

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 11, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2734-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT W. WILCOXSON, III,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Bayfield County:
THOMAS J. GALLAGHER, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Robert Wilcoxson appeals the trial court's modification of his sentence from one concurrent to one consecutive to another sentence following remittitur of his previous appeal. Wilcoxson contends that he could not be resentenced because the State did not seek resentencing as a remedy in his first appeal and the court of appeals ordered a two-year sentence in remanding the first appeal. We conclude that the trial court can resentence Wilcoxson in this case, but because Wilcoxson was not given notice or an opportunity to be heard before he was resentenced, we reverse.

The facts are undisputed. Wilcoxson was convicted of operating a motor vehicle without consent as a repeat offender and was sentenced to eight years concurrent to a Department of Intensive Sanctions' (DIS) sentence he was serving. Wilcoxson appealed his sentence arguing that his repeat offender status was not proven. The State, in that appeal, conceded that Wilcoxson's repeat offender status had not been sufficiently proven and requested that his sentence be commuted from eight years to the two-year maximum. In reversing the judgment, this court ordered that "the trial court shall issue a new judgment of conviction imposing a two-year sentence." *State v. Wilcoxson*, No. 96-0634-CR, slip op. (Ct. App. July 12, 1996). The circuit court entered a new judgment amending Wilcoxson's sentence from eight years to two years, but also changed the sentence from concurrent to consecutive to Wilcoxson's DIS sentence.

Wilcoxson now appeals the modification of his sentence from concurrent to consecutive and argues that the circuit court was without authority to change the concurrent term of the sentence. The State again concedes error in the sentencing because Wilcoxson was not given notice or an opportunity to be heard before the change but asserts that the circuit court has authority at a resentencing hearing to sentence Wilcoxson to a term consecutive to the DIS sentence Wilcoxson was serving. We agree and remand for a resentencing hearing.

Wilcoxson contends that this court's order in the previous appeal that a two-year sentence be imposed prevents the circuit court from holding a resentencing hearing and changing its previous sentence from concurrent to consecutive. Whether the circuit court had authority to resentence defendant presents a question of law. *State v. Martin*, 121 Wis.2d 670, 673, 360 N.W.2d 43, 45 (1985).

Wilcoxson's previous sentence was commuted under § 973.13, STATS. When a sentence is commuted under § 973.13, the sentencing court may resentence the defendant if the premise and goals of the original sentence have been frustrated. *State v. Holloway*, 202 Wis.2d 695, 701, 551 N.W.2d 841, 844 (Ct. App. 1996). In *Holloway*, the defendant's sentence had been commuted under § 973.13 and the circuit court changed the sentence from two concurrent sentences to two consecutive sentences. *Id.* at 698, 551 N.W.2d at 843. The court concluded that the sentence may be altered "in order to bring it into conformity with the law and to effectuate the court's intent." *Id.* at 702, 551 N.W.2d at 844.

The defendant concedes this general rule of resentencing, but argues that because the State failed to ask for a resentencing before remittitur that resentencing is no longer available. The trial court, however, retains discretion to resentence a defendant if its original sentencing purpose is frustrated when a sentence is modified. See *Grobarchik v. State*, 102 Wis.2d 461, 474, 307 N.W.2d 170, 177 (1981). The modification of Wilcoxson's sentence from eight years to two could have been found by the trial court to have frustrated its original sentencing purpose and goals. The trial court had authority to examine the concurrent or consecutive nature of the sentences to satisfy its original sentencing goals. See *id.* Because the trial court retains the resentencing power, the state's failure to argue for a resentencing in the first appeal before remittitur is irrelevant to the court's exercise of that power.

Wilcoxson also asserts that the express language of our remand in the previous appeal prevents the trial court from attempting any resentencing because our opinion provided for the entry of a specific sentence. See *Sutter v. DNR*, 69 Wis.2d 709, 716, 233 N.W.2d 391, 395 (1975). We do not agree. Our previous opinion was silent on whether the court could impose consecutive or concurrent sentences. The consecutive or concurrent nature of the sentence was not argued in the first appeal and the remand did not address this issue. Without a specific instruction from this court, the circuit court was free to exercise its sentencing discretion provided under § 973.013, STATS. The circuit court has the ability to resentence Wilcoxson provided the requirements of § 973.14, STATS., are satisfied and the reasons for resentencing are based on the desire to implement the goals of the original sentence scheme and are articulated on the record. See *Grobarchik*, 102 Wis.2d at 474, 307 N.W.2d at 177.

We conclude the circuit court has authority to resentence Wilcoxson with regard to whether the sentence is to be consecutive or concurrent. The State concedes that the circuit court erred in not providing Wilcoxson notice and an opportunity to be heard on resentencing. Because Wilcoxson was not given any opportunity to be heard on the issue and the circuit court failed to provide any grounds for the change, we reverse the judgment and remand for a new sentencing hearing.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.