

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 21, 1995

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. 94-1692-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MALCOLM J. CAMPBELL,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Malcolm J. Campbell appeals from a judgment¹ and a postconviction order. He claims that (1) he was convicted under a

¹ We review the judgment entered December 3, 1993 and the amended judgment entered May 26, 1994. The amended judgment increases Campbell's sentence credit.

nonexistent statute; and (2) he is entitled to resentencing because the trial court relied on information about events that occurred after the original sentencing.² We conclude that: (1) the trial court's oral decision, which the court reporter incorrectly transcribed is not so ambiguous that we must reverse the judgment; and (2) Campbell has not proven, by clear and convincing evidence, that the trial court relied on improper information when it resentenced him. We therefore affirm.

In a trial to the court, the trial court found Campbell "guilty of four Counts of a violation of 942.25(1)(d)." However, there is no § 942.25(1)(d), STATS. At the request of appellant's counsel, the court reporter verified from her notes that the trial court found Campbell guilty of violating section "nine, forty, two, twenty-five, sub-section one, sub-section `d.'" However, the court reporter had incorrectly transcribed the statutory section as 942.25(1)(d), rather than 940.225(1)(d), STATS., 1987-88. Because of this transcription error, Campbell claims that he was convicted under a nonexistent statute and the judgment must be vacated.

The postconviction court ruled that the oral decision was ambiguous. It reviewed the record, including the complaint, information and judgment, and determined that the trial court intended to convict Campbell of violating the appropriate statute, § 940.225(1)(d), STATS., 1987-88. The court corrected the defective reference. *See* RULE 809.15(3), STATS.

"When there is an ambiguity in the oral sentencing, as opposed to a conflict between the oral pronouncement and the written judgment, it is proper to look to the written judgment to ascertain the court's intention." *State v. Brown*, 150 Wis.2d 636, 641, 443 N.W.2d 19, 22 (Ct. App. 1989) (quoting *United States v. Purcell*, 715 F.2d 561, 563 (11th Cir. 1983)). "[A]n omission [such as failing to specify placement of the decimal] in the oral pronouncement could create an ambiguity which would require the appellate court to determine the court's intent from other parts of the record, including the judgment of conviction." *State v. Lipke*, 186 Wis. 2d 358, 364, 521 N.W.2d 444, 446 (Ct. App. 1994) (emphasis in original) (citation omitted). We conclude that this rule

² On direct appeal, we reversed and remanded for resentencing. Thus, the resentencing occurred six years after Campbell was originally sentenced.

applies equally to the trial court's oral announcement of its decision on the merits.

Campbell relies on *State v. Perry*, 136 Wis.2d 92, 114, 401 N.W.2d 748, 758 (1987), which holds that the trial court's oral announcement of its decision controls over the written judgment. However, *Perry* applies to unambiguous oral decisions. *Id.*; *State v. Brown*, 150 Wis.2d 636, 641, 443 N.W.2d 19, 22 (Ct. App. 1989) (emphasizing the distinction between ambiguous and unambiguous oral decisions).

Campbell also contends he is entitled to resentencing because the court improperly relied on his after-sentencing correspondence to the victims and their families. Although a defendant must be resentenced on the circumstances as they existed at the original sentencing,³ Campbell stipulated to the resentencing court's consideration of supplemental information. After the resentencing court became aware of Campbell's after-sentencing actions, Campbell reneged on the stipulation. Although Campbell objected to the supplemental information contained in the pre-sentence investigation report, he did not specifically object to testimony about Campbell's unwelcome communications, which occurred after the original sentencing. The resentencing court offered "to the best of its ability ... to exclude what it learned from the Pre-Sentence Investigation Report which was supplemental, and the court will not consider it."

The resentencing court stated that it had not considered Campbell's unwelcome correspondence to the victims and their families. Campbell insists that the resentencing court could not have included a "no-contact" provision in the judgment had it not considered his unwelcome contacts. Campbell argues that the no-contact provision shows that the resentencing court was aware of his unwelcome communications, and he contends that the court punished him for the communications by imposing a longer sentence.⁴

³ *State v. Solles*, 169 Wis.2d 566, 569, 485 N.W.2d 457, 458 (Ct. App. 1992).

⁴ Campbell does not challenge the propriety of the no-contact provision, except insofar

We reject Campbell's argument. The State does not dispute that the resentencing court was aware of Campbell's unwelcome communications. However, we find nothing in the record to allow the inference that the court imposed a more severe sentence on him to punish him for communicating with the victims and their families. It was, however, appropriate for the resentencing court to prohibit Campbell from further contacts with the victims and their families. Such a prohibition is not, however, punishment.

Campbell must prove, by clear and convincing evidence, that the court considered improper information and that he was prejudiced by it. *See State v. Littrup*, 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). The resentencing court repeatedly stated that it did not consider this information. Our review of the record shows that the resentencing court considered the proper factors in resentencing Campbell. *See State v. Larsen*, 141 Wis.2d 412, 426-27, 415 N.W.2d 535, 541 (Ct. App. 1987).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

(..continued)
as it purportedly demonstrates consideration of improper information.