



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

July 28, 2022

To:

Hon. Guy D. Dutcher
Circuit Court Judge
Electronic Notice

Melissa M. Zamzow
Clerk of Circuit Court
Waushara County Courthouse
Electronic Notice

Barry James Braatz
Electronic Notice

Winn S. Collins
Electronic Notice

Roberta A. Heckes
Electronic Notice

David Leroy Marks
N5428 24th Ave, Lot 319
Wild Rose, WI 54984

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

2020AP1906-CRNM State of Wisconsin v. David Leroy Marks (L.C. # 2019CF58))

Before Kloppenburg, Fitzpatrick, and Graham, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Appointed counsel for David Marks filed a no-merit report under WIS. STAT. RULE 809.32 (2019-20).¹ In this court's order of February 23, 2022, we ordered counsel to review one issue further. Counsel has responded with a letter. Based on that letter, we now reject the no-merit report, dismiss this appeal, and extend the time to file a postconviction motion.

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

Our February 23 order directed counsel to review an issue related to sentencing. On count one, the circuit court imposed and stayed a prison sentence and placed Marks on probation. The court purported to make the imposed and stayed sentence consecutive to “any sentence being served at the time of revocation.” In other words, if the imposed and stayed sentence is eventually served after revocation of this probation, the court appears to have attempted to make the sentence consecutive to any future sentences that might be imposed during this probation.

We observed that it is not clear that a court is permitted to order such a sentence. When a court imposes sentence, it may provide that the sentence be “consecutive to any other sentence imposed at the same time or previously.” WIS. STAT. § 973.15(2)(a). That provision does not appear to allow a sentence to be made consecutive to sentences imposed later. In other words, the authority to make sentences consecutive appears to lie with a later-sentencing court, not the first-sentencing court. We also noted that staying Marks’ imposed sentence may not affect that analysis. *See* WIS. STAT. §§ 973.09(1)(a) and 973.15(8); *State v. Thompson*, 208 Wis. 2d 253, 559 N.W.2d 917 (Ct. App. 1997) (court may impose a sentence that is consecutive to one previously imposed and stayed; a sentence is imposed at the time of sentencing, not when probation is later revoked).

In response to that order, Marks’ attorney has sent this court a letter concluding that the consecutive sentence is improper for the reason we described. However, counsel further asserts that no further action on her part is necessary because, by statute, the excess portion is void and unenforceable, and is commuted without further proceedings.

We do not agree that no further action by counsel is required. The statute that counsel relies on provides: “In any case where the court imposes a maximum penalty in excess of that

authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.”

WIS. STAT. § 973.13.

We do not agree that this statute relieves counsel from the need to take further action. First, it is not immediately obvious that an improperly consecutive sentence is one that “imposes a maximum penalty in excess of that authorized by law,” and thus leads to a commutation to the “maximum term,” as provided in that statute.

Second, even if the statute does apply to Marks’ situation, the statute is not entirely self-executing. Before it applies, a court must determine that the imposed sentence is indeed excessive. Although we have raised that possibility, and appellant’s counsel has concluded that the consecutive sentence is improper, no court has made a conclusive determination of the issue, and the State has not yet had an opportunity to express its position. When the statute provides that the excess portion of the sentence is commuted without further proceedings, we understand it to mean that the commutation occurs without the need for a resentencing hearing, once a court has determined that the imposed sentence is excessive.

Counsel asserts that no further action by the appellant is necessary because the sentence “cannot be enforced.” However, counsel does not explain what will stop the Department of Corrections from enforcing the existing judgment of conviction that contains the consecutive term. The Department is not likely to disregard an unmodified court judgment solely on the opinion of Marks’ attorney. Counsel also states that Marks currently remains on probation, and therefore the imposed and stayed sentence “may never become a reality.” However, if his probation is later revoked, the imposed and stayed sentence will be executed without further

court proceedings at which the question about the consecutive sentence might be raised. Counsel does not explain what legal procedure would be available to Marks at that time to seek relief from a judgment that could be years old by then. Furthermore, at that point he may no longer have a right to appointed counsel.

For these reasons, if Marks is going to raise the issue, the time for that is now, by the filing of a postconviction motion to which the State may respond and which the circuit court will decide.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the time to file a postconviction motion is extended to thirty days from the date of this order.

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

Sheila T. Reiff
Clerk of Court of Appeals