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September 10, 2013

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

2013AP193-CR State of Wisconsin v. George H. Sergent (L.C. # 2006CF15)

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

George Sergent appeals an order that denied his motion to vacate his sentences on convictions of two counts and to order a resentencing based on allegations that the sentencing court (1) imposed sentences that exceeded the statutory maximum penalties allowed, and (2) based its sentence on the more serious offense on inaccurate information. After reviewing

the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).[1] We affirm in part and reverse in part.

There are several different mechanisms or "defined parameters" by which a defendant can seek sentence modification, depending upon the reason being offered and the amount of time which has passed since the sentence was imposed. *See generally* ***State v. Crochiere***, 2004 WI 78, ¶¶11-16, 273 Wis. 2d 57, 681 N.W.2d 524 (discussing various parameters within which the judiciary exercises its inherent sentencing power), *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶¶46-48, 333 Wis. 2d 53, 797 N.W.2d 828. While a sentence modification motion may invoke multiple theories of relief relying on different mechanisms, each motion to invoke the court's power must be evaluated under the constraints and legal standards pertinent to that power. ***State v. Stenklyft***, 2005 WI 71, ¶61, 281 Wis. 2d 484, 697 N.W.2d 769.

Here, Sergent filed a sentence modification motion that raised two grounds for relief: (1) a claim that the extended supervision portions of two of his sentences exceeded the maximum available penalties; and (2) a claim that he was sentenced based on inaccurate information because the State and court both made references to a sentencing guideline purporting to provide guidance regarding the more serious offense but that did not apply to that count of conviction. He requested resentencing as a remedy for each alleged error. The circuit court denied the motion on the sole rationale that Sergent had not presented any new sentencing factors, apparently without recognizing that Sergent's claims were invoking separate mechanisms for relief.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

As to the first issue, the State concedes that the extended supervision portion of two of Sergent's sentences exceeded the statutory maximum. We agree with both parties.

In an amended judgment, the circuit court sentenced Sergent to seven years of initial confinement and ten years of extended supervision for attempted second-degree sexual assault of an unconscious victim and to two years of initial confinement and three years of extended supervision for attempted third-degree sexual assault.

The maximum penalty for a completed act of second-degree sexual assault of an unconscious victim would have been twenty-five years of initial confinement and fifteen years of extended supervision, while the maximum penalty for a completed act of third-degree sexual assault would have been five years of initial incarceration and five years of extended supervision. *See* WIS. STAT. §§ 940.225(2)(d) (classifying second-degree sexual assault of an unconscious victim as a Class C felony); 973.01(2)(b)3. (setting maximum term of confinement for Class C felonies); 973.01(2)(d)2. (setting maximum term of extended supervision for Class C felonies); 940.225(3) (classifying third-degree sexual assault as a Class G felony); 973.01(2)(b)7. (setting maximum term of confinement for Class G felonies); 973.01(2)(d)4. (setting maximum term of extended supervision for Class G felonies). However, when an offense is charged as an attempt rather than a completed act, the applicable penalties for both the initial confinement and extended supervision are cut in half. *See* WIS. STAT. § 939.32(1m)(a)1. and (1m)(b). Therefore, the ten-year term of extended supervision imposed for the count of second-degree sexual assault of an unconscious victim exceeded the maximum seven-and-one-half year term by two and one-half years, and the three-year term of extended supervision imposed for the count of third-degree sexual assault exceeded the maximum two-and-one-half year term by six months.

Sergent contends that he is entitled to be resentenced based upon the excessive terms of extended supervision that were imposed. However, as the State correctly points out, the remedy for an excessive sentence is explicitly set forth in WIS. STAT. § 973.13. That section provides: "In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess *shall be void* and the sentence shall be valid only to the extent of the maximum term authorized by statute and *shall stand commuted without further proceedings*." ***Id.*** (emphasis added).

Sergent cites four cases for the proposition that a defendant is "entitled to be resentenced," in addition to commutation of a sentence, whenever the sentencing court's original intent has been frustrated. However, we are not persuaded that any of the cases Sergent has cited stand for the proposition that a circuit court must conduct a new sentencing under the circumstances presented here.

In ***Grobarchik v. State***, 102 Wis. 2d 461, 307 N.W.2d 170 (1981), the Wisconsin Supreme Court held that a circuit court did not act vindictively in resentencing a defendant to a term of probation, to be served consecutively to the completion of another sentence, after learning that its initial imposition of a term of probation to run concurrently with the parole on another sentence was invalid. ***Id.*** at 470-71. Although the court did make a general comment about resentencing being a proper remedy for an invalid sentence, we note that the term of probation imposed in that case did not exceed the maximum term available. Rather, the issue was when the probationary period would commence. *See* ***id.*** at 465-66. Since the sentence at issue was not in excess of the maximum penalty available, WIS. STAT. § 973.13 did not apply, and the case did not address whether resentencing was also available for excessive sentence cases.

