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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2011AP2833

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACQUELINE R. ROBINSON,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Milwaukee County, the Honorable Paul R. Van Grunsven Presiding

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief to address the limitations, other than the constitutional limitations that the Double Jeopardy Clause imposes, upon Wisconsin courts seeking to increase a sentence after the original sentence was imposed. It takes no position regarding whether the court below exceeded the limitations of these powers when increasing Ms. Robinson's sentence.

Wisconsin courts do not have free rein to increase sentences merely because the increase in sentence does not offend the Double Jeopardy Clause. Instead, the law bars Wisconsin circuit courts from increasing sentences based upon reflection. Moreover, when courts do increase sentences, the entire record must demonstrate that the change is based upon something other than reflection. After-the-fact statements are insufficient to meet this standard when nothing else in the record supports the proposition.

ARGUMENT

EVEN WHEN DOUBLE JEOPARDY CONSIDERATIONS ARE NOT AT ISSUE, THE CIRCUIT COURT'S POWERS TO CHANGE A SENTENCE ARE LIMITED AND THE RECORD MUST CLEARLY DEMONSTRATE THAT THE CHANGE IS NOT BASED UPON REFLECTION

Wisconsin courts have the inherent, but limited, power to change a sentence at any time while the defendant is still serving his sentence. ***Hayes v. State***, 46 Wis. 2d 93, 101-102, 175 N.W.2d 625 (1970). Double jeopardy considerations are not the only limit on this power and even when double jeopardy considerations are not implicated, the court's inherent power to modify sentences is restricted

A. Wisconsin Courts are Prohibited From Modifying Valid Sentences Upon Reflection

Wisconsin circuit courts long have been prohibited from modifying valid sentences upon reflection. ***Scott v. State*,** 64 Wis. 54, 59, 218 N.W.2d 350 (1974); *see also* ***State v. Macemon***, 113 Wis.2d 662, 668, 335 N.W.2d 402 (1983). This bar applies regardless whether the court seeks to increase, ***Scott***, 64 Wis.2d at 59, or decrease the sentence, ***State v. Wuensch***, 69 Wis.2d 467, 479, 230 N.W.2d 665 (1975). Forbidding changes based upon reflection, regardless of the direction of the change, avoids creating an unfair "double standard." ***Scott***, 64 Wis.2d at 59.

This bar, however, does not apply in situations involving invalid sentences. ***State v. Martin***, 121 Wis.2d 670, 686, 360 N.W.2d 43 (1985); ***Grobarchik v. State***, 102 Wis. 2d 461, 473, 307 N.W.2d 170 (1981). When an invalid sentence occurs, "[a]n alteration of the sentence in order to bring it into conformity with the law is required to effectuate the court's intent. Such an alteration is required without reference to whether or not the defendant 'deserves' an increased term." ***Grobarchik***, 102 Wis. 2d at 473. Such a result makes sense as the new sentence then is not based upon reflection but upon the reality that the sentence as imposed cannot legally stand.[1]

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[1] Thus, for example, had this Court in ***State v. Gruetzmacher***, 2004 WI 55, 271 Wis.2d 585, 679 N.W.2d 533, analyzed the case based upon the inherent powers of the circuit court as well as double jeopardy concerns, the Court would

Similarly, a situation in which a circuit court increases a sentence based upon the impossibility of carrying out the originally imposed sentence is not a situation in which the court can be said to increase a defendant's sentence upon reflection. *See, e.g.,* ***State v. Sepulvada***, 119 Wis.2d 546, 350 N.W.2d 96 (1984).[2] In such circumstances, the sentence might as well be invalid or void because, like an invalid sentence, it cannot be implemented as imposed.

But, with *valid and possible* sentences, answering the question of whether double jeopardy bars an increase in a valid sentence therefore does not answer the separate question whether Wisconsin law permitted the increased sentence.[3] As in ***Scott***, 64 Wis. 2d at 57-60, and in ***State v. Burt***, 2000 WI App 126, ¶¶14-15, 237 Wis.2d 610, 614 N.W.2d 42, in situations in which a court has increased the sentence after the original sentencing, appellate courts should analyze both whether the increase violated double jeopardy

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have concluded that the increase was permissible on those grounds as well. In ***Gruetzmacher***, 2004 WI 55, ¶7, this Court confronted a situation in which the defendant was sentenced on multiple counts to an aggregate sentence of 60 months with 40 months of initial confinement, 20 months of extended supervision, and multiple long probations in which the sentence on count one was invalid because it exceeded the maximum possible sentence. ***Id*.,** ¶8. This Court held that a new sentencing, which did not increase the aggregate sentence but did increase the sentence on some of the counts, did not violate double jeopardy because the invalidity of the sentence gave no "expectation of finality.". ***Id*.,** ¶¶ 1-2. Had this Court considered whether the increase of the sentence on some counts violated the prohibition on increasing sentences on reflection, the Court would have held that the prohibition did not apply due to the invalidity of the sentence.

[2] In ***Sepulvada***, 119 Wis.2d 546, this Court correctly held that the circuit court could modify probation and instead impose prison time when a condition of probation could not be carried out. In ***Sepulvada***, ***id***. at 549, 555, the circuit court originally imposed a term of probation which was premised upon the defendant admitting himself to Mendota Mental Health Institute for intensive treatment, but Mendota refused to admit him on the ground that his mental health problems were untreatable.

[3] To the extent that the double jeopardy analysis focuses on the "'*defendant's* legitimate expectation of finality'," *see* ***Gruetzmacher***, 2004 WI 55, ¶33 (quoting ***State v. Jones*,** 2002 WI App 208, ¶10, 257 Wis.2d 163, 650 N.W.2d 844) (emphasis added), the prohibition on increasing sentences upon reflection should be a factor in creating a legitimate expectation of finality, especially when the record does not clearly and convincingly demonstrate that reflection is not the reason for the increase.

and whether the circuit court was authorized to increase the sentence. Sometimes, as in ***Scott***, an increase of the sentence is forbidden even where double jeopardy would allow it.

B. Solid Policy Reasons Exist for Prohibiting Courts From Modifying Sentences Based Upon Reflection

This Court's long-standing ban on modification of a sentence based upon reflection serves several important purposes. First, the ban on changing sentences based upon reflection helps insulate judicial decision-making from the intense and immediate media pressure that springs up in many cases. As the Code of Judicial Conduct recognizes, "An independent and honorable judiciary is indispensable to justice in our society." SCR 60.02. Sentencing should not occur in the court of public opinion. Instead, legally-constituted courts should apply correct legal standards.

If judges are allowed to change sentences, either upward or downward, based upon reflection, then heavy media criticism could appear to have a pay-off and therefore become even more widespread. The potential for media influence, and the concomitant reduction in judicial independence, is most likely to occur in those difficult cases involving high-profile victims or defendants. This pressure creates the risk of sentencing disparity based upon extra-judicial factors.

Second, the requirement helps discourage courts from sloppiness at sentencing. Just as requiring proper objection from attorneys in the first instance gives them incentive to diligently prepare for trial, *see* ***Vollmer v. Luety***, 156 Wis. 2d 1, 10-11, 456 N.W.2d 797 (1990), requiring courts to sentence carefully the first time gives the courts incentive to diligently prepare for sentencing. This diligent preparation is essential to maintaining the public trust in the judicial process. Knowing that changes will be difficult also provides incentive for the courts to speak carefully when imposing sentence.

In addition, the requirement serves to help maintain the separation of powers. It does so by narrowing the types of events that can form the basis for a change and keeping the circuit courts from considering situations better evaluated by others. Thus, for example, post-sentence conduct generally is not grounds for sentence

modification because it "is a factor that...is properly within the consideration of the Department of Health and Social Services," *see* ***State v. Ambrose***, 181 Wis.2d 234, 240-241, 510 N.W.2d 758 (Ct. App. 1993), and considering it "would turn circuit courts into parole boards....," *see* ***State v. Crochiere***, 2004 WI 78, ¶23 n.13, 273 Wis. 2d 57, 681 N.W.2d 524, overruled on other grounds, ***State v. Harbor*****,** 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

Finally, barring the increase of sentences upon reflection creates more certainty and finality and avoids flooding the judicial system with motions for modification. If sentences can be increased upon reflection, a newly-elected district attorney who wishes to make political points with the public would have reason to file sentence modification motions in any case where he or she believes the sentence is too low. Political posturing and "tough-on-crime" campaigns could result in substantial additional work for the court system and pressure on judges to increase carefully and thoughtfully imposed sentences.

C. When a Court Increases a Sentence, the Record Should Reflect Clearly and Convincingly that the Reason for the Increase is Not Reflection.

For the same reasons that reviewing a record to determine whether a court relied upon inaccurate information is difficult, *see* ***State v. Travis***, 2013 WI 38, ¶¶29, __ Wis. 2d __, __ N.W.2d __, reviewing a record to determine whether a court increased a sentence upon mere reflection can be difficult. As this Court has noted, "Sentencing decisions depend on a wide array of factors, not all fully explained by the circuit court." ***Id***.

As in cases involving inaccurate information, appellate courts should independently review the entire record to identify whether an increased sentence is based on valid considerations or mere reflection. *Cf.* ***State v. Stafford***, 2003 WI App 138, ¶12, 265 Wis.2d 886, 667 N.W.2d 370 (Ct. App. 2003) (holding that the threshold question whether there is a new factor allowing downward modification is a question of law). Moreover, just as "[a] circuit court's after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance," ***Travis***, 2013 WI 38, ¶48, a circuit court's after-the-fact

assertion that a new sentence is not imposed upon reflection should not be dispositive. Like the circuit court which was presented with inaccurate information, *see* ***id***., the circuit court considering increasing a sentence may not accurately recall or identify what it was thinking at the time of the earlier sentence or may not account for all of the factors that went into the original sentence. *Cf.* ***State v. Groth***, 2002 WI App 299, ¶¶29-30, 258 Wis.2d 889, 655 N.W.2d 163 (discussing reliance upon inaccurate information)

Thus, after-the-fact justifications for increased sentences, when not backed by additional evidence from the original sentencing itself, are suspect and rarely, if ever, should be viewed as adequate proof of lack of reflection. In ***Scott,*** 64 Wis. 2d at 57-58, for instance, although the circuit court stated on the record that it was increasing the defendant's sentence to conform with his original intent, this Court rejected the increase as one made upon reflection. In so doing, the Court quoted a federal case, stating:

> [T]he Government argues that an exception should be recognized in cases such as this where the alteration of the sentence was undertaken solely to conform to the original intention of the trial judge and the error in the original sentence was due solely to an inadvertent transposition of the numbers. Were we clairvoyant and able to say for certain in every case what the trial judge really 'intended,' this argument might be persuasive. Being mere mortals, however, we must refrain from such delicate undertakings, and we refuse to sanction a procedure that encourages such an inquiry.

Id. at 59 (quoting ***Chandler v. United States,*** 468 F.2d 834, 836 (5th Cir. 1973)).

Moreover, in the previous cases in which the appellate courts have affirmed an increase in sentence, the records of those cases have contained proof, other than a mere after-the-fact assertion, that the increase was the result of something more than reflection. Viewed from this perspective, regardless of the merits of its holding on the issue of double jeopardy, ***Burt,***[4] 2000 WI App 126, is not a

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[4] Because this case is a Court of Appeals case, it is not binding upon this Court. This Court has the power to overrule, modify, or withdraw language in it. ***Cook v. Cook***, 208 Wis.2d 166, 188-189, 560 N.W.2d 246 (1997).

case involving mere reflection. In ***Burt***, 2000 WI App 126, the court sentenced the defendant to concurrent terms but increased the sentence on the basis that the court meant to say "consecutive." Both the timing of events and original notes from the judge in ***Burt*** provided more than just the court's later assertion of error.

First, the timing and circumstances under which the court realized its error lend support to the notion that the court was not just reflecting on its prior sentence. Burt's co-defendant was sentenced later the same day and it was during or immediately after that sentencing that the court indicated that its attempts to make the sentences the same alerted the court to the mistake. ***Id***., ¶4. Second, the judge placed his original sentencing notes in the record and those notes provided contemporaneous proof that he misspoke when declaring the sentence concurrent. ***Id***. Thus, the Court of Appeals in ***Burt*** correctly held that the increase was not prohibited and was not based upon mere reflection. *See* ***id***., ¶¶14-15.

Similarly, in ***State v. Jones,*** 2002 WI App 208, 257 Wis.2d 163, 650 N.W.2d 844, a review of the record supports the notion that the defendant's affirmative fraud, rather than mere reflection, caused the increase in the sentence. First, when affirmative and deliberate fraud is involved, the defendant intends it to influence the sentence and assuming it does so is not unfair to the defendant. Second, the record demonstrated that defense counsel spoke at length about the defendant's time at war and as a prisoner of war. ***Id***., ¶2. Most important, the trial court spoke to these claims in assessing the character of the defendant at sentencing and its remarks clearly demonstrate that the circuit court believed the lies and deemed them important to the sentence imposed. ***Id***., ¶16-17.

Judges, when crafting a sentence, would do well to follow the old carpenter's adage–"measure twice and cut once." Given the importance of prohibiting resentencing on mere reflection, this Court should continue to require something more than after-the-fact assertions of error when a circuit court wishes to increase a sentence.

CONCLUSION

For these reasons, WACDL asks that the Court reiterate that the ability of the circuit court to increase valid sentences after imposition remains limited, even when that increase does not violate double jeopardy, and that the record must contain clear and convincing evidence that the reason for the increase is not mere reflection.

Dated at Milwaukee, Wisconsin, May __, 2013.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,449 words.

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Ellen Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Ellen Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 3rd day of June, 2013, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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Robinson, J. Amicus Brief corrected.wpd