**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 12, 2010**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2009AP880-CR** **Cir. Ct. No. 2005CF437**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MATTHEW J. HILDEBRAND,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Matthew Hildebrand appeals from a judgment of conviction of two counts of third-degree sexual assault of a child and from an order denying his postconviction motion for sentence modification and credit. We

conclude that Hildebrand is entitled to sentence credit for the time in jail on Fond du Lac county charges that were, pursuant to the plea agreement, read-in, and that upon resentencing the circuit court properly exercised its discretion in giving Hildebrand a longer sentence. We affirm the judgment and order in part; reverse them in part, and remand with directions to give Hildebrand the sentence credit he is due.

¶2 The case has a complicated procedural history. On December 10, 2003 Hildebrand was charged with multiple counts of sexual assault of children in Fond du Lac county. He was in custody on those charges starting December 5, 2003. Two counts of repeated sexual assault of the same child involving two of the same children were filed in Washington county in 2004. By agreement of the Washington county district attorney's office, the Washington county charges were consolidated into the Fond du Lac county case. The charges were reflected as counts eleven and twelve on an amended information filed in the Fond du Lac county case. The charges were consolidated into that case for the purpose of being read-in at sentencing in Fond du Lac county. Hildebrand was convicted in Fond du Lac county on three counts and all others, including the Washington county charges, were dismissed and read-in at sentencing. The Washington county case was subsequently dismissed.

¶3 Hildebrand's Fond du Lac county conviction was vacated. On November 10, 2005 the complaint in this case was filed charging Hildebrand with the two same counts of repeated sexual assault of a child that had been consolidated into the Fond du Lac county case. At a status hearing on March 13, 2007, the prosecution acknowledged that a plea agreement had been reached by

which the Fond du Lac county charges would be "dismissed and read in" upon an Alford plea[1] in this case to amended charges of third-degree sexual assault of a child. The prosecutor also confirmed that the Fond du Lac county prosecutor agreed to have all counts charged in that county dismissed and read-in in this case. As recited by the court, the agreement called for a joint recommendation of a seven-year prison sentence on count one "with credit from December 5, 2003" and ten years' probation on count two.[2] The circuit court was presented with an order from the Fond du Lac county court that based upon a March 1, 2007 "STIPULATION TO CONSOLIDATION OF CASE," the Fond du Lac county case is "transferred to the Jurisdiction of Washington County." When the circuit court inquired whether there would be formal consolidation, Hildebrand's counsel indicated that "it wasn't supposed to be treated as a consolidation" and that "it was supposed to be treated the same way that Washington County's matter was treated when these [charges] went up there, meaning treated as read-in, dismissed and read in for purposes of sentencing, not treated as a formal consolidation." The prosecutor concurred that the Fond du Lac county court would ultimately dismiss the Fond du Lac county charges.

¶4 Hildebrand entered an Alford plea and was sentenced on May 7, 2007. After the prosecutor recited the joint sentencing recommendation under the plea agreement, Hildebrand added that the recommendation included credit back

[1] An ***Alford*** plea is a guilty plea where a defendant pleads guilty to a charge but either protests his or her innocence or does not admit to having committed the crime. *See* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). The plea derives its name from the United States Supreme Court's decision in ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[2] The letter memorandum reporting the agreement to the circuit court is not in the record. The plea questionnaire merely indicated that the plea agreement was "previously forwarded to the court."

to the initial date of incarceration, December 5, 2003, and that the Fond du Lac county charges would be dismissed. The prosecutor, the third to appear in the case, indicated that he had just heard for the first time the sentencing credit proposal and that he did not think Hildebrand would be entitled to credit dating back to his initial incarceration in the Fond du Lac county cases. The circuit court reviewed the transcript of the March 13, 2007 hearing and confirmed that part of the plea agreement included the prosecution's concession that Hildebrand was entitled to credit all the way back to December 5, 2003. The court advised Hildebrand that although it could grant that credit, the Department of Corrections (DOC) might review the credit and inform the court that it was wrong. The court was concerned that Hildebrand not later seek to withdraw his plea if the DOC determined the amount of sentence credit was wrong. Hildebrand waived his right to withdraw his plea on that basis and asked the court to proceed to sentencing not knowing whether the DOC would accept credit dating back to December 5, 2003. The circuit court considered the Fond du Lac county charges as read-ins. The court went along with the joint sentencing recommendation of seven years' imprisonment on count one and ten years' probation on count two and granted Hildebrand credit from December 5, 2003. The Fond du Lac county case was subsequently dismissed.

¶5 Just four days after sentencing the parties appeared before the circuit court because the court had been informed by the DOC that the sentence imposed exceeded the maximum allowed by law at the time of the offense. It was determined that a mutual mistake had been made as to the maximum penalty for third-degree sexual assault. The circuit court vacated the sentence because both the prison term and probation term exceeded the allowable five-year maximum. The court found that it was not required to merely commute the excessive sentence

because the original objective of the sentence was frustrated. *See* ***State v. Holloway***, 202 Wis. 2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996). The case was set for resentencing. Prior to resentencing the circuit court denied the prosecution's motion to be relieved of the plea agreement and to have the original charges reinstated and the matter set for trial.

¶6 Hildebrand was resentenced July 18, 2007 to two consecutive five-year terms of imprisonment. The court denied Hildebrand sentence credit dating back to December 5, 2003, on the ground that Hildebrand was not confined for the course of conduct for which he was being sentenced. The court observed that the Fond du Lac county case had not been consolidated with this case and that the unilateral order from the Fond du Lac county judge was not binding on the Washington county court. Hildebrand was granted sentence credit back to March 13, 2007.

¶7 Hildebrand's postconviction motion argued that the excessive sentence should only have been commuted under WIS. STAT. § 973.13 (2007-08),[3] and that sentence credit dating back to December 5, 2003 should have been granted under WIS. STAT. § 973.155. The postconviction motion was denied. Hildebrand appeals.

¶8 The State defends the circuit court's refusal to grant sentence credit from the time of Hildebrand's confinement on the Fond du Lac county charges on the ground that those charges were not actually consolidated into this Washington

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

county case and were in fact dismissed separately.[4] Hildebrand argues that merely elevates form over substance. We need not decide whether actual consolidation took place or was required. This case is controlled by ***State v. Floyd***, 2000 WI 14, ¶1, 232 Wis. 2d 767, 606 N.W.2d 155, holding that WIS. STAT. § 973.155(1), requires sentence credit for confinement on charges that are dismissed and read-in at sentencing. It is undisputed that the Fond du Lac county charges were utilized as read-in offenses at Hildebrand's sentencing. Under ***Floyd*** he is entitled to sentence credit for the time he was confined on the read-in offenses to the date of sentencing. ***Id.***, ¶32. We reverse and remand to the circuit court with directions to give Hildebrand sentence credit from December 5, 2003.

¶9 With respect to resentencing, we acknowledge that an excessive portion of the sentence is void and may be commuted under WIS. STAT. § 973.13,[5] without further proceedings. *See also* WIS. STAT. § 973.09(2m) (employing the same language for commuting a term of probation in excess of the maximum authorized by statute). However, ***Holloway***, 202 Wis. 2d at 699-700, recognizes the sentencing court's discretionary authority to make changes to the sentence

[4] The State's position is disingenuous because it was the prosecutors' inattention to detail that caused confusion in the record and led to the dispute. Moreover, the plea agreement called for the very credit that the prosecutor later refused to advance. The prosecutors tried to short-change Hildebrand and did not own up to their own responsibility in creating the confusion. The result appears to be an unfortunate example of prosecutors being financially shortchanged by the legislature. It is not this court's place to excuse unacceptable prosecution practice based upon agency budgets, trial court mistakes based on that faulty practice by prosecutors, or to visit the government's shortcomings on a defendant.

