COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP473 **Cir. Ct. No. 2005CF161**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTIN V. YANICK, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: GARY R. SHARPE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Martin V. Yanick, Jr., appeals from an order denying his postconviction motion to vacate the six-year bifurcated sentence imposed following the revocation of his probation on the ground that the trial court's original sentence was invalid and caused him to reasonably believe that his probation had discharged prior to the date on which it was revoked. We conclude

that the trial court's original sentence was valid, that Yanick's consecutive probationary term was not made concurrent by virtue of an error by the department of corrections (DOC), and that the sentence does not violate principles of double jeopardy. We affirm.

¶2 In 2005, while on probation in connection with Dodge County Circuit Court case No. 1999CF384, Yanick was arrested and charged in Fond du Lac County Circuit Court case No. 2005CF161 with operating a motor vehicle while intoxicated as a seventh offense.[1] Due to the new arrest, Yanick's probation in No. 1999CF384 was revoked and a five-year stayed sentence was imposed.

¶3 In No. 2005CF161, Yanick pled guilty to the OWI seventh charge pursuant to a plea agreement which included a joint recommendation for a four-year bifurcated sentence, with two years of initial confinement and two years of extended supervision. Pursuant to the agreement, the State requested that the sentence be ordered consecutive to Yanick's revocation sentence in No. 1999CF384, and the defense requested concurrent time. Attempting to strike a balance between both parties' concerns,[2] the trial court imposed but stayed the maximum six-year sentence in favor of a three-year term of consecutive probation, to include six months of conditional jail time.[3] The written judgment stated that

[1] Fond du Lac County Circuit Court case No. 2005CF161 is the subject of this appeal.

[2] In recommending a consecutive sentence, the State emphasized Yanick's high risk of reoffending, while the defense argued that consecutive imprisonment would delay Yanick's eligibility for treatment programs.

[3] The trial court explained that its sentence would give Yanick "the opportunity to get his counseling." In terms of the conditional jail time, the trial court stated: "Of course that's consecutive. That is a condition of probation that's a mandatory minimum that I am imposing. Just so you understand that. It's a mixed bag here."

"[p]robation [is] to run consecutive to current sentence[,]" and the conditional jail time would "commence after release from Prison."

¶4 In September 2007, Yanick was released from prison onto parole in No. 1999CF384. In November, Yanick's parole officer, Jeffry Moylan, wrote a letter to the court stating his understanding that Yanick's probation in No. 2005CF161 was to begin "after his release from the Wisconsin State Prison System." Moylan informed the court that he had just learned of its order for conditional jail time and asked the court to permit Yanick to begin his jail time on February 1, 2008. In an amended judgment, the court granted Moylan's request and ordered "[j]ail time to commence on or before" that date. On February 1, 2008, Yanick began serving his six months of conditional jail time.

¶5 About a month later, Yanick's new parole agent, Amy Wisley, wrote a letter informing the court that Moylan had made an error and misconstrued Yanick's sentence. Wisley wrote that because Yanick had not yet discharged from his parole in No. 1999CF384, the probationary term in No. 2005CF161 had not commenced. Therefore, Wisley explained, Moylan's request that Yanick begin serving his conditional jail time was premature. Apologizing for the error, Wisley asked the court to amend the judgment in No. 2005CF161 to remove reference to the February 1, 2008 "start date for his condition time." Wisley stated that the court's "original wording would be fine—Jail to commence after release from prison case [No.] 1999CF000384." This language would sufficiently and appropriately reflect that Yanick's conditional jail time, like his probation, would begin only after his discharge from No. 1999CF383.[4] Recognizing that Yanick

[4] Wisley's letter asked the court to avoid setting a start date "in case Mr. Yanick's parole case is ever revoked, he then may possibl[y] have a new discharge date again."

had spent over a month in jail due to the DOC's error, Wisley asked that Yanick be awarded credit for this time against the conditional jail time he would eventually serve once his probation actually started. In response to Wisley's letter, the court again amended Yanick's judgment to remove the February 1, 2008 start date. The amendment stated:

> Jail time to commence after release from Prison in case [No.] 99-CF-384. Agent Kim Wisley to notify jail of commencing date. Time sat will be counted toward his condition time for case [No.] 05-CF-161.

