COURT OF APPEALS DECISION DATED AND FILED

January 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2014AP372-CR
2014AP373-CR

Cir. Ct. Nos. 1998CF46
1998CF108

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID D. TURNER,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed and cause remanded with directions.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. David Turner appeals an order clarifying the date of his offenses and denying his motion to correct the 1998 judgment of conviction

as to the length of probation imposed. He argues: (1) the court violated his due process rights by engaging in ex parte communication regarding the dates of the offenses; and (2) the judgment does not reflect the actual sentence imposed in 1998. We reject these arguments and affirm the order. We remand the matter to the circuit court clerk to amend the judgment to correct an unrelated error.

¶2 In 1998 Turner entered no-contest pleas to counts one and three of the Information. The present appeals involve only count one, repeated sexual assault of the same child. The court accepted the no-contest pleas and placed Turner on probation. After Turner's probation was revoked, the prison registrar sent the court a letter, with copies to the district attorney, the public defender and Turner, requesting clarification of the offense date for count one. The judgment of conviction indicated the "date of offense" was between August 1, 1991, and August 31, 1997. Because of a change in the law regarding mandatory release, effective for serious felonies committed on or after April 21, 1994, through December 30, 1999, the registrar needed clarification of the offense date to determine whether count one fell within the statutory guidelines of the presumptive mandatory release law. Five days later, Turner filed a motion to correct the judgment as to the length of the periods of probation. He did not directly address the registrar's inquiry. The circuit court reviewed the probable cause statement attached to the complaint, which served as the factual basis for the no-contest plea, and found the three specific instances identified in the complaint all occurred during the effective period of the presumptive mandatory release law.[1]

[1] Even if all of the assaults had not occurred during the applicable period, because count one involves a continuing offense, the applicable law is the statute in effect when the last criminal action occurs. ***State v. Ramirez***, 2001 WI App 158, ¶17, 246 Wis. 2d 802, 633 N.W.2d 646.

¶3 Turner does not challenge the court's findings regarding the dates of the assaults that constituted the continuing offense. Rather, he contends the court should not have allowed the Department of Corrections to commence the inquiry "without filing the proper Motions and Brief," and he accuses the court of engaging in ex parte communication.

¶4 The registrar's inquiry was not only authorized, it was required by WIS. ADMIN. CODE § DOC 302.22 (Sept. 2014):

> Ambiguity in sentence. If a registrar is uncertain as to the terms of a sentence imposed on a resident, the registrar shall notify the court of the uncertainty in writing. The registrar shall also inform the resident in writing of the uncertainty and inform the resident of the legal services available at the institution to assist the resident.

Because the request for certification was served on the State, the public defender and Turner, it was not an ex parte communication. The fact that neither Turner nor the public defender responded to the request does not make it an ex parte communication.

¶5 In his pro se motion, Turner sought modification of the 1998 judgment of conviction regarding the length of the probation imposed, contending the judgment was not consistent with the sentencing court's ruling. The sentencing court adopted the parties' joint sentence recommendation as recited by the assistant district attorney at the plea hearing:

> But the part that is a joint recommendation, and again subject to the court's approval, is imposed and stayed on the sexual assault case 15 years and 15 years consecutive on each count for a total of 30 years imprisonment, restitution to be determined....
>
> Then with respect to probation, we are looking at 15 years with the following conditions: 15 months in the county jail. I guess seven-and-a-half on each consecutive.

The judgment of conviction indicated that, as to count one, the court imposed and stayed a fifteen-year prison sentence and ordered fifteen years' probation with seven and one-half months' jail time as a condition of probation. Turner contends the plea agreement adopted by the court should be construed as imposing seven and one-half years' probation. His argument rests, in part, on misquoting the plea agreement by omitting the period after the clause "15 months in the county jail," and adding the word "and" before the clause "seven-and-a-half on each consecutive." Turner gives the impression that the "seven-and-a-half on each consecutive" applies to the fifteen years of probation as well as the fifteen months of jail time. The correct quotation, however, shows the parties' and the court's intent to impose seven and one-half months' jail time consecutive. There is no indication that the parties or the court intended to break down the fifteen years' probation in a similar manner.

¶6 Finally, we note an unrelated error in the judgment of conviction. The judgment incorrectly describes count one as "1st Degree Sexual Assault of A Child, contrary to § 948.02(1)." The actual offense charged to which Turner pled no contest was Repeated Sexual Assault of the Same Child, contrary to § 948.025(1). Upon remittitur, the circuit court clerk shall amend the judgment of conviction in Case No. 1998CF46 to correct the description of the offense and the statute.

By the Court.—Order affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).