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DISTRICT II

April 5, 2017

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

2016AP1237-CR

State of Wisconsin v. John M. Navigato (L.C. #2009CF1123)

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

John Navigato appeals from a judgment convicting him of felony murder as party to the crime on his no contest plea and from a circuit court order denying relief relating to his sentence. On appeal, Navigato argues that the circuit court imposed an illegal sentence and violated his double jeopardy rights in doing so. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21

(2015-16).¹ We agree that the sentence is erroneous but that double jeopardy concerns are not implicated. We reverse and remand for resentencing.

The facts relevant to this appeal are not in dispute. After pleading no contest to felony murder, Navigato was sentenced to a twenty-one-year term allocated as follows: eighteen years of initial confinement and three years of extended supervision. After sentencing, the department of corrections alerted the circuit court that the sentence did not comply with WIS. STAT. § 973.01(2)(d) (a term of extended supervision shall be at least twenty-five percent of the initial confinement term). Navigato sought sentence modification. The circuit court modified Navigato's sentence to eighteen years of initial confinement and four and one-half years of extended supervision, which was twenty-five percent of the initial confinement term. The court stated that the revised sentence served its original intent at sentencing that Navigato be confined for eighteen years.

In this appeal from the resentencing, Navigato argues and the State concedes that the sentence remains unlawful. We agree. The parties and the circuit court agree that the crime of conviction, felony murder, WIS. STAT. § 940.03, is an unclassified felony. *State v. Mason*, 2004 WI App 176, ¶1, 276 Wis. 2d 434, 687 N.W.2d 526. Therefore, the length of the initial confinement portion of the bifurcated sentence for that unclassified felony “may not exceed 75 percent of the total length of the bifurcated sentence.” WIS. STAT. § 973.01(2)(b)10. Navigato's current bifurcated sentence is twenty-two and one-half years. The eighteen-year term of initial

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

confinement is eighty percent of the total length of the bifurcated sentence. Therefore, the eighteen-year confinement term violates the seventy-five percent rule.

Navigato urges us to modify the invalid sentence by reallocating the initial confinement and extended supervision terms to comply with the applicable statutes. We decline Navigato's invitation. The remedy for this invalid sentence is resentencing. *State v. Sturdivant*, 2009 WI App 5, ¶1 n.1, 316 Wis. 2d 197, 763 N.W.2d 185 (2008). On multiple occasions during sentencing and at the hearing on Navigato's sentence modification motion, the circuit court stated its intention to confine Navigato for eighteen years. If we were to reallocate Navigato's sentence as he suggests, we would not give effect to the circuit court's intent. *State v. Kleven*, 2005 WI App 66, ¶31, 280 Wis. 2d 468, 696 N.W.2d 226. Furthermore, we decline to exercise the discretion entrusted to the circuit court² to allocate a sentence between terms of initial confinement and extended supervision.

Navigato argues that his double jeopardy rights are violated by the modified sentence from which he appeals. We disagree. There are no double jeopardy concerns if the circuit court imposes an increased sentence under the following circumstances: "the initial conviction is valid, the initial sentence is invalid, the resentencing court has no new information," and the increased sentence results from a desire to implement the original sentencing scheme as shown by the record of the original sentencing. *State v. Helm*, 2002 WI App 154, ¶¶10-12, 256 Wis. 2d 285, 647 N.W.2d 405. We decide de novo whether a sentence violates a defendant's constitutional rights. *Id.*, ¶6.

All of the *Helm* criteria are satisfied here. The circuit court resentenced Navigato to remedy an invalid sentence. To that end, the court increased his sentence by one and one-half years of extended supervision to satisfy the requirement that extended supervision be at least twenty-five percent of the eighteen-year confinement term, WIS. STAT. § 973.01(2)(d),³ and to give effect to the court’s intent to confine Navigato for eighteen years. Under *Helm* and the facts of this case, double jeopardy concerns do not arise.

The circuit court imposed an erroneous sentence at resentencing. We reverse the judgment of conviction and the circuit court order and remand for resentencing consistent with the requirements of WIS. STAT. § 973.01(2)(b)10. and (2)(d).⁴

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order of the circuit court are reversed pursuant to WIS. STAT. RULE 809.21 and the cause is remanded with directions.

Diane M. Fremgen
Clerk of Court of Appeals

² Sentencing is within the circuit court’s discretion. *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197.

³ As we have held, the resentencing yielded an invalid sentence in relation to the seventy-five percent rule.

⁴ To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).