

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 5, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2994-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY R. COOKE,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Randy R. Cooke seeks to avoid a nine-month jail sentence on charges arising from harassment of his ex-wife. Cooke contends that the circuit court erroneously exercised its discretion by imposing an unduly harsh

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

sentence and violated his due process rights by relying upon incorrect information. He insists that he is entitled to sentence credit for time spent under house arrest as a condition of bond pending this appeal. Finally, he believes that his sentence should be deemed served because there was no room in the county jail when he decided he wanted to start serving his sentence. We reject Cooke's line of reasoning and all of his claims and affirm.

¶2 In 1997 Cooke was charged in an amended criminal complaint with one count of violation of a domestic abuse injunction, one count of intimidating a witness, and one count of disorderly conduct, contrary to WIS. STAT. § 813.12(8), § 940.44(2) and § 947.01. As part of a plea agreement, Cooke entered a no contest plea to the charges of violating a domestic abuse injunction and disorderly conduct; the charge of intimidating a witness was dismissed and read in. The circuit court withheld sentence and imposed three years of probation on each count along with a fine and conditions of probation.

¶3 Cooke's probation agent initiated probation revocation proceedings in February 1999 because of Cooke's numerous violations of the conditions of probation. Although Cooke waived the administrative revocation of his probation, the circuit court conducted a revocation hearing and ordered Cooke's probation revoked.² Shortly after the circuit court ordered Cooke's probation revoked, it held a new sentencing hearing. After hearing from counsel, the circuit court imposed six months in jail on the charge of violating a domestic abuse injunction

² Subsequent to the court-conducted probation revocation hearing, the Wisconsin Supreme Court held that administrative revocation of probation does not unduly burden or substantially interfere with the judiciary's constitutional function to impose criminal penalties and terminated circuit court-conducted probation revocation hearings. *See State v. Horn*, 226 Wis. 2d 637, 653, 594 N.W.2d 772 (1999).

and three months in jail, consecutive, on the charge of disorderly conduct. Upon motion by Cooke's attorney, the court released Cooke on bond pending appeal. The court imposed stringent conditions of bond: (1) "strict house arrest, except work & family court hrg. w/presiding magistrate's permission"; (2) "no contact w/Patricia Cooke whatsoever"; (3) "D.A. will [have] authority to equip w/electronic monitoring"; and (4) "deft. will have to consent to a wire tap by the D.A.'s office."

¶4 Cooke filed several postconviction motions in July 1999. First, he sought a modification of the sentence because the sentence imposed was unduly harsh and shocked the conscience of the community and his due process rights were violated by the court's reliance upon a victim impact statement containing false information. Second, he sought sentence credit under WIS. STAT. § 973.155(1)(a) for every day that he was under strict house arrest with electronic monitoring while on bond pending appeal. Finally, he sought to have the sentence vacated or deemed satisfied under the holding of *State v. Riske*, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989).

¶5 The court denied all of Cooke's motions. First, the court held that the sentence was not unduly harsh because it was proportional to Cooke's prior record and the multiple violations of the probation condition that Cooke not possess a firearm. Second, the court stated that in sentencing Cooke it did not rely upon information in the victim impact statement that was disputed by Cooke; therefore, there was no violation of his due process rights. Third, the court held that the stringent conditions of bond pending appeal were not the functional equivalent of custody, and Cooke was not entitled to sentence credit under WIS. STAT. § 973.155(1)(a). Finally, the court denied the *Riske* motion, reasoning that Cooke's jail sentence was not delayed between the date he was ordered to report to

jail and the date he was finally accepted into the jail. Cooke appeals all of the court's rulings denying his motions.

¶6 We will first consider whether the sentence was a misuse of the circuit court's discretion because it is unduly harsh and shocks the conscience of the community. A circuit court may review its sentence for a misuse of discretion if it concludes that the sentence was unduly harsh or unconscionable. *See Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979). We review a court's conclusion that a sentence it imposed was not unduly harsh or unconscionable for an erroneous exercise of discretion. *See State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990). We are not limited to the transcript of the sentencing, but can consider any remarks the court made during postconviction proceedings that explain the sentence imposed. *See State v. Santana*, 220 Wis. 2d 674, 683, 584 N.W.2d 151 (Ct. App. 1998).

