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April 1, 2015

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

2014AP1614

State of Wisconsin v. David A. Day (L.C. # 2005CF431)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

David A. Day appeals from an order denying his motion to reduce the fine and costs reflected on his original judgment of conviction by \$5000, from \$42,676.62 down to \$37,672.62. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

A jury found Day guilty of conspiracy to commit kidnapping. At the time of sentencing, Day had a large amount of money held in trust by the department of corrections (DOC). At Day's sentencing hearing the court imposed a forty-five year prison sentence and stated its intent to order a large fine:

You have shown - - And this is with special regard to the fine. - - a repeated proclivity to use your financial resources to victimize those who oppose you. And a fine is needed to reduce your primary remaining assaultive weapon - - And that's resources. - - needed to protect the public generally and the victims specifically. Now having said that, I talked about a fine versus legal fees. A man who has some assets has a right for the Court to consider the need - - Looking at ability to pay now. - - to consider that individual's needs.

So as far as the fine is concerned, what I'm going to do is I'm going to - - I haven't established a fixed number yet. I will permit, prior to me determining that fine, for an amount to be reserved to be transferred to your attorney's account as a retainer that he can draw future legal fees from both for this case and for appeals and post-conviction relief generally. Why am I doing that? Is it because I'm a nice guy? No. It's because a man with money ought to pay for his lawyer. If I took all that money and called it a fine and pushed it away, then the taxpayer would be paying for your lawyer.

The sentencing court authorized the disbursement of a \$40,000 retainer to the Boyle law firm, stating that "if there should be any balance after you've exhausted all of your appeals, that balance is subject to further Order of this Court." The court added:

Now as far as the balance in excess of that, I will permit you to retain funds necessary to complete any money that's owing to [court-appointed trial counsel]. I'll permit you to retain the sum of \$5000 in your account net. The balance will be the fine, whatever that exact number is. We'll sort that out. So that will be somewhere - - Just so the Appellate Court knows, that will be somewhere in the 30 to \$35,000 range.

My object is to permit you a minimum amount of money so that you can meet your minimum needs within the legal system; that

you can pay your legal fees. But beyond that my intent is to incapacitate you financially. That is my intent.

In furtherance of its sentence and prior to entry of the judgment, the sentencing court entered a March 16, 2009 written “Order on Funds and for Fine” disbursing the money held by the DOC in trust.² A judgment of conviction was entered on March 17, 2009, reflecting a fine of \$42,563 plus itemized costs, for a total of \$42,676.62. The judgment also stated “See attached order with regard to the fine due.”

Thereafter, Day, represented by the Boyle firm, filed a postconviction motion and after the trial court denied the motion, Day appealed. This court affirmed Day’s judgment of

² The “Order on Funds and for Fine” provided:

The Court finds that the Department previously disbursed \$40,000.00 to Attorney Gerald Boyle’s office as a retainer to allow legal representation in this and other criminal matters where David A. Day is the defendant. Any balance remaining after all legal representation has been concluded shall be held pending further order of the Court. Counsel has the continuing obligation to report the availability of said balance to the Court.

THE COURT FURTHER orders that \$5,000.00 shall be retained in Mr. Day’s account with the Department of Corrections for commissary use according to the Department’s policies which includes the \$500.00 in Mr. Day’s release account and the \$425.87 currently in Mr. Day’s regular account.

THE COURT FURTHER ORDERS that the remaining balance of \$42,676.62 constitutes the costs and fine in the above file and shall be disbursed to the Washington County Clerk of Court for further disbursal according to law.

conviction and the order denying his postconviction motion.³ *State v. Day*, No. 2010AP1331-CR, unpublished op. and order (WI App May 25, 2011). The Wisconsin Supreme Court denied Day's petition for review.

In 2013, Day wrote a letter informing the trial court⁴ that the Boyle firm had contacted him stating that it could no longer represent him due to a conflict of interest and that it was holding \$5,000 of Day's retainer which it could not disburse absent a court order. In response to the trial court's letter of inquiry, the Boyle firm confirmed that \$5,000 of the original \$40,000 retainer remained in its trust. The State replied that Day owed outstanding restitution and costs in connection with a companion case totaling approximately \$1070. Based on this information, on February 26, 2014, the trial court entered a decision and order deducting the unpaid restitution from the \$5000 held in Boyle's account, and the remaining balance of \$3930 was disbursed to Day.

Contrary to the State's position on appeal, this is not the order from which Day appeals. Rather, after the court's decision disbursing Boyle's leftover retainer, Day filed a "Notice of Motion and Motion for Order in Nunc Pro Tunc" requesting that the trial court disburse to him the original \$5000 mentioned in its March 16, 2009 "Order on Funds and for Fine." Day's motion asserted that there must have been some arithmetic error at the time of his original

³ Day's appellate issues included a challenge to the imposition of a \$42,000 fine. Day argued that it was improper for the sentencing court to "pauperize" him for the purpose of preventing him from using that money to commit future crimes. *State v. Day*, No. 2010AP1331-CR, unpublished op. and order at 5 (WI App May 25, 2011). We concluded that the sentencing court's decision constituted an appropriate exercise of discretion. *Id.* at 7.

