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 III

April 23, 2024

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

2022AP1063-CR State of Wisconsin v. Daniel G. Latimer
(L. C. Case No. 2020CF946)

Before Stark, P.J., Hruz and Gill, 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).

Daniel Latimer appeals a judgment, entered upon his no-contest plea, convicting him of operating a motor vehicle while intoxicated (OWI), as a fifth or sixth offense. In particular, he takes issue with the sentence that the circuit court imposed upon resentencing after it was discovered that the original, withheld sentence was not permitted by statute. Latimer first argues that his original sentence was legal and, therefore, should not have been vacated. Alternatively, Latimer challenges the propriety of the sentence that was ultimately imposed. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for

summary disposition. We reject Latimer's arguments, and we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

The State charged Latimer with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), both counts as a fifth or sixth offense. The complaint alleged that Latimer crashed his car into a light pole and admitted to a responding police officer that he had consumed five drinks. According to the complaint, Latimer also stated that he believed he was under the influence of alcohol. Following field sobriety testing, Latimer was placed under arrest, and he refused a request for a blood sample. Law enforcement obtained a search warrant for Latimer's blood draw, and a test revealed a blood alcohol concentration of .280.

In exchange for Latimer's no-contest plea to OWI as a fifth offense, the State agreed to recommend outright dismissal of a refusal charge in another Outagamie County case and agreed to read in a bail jumping charge from an Oconto County case. The State also agreed to recommend eighteen months of initial confinement followed by eighteen months of extended supervision. The circuit court withheld sentence and placed Latimer on probation for three years, with one year in jail as a condition of probation.

The Department of Corrections (DOC) subsequently notified the circuit court of its belief that Latimer's sentence was illegal under WIS. STAT. § 346.65(2)(am)5. which applies to convictions for an OWI fifth or sixth, and provides, in relevant part:

> The court shall impose a bifurcated sentence under [WIS. STAT. §] 973.01, and the confinement portion of the bifurcated sentence imposed on the person shall be not less than one year and 6 months. The court may impose a term of confinement that is less

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

> than one year and 6 months if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record.

The court consequently vacated the original sentence and resentenced Latimer, imposing a three-year sentence consisting of eighteen months of initial confinement followed by eighteen months of extended supervision. This appeal follows.

Latimer argues that the circuit court erred by concluding that his original sentence was illegal. We disagree. In ***State v. Shirikian***, 2023 WI App 13, ¶43, 406 Wis. 2d 633, 987 N.W.2d 819, this court held that WIS. STAT. § 346.65(2)(am)5. requires the imposition of a bifurcated sentence and does not allow a circuit court to impose probation with conditional jail time for a fifth or sixth OWI conviction. The court, therefore, properly vacated the original sentence.

Latimer alternatively argues that the circuit court erroneously exercised its discretion "on a capricious whim" when it resentenced him to a term of initial confinement that was longer than the term of the originally imposed conditional jail time. Latimer claims that the court impermissibly sentenced him "more harshly," thus violating his rights to due process and to be free from double jeopardy. We are not persuaded.

A circuit court has the inherent authority to correct an illegal sentence. ***Hayes v. State***, 46 Wis. 2d 93, 101-02, 175 N.W.2d 625 (1970), *overruled on other grounds by* ***State v. Taylor***, 60 Wis. 2d 506, 523, 210 N.W.2d 873 (1973). As noted above, the circuit court was required to impose a bifurcated sentence that included at least one year and six months of initial confinement unless it found "that the best interests of the community will be served and the public will not be harmed." *See* WIS. STAT. § 346.65(2)(am)5. In resentencing Latimer, the court stated: "It's the same length over all of the supervision or sentence that I wanted, because I had previously ordered

a three[-]year probationary period with one year jail." The three-year bifurcated sentence therefore gave effect to the court's original intention of assuring that Latimer would be under some form of supervision for three years.

Further, the circuit court necessarily imposed a sentence that was harsher than the original disposition because absent a finding that the best interests of the community will be served and the public will not be harmed, the statute required a minimum bifurcated sentence of one year and six months of initial confinement in prison, while the original disposition did not include any confinement in prison. Further, when a court resentences a defendant to correct an illegal disposition, it can impose a longer sentence provided it is "motivated not by 'malice or vindictiveness in an attempt to penalize the defendant for seeking a correction of his sentence'" but by a "desire to implement its original dispositional plan." ***State v. Church***, 2003 WI 74, ¶45, 262 Wis. 2d 678, 665 N.W.2d 141 (citation omitted). Altering the initial disposition "to bring it into conformity with the law" is necessary, and imposing a legal sentence is "required without reference to whether or not the defendant deserve[d] an increased term." ***Grobarchik v. State***, 102 Wis. 2d 461, 473, 307 N.W.2d 170 (1981).

Out of a maximum possible ten-year sentence, including five years of initial confinement, the circuit court, on resentencing, imposed the presumptive minimum term of initial confinement in prison—one year and six months—followed by one year and six months of extended supervision. We are not persuaded that Latimer's due process rights were violated by the court's imposition of the presumptive minimum sentence. Latimer's double jeopardy argument likewise fails, as the double jeopardy clause does not guarantee the finality of sentences. *See* ***State v. Pierce***, 117 Wis. 2d 83, 87, 342 N.W.2d 776 (Ct. App. 1983). Correcting what was an illegal disposition by imposing the required bifurcated sentence did not constitute double jeopardy.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals