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DISTRICT II

October 23, 2024

To:

Hon. Ryan J. Hetzel
Circuit Court Judge
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Nathaniel Emery Adamson
Electronic Notice

Hector Salim Al-Homsi
Electronic Notice

Howard Leventhal #174956
Ozaukee County Jail
1201 S. Spring Street
Port Washington, WI 53074

You are hereby notified that the Court has entered the following opinion and order:

2024AP1665-CR State of Wisconsin v. Howard Leventhal (L.C. #2024CF261)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Howard Leventhal, pro se, petitions for leave to appeal a non-final order¹ denying his motion to dismiss the complaint against him on the grounds that this prosecution violates double jeopardy. Based upon our review of the briefs and limited materials from the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22). We summarily affirm.

¹ We grant Leventhal's petition for leave to appeal in accordance with *State v. Jenich*, 94 Wis. 2d 74, 288 N.W.2d 114 (1980).

In 2021, the State charged Leventhal with two counts of stalking in Ozaukee County Circuit Court case No. 2021CF16. *State v. Leventhal*, No. 2021AP1184-CR, unpublished op. and order at 1 (WI App Mar. 29, 2023). Pursuant to a plea agreement, Leventhal pled no contest to one count of stalking his ex-wife. *Id.* at 1-2. A second count for stalking his adult daughter was dismissed and read-in. *Id.* Part of Leventhal’s method of harassment was to file frivolous lawsuits against his victims. *Id.* at 2 n.2. On May 19, 2021, the circuit court withheld sentence and placed Leventhal on probation for three years. *See id.* at 2. We affirmed his conviction on direct appeal. *Id.* at 3.

Leventhal’s probation was later revoked. In December 2023, the circuit court sentenced him following revocation. Leventhal is currently challenging his sentence after revocation in appeal No. 2024AP95.

On June 21, 2024, the State again charged Leventhal in a two-count complaint with stalking his ex-wife and his adult daughter. The charges were enhanced because of Leventhal’s previous stalking conviction. The complaint generally alleged that between February 7, 2022 and April 30, 2024, Leventhal filed lawsuits against his ex-wife, including her extended family, and his adult daughter.

On July 15, 2024, Leventhal moved to dismiss the complaint on the grounds of double jeopardy. Specifically, he argued the State’s new prosecution violated the double jeopardy clause because he had been charged for the same conduct that was the basis for the revocation of his probation in Ozaukee County Circuit Court case No. 2021CF16. He asserted he could not be placed in “jeopardy a second time, for identical fact allegations under which he has already been sentenced.” Following a motion hearing, the circuit court denied Leventhal’s motion to dismiss based on double jeopardy.

Leventhal petitioned for leave to appeal the circuit court’s non-final order. To facilitate review of Leventhal’s double jeopardy claim, we ordered Leventhal to make “arrangements for the preparation of the portions of the transcript pertinent to the double jeopardy issue and identify relevant portions of the record to enable the clerk of circuit court to transmit the record to the clerk of this court within 45 days of the date of this order.” We also ordered Leventhal to file a brief “addressing the merits of the double jeopardy issue” within forty-five days of the date of that order. The State was required to file a response brief, and Leventhal was permitted to file a reply brief.

At the outset, we did not receive a record from the circuit court clerk or a transcript of the double jeopardy motion hearing. It is unclear whether Leventhal made arrangements to have the transcript prepared or record items transmitted to this court. The parties have, however, fully briefed the merits of Leventhal’s double jeopardy claim.² In the State’s response, it recognizes that no transcript or record has been filed. The State, nevertheless, asks us to review Leventhal’s double jeopardy claim on the merits because the dispute implicates a question of law and to promote judicial economy. We agree with the proposed course of action.

Whether Leventhal’s double jeopardy protections have been violated is a question of law that we review de novo. *State v. Jones*, 2002 WI App 208, ¶8, 257 Wis. 2d 163, 650 N.W.2d 844. “The underlying purpose for this protection ... is to prevent the State from using its

² In his briefs, Leventhal has included other issues he wants this court to review and decide. However, by order dated August 20, 2024, we limited the briefs to the “merits of the double jeopardy issue.” We take no action on the other issues raised in Leventhal’s briefs because they are not properly before this court.

resources and power to make repeated attempts to convict a person for the same offense.” *State v. Seefeldt*, 2003 WI 47, ¶15, 261 Wis. 2d 383, 661 N.W.2d 822.

In his brief, Leventhal argues he is being “plac[ed] at jeopardy again” because the new criminal complaint is a “cut and paste version of” his revocation packet. He asserts double jeopardy is implicated because he was sentenced after revocation “based upon the conduct described in the Revocation Summary” and because he is now being prosecuted for the same conduct.

We disagree. The case law is settled that revocation is not considered punishment within the meaning of double jeopardy. *State v. Schreiber*, 2002 WI App 75, ¶14, 251 Wis. 2d 690, 642 N.W.2d 621. As we explained in *State v. Verstoppen*, 185 Wis. 2d 728, 736-37, 519 N.W.2d 653 (Ct. App. 1994), the imposition of a sentence after revocation is not the imposition of a new punishment but rather is a continuing consequence flowing from the original conviction. “The sentence [a probationer] is required to serve upon revocation is the *punishment for the crime of which [the probationer] has previously been convicted*’ and [only] involves changing the manner of serving the previously imposed sentence.” *Id.* (quoted source omitted). Probation revocation is not a criminal proceeding “designed to punish a defendant for [the] newly charged wrong” *Id.* at 736.

Here, although Leventhal’s conduct giving rise to the charges in this case may have been one of the reasons for terminating his probation on the earlier offense and imposing a sentence after revocation, that sentence constitutes punishment for the earlier offense, not the present one. Leventhal’s new charges for stalking his ex-wife and daughter after he was placed on probation are not barred by double jeopardy.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals