

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 15, 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 No. 2010AP1463-CR**

**Cir. Ct. No. 2006CF61**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL D. WAITE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Waite appeals an amended judgment sentencing him after revocation of his probation and an order denying his motion to reinstate the sentence imposed in the initial judgment. Because we conclude

that Waite had a legitimate expectation of finality in the sentence initially imposed and amendment of the sentence violated Waite's double jeopardy right, we reverse the judgment and order and remand the matter for reinstatement of the initial sentence on count two, bail jumping.

¶2 In the initial judgment, the court sentenced Waite to consecutive terms of three years' initial confinement and two years' extended supervision for domestic abuse criminal damage to property, and one year initial confinement and one year extended supervision for bail jumping. One month later, the Department of Corrections sent the court a letter noting that the penalty imposed for domestic abuse criminal damage exceeded the statutory maximum. Four and one-half months after the Department's letter, the court conducted a hearing and "flip-flopped" the two sentences, making the total sentence the same by decreasing the sentence for domestic abuse criminal damage and increasing the sentence for bail jumping. Waite objected to the increased sentence for bail jumping, arguing that it violated his double jeopardy right. Following briefing, the circuit court rejected Waite's double jeopardy argument, finding that because Waite originally knew he would serve four years' initial confinement and after the modification he would still serve four years' initial confinement, his expectation of finality had not changed.

¶3 Whether the change in the sentence structure violates Waite's double jeopardy right is a question of law that we decide without deference to the circuit court. *State v. Gruetzmacher*, 2004 WI 55, ¶15, 271 Wis. 2d 585, 679 N.W.2d 533. Although *Gruetzmacher* did not specifically address the need to consider the discrete sentences when applying the double jeopardy analysis, we conclude that *Gruetzmacher* prohibits applying this analysis to the total sentences imposed. In *Gruetzmacher*, the circuit court amended the sentences to rectify a sentencing

error but left the total amount of initial confinement unchanged. The double jeopardy analysis employed by the Wisconsin Supreme Court would have been unnecessary if the court had only been concerned with the collective sentences. Therefore, this court must determine whether the increase in the sentence for bail jumping violated Waite's double jeopardy right.

¶4 The sentencing court may modify the sentence to correct a mistake without violating a defendant's double jeopardy right "where the court promptly recognizes the error, and where the court, by reducing an erroneous original sentence on one count and increasing the original sentence on another, seeks to impose a lawfully structured sentence that achieves the overall disposition that the court originally intended." *Id.*, ¶14 (emphasis added). In *Gruetzmacher*, the circuit court recognized its error on the same day it imposed the sentence. It stayed Gruetzmacher's transfer to the prison and promptly set a hearing date to correct the error. *Id.*, ¶38. Therefore, the supreme court concluded that *Gruetzmacher* did not have a legitimate expectation of finality, the keystone to the double jeopardy analysis. *Id.*, ¶33.

¶5 In contrast, Waite had a legitimate expectation of finality. One month after his transfer to the prison, the Department of Corrections discovered the sentencing error. The amended sentence was not imposed until four months after the error was discovered. Because, unlike the court in *Gruetzmacher*, the court here did not promptly rectify its error, Waite could legitimately expect no

increase in the sentence for bail jumping. Under WIS. STAT. § 973.13 (2009-10),<sup>1</sup> the excessive sentence was deemed commuted without further proceedings.

¶6 The State argues that Waite never stated at the hearing that his expectation of finality was upset by the restructuring of the sentence. This argument fails to consider Waite’s double jeopardy argument in his motion to vacate the amended sentence and his brief in support of the motion stating “this fact actually supports Waite’s argument that he had a legitimate expectation that he was receiving one year initial confinement on count two.” The court’s failure to correct the sentence for four months after Waite was informed that the sentence on count one exceeded the statutory maximum created a reasonable expectation that the excessive sentence would be reduced without any corresponding increase in the sentence for count two.

*By the Court.*—Judgment and order reversed and cause remanded.

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

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<sup>1</sup> All references to the Wisconsin Statutes refer to the 2009-10 version unless otherwise noted.

