COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP800-CR **Cir. Ct. No. 2011CF938**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES A. MCINTYRE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed*.

¶1 STARK, J.[1] Charles McIntyre appeals the denial of his motion to amend his judgment of conviction. McIntyre argues the judgment of conviction sets forth an ambiguous sentence that should be resolved in his favor. We affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

BACKGROUND

¶2 McIntyre was convicted in January 2013 of five counts: Count One, fourth-degree sexual assault as a repeater; Count Two, fourth-degree sexual assault; Count Three, battery as a repeater (domestic abuse); Count Four, resisting or obstructing an officer; and Count Five, disorderly conduct (domestic abuse). He was placed on probation which was subsequently revoked.

¶3 At the sentencing-after-revocation hearing held on August 28, 2013, the circuit court first adopted the State's sentencing recommendations for Counts Three, Four and Five. The court then decided it would "adopt the recommendation as to Count 1 of one year, six months. That will be concurrent to the other counts. However—Strike that. That one will be consecutive." Finally, the court proceeded to sentence McIntyre on the second count to one year and six months' initial confinement, with six months of extended supervision, concurrent to the other counts.

¶4 The court then attempted to clarify its sentencing decision, and stated, "All of those counts, 2, 3, 4 and 5, are concurrent. However, Count 1 I am adopting the recommendation of the Revocation Summary, one year, six months' initial confinement, six months' extended supervision. That, however, will be concurrent." The court asked whether any further clarification was needed, and the district attorney responded, "I think you need to because your last statement was that Count 1 would be concurrent … I assume you meant consecutive." The court replied, "I did. Perhaps I should clarify the whole thing again. Counts 2, 3, 4 and 5 are all concurrent. Count 1 is consecutive …. Again, 2, 3, 4 and 5 are concurrent. One is consecutive."

¶5 The defense then drew the court's attention to a mistaken repeater designation for the second count. The court stated it would "amend Count 2, which is why, quite frankly, I made Count 1 a consecutive count." It decided "to run through it again …. Two through five are all concurrent to each other. On Count 1, I'm adopting the recommendation of the Revocation Summary …. That is concurrent."

¶6 A judgment of conviction after revocation was filed on August 30. It detailed McIntyre's sentences as follows:

- Count 1: one year and six months' initial confinement in state prison, with six months' extended supervision, to be served consecutive to all other counts;
- Count 2: nine months' local jail, to be served concurrent to the other counts;
- Count 3: one year and six months' initial confinement in state prison, with six months' extended supervision, to be served concurrent to the other counts;
- Count 4: nine months' local jail, to be served concurrent to the other counts; and
- Count 5: ninety days' local jail, to be served concurrent to the other counts.

¶7 On September 5, a "corrected" judgment of conviction after revocation was filed, modifying Count Two to nine months in local jail to be served consecutive to Count One, and concurrent to the other counts. An "amended" judgment of conviction was filed November 19 retracting McIntyre's eligibility for the Challenge Incarceration Program and Substance Abuse Program.

¶8 In January 2014, the Department of Corrections requested the circuit court clarify McIntyre's judgment of conviction. The Department asked

specifically about Count One, "as the judgment indicates consecutive and the oral pronouncement appears to be concurrent." The circuit court issued a written decision and order on February 7, 2014, explaining Count One was consecutive to the other counts. A fourth judgment of conviction was filed on February 21 in accordance with that order, again listing Count One as consecutive to McIntyre's other counts.

¶9 McIntyre filed a pro se motion on March 6, 2014, requesting the judgment of conviction be amended to list Count One as concurrent to the other counts. The circuit court denied his motion, and McIntyre, represented by counsel, now appeals.

DISCUSSION

¶10 The test for ambiguity in sentencing disputes is the same as that used in statutory construction disputes: whether the sentence is capable of being understood by "reasonably well-informed persons in two or more different ways." ***State v. Oglesby***, 2006 WI App 95, ¶19, 292 Wis. 2d 716, 715 N.W.2d 727. Whether a sentence is ambiguous is a question of law we review de novo. *See* ***State v. Peterson***, 2001 WI App 220, ¶¶12-13, 247 Wis. 2d 871, 634 N.W.2d 893.

¶11 Here, the circuit court repeatedly interchanged "consecutive" and "concurrent" in its oral pronouncement regarding Count One. Despite several attempts at clarification, the sentence imposed on Count One was undeniably confusing and capable of being understood by reasonably well-informed persons in two different ways. Therefore, we agree with McIntyre that the circuit court's oral pronouncement was ambiguous.

