

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1238-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR E. MESSICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed in part; vacated in part.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Arthur E. Messick has appealed from a judgment convicting him of homicide by intoxicated use of a motor vehicle in violation of

WIS. STAT. § 940.09(1)(a) (1999-2000).¹ The judgment sentenced Messick to fifteen years in prison. When imposing sentence, the trial court also ordered as conditions of parole that Messick pay restitution, maintain absolute sobriety, and comply with any treatment or medication recommendations of the parole board.

¶2 The sole issue on appeal is whether the trial court committed reversible error when it ordered conditions of parole. We conclude that the trial court exceeded its authority when it ordered Messick to maintain absolute sobriety as a condition of parole. We vacate that portion of the judgment. We affirm the remainder of the judgment.

¶3 Initially, we address the State’s argument that Messick waived his right to challenge his sentence because he did not object when the trial court ordered conditions of parole, and did not file a postconviction motion raising an objection. This court generally will not consider an issue raised for the first time on appeal. *See Evjen v. Evjen*, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992). However, a review of the record establishes that in his sentencing memorandum, Messick argued that if the trial court ordered a term of imprisonment in the Wisconsin state prisons rather than placing him on probation, he would no longer be under the control of the court. Messick asserted that he would be “eligible for parole and would be paroled without any input from this court concerning what conditions should be imposed on his parole.” He requested that the trial court place him on probation, arguing that this would permit the trial court to impose conditions.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

¶4 Based upon this argument, we conclude that Messick gave the trial court adequate notice of his contention that conditions could be imposed by the trial court only if he was placed on probation. We therefore reject the State's waiver argument and address Messick's arguments on the merits.

¶5 Essentially, Messick argues that the trial court has no authority to set conditions of parole. He contends that by doing so here, the trial court exceeded its sentencing authority and erroneously exercised its discretion, necessitating a new sentencing hearing.

¶6 Generally, a trial court may impose conditions at sentencing only when it orders probation. *See State v. Gibbons*, 71 Wis. 2d 94, 98, 237 N.W.2d 33 (1976). The decision to grant or deny parole clearly lies with the parole commission under Wisconsin law. *See* WIS. STAT. § 301.03(3). Within this grant of authority, the parole commission is empowered to impose conditions with which the offender must comply while released on parole. *See* WIS. ADMIN. CODE § PAC 1.07 (2000). If an offender fails to comply with conditions set by the parole commission, his or her parole may be revoked. *See* WIS. ADMIN. CODE § HA 2.05(7)(b)2, 3 (1999).

¶7 Although the trial court is not authorized to impose conditions of parole, we find no reversible error in the portion of the trial court's sentencing decision ordering Messick to comply with any treatment or medication recommendations of the parole board. By requiring Messick to comply with conditions set by the parole commission, the trial court merely stated a requirement that is already established by law. Although superfluous, because the trial court's order imposed no restriction on Messick that did not already exist, it provides no basis for concluding that his sentence is invalid and must be reversed.

¶8 We also reject Messick's claim that the trial court committed reversible error when it ordered him to pay restitution as a condition of parole. WISCONSIN STAT. § 973.20(1r) provides:

When imposing sentence ... for any crime for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record. *Restitution ordered under this section is a condition of ... parole served by the defendant for a crime for which the defendant was convicted.* (Emphasis added.)

¶9 It is undisputed that the trial court properly ordered restitution in this case. Based upon WIS. STAT. § 973.20(1r), payment of the restitution is a condition of parole as a matter of law. The trial court's decision ordering Messick to pay the restitution as a condition of parole therefore merely states what is required by law. It does not invalidate his sentence.

¶10 The final condition of parole set by the trial court is that Messick maintain absolute sobriety. The State concedes that this is error, and we agree. If the parole commission ultimately concludes that Messick must maintain absolute sobriety, it will be well within its authority to set such a condition. However, the trial court cannot do so. *See Gibbons*, 71 Wis. 2d at 98-99.

¶11 Nevertheless, we reject Messick's argument that because the trial court erroneously ordered a condition of parole, the entire sentence must be reversed and the matter remanded for a new sentencing hearing. The reasons for the fifteen-year sentence imposed by the trial court were set forth at length at the sentencing hearing. The trial court considered proper factors, and provided a reasoned and reasonable explanation for its determination that incarceration for a

fifteen-year period was warranted. No basis exists to disturb that determination. *See State v. Rodgers*, 203 Wis. 2d 83, 93-94, 552 N.W.2d 123 (Ct. App. 1996).

¶12 There is no indication in the trial court's decision that the fifteen-year sentence was in any way contingent on the condition that Messick maintain absolute sobriety when released on parole, or that the failure to include such a condition on parole would invalidate the remainder of the sentence. Consequently, the proper remedy for the error is to vacate the requirement that Messick maintain absolute sobriety as a condition of parole, not to reverse the sentence and remand for a new sentencing hearing. *See Gibbons*, 71 Wis. 2d at 98-100. The condition that Messick maintain absolute sobriety as a condition of parole is therefore vacated; the remainder of the judgment and sentence is affirmed.

By the Court.—Judgment affirmed in part; vacated in part.

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