¶7 Cooke asserts that the jail sentence imposed "is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment" and constitutes an erroneous exercise of the court's sentencing discretion. He maintains that six months in jail for violating a domestic restraining order is unusual. He points out that "[t]here was no violence committed against Mr. Cooke's ex-wife. There was no physical altercation between Mr. Cooke and his ex-wife. There were no weapons involved." Therefore, he reasons that this was not an aggravated or vicious offense and the sentence is excessive.

¶8 When Cooke was originally placed on probation, the court stated that it could not deal lightly with his conduct that led to the charges. The charges against Cooke arose out of a phone call he made to his ex-wife on June 22, 1997, in violation of a domestic abuse injunction that prohibited him from contacting

her. During the telephone conversation, Cooke told his ex-wife that “she needs to go to Lake County and confess to filing a false report” and if she did not, “things are going to get real nasty.”

¶9 At sentencing after probation revocation, the circuit court focused on Cooke’s repeated failure to follow rules, either contained in restraining orders or in the conditions of probation. The probation revocation was precipitated by Cooke’s arrest in Alabama for firing a .357 pistol at a deer decoy and his admission that he had been drinking—both activities which were in violation of his conditions of probation. Another impetus for the revocation was Cooke’s failure to promptly report the Alabama incident to his probation agent. Other incidents that supported the probation revocation included Cooke’s purchase of a firearm in violation of the probation conditions, his refusal to submit written statements, and his refusal to cooperate in a search of his residence for firearms. The court also considered Cooke’s prior record which included convictions for carrying a concealed weapon and reckless use of a weapon.

¶10 After our independent review, we observe that the circuit court properly considered the primary sentencing factors of the gravity of the offense, the character of the defendant and the need for the protection of the public. *See State v. Kourtidas*, 206 Wis. 2d 574, 588, 557 N.W.2d 858 (Ct. App. 1996). We cannot quarrel with the court’s stated concerns that many of Cooke’s prior convictions were for weapons violations, that two precipitating reasons for the revocation were violations against ownership of weapons and that he had trouble following the law and the rules of probation. Further, we agree with the circuit court’s assessment that Cooke has repeatedly demonstrated that he will not obey the law, the orders of the court and the rules of probation. In fact, Cooke’s

continual failure to comply with the law is more than enough justification for the sentence imposed.

¶11 We agree with the circuit court that this background justifies confinement, especially because Cooke failed to comply with the law twice while on probation. The sentence imposed by the circuit court is justified because of Cooke's character and prior record, and the sentence is not so excessive, unusual and disproportionate to the offense as to be an erroneous exercise of the court's sentencing discretion.

¶12 We next turn to Cooke's claim that his due process rights were violated when the circuit court relied upon untrue and incorrect information contained in a victim impact statement in imposing sentence. Cooke provides excerpts of his ex-wife's testimony in different court proceedings and argues that the differences and inconsistencies in the testimony she gave represent incorrect information. He asserts that "the court relied somewhat on the victim's impact statement There was false information in that report....," and this constitutes a violation of his due process rights.

¶13 We agree with Cooke that he has a due process right to be sentenced on the basis of correct information. *See State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). But that is as far as we will go because we find no evidence in the record that the circuit court placed any reliance upon the victim impact statement; moreover, the court took pains to explain the reasons why it did not rely upon the victim impact statement.

¶14 At the first sentencing hearing where Cooke was placed on probation, the court began the discussion of the reasons for the sentence to be imposed by disavowing the victim impact statement.

Well, I know better than to get involved in the thicket of one of these divorces, and I have no reason to disbelieve or believe anything anybody tells me; and sometimes neither of them is telling the truth, sometimes both of them are telling the truth. Sometimes one of them is telling the truth and not the other. I don't have it in my power to be able to decipher that in most instances.

