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DISTRICT IV

October 25, 2013

To:

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

2012AP648-CR

State of Wisconsin v. Thomas Jay Bayrhoffer (L.C. # 2011CF20)

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

Thomas Bayrhoffer appeals a judgment convicting him of a fifth or subsequent offense of operating a motor vehicle under the influence of an intoxicant (OWI-5th) and an order denying his motion for postconviction relief. The sole issue on appeal is whether the circuit court violated Bayrhoffer's double jeopardy rights by issuing an amended judgment making the sentence in this case consecutive to a previously imposed sentence, only two hours after the court had issued a judgment stating that the extended supervision portion of the instant sentence would be concurrent to the previously imposed sentence. After reviewing the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

At a sentencing hearing held on the morning of July 22, 2011, the circuit court imposed a bifurcated sentence in this case consisting of two years of initial incarceration and three years of extended supervision. Although the court had noted earlier in the hearing that Bayrhofer was already serving a fifteen-month revocation sentence in another case, it did not state whether the sentence in this case was to be served concurrent or consecutive to the prior sentence. Notwithstanding the omission in the court's bench ruling, the written judgment issued shortly after the hearing stated that the extended supervision portion of the sentence was to be concurrent to the sentence Bayrhofer was already serving.

Two hours later, the court called the parties back because it had come to the court's attention that the question of whether the sentence was to be consecutive or concurrent had not been addressed. Bayrhofer explained that he sought clarification that the initial incarceration portion of the sentence was also to be concurrent, in accordance with the recommendation the State had agreed to make in the plea bargain. The circuit court noted it was not bound by recommendations, pointed out that the PSI had recommended that the sentence be concurrent, and asked for argument from Bayrhofer on the question. The court determined that the sentence should be consecutive so that Bayrhofer would understand that if he continued to offend, the punishments would increase. The court issued an amended judgment that afternoon specifying

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

that both the initial confinement and extended supervision portions of the sentence were to be consecutive to any other sentence being served.

Bayrhooffer filed a postconviction motion challenging the amended judgment on the grounds that the circuit court lacked authority to modify his sentence without the existence of a new factor, and that he had a legitimate expectation of finality in the original sentence for purposes of the double jeopardy clause. At the postconviction hearing, the court explained that it thought it had said the sentence was consecutive, but upon checking as the clerk was preparing the judgment, realized that the matter had not been addressed, and so called the parties back after lunch. The court further stated that the judgment was entered in error because the court had not in fact imposed a concurrent sentence at the original hearing. The court denied the motion, and Bayrhooffer appeals.

Based upon the court's explanation of its actions, we are satisfied that the court did not, as Bayrhooffer asserts, resentence him because it had changed its mind upon further reflection. Rather, the court was properly using its inherent authority to correct its own error. *See State v. Burt*, 2000 WI App 126, ¶15, 237 Wis. 2d 610, 614 N.W.2d 42. Because the court acted in a timely manner, before Bayrhooffer had even been transported to prison, Bayrhooffer did not have a legitimate expectation of finality in the mistakenly entered judgment. *State v. Gruetzmacher*, 2004 WI 55, ¶¶36-38, 271 Wis. 2d 585, 679 N.W.2d 533.

IT IS ORDERED that the amended judgment of conviction and order denying postconviction relief are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