Upon the court's order, Yanick was released after serving forty-seven days in jail.

¶6 About six months later, while still on parole in connection with No. 1999CF384, Yanick was charged with OWI as an eighth offense in Dodge County Circuit Court case No. 2008CF330. His parole in No. 1999CF384 was revoked and on the new conviction he received a consecutive, seven-year bifurcated sentence. In September 2011, Yanick was released from prison onto parole in No. 1999CF384 and extended supervision in No. 2008CF330. In July 2012, Yanick reached his maximum discharge date in No. 1999CF384.

¶7 On November 21, 2012, Yanick was arrested for OWI as a ninth offense. Because he had discharged from No. 1999CF384, his probationary term in the present case had commenced and revocation proceedings were initiated. Yanick waived his right to a revocation hearing and in the present case, his previously stayed six-year bifurcated sentence was imposed. Yanick was awarded

sentence credit for the forty-seven days of conditional jail time served due to the DOC's error.[5]

¶8 Subsequently, Yanick brought a postconviction motion seeking to vacate the sentence imposed in No. 2005CF161, arguing that his probation should have terminated in February 2011, which was three years after the date he was erroneously ordered to report to jail. The original sentencing judge had since retired and a new judge presided over postconviction proceedings. The trial court denied the motion, finding that the original judgment in No. 2005CF161 evinced the sentencing court's intent that Yanick's probation was to be served consecutive to No. 1999CF384, and that the erroneous interim amendment did not alter the intended sentence structure. The trial court concluded that the award of forty-seven days of sentence credit against Yanick's eventual conditional jail time was a sufficient remedy and eliminated any double jeopardy concerns.

¶9 On appeal, Yanick maintains that he was not lawfully on probation at the time he reoffended in 2012, either because the trial court's original sentence was unlawful or because the nature of that sentence was converted from consecutive to concurrent when he served forty-seven days in jail as the result of an administrative error which was then approved by the court's interim amended judgment. We reject both theories.

¶10 Upon a person's conviction for a crime, the trial court may impose a sentence, stay its execution, and place the person on a period of probation to be

[5] Yanick's extended supervision in No. 2008CF330 was also revoked. The new OWI ninth was charged in Jefferson County Circuit Court case No. 2012CF420 and pursuant to his plea, he received an eight-year bifurcated sentence "to commence consecutive to any other sentence in being."

served concurrent or consecutive to another sentence. *See* WIS. STAT. § 973.09(1) (2011-12).[6] As a condition of probation, the court may require that the person be confined during such period of the term of probation as the court prescribes. *See* § 973.09(4). A probationary term ordered consecutive to a prior sentence commences after the prior sentence has fully discharged. *See* ***Grobarchik v. State***, 102 Wis. 2d 461, 468-69, 307 N.W.2d 170 (1981) (an imposed sentence continues during parole until the defendant is finally discharged at the expiration of the term imposed). A sentence cannot be "split" so that part of the sentence is served concurrently and part consecutively. *See* ***State v. Bagnall***, 61 Wis. 2d 297, 312, 212 N.W.2d 122 (1973), *modified on other grounds by* ***State v. Rabe***, 96 Wis. 2d 48, 55-60, 291 N.W.2d 809 (1980). *See also* ***Grobarchik***, 102 Wis. 2d at 469-70 (the trial court is without authority to order a term of probation to commence upon a person's release from prison onto parole; a prior sentence has not discharged if the person remains on parole).

¶11 Yanick's primary contention appears to be that the trial court's original sentence was invalid because, though his probation was ordered to run consecutive to No. 1999CF384, the judgment of conviction stated that his conditional jail time would "commence after release from prison." Yanick reads the judgment to indiscriminately require the service of his conditional jail time *immediately* upon his release from prison in No. 1999CF384, which, in his case, was prior to the commencement of his probation. Based on this interpretation, Yanick argues that the trial court improperly split his sentence so that it was in part concurrent (the conditional jail time) and in part consecutive (the probationary

[6] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

term). Likening his case to ***Grobarchik***, Yanick contends that the trial court's original sentence was unlawful because it required him to serve his conditional jail time upon his release from prison rather than his discharge in No. 1999CF384.

¶12 We reject Yanick's proposition that the single sentence in the judgment stating "jail to commence after release from prison" renders his entire sentence invalid. It is well-established that a trial court's intent as to sentence structure is to be discerned from the language of the judgment, the court's oral pronouncement, and the record as a whole. *See* ***State v. Lipke***, 186 Wis. 2d 358, 364, 521 N.W.2d 444 (Ct. App. 1994). An unambiguous oral sentencing pronouncement controls over a written judgment of conviction.[7] ***State v. Prihoda***, 2000 WI 123, ¶29, 239 Wis. 2d 244, 618 N.W.2d 857. Here, in pronouncing sentence, the trial court unequivocally stated that both the term of probation and its

[7] We are not determining that the original judgment on its face was ambiguous or manifested an invalid sentence. The written judgment plainly states: "Probation to run consecutive to current sentence." Though the State suggests that the dictate concerning conditional jail time may be interpreted to mean "immediately after release," in light of the clear pronouncement that probation was to be consecutive, it is most reasonably interpreted to mean that jail time would start after Yanick discharged from No. 1999CF384. In light of the indeterminate nature of the sentence in No. 1999CF384 and therefore, its unknown discharge date, this interpretation comports with the understood meaning of imprisonment as including both the period of confinement and any periods of supervision. *See* ***Grobarchik v. State***, 102 Wis. 2d 461, 469-70, 307 N.W.2d 170 (1980). We also find significant that in amending the judgment back to effectuate the intended sentence, Wisley acknowledged the propriety of the trial court's original language which the DOC construed as authorizing the service of Yanick's jail time after his discharge, or, "release from prison case [No.] 1999CF000384."

conditional jail time were to run consecutive to No. 1999CF384.[8] The court's remarks demonstrate its awareness that treatment would be unavailable if Yanick received consecutive incarceration. The court explained that by staying its sentence in favor of consecutive probation, it intended to make treatment more readily available to Yanick, while still ensuring that he would be subject to DOC custody and supervision for a significant period of time.

¶13 Additionally, any question about the court's intent regarding the sentence structure was put to rest by the record as a whole, including the court's second amended judgment. Wisley's letter establishes that when Yanick's file was properly examined, the DOC understood the judgment in No. 2005CF161 to mean that Yanick's probation would not commence until after his discharge in No. 1999CF384. Further, the court's action upon that letter reaffirmed that, notwithstanding Moylan's erroneous reading of Yanick's file, the court had

[8] Yanick's brief asserts that in its oral pronouncement, the "sentencing court ordered the condition of probation to commence concurrently with Yanick's parole in case [No.] 99CF384." In support he cites to the following exchange:

> [The State]: If—I should say when his probation kicks in, he will be released and the six-month condition time will be served in the county jail. I don't know if he is requesting Huber.
>
> [Defense counsel]: Yes, we would be.
>
> [Trial Court]: All right.

We are hard pressed to interpret this exchange as Yanick suggests. More reasonably, the State is pointing out that Yanick will be out of custody at the time his probation begins and will therefore be serving his conditional jail time in Huber. This acknowledges the difference between a consecutive jail term which, by operation of law is served in prison, *see* WIS. STAT. § 973.03(2), and a later-served period of conditional jail time which may be served in the county jail.

always intended that Yanick would not serve his probation, or the corresponding jail time, until after he completed his sentence in No. 1999CF384.[9]

¶14 Finally, even if the trial court had inadvertently ordered the conditional jail time to commence prior to the term of probation, we fail to see how such a short-lived and quickly corrected error would invalidate its primary order for an imposed and stayed sentence in favor of consecutive probation. The jail time ordered was simply a condition of probation. To the extent the condition may have been improper, the remedy would not require invalidation of the trial court's legally sound order for consecutive probation.

