COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2016

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 No. 2015AP1636-CR **Cir. Ct. No. 2006CF4609**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY SEAN GORAK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

Before Kessler and Brennan, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Gregory S. Gorak, *pro se*, appeals an order of the circuit court that denied his motion for reconsideration of an order denying his motion for sentence modification. We affirm.

BACKGROUND

¶2 On April 19, 2007, Gorak entered guilty pleas to possession of a Molotov cocktail (count two) and carrying a concealed weapon (count three), and a no-contest plea to burglary (count four). Three other charges were dismissed and read in. On June 7, 2007, a federal court imposed on Gorak a sentence of nine years and ten months' confinement and three years of supervision in another case. On June 8, 2007, the circuit court in this matter imposed six years' imprisonment for count two and ten years' imprisonment for count four.[1]

¶3 The original judgment of conviction, as entered on June 25, 2007, after amendment to correct a scrivener's error, specified that the count two sentence was consecutive to any other sentence and the count four sentence was concurrent with any other sentence. Following a *pro se* motion by Gorak, an amended judgment was entered on July 1, 2008, to award additional sentence credit against count four. Gorak moved for reconsideration, believing the credit should have also applied to count two. The motion was denied based on the prohibition against dual credit on consecutive cases. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). Gorak appealed, and we ultimately affirmed. *See* ***State v. Gorak***, No. 2008AP2399-CR, unpublished slip op. (WI App Dec. 22, 2009).

¶4 On October 10, 2008, in response to another *pro se* motion filed by Gorak, another amended judgment was entered, specifying the sentence on count two was consecutive to the federal sentence to more accurately reflect the circuit

[1] The sentence for count three was nine months' imprisonment; the sentence on this offense is irrelevant to the appeal.

court's actual pronouncement of sentence. Count four was noted as concurrent with the other two sentences and the federal sentence.

¶5 Thus began a series of requests for clarification from the Department of Corrections, motions from Gorak, and assorted orders from the circuit court. The most recent correspondence from the Department that is relevant to this appeal came in 2011, when the Department asked for clarification about when to start the count two sentence. The request came about because the federal court had, in 2010, retroactively designated the Department as a place for Gorak to serve his federal sentence, which resulted in the federal sentence being treated as concurrent with the Wisconsin sentences. Gorak filed a motion to review his sentence on May 2, 2011.

¶6 On May 6, 2011, the circuit court entered an order that stated, in relevant part:

> The sentence on count four was ordered to run concurrently with the defendant's federal sentence and concurrent with count two. Count two was ordered to run consecutive to the defendant's federal sentence. Because the federal sentence is much longer than the sentence imposed in count four, count four will never run concurrently with count two. The court will remedy the situation by removing the language "concurrent with count two" from the sentence imposed in count four so that it will only run concurrent with the federal sentence. When the federal sentence is over, count two will commence to run.

Thus, another amended judgment of conviction was entered on May 11, 2011. This judgment now shows count two as consecutive to the federal sentence and count four as concurrent with count three sentence and the federal sentence. Gorak did not appeal the circuit court's order, though he did move to vacate it. When the motion was denied, Gorak did not appeal.

¶7 In January 2015, Gorak filed a new motion for sentence modification, asserting a new factor in light of the court's May 2011 order. The circuit court perceived this motion as "an apparent effort to reinstate a specific order that count four is concurrent to count two so that he can argue that he already served his confinement on count two before he was placed in federal custody." It rejected Gorak's claim that count four was now an illegally split sentence and denied the motion on January 26, 2015.

¶8 Gorak moved for reconsideration. The circuit court ordered a hearing, at which a records supervisor from Redgranite Correctional Institution testified. The circuit court ultimately denied the motion on July 9, 2015. It explained, among other things, that the 2011 amended judgment was entered to clarify that the count two sentence was to be consecutive to the federal sentence. The order further determined that the count four sentence was not an illegally split sentence and that count four is not running consecutively to count two. The circuit court additionally stated that while the sentence structure is complex, it is not illegal. Gorak appeals.

DISCUSSION

¶9 As an initial matter, we note that Gorak's appeal was untimely as to the January 26, 2015 circuit court order that denied his motion for sentence modification. By order dated September 8, 2015, we noted that an appeal cannot be taken from an order denying a motion for reconsideration that presents the same issues as those determined in the order sought to be reconsidered. *See* ***Silverton Enters., Inc. v. General Cas. Co. of Wis.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). However, we further noted that it appeared that the motion for reconsideration may have raised new issues, so we determined that "the

appeal may continue but is limited to the issues decided by the order denying reconsideration."[2] On appeal, Gorak identifies five main issues.[3] We address each issue in turn.

I. Illegally Split Sentence

¶10 Gorak first contends that his count four sentence is illegally split.[4] A split sentence is one that is ordered to be served both concurrently and consecutively. *See* ***State v. Bagnall***, 61 Wis. 2d 297, 311, 212 N.W.2d 122 (1973) (circuit court improperly imposed thirty-year sentence, the first seven years to be served concurrent with any other sentence).

