COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2000

Cornelia G. Clark , Clerk
Court of Appeals of Wisconsin

No. 99-2860-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL B. ILKKA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

¶1 EICH, J.[1] Michael Ilkka appeals from an order directing that he begin serving a sentence for a misdemeanor traffic offense. We affirm.

[1] This case is decided by a single judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

¶2 The facts, while unusual, may be briefly stated. Ilkka was charged in Iowa County with fourth-offense drunk driving. After denial of his motion to suppress evidence, he entered a plea to the charge and was convicted. On December 23, 1998, Ilkka was sentenced to 180 days and ordered to report to the Iowa County jail on December 31 to begin his sentence. At his request, the Iowa County court added a provision permitting him to serve the sentence in Sauk County if it could be arranged. On December 30, in an unrelated case, Ilkka was convicted of fourth-offense drunk driving in the Sauk County Circuit Court and sentenced to 240 days in the Sauk County jail, with the sentence to begin the following day, December 31. Neither the Iowa nor Sauk county judges knew of the other case.

¶3 Ilkka reported to the Iowa County jail on December 31, 1998, and was directed by the Iowa County Sheriff to report to the Sauk County jail. He did and remained there for 240 days (less good time), and was released on June 28, 1999.

¶4 In August 1999, the Iowa County Sheriff's office notified the Iowa County court and district attorney that Ilkka had not yet served his Iowa County sentence; and, on August 19, the district attorney filed a motion to compel service of that sentence. Making a special appearance, Ilkka moved to dismiss the motion, arguing that the Iowa County court had lost jurisdiction over the matter and, further, that, as a matter of law, his Iowa County sentence should be deemed to have been served concurrently with the Sauk County sentence. The court granted the State's motion and ordered Ilkka to begin serving the 180-day sentence. The court reasoned that it possessed inherent power to correct certain

sentencing errors and that the error in this case was a "lack of communication" between the two counties. The court stated:

> [I]t's also clear that at the time this court was sentencing Mr. Ilkka for a fourth offense OWI, that it was asked … that this be a courtesy to Mr. Ilkka to allow him to serve that time in Sauk County.
>
> And to allow him not to even pretend to take advantage of that courtesy … and not to pretend somehow that that is intending to allow him to… claim credit for time served in Sauk County pursuant to a Sauk County sentence to be applied to an Iowa County sentence is unconscionable.

¶5 Ilkka argues first that the supreme court's decision in ***State v. Horn,*** 226 Wis. 2d 637, 594 N.W.2d 772 (1999), requires reversal of the circuit court's order for lack of jurisdiction. Specifically, Ilkka refers us to the following language in ***Horn***:

> [O]nce a defendant has been charged with a crime … convicted, sentenced, and gone through an appeal if desired, the litigation is over and the judicial process is ended. Whether a convicted defendant is sentenced to prison or the circuit court imposes probation, the "adversary system has terminated and the administrative process, vested in the executive branch of the government … has been substituted in its place." The judiciary phase of the criminal process—imposing a penalty—is complete.

Id. at 650 (citations omitted). Based on that statement, Ilkka asserts that the circuit court's "inherent powers" must "terminate once the judicial process has ended." Ilkka doesn't explain the argument further. Taking the ***Horn*** court's words at face value, we assume Ilkka cites the case for the proposition that the court loses jurisdiction once the judicial process is complete—that is, according to the quoted language from ***Horn***, when the court "impose[s] a penalty."

¶6 There is little question, however, that circuit courts in Wisconsin have plenary subject matter jurisdiction and, in addition, posses inherent power to change and modify a sentence even after the defendant has begun serving it. *See* ***State v. Borst***, 181 Wis. 2d 118, 124, 510 N.W.2d 739 (Ct. App. 1993). Ilkka counters by arguing that he has served his Iowa County sentence as a matter of law because, as the circuit court ordered, it was to begin on December 31, 1998, and was never stayed by any order of the court under WIS. STAT. § 973.15(8) (1997-98).[2] Of course it wasn't. The Iowa County court knew nothing of the Sauk County sentence, and vice-versa.[3]

¶7 It is true, as Ilkka points out, that, under Wisconsin law, sentences are considered to be "continuous" unless interrupted by escape, violation of parole or some fault of the prisoner; and that when a prisoner is erroneously discharged from a penal institution, without contributing fault on his or her part, the sentence continues to run while he or she is on liberty. ***State v. Riske***, 152 Wis. 2d 260, 264, 448 N.W.2d 260 (Ct. App. 1989). Thus, says Ilkka, his Iowa County sentence must be deemed served by operation of law. We disagree.