¶15 Having concluded that Yanick's initial sentence was valid and in accord with controlling law, we turn to his contention that Moylan's erroneous

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[9] Yanick points to several points in the record which he asserts evince the trial court's intent to have his conditional jail time commence prior to his probationary term. We find none persuasive. As to Yanick's May 2007 letter to the trial court requesting that he be permitted to serve his conditional jail time concurrent with his revocation sentence, we do not construe the trial court's handwritten words "Request Denied" as an acknowledgment that Yanick had started serving his probationary term or as "ensur[ing] that the conditional jail term would be concurrent with Yanick's parole case in [No.] 99CF384."

Yanick also relies on the postconviction court's initial interpretation of the original judgment as ambiguous. Ambiguity is a question of law. *See* ***State v. Peterson***, 2001 WI App 220, ¶13, 247 Wis. 2d 871, 634 N.W.2d 893. Further, the postconviction court's interpretation of the original judgment appeared to derive from its erroneous belief that Yanick's May 2007 letter to the trial court was a "stay request." The postconviction court's misapprehension concerning the nature and significance of Yanick's May 2007 letter can be traced to this erroneous assertion in Yanick's postconviction motion:

> When the defendant wrote a letter to this court in 2007 asking for a stay regarding the 6 month conditional jail time, this court denied the stay and emphatically ordered the defendant to begin the jail time immediately upon release from prison, on parole, in case [No.] 99CF384, hence the "consecutive probation."

Yanick's assertion blatantly misrepresents both the May 2007 letter and the trial court's response.

interpretation of his sentence and the court's responsive amendment to the judgment transformed Yanick's probationary term from consecutive to concurrent. Here, Yanick argues that because he started his conditional jail time on February 1, 2008, he legitimately expected that his probation would terminate three years later, and double jeopardy principles operate to preclude additional punishment in the form of his imposed prison sentence. We disagree.

¶16 First, Moylan's misconstruction of the nature of Yanick's sentence structure did not and could not alter the trial court's sentence or divest the DOC of the authority to revoke Yanick's probation. ***State ex rel. Greer v. Wiedenhoeft***, 2014 WI 19, ¶¶39-53, 353 Wis. 2d 307, 845 N.W.2d 373 (the DOC's custody and control of probationers cannot be divested merely by an administrative error); ***State ex rel. Rodriguez v. DHSS***, 133 Wis. 2d 47, 51, 393 N.W.2d 105 (Ct. App. 1986) (where an administrative action of the custodial agency is contrary to the governing statutes or contrary to the judgment of conviction, the agency's action will be treated as a legal nullity). In ***Greer***, the court determined that the DOC's issuance of a premature discharge certificate in Greer's probation case did not defeat its jurisdiction to revoke his erroneously discharged probation. ***Greer***, 353 Wis. 2d 307, ¶¶39-53. Explaining that the DOC's authority over probationers is governed by statute, the court concluded that because WIS. STAT. § 973.09(5) provides that a discharge certificate shall issue only when the "period of probation … has expired," the erroneous issuance of the certificate before the expiration of

probation could have no effect on Greer's probationary status. ***Greer***, 353 Wis. 2d 307, ¶¶39-41, 51.[10]

¶17 Similarly, in ***Rodriguez***, the defendant's probation agent mistakenly informed him that he was off of supervision though in actuality, Rodriguez had been ordered to serve a second probationary term. The court determined that notwithstanding the erroneous information from the agent, Rodriguez was properly subject to revocation in the second case. ***Rodriguez***, 133 Wis. 2d at 49, 51. In addition to its reliance on WIS. STAT. § 973.09(5), the court gave particular weight to the fact that Rodriguez had been present at sentencing and was thus presumed to be aware of the terms of his sentence. ***Rodriguez***, 133 Wis. 2d at 52.

