total sentence of five years, consecutive to the sentence in Waukesha county circuit court case No. 2000CF853. This amended judgment was entered on March 23, 2007. Since this particular amendment is not challenged in this appeal, when an amended judgment is entered on remand, the new judgment must indicate that Crewz is sentenced to five years for count one, consisting of two years of initial confinement and three years of extended supervision, concurrent to the sentence in Waukesha county circuit court case No. 2000CF853.

¶2 On February 14, 2007, Crewz entered pleas of no contest to two counts of uttering a forgery as a repeat offender (counts one and two), and one count of obstructing an officer as a repeat offender (count five). Sentencing immediately followed.

¶3 At the commencement of the February 14, 2007 hearing, the parties informed the trial court that Crewz' extended supervision in the Waukesha case had been revoked and that she was serving ten months and twenty-five days at the prison in Taycheedah. In detailing the parties' plea agreement, defense counsel related the terms as set forth in the guilty plea questionnaire and waiver of rights form, indicating that the State was recommending six years in prison on count one, consisting of two years of initial confinement and four years of extended supervision, plus three years of consecutive probation on counts two and five.[4] The prosecutor then stated that, pursuant to the plea agreement, he would be recommending:

> On Count 1, uttering, six years Wisconsin State prison, to be composed of two years incarceration and four years extended supervision, consecutive.
>
> On the balance of the charges, which is another felony forgery as a repeater and obstructing as a repeater, a withheld sentence, five years probation on the forgery charge, Count 2. Three years probation on the obstructing as a repeater charge, Count 5. Probation is concurrent to each other, but consecutive to the prison sentence.

¶4 Crewz then engaged in a plea colloquy with the trial court judge, entered her no contest pleas, and proceeded to sentencing. In his sentencing

[4] The plea questionnaire did not state if count one was to be consecutive or concurrent to the Waukesha county case.

argument, Crewz' attorney asked the trial court to impose and stay a sentence and place her on consecutive probation.

¶5 In sentencing Crewz, the trial court determined that she did not pose a good risk for probation. It stated:

> What I am going to do is follow the recommendation. I'm going to sentence you to total sentence of six years, two years of initial confinement and four years of extended supervision after that.…
>
> On Count 2 I'm going to withhold sentence and place you on probation for a period of five years, consecutive to the extended supervision on Count 1. And on Count 5 I'm going to withhold sentence and place you on probation for a period of three years, consecutive to the period of extended supervision, but concurrent to that imposed on Count 2.

¶6 At the conclusion of the trial court's sentencing comments, Crewz' trial counsel asked: "Judge, the Court's sentence, does that start forthwith?" The trial court replied, "Right. Forthwith." Crewz asked: "What does that mean?" Her attorney replied that he would talk to her about it.

¶7 A written judgment was entered in the office of the clerk of the circuit court on February 14, 2007, stating: "On count 1 defendant is confined to prison for 2 years followed by a period of 4 years extended supervision for a total length of sentence of 6 years." The judgment contained no language indicating whether the sentence was concurrent or consecutive to the Waukesha county judgment.[5]

[5] Under ***State v. Cole***, 208 Wis. 2d 328, 332, 559 N.W.2d 599 (Ct. App. 1997) the sentence is deemed to be concurrent in the absence of a statutory or judicial declaration to the contrary.

¶8 After sentencing, Crewz was returned to the county jail. Two days later, on February 16, 2007, a second hearing was held. The trial court judge stated that he had asked that the case be put back on the record. He indicated that his clerk had been preparing the judgment of conviction on February 15, 2007, the day after sentencing, and questioned him as to whether he was ordering a consecutive or concurrent sentence. The judge stated:

> And the reason she was confused, she had gone over the record. I said at one point I adopted the State's recommendation, which was consecutive. Then later on when she was trying to put the judgment together, I said the judgment would start forthwith, which would seem to indicate concurrent.

¶9 The trial court further stated:

> My intention at the time was to make it consecutive. I think it was clear from the tenor.…
>
> And I want to clarify this. This is not based upon any reflection or change of anything. I did not even know about it until late yesterday afternoon. It was just simply to clarify that this was to be consecutive to the time that she was currently serving.

¶10 In response to defense counsel's reminder that he had asked if the sentence was to start immediately, the trial court stated:

> You definitely did. You said is this starting immediately. And I just didn't pick up on that going—that you were asking whether it was concurrent or consecutive. And obviously if it were concurrent, it would start forthwith. I said it did. I was in error. And my intent at the time was to sentence Ms. Crewz to consecutive time, and that's what the judgment will read. I apologize for any error. That was my responsibility.

¶11 An amended judgment of conviction was entered in the office of the clerk of the circuit court on February 16, 2007, stating that the sentence on count one was consecutive to the sentence Crewz was serving in Waukesha county

circuit court case No. 2000CF853. Subsequently, Crewz moved for sentence modification, contending that the trial court violated her double jeopardy rights on February 16, 2007, by altering the sentence to provide that it was consecutive rather than concurrent. The trial court judge denied Crewz' motion, stating that when he realized on February 15, 2007 "that I had made a misstatement and that the sentence did not reflect my intent," he made arrangements to have Crewz remain in the county jail until the parties could return to court on February 16, 2007, so that he could "correct it so that this sentence matched what I intended it to do." The trial court judge stated that this was not a situation involving changing a sentence upon reflection, but rather was a correction of a misstatement.

¶12 Double jeopardy protections apply to some resentencings. ***State v. Burt***, 2000 WI App 126, ¶11, 237 Wis. 2d 610, 614 N.W.2d 42. While there is no longer a per se rule that prohibits a trial court from increasing a defendant's sentence after service of the sentence has begun, if a defendant has a legitimate expectation of finality in the sentence, then the double jeopardy clause prohibits an increase in that sentence. ***State v. Jones***, 2002 WI App 208, ¶9, 257 Wis. 2d 163, 650 N.W.2d 844. The application of the double jeopardy clause to an increase in a sentence turns on the extent and legitimacy of the defendant's expectation of finality in the sentence. ***Id.***, ¶10. This may be influenced by many factors, including the completion of the sentence, the passage of time, the pendency of an appeal, or the defendant's misconduct in obtaining the sentence. ***Id.***

¶13 The ***Jones*** factors must be evaluated in light of the circumstances of each particular case. ***State v. Gruetzmacher***, 2004 WI 55, ¶34, 271 Wis. 2d 585, 679 N.W.2d 533. Whether double jeopardy protections prevent a trial court from effectively increasing a defendant's sentence after she has commenced serving it is

a question of law which this court reviews de novo. ***State v. Willett***, 2000 WI App 212, ¶4, 238 Wis. 2d 621, 618 N.W.2d 881.

¶14 We reverse the trial court's order denying sentence modification because, based on the facts of this case, Crewz had a legitimate expectation of finality in the sentence as pronounced and entered on February 14, 2007. At the February 14, 2007 hearing, the trial court expressly stated that the prison sentence for forgery would begin "forthwith." As in ***Willett***, 238 Wis. 2d 621, ¶6, Crewz therefore heard the trial court impose what was a valid, concurrent sentence. Moreover, even when alerted by Crewz' question to her counsel as to the meaning of the trial court's statement that the sentence was to begin forthwith, the trial court did not indicate that it had meant to say "consecutive," nor did the prosecutor object to the trial court's response or request clarification.

¶15 Under these circumstances, Crewz legitimately expected that her sentence for count one was concurrent to the Waukesha county sentence when she left the courtroom on February 14, 2007. She commenced serving the sentence while incarcerated in the county jail. Although she was not incarcerated in the county jail for a lengthy period of time before being returned to court, her service of two days of the sentence before being returned to court is relevant in determining that she had a legitimate expectation that the concurrent sentence was final. *Cf.* ***id.***

¶16 Because the trial court had clearly expressed at sentencing that the forgery sentence for count one was to begin forthwith and was therefore concurrent, and because the trial court did not attempt to correct the sentence until the issue was raised by its clerk on February 15 and Crewz was returned to court on February 16, we conclude that Crewz had a legitimate expectation of finality in

the sentence as pronounced on February 14, 2007. Double jeopardy provisions therefore precluded modifying Crewz' sentence to make it consecutive.

¶17 The State contends that this case is analogous to ***Burt*** and ***Gruetzmacher***, where post-sentencing modifications were allowed. We disagree. In ***Burt***, the trial court realized while sentencing a co-defendant that it had misspoken earlier in the day at the defendant's sentencing when it stated that the defendant's sentence should be concurrent rather than consecutive. ***Burt***, 237 Wis. 2d 610, ¶3-4. It called the defendant back to the courtroom for another hearing on the very afternoon of his original sentencing. ***Id.*** This court held that a defendant's interest in the finality of his sentence was not a significant concern when the trial court simply corrected an error in speech in its pronouncement of the sentence later the same day. ***Id.***, ¶12. We held that the defendant did not have a legitimate expectation that the judge would not correct his slip of the tongue on the day of sentencing. ***Id.*** We noted that the trial court did not modify the sentence after reflection, but rather misspoke as to the intended sentence. ***Id.***, ¶15.

