COURT OF APPEALS
DECISION
DATED AND RELEASED

September 6, 1995

No. 95-0882-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. JOHNSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Reversed and cause remanded.*

SNYDER, J. Donald J. Johnson appeals from the increased penalties imposed on his resentencing for two convictions of disorderly conduct (repeater), contrary to §§ 947.01 and 939.62, STATS. Johnson contends that the three-year sentence increase after he began to serve the original sentences violates his double jeopardy rights. We agree and reverse.

The facts are undisputed. On March 7, 1992, Johnson committed two counts of disorderly conduct while an inmate at the Kenosha county jail

awaiting trial on charges of felony battery and second-degree reckless endangerment. A jury convicted Johnson of the battery and reckless endangerment charges, and he received an eleven-year prison sentence on July 31, 1992.[1] He appealed those convictions.

On January 23, 1993, Johnson entered pleas of no contest to the March 7, 1992, disorderly conduct charges and received concurrent sentences of two years, consecutive to the existing eleven-year sentence. On April 27, 1994, his battery and reckless endangerment convictions were reversed on appeal and the matters remanded for a new trial.[2] The remitted matters were scheduled for trial on November 7, 1994.

A hearing to address the impact of the vacation of the eleven-year sentence on the disorderly conduct charges occurred on August 16, 1994.[3] At that hearing, Johnson was resentenced to consecutive prison terms of two and three years, an increase of three years over the original sentence.[4]

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[1] Johnson was sentenced to three years on the felony battery charge and eight years consecutive on the reckless endangerment charge.

[2] ***State v. Johnson,*** 184 Wis.2d 324, 516 N.W.2d 463 (Ct. App. 1994).

[3] Normally, a sentence review occurs in response to a defendant's motion to modify a sentence pursuant to § 973.19, STATS., or a defendant's motion for postconviction relief pursuant to § 974.06, STATS. Here we have neither. We note that defense counsel told the trial court that the prosecutor "was wise in bringing [the sentence status] before the Court" and conclude that the matter was brought as a State motion for resentencing. Johnson did not object to the hearing, contending that the concurrent sentences had been retroactively served with two years and 162 days credit.

[4] At the original sentencing, the State had recommended "two years on each count, consecutive to each other and consecutive to the time that the defendant is presently serving." At the resentencing hearing, the State recommended "the maximum amount of time, which would be six years on the sentence retroactive to the original sentencing date."

Whether Johnson's second, harsher sentence violates due process protections presents a question of constitutional fact. We review such questions independently of the trial court's determination. ***State v. Turner,*** 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987). Moreover, the historical facts are not in dispute, permitting us to engage in an independent review. ***Id.***

We begin by addressing whether Johnson's double jeopardy argument is cognizable under these facts. The issue of double jeopardy arises in multiple punishments for the same offense. ***State v. Martin***, 121 Wis.2d 670, 675, 360 N.W.2d 43, 46 (1985). In Wisconsin, the double jeopardy guarantee prevents a trial court from increasing a sentence after the defendant has commenced serving the sentence. ***Id.*** at 677, 360 N.W.2d at 47.

This rule is subject to exceptions that depend upon the reason for the increased penalty at resentencing. Double jeopardy does not apply where a correction to an original invalid sentence results in a sentence increase, ***id.*** at 677-78, 360 N.W.2d at 47 (citing ***Bozza v. United States,*** 330 U.S. 160, 167 (1947)), or where an increased sentence occurs after a retrial. ***Id.*** at 678, 360 N.W.2d at 47 (citing ***North Carolina v. Pearce,*** 395 U.S. 711, 723 (1969), *overruled on other grounds*, 490 U.S. 794 (1989)). These exceptions do not apply to Johnson; the validity of his original sentences is not disputed, and he was not retried.

Johnson was originally sentenced to a total of two years in prison for the disorderly conduct convictions. The addition of three years to that sentence clearly represents additional punishment for the same two offenses. We are satisfied that Johnson's double jeopardy argument is cognizable.

We now address whether the original disorderly conduct sentences commenced prior to the imposition of the additional three years at resentencing. A modification to amend sentencing would run afoul of the double jeopardy guarantee when the court seeks to increase sentences already being served. ***State v. North,*** 91 Wis.2d 507, 509-10, 283 N.W.2d 457, 458-59 (Ct. App. 1979) (citing ***United States v. Benz,*** 282 U.S. 304, 308-09 (1931)).

Johnson was in custody at the August 16, 1994, resentencing hearing. At that hearing, the prosecutor conceded that "[t]his [disorderly conduct] sentencing would begin on the date of remittitur" of the battery and reckless endangerment case, and further conceded that "[t]hat case was remitted on April 27, 1994."

In addition, the trial court's findings support a sentence commencement date prior to resentencing:

> The Court does believe under the circumstances I guess [that Johnson] should receive credit from on or about March 7th. You have been in custody. You have been serving time, *and there is no other crime for which you have been convicted that you were serving that time on*. [Emphasis added.]

We conclude that Johnson's concurrent disorderly conduct sentences commenced prior to the trial court's imposition of the increased sentences.

Having determined that Johnson's original sentence was valid, that Johnson's increased sentence is subject to double jeopardy analysis and that his disorderly conduct sentences commenced prior to the imposition of the

additional three years at resentencing, we are compelled to agree with Johnson that his due process rights were violated.

While Johnson's postconviction success in overturning the prior criminal sentence of eleven years may have frustrated the trial court's intentions that Johnson serve more than two years in prison, that frustration arises solely from a "sentencing flaw" in the otherwise valid disorderly conduct sentences. We are satisfied that a sentencing flaw in an otherwise valid and legal sentence must be addressed prior to the commencement of the original sentence in order to avoid double jeopardy protections.

The State argues that Johnson enjoys an undeserved windfall here due to his successful appeal of the prior conviction and the vacation of the attending sentence. This court previously addressed the defendant windfall concern when we acknowledged that "[t]he potential for abuse in broad judicial power to increase sentences outweighs the possibility of giving a few defendants the benefits resulting from a judicial mistake." ***North,*** 91 Wis.2d at 511, 283 N.W.2d at 459 (quoting ***United States v. Turner,*** 518 F.2d 14, 17 (7th Cir. 1975)).

We hold that the trial court erred by increasing the otherwise valid disorderly conduct sentences by three years after Johnson had commenced the sentences. The three-year sentence increase subjected Johnson to double punishment for the same charges. We therefore reverse the resentencing judgment of conviction and remand this case with directions to reinstate the original sentence.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.