[5] WISCONSIN STAT. § 973.13 provides: "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."

when "the premise and goals of the prior sentence have been frustrated."[6] The circuit court made a finding that the original objective of the sentence was frustrated by the fact that only a five-year maximum applied to the third-degree sexual assault convictions. Hildebrand does not directly challenge that finding. We accept that finding because commuting the sentence to just five years frustrated the original objective of the sentence that Hildebrand serve seven years. *See* ***Grobarchik v. State***, 102 Wis. 2d 461, 473, 307 N.W.2d 170 (1981) (when an invalid sentence is rendered the sentencing court's dispositional plan is frustrated).

¶10 We turn to consider whether the longer sentence imposed on resentencing was a proper exercise of discretion. A judge does not retain unlimited discretion when resentencing a defendant in the face of a prior invalid sentence. ***Id.*** at 472.

> When a defendant is resentenced for the purpose of correcting a prior invalid sentence, and when, as compared with the original sentence, the liberty interests of the defendant are substantially and adversely affected, the trial court must state on the record the reasons for so modifying the first sentence. His reasons must be based upon a desire to implement the original dispositional scheme as manifested by the record in the first sentencing proceeding.

***Id.*** at 474. The requirement that the sentencing court stick to the original record and general overall sentence structure guards against due process/vindictiveness

[6] Hildebrand cites to ***State v. Flowers***, 221 Wis. 2d 20, 22, 29, 586 N.W.2d 175 (Ct. App. 1998), as holding that the sentencing court could only commute the sentence and nothing more. He argues the sentencing court's reliance on ***State v. Holloway***, 202 Wis. 2d 694, 699-700, 551 N.W.2d 841 (Ct. App. 1996), is misplaced because ***Holloway*** predated ***Flowers*** and is ultimately "trumped" by ***Flowers***. His argument fails because ***Holloway*** was quoted with approval in ***State v. Volk***, 2002 WI App 274, ¶¶47-48, 258 Wis. 2d 584, 654 N.W.2d 24.

sentencing violations. ***State v. Church***, 2003 WI 74, ¶49, 262 Wis. 2d 678, 665 N.W.2d 141.

¶11 Although initially the sentencing court's remarks read like an original sentencing proceeding,[7] the sentencing court did relate the longer sentence to the original sentencing objectives. It noted how its original sentencing objectives to punish Hildebrand by requiring additional incarceration and protect the public by a long period of supervision with a possible ten-year sentence hanging over Hildebrand were totally frustrated by the fact that the maximum was in fact only five years. It concluded that without taking into account the credit issue Hildebrand would serve very little time in prison, if any, over and above the time he already served if the court was limited to just a five-year maximum. Additionally, it found that because Hildebrand no longer faced the possibility of going back to prison for up to ten years if he failed on probation, its objective to protect the public was diminished by fifty percent. It also found the five-year maximum "lessened considerably" Hildebrand's incentive not to violate probation. The sentencing court observed that anything less than the maximum would deprive the sentence of any value in sending a message of deterrence to others. The sentencing court exercised its discretion to increase Hildebrand's sentence in a manner that was based upon a desire to implement the original dispositional scheme. The sentence is affirmed but we reiterate that on remand the sentencing

[7] The sentencing court gave closer examination at the resentencing to Hildebrand's character, the gravity of the offenses, and Hildebrand's failure to accept responsibility for his action than it did at the original sentencing. However, the court stuck to the original record and this is not a circumstance where a presumption of vindictive sentencing is triggered. *See* ***State v. Church***, 2003 WI 74, ¶53, 262 Wis. 2d 678, 665 N.W.2d 141 (the ***North Carolina v. Pearce***, 395 U.S. 711, 726 (1969), presumption of vindictive sentencing was triggered by the imposition of a longer sentence when the court treated the resentencing as an opportunity to revisit the original sentence based upon updated information and argument).

court must enter a new judgment giving Hildebrand sentence credit from December 5, 2003.

*By the Court.*—Judgment and order affirmed in part, reversed in part, and cause remanded with directions.

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