¶18 This case is clearly distinguishable from ***Burt***. Unlike the defendant in ***Burt***, Crewz was not notified on the day of sentencing that the trial court judge had misspoken. Instead, she commenced serving the concurrent sentence for count one, albeit in the county jail. Her counsel was not notified of the trial court's concerns until the next day when the judge's clerk questioned whether the trial court intended the sentence for count one to commence forthwith as stated at the February 14, 2007 hearing. Crewz was not returned to court until the following day, February 16, 2007. Because Crewz had served one day of the sentence for count one before being notified of the trial court's concerns, and served two days before being returned to court, she had a legitimate expectation of finality concerning the concurrent sentence that the defendant in ***Burt*** lacked.

¶19 ***Gruetzmacher*** is also distinguishable. In that case, the trial court expressly stated during sentencing on multiple charges that forty months was the minimum period necessary for the defendant. ***Gruetzmacher***, 271 Wis. 2d 585, ¶7. The trial court sentenced the defendant to forty months of initial confinement, but mistakenly ordered that the forty months be served for a conviction with a maximum period of initial confinement of twenty-four months. ***Id.***, ¶8. It realized its mistake later the same day, notified the sheriff not to send the defendant to the prison, and attempted to contact counsel, convening a hearing to address the matter two days after sentencing. ***Id.***, ¶¶8-9. At a hearing held two weeks later, the trial court resentenced the defendant to forty months of initial confinement on one of the other charges, while reducing the erroneous sentence to the maximum penalty of twenty-four months of initial confinement. ***Id.***, ¶¶10-11.

¶20 The ***Gruetzmacher*** court held that the trial court was entitled to correct an obvious error in sentencing when it made a good faith mistake at the initial sentencing, promptly recognized the error and, although it increased the sentence on one charge while reducing the sentence on another at resentencing, achieved what the trial court originally intended. ***Id.***, ¶¶1-2. The ***Gruetzmacher*** court held that the defendant did not have an expectation of finality in regard to his initial sentence and the sentence could be modified because, as evidenced by its statements at the original sentencing hearing, the trial court clearly intended to sentence the defendant to forty months of initial confinement. ***Id.***, ¶40.

¶21 This case is inapposite. At the original sentencing on February 14, 2007, the trial court expressly stated that Crewz' sentence was to commence forthwith, meaning that it was concurrent. It did not express a clear intent to

impose a consecutive sentence on Crewz.[6] Consequently, unlike the situation in ***Gruetzmacher***, this court cannot determine that the trial court made a good faith mistake and imposed a sentence contrary to what was clearly its original intent. Moreover, unlike the defendant in ***Gruetzmacher***, who knew that he was expected to serve forty months of initial confinement under the sentencing structure imposed by the trial court, Crewz legitimately expected to serve a concurrent sentence after sentencing on February 14, 2007.[7] Under these circumstances, resentencing was impermissible.

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[6] In reaching this conclusion, we acknowledge that at the February 14, 2007 sentencing, the trial court stated that it was going to "follow the recommendation" and sentence Crewz to two years of initial confinement and four years of extended supervision. However, this did not demonstrate a clear intent to make the sentence consecutive. While the prosecutor stated at the February 14, 2007 hearing that the State's recommendation under the plea agreement was "two years incarceration and four years extended supervision, consecutive," neither the guilty plea questionnaire that was before the trial court nor defense counsel's description of the plea agreement indicated that the State's recommendation under the plea agreement was for a consecutive sentence on count one to the Waukesha county judgment. Moreover, after imposing sentence, the trial court responded to defense counsel's direct query by stating that the sentence would begin forthwith. The court had earlier been made aware that Crewz was serving ten months and twenty-five days at Taycheedah. Finally, the judgment entered on February 14, 2007, contained no language indicating whether the sentence was concurrent or consecutive to the Waukesha county judgment. Under these circumstances, the February 14, 2007 sentencing record does not permit this court to conclude that the trial court clearly intended to impose a consecutive sentence.

[7] The State relies upon the trial court's statement that it took steps on February 15, 2007, to keep Crewz in the county jail so that she could be returned to court for a new hearing. The State contends that "the justice system as a whole" therefore had not yet begun to act upon the trial court's sentence. *See* ***State v. Gruetzmacher***, 2004 WI 55, ¶38, 271 Wis. 2d 585, 679 N.W.2d 533.

The ***Gruetzmacher*** court considered the trial court's retention of the defendant in jail as a factor in determining that the defendant did not have a legitimate expectation of finality in the sentence as originally imposed. ***Id.*** However, as already noted, the defendant in ***Gruetzmacher*** knew at the original sentencing that he was expected to serve forty months of initial confinement under the sentencing structure imposed by the trial court. In contrast, Crewz was told that she was going to commence serving the forgery sentence forthwith, and therefore legitimately expected to serve a concurrent sentence. The trial court's efforts to keep her at the jail so that she could be returned to court therefore did not deprive Crewz of a legitimate expectation of finality as to the February 14, 2007 sentence.

By the Court.—Amended judgment affirmed in part and reversed in part; order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.