¶18 As in ***Greer*** and ***Rodriguez***, Moylan's administrative mistake did not alter the terms of Yanick's sentence or divest the DOC of its revocation authority. The trial court's invalid interim amended judgment was based on Moylan's erroneous representation and cannot be construed as effecting a legal change to Yanick's previously valid consecutive sentence. A trial court's authority to modify its own sentence is narrowly circumscribed and limited to such situations as where a new factor has come to light, or where it erroneously exercised its discretion in imposing sentence. *See* ***Greer***, 353 Wis. 2d 307, ¶52; ***State v. Gruetzmacher***, 2004 WI 55, ¶39, 271 Wis. 2d 585, 679 N.W.2d 533; ***State v. Sepulveda***, 119 Wis. 2d 546, 561-62, 350 N.W.2d 96 (1984). Here, after erroneously changing the judgment, the court recognized the error, effectively

[10] In ***State ex rel. Greer v. Wiedenhoeft***, 2014 WI 19, ¶¶47, 52, 353 Wis. 2d 307, 845 N.W.2d 373 , the court explained that in addition to the relevant statute, the probationer's status is governed by the language of the judgment of conviction. The ***Greer*** court found it inconceivable "that a sentence, validly imposed by a circuit court, could be undermined by a mere clerical error by an agency." ***Id.***, ¶53.

vacated the amendment, and reinstituted the valid judgment. *See* ***Gruetzmacher***, 271 Wis. 2d 585, ¶39 (where a court's amendment to a sentence is not based on an accurate understanding of the facts or a proper legal foundation, the court's amendment will be vacated, and the previous valid sentence will be reinstated).

¶19 Finally, we reject Yanick's argument that double jeopardy principles require that his sentence be vacated.[11] A sentence modification violates double jeopardy where the sentence is increased and the defendant possessed a legitimate expectation of finality in the original sentence. *See* ***id.***, ¶33 (citing ***State v. Jones***, 2002 WI App 208, ¶¶9-10, 257 Wis. 2d 163, 650 N.W.2d 844).

¶20 Yanick has first failed to show that his sentence was actually increased. Though Yanick prematurely served forty-seven days in jail due to the DOC's error and the court's interim judgment, he would have had to serve that time anyway. It was ordered as a condition of his probation and is a mandatory minimum sentence imposed by Yanick's statute of conviction. *See* ***State v. Eckola***, 2001 WI App 295, ¶¶12, 15, 249 Wis. 2d 276, 638 N.W.2d 903. By granting Yanick credit against his eventual conditional jail time, the court eliminated any multiple or increased punishment.

¶21 Additionally, even assuming an increase in Yanick's sentence, he has not demonstrated a legitimate expectation of finality. Yanick was present when the trial court ordered a consecutive three-year term of probation. The judgment clearly stated that the probation was to run consecutive to

[11] Yanick's theory is that because he erroneously served a jail sentence independent of a probation sentence that had yet to start, he was subject to an "amended sentence [which] increased the term of probation by many years and created multiple punishments for the same offense, those being two separate terms of jail and an imposed and stayed prison term."

No. 1999CF384. The second amended judgment of conviction, which reaffirmed his initial sentence, lists Yanick as a recipient party, and other than Yanick's self-serving statements, there is no indication that he did not receive that judgment. Furthermore, when he was arrested in September 2008 and eventually convicted in connection with No. 2008CF330, the DOC revoked his parole in No. 1999CF384 but not his probation in the present case, a clear indication that Yanick had not yet started serving his probationary term. Finally, Yanick confirmed that he never received a discharge certificate in No. 2005CF161.[12] *See* ***Greer***, 353 Wis. 2d 307, ¶46 (discharge from probation or parole occurs only upon the issuance of a validly issued discharge certificate). The amended judgment returned Yanick to the status that had applied before Moylan's error, thereby eliminating any arguable confusion about his sentence structure. Yanick's alleged expectation that the probation ordered in No. 2005CF161 had discharged prior to his 2012 reoffense date was unreasonable.

By the Court.—Order affirmed.

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

[12] Though Yanick's opening brief asserted that his signed revocation paperwork referred only to the revocation of his extended supervision in No. 2008CF330, the State's brief promptly corrected this misinformation by pointing to the relevant documents contained in Yanick's appendix. The waiver of final revocation form signed by Yanick clearly states that the DOC was seeking to revoke both his probation in No. 2005CF161 and his extended supervision in No. 2008CF330.