¶8 In ***State v. Coles,*** 208 Wis. 2d 328, 559 N.W.2d 599 (Ct. App. 1997), the defendant was sentenced on one misdemeanor and two felony convictions. On the misdemeanor count the circuit court imposed a "time-served" 185-day sentence. On one of the felony counts, the court sentenced the defendant to eight years in prison, but did not indicate whether the sentence was to run

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] The State's assertion to that effect, which cites to the record, is not disputed by Ilkka, and we take it as conceded. *See* ***Schliepper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

consecutively or concurrently with the misdemeanor sentence. On the second felony count, the court sentenced the defendant to eight years, expressly stating that that sentence was to be consecutive to the other eight-year sentence. On appeal, the defendant argued that the 185 days of "time-served" credit should be applied against the first felony sentence. He based his argument on cases holding that sentences are deemed to run concurrently in the absence of a statutory or judicial declaration to the contrary. *See* ***State v. Rohl***, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991). He also relied on the provisions of WIS. STAT. § 973.15(1), that all sentences are deemed to "commence at noon on the day of sentence."

¶9 We rejected the argument. While the defendant's legal authorities were unimpeachable, we stated that "the law is not a science and the courtroom is not a laboratory," and went on to consider the circuit court's intent in imposing the sentences, noting that in cases where the court's sentencing intent is ambiguous, we will look to the entire record to determine that intent. ***Coles***, 208 Wis. 2d at 333. We didn't have to look far in ***Coles*** because of the "time-served" nature of the first misdemeanor sentence "and the progression by which the ... court moved from sentence to sentence." ***Id.*** at 334. Most importantly, we said that "[I]f we were to adopt [the defendant]'s argument and mechanistically apply the legal principles upon which he relies, we would thwart the trial court's sentencing structure," and that

> [a]bsent an illegal sentence, we should not do so. Sentences are to be individualized to meet the facts of the particular case and the characteristics of the individual defendant. [Defendant]'s approach does not serve this end. Instead, the resulting sentences would be artificial, as if imposed in a vacuum.
>
> Undoubtedly the better practice would have been for the trial court to expressly state that the challenged

> sentence was a consecutive sentence. But that failing should not undo what nonetheless is clearly conveyed by the words and the procedure which the court otherwise did use.

Id. at 334-35.

¶10 In this case, we can't fault the circuit court for failing to direct that its sentence be consecutive to the Sauk County sentence, because it was unaware of that sentence. Indeed, it hadn't even been imposed. And it goes without saying that accepting Ilkka's argument in this case would thwart the intent of the circuit court, for it would, in effect, excuse him from serving that sentence at all.

¶11 Ilkka contends that ***Coles*** lacks precedential value because no consecutive/concurrent sentence argument is being advanced in this case. That is true. But we don't discuss ***Coles*** as an "all-fours" case. It is, rather, a guide in assessing the plain intent of the sentencing court when events—whether part and parcel of the proceedings or, as here, occurring wholly outside of the sentencing proceedings—conspire to render that sentence wholly or partially ineffective. Here that intent couldn't be more plain. The Iowa County Circuit Court's sentence was imposed with the intent that it be served; and the fact that that intent was thwarted by an apparent lack of communication between the two counties—whether at the inception of the Iowa County sentence (which, at Ilkka's own request, he was permitted to serve in Sauk County), or at the conclusion of the Sauk County sentence—should not excuse Ilkka from serving his Iowa County sentence. If the law countenanced such a result it would certainly, as Mr. Bumble said, be "a ass, a idiot."[4]

[4] Dickens, OLIVER TWIST, ch. 2.

By the Court.—Order affirmed.[5]

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

[5] Ilkka also seeks review of the circuit court's pretrial order denying his motion to suppress evidence. Any appeal from that order is time-barred, however. Denial of the motion was reviewable by direct appeal, and WIS. STAT. § 809.30 imposes a sixty-day time limit for appealing a final judgment or order. As we have noted above, Ilkka was convicted in December 1998, and never appealed the judgment of conviction. It is true, as Ilkka posits, that WIS. STAT. § 809.10(4), states that "[a]n appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant … made in the action or proceeding not previously appealed and ruled upon." He claims that the court's order directing him to serve his sentence is the "final judgment" in this case, and thus his appeal from that order brings the pretrial suppression-motion denial before us as well. We disagree. The 1998 judgment of conviction was the final order in his case, and he elected not to appeal. He may not do so now. *See* ***State v Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994) (defendant who failed to appeal his conviction could not later, when his probation was revoked, move to withdraw his original guilty plea because the "deadline for filing a direct appeal from the judgment of conviction had long since expired.").