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**DISTRICT II**

November 23, 2016

To:

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

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2015AP2197	State of Wisconsin v. Nelvnes Shells (L.C. #2010CF1669)
2015AP2198	State of Wisconsin v. Nelvnes Shells (L.C. # 2011CF230)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Nelvnes Shells, pro se, appeals from an order denying the WIS. STAT. § 974.06 (2013-14)<sup>1</sup> motion seeking sentence modification he filed after his probation was revoked. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. We affirm the order.

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

Shells was charged in two Racine County Circuit Court cases that later were consolidated. He entered a global no-contest plea to misdemeanor theft, disorderly conduct, and three counts of felony bail jumping. Two counts of telephone harassment and nine other counts of felony bail jumping were dismissed and read in at sentencing.

In June 2012, the court sentenced him to three years' probation and two years' initial confinement (IC) plus two years' extended supervision (ES), imposed and stayed, on each of the three felony bail-jumping count, credit for time served (fifty-two days) in jail on the misdemeanor theft, and ninety days in jail on the disorderly conduct. The court ordered that, should Shells' probation be revoked, the bail-jumping sentences were to be served consecutively. Shells did not file a postconviction motion, a direct appeal, or a motion to modify sentence under WIS. STAT. § 973.19 within ninety days of being sentenced.

Shell's probation was revoked in December 2014. In June 2015, he moved for sentence modification under WIS. STAT. § 974.06, alleging that the court erroneously exercised its sentencing discretion, illegally ran the stayed sentences consecutively, and relied on immaterial or improper facts—i.e., that Shells accepts Social Security disability benefits from “law-abiding taxpayers,” then, instead of following society's rules, “go[es] out and commit[s] crimes.” The court noted that Shells' motion was untimely and improperly brought under § 974.06 but, as he was pro se, it would liberally construe the motion to allege a violation of the constitutional prohibition against cruel and unusual punishment. *See* U.S. Const. amend. VIII and WIS. CONST. art. I, sec. 6. The court denied the motion without a hearing.

When a sentence is within the statutory maximum or otherwise within the statutory power of the circuit court, WIS. STAT. § 974.06 is not the proper vehicle by which to challenge

the court's exercise of sentencing discretion. *Smith v. State*, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). "The proper remedy is a motion for modification of sentence." *Id.* Postconviction review under § 974.06 applies "only to jurisdictional or constitutional matters or to errors that go directly to the issue of the defendant's guilt." *Smith*, 85 Wis. 2d at 661.

Like the trial court, we nonetheless consider Shell's sentence within the framework of cruel and unusual punishment. The standard for determining whether a punishment is cruel and unusual is the same under federal and Wisconsin law. *State v. Ninham*, 2011 WI 33, ¶85, 333 Wis. 2d 335, 797 N.W.2d 451. To be cruel and unusual, the punishment must be "so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice." *State v. Pratt*, 36 Wis. 2d 312, 322, 153 N.W.2d 18 (1967) (citations omitted). Similarly, "[a] sentence is unduly harsh or unconscionable 'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *State v. Cummings*, 2014 WI 88, 357 Wis. 2d 1, 850 N.W.2d 915 (citation omitted). We will not interfere with a sentence within the statutory limit unless it is "clearly cruel and unusual." *Pratt*, 36 Wis. 2d at 322. (citation omitted).

Shells' three felony bail-jumping convictions each carried a maximum penalty of six years' imprisonment, bifurcated as three years' IC and three years' ES, and up to a \$10,000 fine. He faced up to twelve months in jail and \$11,000 in fines on his misdemeanor convictions. Measured against his total exposure of nine years' IC, nine years' ES, a year in jail, and \$21,000 in fines, his six years in, six years out, and ninety days in jail is not shocking to the sense of justice or unduly harsh. This is especially so since, as the sentences were stayed, Shells was in the driver's seat: serving the time of which he now complains depended on his own conduct.

The trial court considered appropriate sentencing factors and objectives and provided a “rational and explainable basis” for the sentence. *See State v. Gallion*, 2004 WI 42, ¶¶39, 40, 43 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court’s Social Security benefit comments were not “totally irrelevant or immaterial,” to the sentence, *see Ocanas v. State*, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975), but were made in the context of his “constantly repetitive” criminality while feeding at the public trough, betraying those who contribute to his welfare.

We reject Shells’ contention that his sentences were improperly imposed consecutive to his probation in violation of WIS. STAT. § 973.15(2). *See State v. Maron*, 214 Wis. 2d 384, 395, 571 N.W.2d 454 (Ct. App. 1997). Shells’ stayed sentences were imposed at sentencing, not when his probation was revoked. *See State v. Thompson*, 208 Wis. 2d 253, 256-57, 559 N.W.2d 917 (Ct. App. 1997). Thus, whether to make the sentences concurrent or consecutive was a matter for the court’s sound discretion. *See* § 973.15(2); *State v. Ramuta*, 2003 WI App 80, ¶24, 261 Wis. 2d 784, 661 N.W.2d 483. Although not obliged to, *see State v. Berggren*, 2009 WI App 82, ¶45, 320 Wis. 2d 209, 769 N.W.2d 110, the court explained that the sentence structure was its “insurance policy on behalf of society that you’re going to abide by the rules and regulations of an orderly society now.” That is a reasonable rationale.

Upon the foregoing reasons,

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

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

