COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2951-CR **Cir. Ct. No. 2003CF3862**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT L. CHEESEMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Curley, P.J., Fine, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Scott Cheeseman appeals from the order denying his sentence modification motion. He asserts constitutional, statutory, and common law bases for relief, but all of his arguments are grounded on the

assertion that the circuit court unlawfully increased his sentences by amending a judgment of conviction three years after the sentencing proceeding. Because we conclude that the circuit court did no more than correct a scrivener's error in the written judgment, we reject Cheeseman's arguments and affirm.

Background

¶2 Cheeseman pled guilty to six counts of burglary as a party to a crime. On February 26, 2004, the circuit court imposed six three-year sentences, each comprised of one year of initial confinement and two years of extended supervision. The court stated that the sentences were each to be served concurrently with an earlier-imposed reconfinement term.[1]

¶3 In its sentencing remarks, the court included its explanation of the effect of the sentences:

> What I think it does is to give you [Cheeseman] six years to attempt to see whether the Prozac let's [sic] you go through drug treatment…. But there will be twelve years of extended supervision that you will have in order to be supervised, monitored, managed.
>
> ….
>
> I don't think you're eligible for either boot camp or for earned release based upon the performance that you have given to this point in drug treatment programs. I also think it's important that you spend the time in custody. So it's going to be six years without parole or good time.

[1] In a separate proceeding held on November 20, 2003, Cheeseman was ordered reconfined for five years and one day following revocation of his extended supervision for an earlier burglary conviction.

¶4 The clerk of circuit court entered a judgment of conviction providing that, as to counts one, two, three, five, and six, "defendant is confined to prison for 1 year followed by a period of 2 years extended supervision for a total length of sentence of 3 years…. Concurrent with revocation sentence, but consecutive to any other sentence." As to count four, however, the judgment provides: "defendant is confined to prison for 1 year followed by a period of 2 years extended supervision for a total length of sentence of 3 years…. *Concurrent to revocation sentence but concurrent to any other sentence*" (emphasis added).

¶5 On January 4, 2007, the Offender Records Supervisor of Columbia Correctional Institution, Jill Greene, wrote to the circuit court expressing uncertainty as to the terms of Cheeseman's sentences pursuant to WIS. ADMIN. CODE § DOC 302.22 (Dec. 2006). Greene observed that, according to the sentencing transcript, Cheeseman was required to serve all six sentences concurrently with a previously-imposed reconfinement term but consecutively to each other. Greene requested clarification of the discrepancies in the written judgment suggesting otherwise.

¶6 The circuit court reviewed the sentencing transcript and concluded: "[i]t is clear … that the court intended the defendant to serve these sentences consecutive to each other and concurrent with his revocation sentence."[2] Accordingly, the court directed the clerk of circuit court to enter a modified judgment of conviction reflecting that Cheeseman's sentence as to count four is "concurrent to the revocation sentence but consecutive to any other sentence."

[2] The Honorable Karen E. Christenson presided over the original sentencing in this matter. The Honorable M. Joseph Donald responded to the request for clarification of Cheeseman's sentences and presided over Cheeseman's subsequent postconviction motions.

¶7 After unsuccessfully challenging entry of the amended judgment of conviction, Cheeseman filed the sentence modification motion underlying this appeal. He contended that the circuit court's entry of a modified judgment of conviction constituted a new factor, denied his constitutional rights to due process and freedom from double jeopardy, and imposed sentences *in abstentia* in violation of WIS. STAT. § 971.04 (2005-06).[3] He asked that his sentences be modified to an aggregate three-year term of imprisonment, and he demanded a hearing.

¶8 The circuit court denied Cheeseman's motion in *toto*, holding that the amended judgment of conviction merely memorialized the original sentence as pronounced. Cheeseman appeals.

Discussion

¶9 The test for ambiguity in sentencing pronouncements is the same as that employed in statutory construction disputes. ***State v. Oglesby***, 2006 WI App 95, ¶19, 292 Wis. 2d 716, 715 N.W.2d 727. Therefore, "[w]hether a sentence is ambiguous is a question of law." *See* ***State v. Peterson***, 2001 WI App 220, ¶13, 247 Wis. 2d 871, 634 N.W.2d 893. Whether the sentence portion of a written judgment of conviction should be corrected also presents a question of law. ***State v. Prihoda***, 2000 WI 123, ¶8, 239 Wis. 2d 244, 618 N.W.2d 857. We review questions of law *de novo*. ***State v. Ploeckelman***, 2007 WI App 31, ¶8, 299 Wis. 2d 251, 729 N.W.2d 784. We conclude that the sentencing transcript in this

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

case contains no ambiguity and that the judgment of conviction was properly amended to reflect the circuit court's pronouncement.

¶10 The sentencing court explained that it was imposing six bifurcated sentences of one year of initial confinement and two years of extended supervision, to be served concurrently with an earlier-imposed reconfinement term. We acknowledge that the sentencing court did not expressly state that Cheeseman was to serve each of the six sentences consecutively. Rather, the court expressed the consecutive nature of the sentences by stating the total amount of time imposed: six years of initial confinement and twelve years of extended supervision. By stating these totals in its remarks, the court clearly conveyed the structure of the dispositions. *Cf.* ***State v. Coles***, 208 Wis. 2d 328, 334-35, 559 N.W.2d 599 (Ct. App. 1997) (circuit court not compelled to state expressly that sentences are consecutive to convey consecutive nature of sentences). Because the court's remarks can be reasonably understood only as imposing six consecutive terms, the sentencing pronouncement is unambiguous. *See* ***Oglesby***, 292 Wis. 2d 716, ¶19.

¶11 "[A]n unambiguous oral pronouncement controls when a conflict exists between a court's oral pronouncement of sentence and a written judgment." ***Prihoda***, 239 Wis. 2d 244, ¶24. Accordingly, the circuit court properly ordered the clerk of circuit court to enter an amended judgment of conviction that correctly reflected the actual disposition in this case. *See* ***id.***, ¶17.

¶12 Because we conclude that the circuit court did no more than direct correction of a clerical error, we reject Cheeseman's contention that this case presents a new factor warranting sentence modification. A "new factor" is a fact or set of facts highly relevant to sentencing but not known to the sentencing judge,

either because it was not in existence or because it was unknowingly overlooked by the parties. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A corrected judgment of conviction is wholly divorced from the concept of a "new factor."

¶13 Similarly, double jeopardy concerns are not implicated here. The double jeopardy clause of the United States Constitution imposes some limits on increasing a sentence after its imposition. *See* ***State v. Jones***, 2002 WI App 208, ¶9, 257 Wis. 2d 163, 650 N.W.2d 844. A clerical correction to the written judgment of conviction does not increase the sentence; "it merely correctly reflects the actual sentence imposed." ***Prihoda***, 239 Wis. 2d 244, ¶43.

¶14 ***Prihoda*** also disposes of Cheeseman's contention that he was wrongly "resentenced *in abstentia*" in violation of statutory and constitutional guarantees of notice and an opportunity to be heard. An offender has neither a statutory nor a constitutional right to be present when the circuit court corrects a clerical error in a written judgment of conviction. *See* ***id.***, ¶¶29-30. Further, Cheeseman was not entitled to a hearing. Where, as here, the record is uncomplicated and the sentencing court's intent may be easily determined, the circuit court is not required to give notice and hold a hearing before directing that the clerk enter a corrected written judgment. *See* ***id.***, ¶33.

¶15 Finally, we note Cheeseman's contention that, at a hearing, "Cheeseman would have asserted that he only was sentence [sic] to three years total or otherwise, Cheeseman would have withdraw [sic] his plea agreement." Such an assertion would have been futile. Disappointment in the sentences imposed does not provide a basis for withdrawal of guilty pleas. *See* ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

By the Court.—Order affirmed.

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