In ***State v. Holloway***, 202 Wis. 2d 694, 697, 551 N.W.2d 841 (Ct. App. 1996), the question was whether a circuit court had the authority to modify the consecutive or concurrent structure of sentences that had been commuted pursuant to WIS. STAT. § 973.13. The court concluded that § 973.13 addresses only the *duration* of a sentence, and not any other components or conditions of the sentence. ***Holloway***, 202 Wis. 2d at 698. Therefore, the court reasoned that the statute did not bar the court from using its inherent authority to adjust other aspects of a sentence, such as its concurrent or consecutive nature, in order to bring the overall structure of the commuted sentences into line with its original sentencing intent. ***Id.*** at 700.

In ***State v. Church***, 2003 WI 74, 262 Wis. 2d 678, 665 N.W.2d 141, the court addressed whether the vacation of one count in a multi-count judgment of conviction warranted resentencing on other counts and whether the increased sentenced imposed on the vacated count following appeal constituted retaliation for the defendant's successful exercise of his appellate rights. ***Id.***, ¶60. That case is inapplicable here because it did not involve an excessive sentence claim under WIS. STAT. § 973.13.

In ***State v. Kleven***, 2005 WI App 66, 280 Wis. 2d 468, 696 N.W.2d 226, this court considered whether the proper remedy for the circuit court's failure to impose a term of extended supervision that comprised at least 25% of the total imprisonment was: to reallocate a portion of the initial confinement to extended supervision; or to vacate the sentence and remand for commutation or resentencing. ***Id.***, ¶¶29-31. That case is also inapplicable here, because neither of the two components of the sentence at issue there by itself exceeded the maximum term available for either component—it was the relationship between the two components that was out of proportion. Therefore, the remedy of commutation could not have been applied in the same manner as when an excessive sentence is at issue.

In addition to the fact that none of the cases Sergent cited are procedurally on point, we note that in all of them, resentencing was considered an appropriate mechanism to *increase* some aspect of the defendant's overall sentence structure, when the court's sentencing objectives would otherwise have been frustrated by voiding the illegal portion of the sentence. That rationale would not benefit Sergent, who is already benefitting from a commutation that reduces the sentence the court intended to impose upon him. In sum, Sergent fails to identify authority supporting his argument that he must be resentenced.

As to the second issue, Sergent's assertion that he was sentenced based upon inaccurate sentencing information is a constitutional due process claim that falls within the scope of a postconviction motion under WIS. STAT. § 974.06.[2] *See, e.g.*, ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. As we noted above, it is permissible to combine requests for relief invoking different mechanisms into a single motion. However, constitutional claims that could have been raised in a prior direct appeal or in a postconviction motion under WIS. STAT. § 974.02 cannot be the basis for a § 974.06 motion unless the court finds there was sufficient reason for failing to raise the claim earlier. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

The State contends that Sergent should be barred under ***State v. Escalona-Naranjo*** from raising his claim that the circuit court erred in referring to an inapplicable sentencing guideline. Sergent responds that the State has forfeited the right to raise ***Escalona-Naranjo*** as a procedural

[2] Although Sergent attempts to categorize this issue as part of his WIS. STAT. § 973.13 claim, we are not bound by labels. Plainly, the circuit court's reference to guidelines in the course of exercising its sentencing discretion is a separate issue from whether the length of the sentences imposed exceeded the statutory maximums.

bar because it did not raise it in the circuit court. *See* ***State v. Miller***, 2009 WI App 111, ¶¶23-24, 320 Wis. 2d 724, 772 N.W.2d 188. However, Sergent does not assert that he did in fact have any sufficient reason for failing to previously raise the guideline issue that he could have presented to the circuit court if he had been afforded the opportunity. Forfeiture is most appropriate to apply when it serves the interest of judicial economy because the failure to raise an issue denied the opposing party an opportunity to litigate the issue. We therefore decline to apply the forfeiture rule against the State where Sergent suggests now no sufficient reason for failure to raise the issue before, and we conclude that Sergent is procedurally barred from challenging the circuit court's reference to an inapplicable sentencing guideline.

Accordingly, we reverse that portion of the circuit court's order refusing to commute two of Sergent's sentences as in excess of statutory maximums, but affirm that portion of the circuit court's order refusing to resentence Sergent based either upon the excessive sentences or the court's use of an inapplicable sentencing guideline.

IT IS ORDERED that the circuit court's order is affirmed in part and reversed in part pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that, pursuant to WIS. STAT. § 973.13, the clerk of the circuit court shall amend the judgment of conviction to reflect the commutation of the sentences on Counts One and Two without further circuit court proceedings. Specifically, the term of extended supervision for the count of second-degree sexual assault of an unconscious victim shall be reduced to seven-and-one-half years, and the term of extended supervision imposed for the count of third-degree sexual assault shall be reduced to two-and-one-half years.

IT IS FURTHER ORDERED that the appellant's pending motions for relief pending appeal, to supplement the record, and to expedite the appeal are deemed moot.

Diane M. Fremgen
Clerk of Court of Appeals