¶15 At the sentencing after revocation, Cooke charged that the court relied upon his ex-wife's victim impact statement twice. The court replied, "[O]ne can be badly misled by relying too heavily on what his ex-wife says. And I don't mean by saying that to suggest anything that your wife has written or said is not accurate. What I'm saying is that it comes from the source that has reason to be biased. And so I don't want to get too involved in that."

¶16 Finally, at the postconviction hearing, after Cooke's counsel complained that before sentencing the district attorney had written a letter to the court with incorrect information, the court interrupted counsel and reiterated its previous statements:

It is not my practice to in sentencing people rely on unsworn information or unadmitted information. And in this case I was well aware of Mr. Cooke's denials of his wife's allegations both in other matters and in the victim impact statement. Now, it would be rare, if ever, that it would occur where I would place any reliance at all on disputed hearsay without explicitly stating that I was

... I do not believe that I relied upon anything that the wife had said that was not part of the admitted content of the conduct in this case in this sentencing. So it's really quite irrelevant what the district attorney may have said unless there is something in the record that suggests that I did rely on something.

¶17 We have no reason to doubt the court's denial that it relied upon the victim impact statement. During our independent review of the record, we failed to unearth any statement by the court that even remotely relied upon the victim

impact statement. As we held earlier, the court properly premised its sentence on Cooke's repeated failures to bring himself into compliance with the law, court orders and the conditions of probation along with his prior convictions for weapons violations.

¶18 Next, we turn to Cooke's contention that he is entitled to "dead time credit" under WIS. STAT. § 973.155(1)(a) for every day that he was on bond pending appeal because the condition of house arrest, with electronic monitoring, was so onerous that it was the functional equivalent of custody. Cooke is reasoning that the conditions of bond were so stringent that his freedom of movement was restricted and represented significant limitations on his liberty. Relying upon *State v. Collett*, 207 Wis. 2d 319, 558 N.W.2d 642 (Ct. App. 1996), Cooke argues that under these circumstances he was under the control of a state agent and the legislature intended that he be given sentence credit.

¶19 *Collett* is of no help to Cooke. In *State v. Magnuson*, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536, the supreme court rejected the case-by-case approach adopted in *Collett* because it "imposes an unnecessary burden upon [the] courts and hinders consistency." *Id.* at ¶22. The *Magnuson* court adopted a bright-line test: "[A]n offender's status constitutes custody for sentence credit purposes when the offender is subject to an escape charge for leaving that status." *Id.* at ¶47.

¶20 Applying this test to the facts of this case, we conclude that Cooke is not entitled to any sentence credit because he was not in a status that subjected him to an escape charge. Cooke was under house arrest as a condition of bond pending appeal. *See* WIS. STAT. RULE 809.31. He was not in actual or constructive custody serving a jail sentence because the circuit court had stayed

the jail sentence pending appeal. If he had left the house for a reason other than to go to work or to attend a family court hearing, he could not have been charged with escape under WIS. STAT. § 946.42. If Cooke had failed to comply with the conditions of the bond pending appeal, the only criminal charge that he would have been subject to would be bail jumping under WIS. STAT. § 946.49.

¶21 Finally, we consider Cooke's request that his sentence be vacated or deemed to have been satisfied. Cooke's sole support for this proposition is *Riske*, where we held that when a defendant is ordered to report to jail and is refused admission because of overcrowding, he or she is entitled to a sentence credit. Cooke claims to have been rebuffed by the Kenosha county jail and the Walworth county jail when, several months after being granted bond pending appeal, he called and requested they permit him to begin serving his jail time. Because there was no room in the jail, Cooke claims he is entitled to a sentence credit for every day that has elapsed since he sought to begin serving his sentence.

¶22 *Riske* is inapplicable for the reason that at Cooke's request, the court had stayed his jail sentence. There was no jail sentence to be served when Cooke allegedly made his calls to the county jails. He cannot unilaterally vacate the stay of the sentence. If Cooke had been sincere in wanting to begin serving the sentence, his only course of action would have been to file a motion with the court to vacate the stay of the judgment, rescind the bond pending appeal and set a date to report to the jail.

By the Court.—Judgments and orders affirmed.

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