⁴ At some point, a new circuit court judge was assigned responsibility for Day's case. The new judge was not the judge who presided at trial or sentencing, or entered the March 2009 judgment of conviction and "Order on Funds and for Fine."

sentencing because with the \$40,000 disbursement to Boyle, the \$1908 disbursement to his court-appointed trial counsel, and the \$42,676.62 disbursement to the county to cover his fine and costs, there was not enough money left to release \$5000 into Day's prison account. Day argues that because the sentencing court intended for him to keep \$5000 in his commissary, the "Order on Funds and for Fine" should have reflected a fine and costs totaling \$37,676.62.

On May 28, 2014, the trial court issued a decision and order denying Day's "Motion for Order in Nunc Pro Tunc." The court stated it had reviewed the file and ordered:

That said Motion and all requests therein are summarily denied.

The matters raised in said motion were resolved long ago and any objections thereto have been waived.

Further, the court incorporates herein the Decision and Order dated and filed on February 26, 2014.

Thereafter, the trial court denied Day's motion for reconsideration and Day appeals.

We conclude that the trial court properly denied Day's motion to amend the judgment nunc pro tunc. First, we agree with the trial court that the matters raised in Day's motion were previously resolved and have been waived or forfeited. Day had a postconviction motion and direct appeal. Though he now complains that the \$42,000 fine was entered in error, he previously acknowledged the fine's amount by challenging it as an erroneous exercise of discretion. The time to challenge the judgment of conviction as in conflict with the court's oral pronouncement would have been through his direct appeal.

Second, the trial court properly denied Day's motion because he failed to establish that the fine on the judgment conflicted with the sentencing court's oral pronouncement or did not accurately represent its sentencing intent. The sentencing court's remarks reflect that its primary

concerns were to incapacitate Day financially, and to ensure that he could pay for legal expenses incurred previously and in the future. The sentencing court intended for Day to pay his court-appointed trial attorney's fees in the amount of \$1908. An attachment to Attorney Boyle's response demonstrates that when the sentencing court was made aware that there was not enough in Day's account to pay Boyle's \$40,000 retainer, the \$1908 to his trial attorney, the \$42,676.62 fine and costs, and still leave Day with a full \$5,000 in his commissary, the sentencing court reaffirmed its intent that the fine and costs be paid, even if this resulted in a smaller amount being retained by Day for his personal use.⁵ Day's attempt to cast the lack of funds as attributable to a clerk's arithmetic error ignores that the sentencing court itself signed not only the judgment, but also the written "Order on Funds and for Fine," and on May 19, 2009 directed that the \$42,676.62 fine be paid in full.

Finally, we observe that at the time the trial court was charged with deciding how to disburse the \$5,000 from Boyle's trust, it was aware of Day's complaint that he never received the full \$5,000 he believed should have been placed in his commissary account pursuant to the sentencing court's "Order on Funds and for Fine." Giving Day's pleading a liberal construction, it may be viewed as a motion to modify the fine portion of his sentence based on the existence of a new factor, namely, the non-receipt of originally intended funds. See *State v. Harbor*, 2011 WI 28, ¶¶36, 40, 333 Wis. 2d 53, 797 N.W.2d 828 (a new factor is "a fact or set of facts highly

⁵ Boyle's letter response concerning the remaining \$5,000 in trust included as an exhibit a May 12, 2009 memorandum from the clerk of circuit court to the sentencing judge indicating that if the DOC retained in Day's personal account the full \$5,000 referenced in the "Order on Funds and for Fine," there would only be enough to pay a fine and costs totaling \$38,604.41. On May 19, 2009, the sentencing judge informed the clerk that its intent was to require Day to pay the full \$42,676.62 ordered. Pursuant to the contents of the memo, the sentencing judge was made aware that Day would only have access to \$427.79 for commissary from his regular account and that his release account contained \$500.

relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.”) (citation omitted). “The existence of a new factor does not automatically entitle the defendant to sentence modification.” *Id.*, ¶37. If a new factor is present, whether and to what degree a sentence should be modified is a discretionary determination for the trial court. *Id.*, ¶¶36-37. Here, the trial court was well within its discretion to decline to modify the original fine. The trial court was aware that when faced with the choice of reducing either Day’s fine or the amount he could retain in his commissary account, the sentencing court opted for the latter. Additionally, the trial court was aware that even after paying the fine and especially given the large amount it had just ordered disbursed to Day from the \$5,000 remaining in Boyle’s trust, Day was left with “a minimum amount of money ... [sufficient to] meet [his] minimum needs within the legal system,” just as the sentencing court intended.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals