COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP424-CR **Cir. Ct. No. 1999CF3079**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTUAN WAYNE MCCLINTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: MICHAEL R. FITZPATRICK, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Antuan W. McClinton appeals a circuit court order denying his motion to vacate a sentence imposed after revocation of his

probation.[1] McClinton contends that he served his probation concurrently with an earlier-imposed prison sentence and that he completed service of that probation before the Department of Corrections initiated revocation proceedings. He asserts that the sentence imposed following revocation is therefore illegal. We reject his arguments and affirm.

Background

¶2 McClinton challenges the sentence imposed in Rock County case No. 1999CF3079, but two other criminal cases and the sentences McClinton received in those cases are relevant to the instant appeal. We therefore set out the pertinent facts concerning the convictions, sentencing terms, and post-sentencing events as to all three cases.

¶3 In Rock County case No. 1993CR570, a jury convicted McClinton of a felony he committed in March 1993. The trial court imposed and stayed a seven-year indeterminate prison sentence and placed McClinton on probation for ten years. His probation was revoked on February 15, 1996, and he commenced serving his seven-year sentence.

¶4 In Rock County case No. 1995CF1789, McClinton pled guilty to a felony he committed in November 1995, while on probation for his 1993 offense. On April 30, 1996, the trial court imposed a three-year consecutive indeterminate prison sentence for the crime.

[1] The Honorable Michael R. Fitzpatrick presided over the motion to vacate sentence. We refer to Judge Fitzpatrick in this opinion as the circuit court. Other Rock County judges presided over the various trial and sentencing proceedings that form the background of this litigation. We refer to each of those judges as the trial court.

¶5 In Rock County case No. 1999CF3079, which directly underlies this appeal, the State charged McClinton with multiple crimes committed in July 1999 while he was on parole for his earlier convictions in case Nos. 1993CR570 and 1995CF1789. He absconded, however, and police did not apprehend him until 2001. At that time, he returned to prison to serve his consecutive prison sentences in case Nos. 1993CR570 and 1995CF1789. While in prison, he resolved the charges pending in case No. 1999CF3079: pursuant to a plea bargain, he pled guilty to one felony and admitted that, because he was previously convicted of a felony in case No. 1995CF1789, he committed the July 1999 crime as a habitual offender. On August 21, 2001, the trial court imposed a three-year term of probation and ordered that McClinton serve the probationary term in case No. 1999CF3079 "consecutive to the sentence [he was] presently serving."

¶6 In due course, McClinton was again released from prison to parole. He was discharged from the judgment in case No. 1993CR970 effective April 11, 2005, and he was discharged from the judgment in case No. 1995CF1789 effective March 20, 2008. Also on March 20, 2008, he was granted probationary status in case No. 1999CF3079.

¶7 In 2009, McClinton absconded from probation and remained at large until he was apprehended in 2014. The Department of Corrections revoked his probation in case No. 1999CF3079, and, on November 11, 2014, the trial court imposed a ten-year indeterminate prison sentence.

¶8 McClinton filed a postconviction motion to vacate the ten-year sentence imposed in case No. 1999CF3079. He contended that in August 2001 when the trial court originally imposed probation in that case "consecutive to the sentence [he was] presently serving," the trial court imposed probation

consecutive only to his sentence in case No. 1993CR570. Therefore, he argued, he served that probation concurrently with his sentence in 1995CF1789 and completed the three-year probationary term before the Department sought revocation of that term. He concluded that the trial court acted unlawfully in November 2014 by imposing a ten-year sentence in case No. 1999CF3079 because, he said, he had served his probation in that case and thus paid the penalty for his crime.

¶9 The circuit court denied the motion to vacate sentence, concluding that the probation imposed in the 1999 case was consecutive to the sentences imposed in both the 1993 case and the 1995 case. McClinton appeals.

Discussion

¶10 The law presumes that sentences are concurrent "in the absence of a statutory or judicial declaration to the contrary." *See* ***State v. Coles***, 208 Wis. 2d 328, 332, 559 N.W.2d 599 (Ct. App. 1997). McClinton contends that in 2001, when the trial court ordered him to serve probation consecutive to the prison sentence he was "presently serving," he was imprisoned as a consequence of only his 1993 offense. The trial court's sentencing pronouncement therefore did not, in his view, include a declaration that his probation was consecutive to the sentence imposed for his 1995 offense. Relying on the presumption of concurrency, McClinton argues that he served his probation concurrently with his 1995 sentence and that he completed probation before any revocation proceedings began. He

concludes he "should not [have] been on probation at the time [he] was revo[k]ed" and therefore his sentence is illegal. We cannot agree.[2]

¶11 When McClinton was sentenced for his crimes, and as is still the case today, all consecutive sentences for crimes committed before December 31, 1999, were computed as one continuous sentence. *See* WIS. STAT. §§ 302.11(3) (1993-94); 302.11(3) (1995-96); 302.11(3) (2001-02); and 302.11(3) (2015-16); *see also* ***Ashford v. Division of Hearings and Appeals***, 177 Wis. 2d 34, 42, 501 N.W.2d 824 (Ct. App. 1993) (stating that "[§] 302.11(3) requires that all consecutive sentences be computed as one continuous sentence"). Thus, while the trial court's reference to "the sentence [McClinton was] presently serving" might be understood as limited to only one of his consecutive sentences, the reference may properly also be understood as encompassing his aggregate sentence. A court's oral sentencing pronouncement is ambiguous when it is capable of being understood by "reasonably well-informed persons in two or more different ways." *See* ***State v. Oglesby***, 2006 WI App 95, ¶19, 292 Wis. 2d 716, 715 N.W.2d 727. We conclude that the trial court's sentencing remarks were ambiguous. When sentencing remarks are ambiguous, we may look to the entire record to determine the sentencing court's intent. *See* ***Coles***, 208 Wis. 2d at 333.

