

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 9, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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.

**Appeal Nos. 2010AP681
2010AP682
2010AP683**

**Cir. Ct. Nos. 2004CF717
2004CF1011
2004CF1239**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY M. KAMAKIAN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Kelly Kamakian believes that his reconfinement term was eighteen months; the circuit court found that the term was thirty-six

months. In these consolidated appeals, Kelly Kamakian appeals from the circuit court's orders rejecting his claim. We conclude that the reconfinement orders control, and the reconfinement term was thirty-six months. We therefore affirm the circuit court's orders.

¶2 The circuit court entered reconfinement orders in February 2008. The first order imposed eighteen months for operating while intoxicated (5th or greater offense) in Racine county circuit case No. 2004CF717. The second order imposed two eighteen-month terms for bail jumping in Racine county circuit court case Nos. 2004CF1011 and 2004CF1239 concurrent to each other but consecutive to the eighteen-month operating while intoxicated sentence.

¶3 In June 2008, Kamakian asked the circuit court to clarify that the reconfinement term was eighteen months rather than thirty-six months as the department of corrections had calculated. The circuit court determined that the department of corrections had properly determined the reconfinement term.

¶4 In December 2009, Kamakian again complained to the circuit court that the reconfinement term was eighteen months. At the hearing on Kamakian's challenge, the circuit court found that the reconfinement structure was intended to mirror the overall structure of the three original sentences: an eighteen-month sentence for operating while intoxicated and two eighteen-month bail jumping sentences concurrent to each other but consecutive to the operating while intoxicated sentence, for a total of thirty-six months. Therefore, the court found that Kamakian was reconfined for two eighteen-month terms, not one eighteen-month term. Kamakian appeals.

¶5 On appeal, Kamakian argues that the reconfinement orders did not reflect what the circuit court ordered at the reconfinement hearing. As Kamakian characterizes the hearing, the circuit court imposed eighteen months of reconfinement for all counts with the balance to be used for extended supervision. In so arguing, Kamakian relies upon the rule that where there is a conflict between a court’s oral pronouncement and a written order, the oral pronouncement controls with any uncertainty resolved in favor of the defendant. *State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987). Kamakian argues that there is such a conflict and that the oral pronouncement controls.

¶6 The State counters that the threshold question is whether the oral pronouncement and the reconfinement orders are unambiguous. Only if the oral pronouncement and the reconfinement orders are both unambiguous will the oral pronouncement control. *State v. Lipke*, 186 Wis. 2d 358, 364, 521 N.W.2d 444 (Ct. App. 1994). However, when the oral pronouncement is ambiguous, the reviewing court reviews the record as a whole, including the reconfinement orders, to determine the circuit court’s intent. *See id.*; *State v. Oglesby*, 2006 WI App 95, ¶¶20, 25, 292 Wis. 2d 716, 715 N.W.2d 727. We agree that this is the proper approach in this case

¶7 The test for ambiguity in sentencing¹ pronouncements is the same as that employed in statutory construction disputes. *Oglesby*, 292 Wis. 2d 716, ¶19. The question is whether the language at issue “is capable of being understood by reasonably well-informed persons in two or more different ways.” *Id.* Ambiguity

¹ Reconfinement is akin to sentencing. *State v. Swiams*, 2004 WI App 217, ¶¶4, 23, 277 Wis. 2d 400, 690 N.W.2d 452.

is a question of law. *See State v. Peterson*, 2001 WI App 220, ¶13, 247 Wis. 2d 871, 634 N.W.2d 893. Whether a reconfinement order should be corrected also presents a question of law. *See State v. Prihoda*, 2000 WI 123, ¶8, 239 Wis. 2d 244, 618 N.W.2d 857 (applying rule to judgments of conviction). We review questions of law de novo. *State v. Ploeckelman*, 2007 WI App 31, ¶8, 299 Wis. 2d 251, 729 N.W.2d 784.

¶8 We agree with the State that the oral pronouncement at the reconfinement hearing was ambiguous. At the reconfinement hearing, the circuit court reviewed the structure of the original sentences. The court then made multiple statements about the reconfinement terms that, when considered together, created ambiguity. First, the court stated that “the amount of confinement necessary to protect the public and to meet your rehabilitation needs, which are continued treatment, is to reincarcerate you for eighteen months.” The court then stated that such a sentence would leave eighteen months of extended supervision in the community after release from reconfinement. Defense counsel then asked the court to clarify that the eighteen months of reconfinement was for case No. 2004 CF717 (operating while intoxicated). The court agreed with this description and stated that “on all the other files as I read it they’re concurrent ES times.”

¶9 The State posits various interpretations of the reconfinement terms the circuit court intended to impose, but we need only focus on the fact that under no scenario would Kamakian have only eighteen months of extended supervision upon release from eighteen months of reconfinement. Because Kamakian successfully completed the earned release program, the court had three years, one month and fifteen days available for reincarceration in the operating while intoxicated case (case No. 2004CF717) and two concurrent three-year sentences

for the bail jumping cases (case Nos. 2004CF1011 and 2004CF1239) to be served consecutively to the operating while intoxicated case. All of this available time had to be accounted for in the circuit court's reconfinement scheme, and eighteen months of reconfinement and eighteen months of extended supervision does not account for all of this time.

¶10 When faced with an ambiguous oral pronouncement, we turn to the record as a whole, including the reconfinement orders, to determine the circuit court's intent. See *Oglesby*, 292 Wis. 2d 716, ¶¶20, 25. We find that intent in three places. The reconfinement orders impose thirty-six months of reconfinement time. On two occasions, when asked to clarify the reconfinement scheme, the circuit court stated that the reconfinement term was thirty-six months. In an August 7, 2008 notation on Kamakian's June 24, 2008 letter, the court stated that the reconfinement sentence was as it appeared in the reconfinement orders. Finally, at the hearing on Kamakian's request to modify his reconfinement terms, the court referred back to the original sentencing structure and stated that the reconfinement structure was supposed to mirror the original sentencing structure. We conclude that the court's intent was expressed in the reconfinement orders, and it properly denied Kamakian's request for sentence modification.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