¶11 However, we are not persuaded that the amended judgment created an illegally split sentence. The circuit court did not impose a sentence with the prohibited structure described in ***Bagnall***. Further, prior to the 2011 amendment, the judgment of conviction specified that count four was concurrent with count two. The Redgranite records supervisor testified that after the 2011 amendment,

[2] We do not agree with the State's assertion that Gorak's *entire* appeal is defeated by our order; the circuit court clearly believed there were new issues in the reconsideration motion given that it ordered a hearing.

[3] To the extent there are additional issues lurking within the brief, we decline to address them. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

[4] We disagree with the State that this issue is barred by ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). The issue in the prior appeal was whether the count two sentence was illegally split. The issue here is whether the 2011 amended judgment caused the count four sentence to become illegally split. The circuit court, in its order denying reconsideration, expressly noted that the current split-sentence issue "was not before the Court of Appeals previously."

though that specific language was removed, the Department continued to treat count four as concurrent.

II. Whether the Current Sentence Structure Violates Statutes or Code

¶12 Gorak next claims that his sentence structure violates several statutes "and/or" a portion of the administrative code.[5] This argument is procedurally barred because Gorak does not explain why it was not raised previously.[6] *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (WISCONSIN STAT. § 974.06 "compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion" or provide a sufficient reason for not raising the issue earlier); *see also* WIS. STAT. § 974.06(1) (2013-14)[7] ("[A] prisoner in custody under sentence of a court … claiming the right to be released upon the ground that the sentence was imposed in violation of the … laws of this state … may move the court which imposed the sentence to vacate, set aside or correct the sentence.").[8]

[5] Gorak refers to "WISCONSIN ADMINISTRATIVE CODE 302.21(3)(c)(1)" without specifying the agency code, though we presume he is referring to WIS. ADMIN. CODE § DOC 302.21(3)(c)1. (through Dec. 31, 2014).

[6] If it was raised previously, it is barred by ***Witkowski***. *See* ***id.***, 163 Wis. 2d at 990.

[7] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[8] Although Gorak may have captioned his motions as motions for sentence modification under WIS. STAT. § 973.19 and not as WIS. STAT. § 974.06 motions, we are not bound by the labels parties place on their filings. *See* ***Lewis v. Sullivan***, 188 Wis. 2d 157, 166, 524 N.W.2d 630 (1994). A motion for sentence modification under § 973.19 can be brought within ninety days of sentencing or within the timelines of WIS. STAT. RULE 809.30. *See* ***State v. Nickel***, 2010 WI App 161, ¶5, 330 Wis. 2d 750, 794 N.W.2d 765. Both of those deadlines are long-expired. While a motion for sentence modification based on a new factor can be brought at any time, *see* ***State v. Noll***, 2002 WI App 273, ¶¶11-12, 258 Wis. 2d 573, 653 N.W.2d 895, the circuit court did not engage in a new-factor analysis, and Gorak does not provide any such discussion on appeal.

¶13 To the extent that Gorak is actually challenging the manner in which the Department of Corrections is implementing his sentences, his remedy is an action against the Department, not a motion for sentence modification. *See, e.g.*, ***State ex rel. Darby v. Litscher***, 2002 WI App 258, ¶1, 258 Wis. 2d 270, 653 N.W.2d 160.

III. Double Jeopardy, Due Process, and Equal Protection

¶14 Gorak next argues that his sentence on, or service of, count two violates various constitutional protections. This argument, however, is also procedurally barred. It was raised in his September 19, 2011 motion to vacate. He did not appeal the denial of the motion. He cannot relitigate it. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991); *see also* ***Escalona***, 185 Wis. 2d at 185.

IV. The Circuit Court's Denial of the WIS. STAT. § 973.19 Motion

¶15 Gorak next claims the circuit court's denial of his motion for sentence modification was an abuse of discretion.[9] We cannot reach denial of the order proper—as we explained, the notice of appeal was untimely as to that order. To the extent that Gorak is claiming the circuit court erred in denying reconsideration, we disagree for the reasons already set forth herein.

[9] The supreme court replaced the phrase "abuse of discretion" with "erroneous exercise of discretion" nearly twenty years ago. *See* ***City of Brookfield v. Milwaukee Metro. Sewer. Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

V. Improper Findings of Fact

¶16 Gorak's final argument on appeal is that "the circuit court's judicial findings of fact motion and/or evidentiary hearing rulings constitute an abuse of discretion." He "directs the Court to R:112 to consider the arguments raised therein as he has exceeded his page allotment in [his] brief." Argument by reference is not permitted. *See* ***State v. Armstead***, 220 Wis. 2d 626, 642 n.6, 583 N.W.2d 444 (Ct. App. 1998); ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994). We therefore do not consider this argument further.

By the Court.—Order affirmed.

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