[2] Although the parties present the issue on appeal as a challenge to the validity of the sentence McClinton received following his probation revocation, we observe that McClinton's real contention is that his probation expired and therefore could not lawfully be revoked. As a rule, a convicted person cannot challenge the validity of a probation revocation in the context of the underlying criminal action. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation is independent from the underlying criminal action); *see also* ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 522-23, 563 N.W.2d 883 (1997) (judicial review of probation revocation is by a petition for a writ of *habeas corpus*). Because the State did not argue on appeal that McClinton's claim is procedurally defective, we will not further consider that possibility here and instead address the issue as the parties framed it.

¶12 Upon review of the record, we conclude that the trial court did not intend McClinton to serve the probation imposed in 2001 concurrently with any previously imposed sentence. Rather, the trial court intended McClinton to serve a term of probation consecutive to his aggregate sentence.

¶13 Our examination of the record necessarily encompasses the parties' sentencing arguments. At the outset of the sentencing proceeding, the parties said that they were making a joint recommendation, and the State explicitly advised that it was "recommending three years consecutive probation." The State went on to remind the trial court that McClinton was imprisoned as a consequence of his prior criminal history, specifically including the 1995 offense that was the basis for the repeater allegation in the instant case, and that additional probation would allow for significant oversight by the Department:

> McClinton was revoked on probation or parole from the prior incident that's referred to in the repeater allegation. He's serving three years in prison for that. And he also has three years, I think, left of parole after he finishes his prison sentence. Combined with this, the three-year consecutive probation recommendation, assuming the court follows it, Mr. McClinton will be on supervision for, I believe, approximately six years.

¶14 Defense counsel also recited the terms of the recommendation: "[t]here will be a joint recommendation that sentence be withheld, [McClinton] be placed on probation for a period of three years, and that to run consecutive to the prison sentence that he's presently serving." Advocating for the joint recommendation, defense counsel explained that McClinton's "maximum discharge date, I believe, from his underlying offense is March of 2007.[3] *So an*

[3] As we have seen, McClinton's discharge date actually fell on March 20, 2008.

additional three years of supervision on top of that, it's going to put him under the thumb of the [D]epartment for a good long time." (Emphasis added.)

¶15 The trial court was persuaded by the sentencing arguments, stating: "so the court, without belaboring the matter, feels that the joint recommendation of the parties is appropriate." Because the trial court adopted the parties' joint recommendation, the trial court necessarily followed the recommendation to impose three years of probation "on top of" the maximum discharge date, a date determined by computing the consecutive sentences as one continuous sentence. *See* ***Ashford***, 177 Wis. 2d at 43-44.

¶16 Further, it is illogical to conclude that the trial court placed McClinton on probation and then ordered him to serve that term of probation while in prison for another crime. The sentencing proceedings made clear that a significant goal of the disposition was to ensure continued Department supervision after the maximum discharge date dictated by the earlier-imposed sentences. As the circuit court explained when denying McClinton's postconviction motion, probation concurrent with incarceration "would accomplish nothing in terms of public safety, rehabilitation, or any of the other objectives of probation."

¶17 Finally, this court previously reviewed the trial court's 2001 sentencing remarks in ***State v. McClinton*** (***McClinton I***), No. 2002AP702-CRNM, unpublished op. and order (WI App Oct. 15, 2002). There, we explained that the trial court "followed [the] parties' joint recommendation for sentencing," and we specifically observed that the trial court "withheld sentence and placed [McClinton] on three years' probation consecutive to prison sentences he was then serving." *See* ***id.*** at 2-3. Our decision in ***McClinton I*** constitutes the law of the case, and, under the law of the case doctrine, we are bound to apply the

decision in subsequent proceedings. *See* ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82. Although the law of the case doctrine is not an inexorable rule, courts should adhere to it '"unless the evidence on a subsequent trial was substantially different, or controlling authority has since made a contrary decision of the law applicable to such issues.'" ***Id.***, ¶24 (citation and brackets omitted). Neither reason for abandoning the doctrine has any applicability here. Accordingly, our prior decision—which was not challenged by either a motion to reconsider or a petition for supreme court review—establishes that the trial court's 2001 sentencing remarks are properly understood as imposing probation in this case consecutive to the sentences McClinton was serving in case Nos. 1993CR570 and 1995CF1789.

¶18 In sum, the record shows that in 2001, the trial court ordered McClinton to serve a term of probation in case No. 1999CF3079 consecutive to his previously imposed sentences. He therefore did not complete that probation while incarcerated for another crime. Because he fails to show that he completed probation before the Department commenced revocation proceedings, we reject his contention that his sentencing after revocation was unlawful.[4]

By the Court.—Order affirmed.

[4] In the respondent's brief, the State says McClinton can be understood to argue that the sentencing court lacked authority to impose probation for his 1999 crime consecutive to the 1995 sentence. McClinton asserts in his reply brief that he "never claimed that the judge lacked authority to make the 1999 sentence consecutive to the 1995 case." To the extent, if any, that McClinton might have been understood to challenge the circuit court's authority in the way that the State describes, we conclude McClinton has abandoned any such argument, and we have not addressed it. *See* ***Cosio v. Medical Coll. of Wis., Inc.***, 139 Wis. 2d 241, 242-43, 407 N.W.2d 302 (Ct. App. 1987).

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).