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DISTRICT I

May 24, 2022

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
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Todd Michael Lund 312556
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1217

State of Wisconsin v. Todd Michael Lund
(L.C. # 1997CF975083)

Before Brash, C.J., Donald, P.J., and Dugan, J.

Todd Michael Lund appeals an order of the circuit court denying his motion to correct his sentence. He also appeals from the order denying reconsideration of his motion. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We summarily affirm.

On November 13, 1997, the State charged Lund with four counts of robbery with the use of force, as a party to the crimes (counts one, two, four, and seven). According to the complaint,

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Lund and a coactor committed a series of robberies over the period of ten days when they repeatedly stole purses from elderly or middle-aged women. Lund ultimately pled no contest to counts one, two, four, and seven.

At sentencing, the circuit court stated the following:

I'm going to start with Mr. Lund. On Count ... 1 ... it's the sentence of this Court you serve five years in the Wisconsin State Prison. As to Count 2 ... it's the sentence of this Court you serve five years in Wisconsin State Prison consecutive to Count 1. As to Count 4 ... it's the sentence of this Court you serve 10 years in Wisconsin State Prison. I'm going to stay that and put you on 10 years consecutive probation. As to Count 7 ... it's the sentence of this Court you serve 10 years consecutive to Count 4, and stay it, put you on 10 years concurrent probation. That means when you get out of prison you'll have 20 years hanging over your head for 10 years. It's 20 years stayed but 10 years consecutive probation, but the probations are going to be concurrent to each other. The second count's concurrent to the first count.

In short, the circuit court sentenced Lund to five years each for counts one and two to run consecutive; as to counts four and seven, the circuit court imposed and stayed consecutive ten year prison sentences and placed Lund on two probationary periods of ten years. The probationary periods were concurrent to each other, but consecutive to the prison sentences imposed for counts one and two.

Lund's probation was revoked on June 14, 2006, January 21, 2007, and April 9, 2010. The record does not contain the dates of his release from his indeterminate prison sentences or the length of the revocation sentences.

On April 15, 2021, Lund filed a motion, alleging an illegal sentence and seeking a correction to the judgment of conviction. As relevant to this appeal, he argued that the circuit court's sentence was illegal because the probationary periods must be concurrent, but are actually running consecutive.

The postconviction court denied the motion. Lund moved for reconsideration and the postconviction court again denied his motion. This appeal follows.

On appeal, the crux of Lund's argument is that the circuit court imposed an illegal sentence as to counts four and seven because the circuit court imposed consecutive terms of probation. Lund argues that upon revocation of his probation, he began serving consecutive ten-year sentences and that the consecutive nature of the prison sentences is unlawful. Lund is mistaken.

The circuit court has discretion in sentencing. *State v. Holloway*, 202 Wis. 2d 694, 697, 551 N.W.2d 841 (Ct. App. 1996). Whether the circuit court imposed an illegal sentence is a question of law that this court reviews independent of the circuit court. *See id.*

We agree with the State that Lund's arguments stem from a misunderstanding of the difference between a sentence and probation. Probation is not a sentence. *State v. Schwebke*, 2001 WI App 99, ¶¶29-30, 242 Wis. 2d 585, 627 N.W.2d 213. However, a court may impose a sentence, stay its execution, and place a person on probation for a period of time. WIS. STAT. § 973.09(1)(a). The term of probation "may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously," *see id.*, but a court may not impose consecutive terms of probation. *See Schwebke*, 242 Wis. 2d 585, ¶¶29-30. A court also may not "impose a sentence consecutive to a term of probation" when the sentence has been withheld and the defendant placed on probation. *State v. Maron*, 214 Wis. 2d 384, 395, 571 N.W.2d 454(Ct. App. 1997).

Here, the circuit court imposed, but stayed, two *consecutive* ten-year prison *sentences* on counts four and seven. In staying the sentences, the circuit court imposed two *concurrent*

probationary periods on those counts, to run consecutive to the sentences in counts one and two. Contrary to Lund’s argument, the probationary periods themselves were not consecutive to one another, as is made clear by the sentencing transcript. Nor were the probationary periods a part of Lund’s actual sentence. See *Schwebke*, 242 Wis. 2d 585, ¶29. Where Lund appears to be confused is that, when his probation was revoked, he began serving the *actual stayed sentences* for counts four and seven. Those sentences—the ten-year prison terms—were to run consecutive to one another and are lawful under WIS. STAT. § 973.09(1)(a). As the postconviction court aptly stated, “[t]he probation terms on counts four and seven are not and have never been consecutive to each other.”²

For the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the orders are summarily affirmed. See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

² Lund also argues that the amended judgment of conviction is invalid because it conflicts with the sentencing transcript. Lund is mistaken. The judgment of conviction reflects the sentencing court’s oral pronouncement: the probation terms were concurrent, but the imposed and stayed sentences were consecutive.