¶12 When an oral pronouncement of a sentence is ambiguous, the intent of the sentencing court "controls the determination of the terms of a sentence." ***State v. Brown***, 150 Wis. 2d 636, 641, 443 N.W.2d 19 (Ct. App. 1989). The search for the circuit court's sentencing intent is fact specific. ***Oglesby***, 292 Wis. 2d 716, ¶34. On review, we look to the written judgment, as well as the record as a whole, in order to determine the court's intent. ***Id.***, ¶¶20-21.

¶13 McIntyre argues, without authority, that the court's final oral pronouncement declaring Count One as concurrent should prevail over the conflicting written judgments. He asserts the court's intent cannot be adequately determined from the record, and that we should follow the presumption that a sentence is concurrent when the court's sentencing intention cannot be ascertained. *See* ***id.***, ¶21.

¶14 We reject McIntyre's assertion that the court's intent cannot be adequately determined from the record. The determination that the oral pronouncement was ambiguous does not preclude us from ascertaining the court's intent. The presumption McIntyre relies upon applies when there are no statutory or judicial statements to the contrary. ***Id.*** (citing ***State v. Rohl***, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991)).[2] We conclude the record as a whole, including the written judgments of conviction, clearly evidences the circuit court's intention that Count One be served consecutive to the sentences imposed on all other counts.

[2] In addition, we note the presumption that a sentence is concurrent, in situations in which it is disputed, has been questioned. *See* ***State v. Oglesby***, 2006 WI App 95, ¶21 n.6, 292 Wis. 2d 716, 715 N.W.2d 727 (citing ***State v. Rohl***, 160 Wis. 2d 325, 331, 466 N.W.2d 208 (Ct. App. 1991)); ***State v. Brown***, 150 Wis. 2d 636, 639, 443 N.W.2d 19 (Ct. App. 1989); ***State v. Morrick***, 147 Wis. 2d 185, 187, 432 N.W.2d 654 (Ct. App. 1988).

¶15 Despite the court's transposition of terms at the sentencing hearing, it is clear from the sentencing hearing transcript that the circuit court intended to make Count One consecutive. The oral pronouncement is only ambiguous because the hearing ended after the court declared Count One was concurrent without correcting itself. A complete reading of the transcript shows on every other occasion the circuit court ordered Count One to be served "concurrent," it corrected the order to be served "consecutive"—never the other way around. At the very start of its pronouncement, the court characterized Count One as concurrent, but of its own volition, immediately stated, "Strike that. That one will be consecutive." It then grouped Counts Two, Three, Four and Five together, stating, "All of those counts, 2, 3, 4, and 5 are concurrent. However, Count 1 I am adopting the recommendation of the Revocation Summary, one year, six months initial confinement, six months extended supervision. That, however, will be concurrent." Despite saying "concurrent" at that point, the court's use of grouping and the word "however" plainly indicate its intention to distinguish Count One from the other counts. Thus, when the prosecutor pointed out the court had declared Count One was concurrent, the court corrected itself. It clarified, "Counts 2, 3, 4, and 5 are all concurrent. Count 1 is consecutive …. Again 2, 3, 4, and 5 are concurrent. One is consecutive." Then, when rectifying an erroneous repeater designation on Count Two, the court said, "I'll amend Count 2 which is why, quite frankly, I made Count 1 a consecutive count."

¶16 After the hearing, three unambiguous judgments of conviction were filed, dated August 30, September 5 and November 19. Each designated Count One as consecutive.

¶17 Finally, the court issued a decision and order on February 7, 2014, affirming that Count One was consecutive in response to the Department of

Corrections' request for clarification. This was followed by a fourth judgment of conviction on February 21, reading, "Per 2/07/14 Court Order, count 1 is CONSECUTIVE to all other counts."

¶18 McIntyre contends the delay between the August sentencing after revocation and the February clarifying order is so great that it is unfair to follow the February order and corresponding judgment. Relying on ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987), he argues a trial judge may not accurately remember his or her intent from a sentencing hearing that took place a number of months earlier, and therefore, fairness requires deferring to the oral sentencing pronouncement.

¶19 McIntyre's reliance on ***Perry*** is misplaced. This court previously determined that ***Perry*** "speaks only to the situation where an unambiguous oral pronouncement conflicts with an equally clear statement of the sentence in the written judgment." ***Brown***, 150 Wis. 2d at 641. That is not the case here. McIntyre acknowledges that difference but asserts "***Perry*** nevertheless closely parallels McIntyre's case in that the judge clarified his intent regarding concurrent versus consecutive sentence in a hearing held months after the original sentence was imposed." Despite the similar gaps in time, McIntyre ignores the fact that, unlike in ***Perry***, we need not rely solely upon an order issued months after the sentencing hearing to determine the circuit court's intent. The written judgments of conviction, coupled with the context obtained from the sentencing hearing transcript as discussed above, clearly indicate the court intended to designate Count One to be served consecutive to the other counts despite repeated slips of the tongue.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.