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DISTRICT IV

May 23, 2024

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

2022AP2224-CR State of Wisconsin v. Tommy D. Orange (L.C. # 2017CF416)

Before Kloppenburg, P.J., Blanchard, and Nashold, 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).

Tommy Orange appeals a judgment imposing sentence after his probation was revoked. Orange argues that the circuit court erred by denying his motion for equitable estoppel against the Department of Corrections (DOC) based on a seven-month delay in requesting a sentencing after revocation hearing. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We summarily affirm.

On March 26, 2021, Orange’s supervision was revoked in three criminal cases. DOC filed the revocation order and warrant in the circuit court in this case on October 28, 2021, over seven months after the revocation order and warrant was signed.² Orange subsequently filed a motion objecting to DOC’s request for a sentencing after revocation hearing, arguing that DOC should be equitably estopped from proceeding.

The circuit court denied the motion. It determined that equitable estoppel could not be asserted against the State under *State v. Drown*, 2011 WI App 53, 332 Wis. 2d 765, 797 N.W.2d 919 (equitable estoppel may not be applied to bar the State from pursuing a criminal prosecution). The court also determined that Orange had not met his burden to show that the factors for equitable estoppel were met. The court sentenced Orange to three years of initial confinement and two years of extended supervision, consecutive to Orange’s other sentences.

Equitable estoppel has four elements: “(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to [the other’s] detriment.” *Milas v. Labor Ass’n of Wis., Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). “When the facts are undisputed, or the circuit court’s factual findings are not clearly erroneous, we independently consider

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

² Orange asserts that DOC’s administrative rules required DOC to file the revocation order and warrant with the sentencing court within ten days after the revocation order and warrant was signed. The State does not dispute that DOC was required to file the revocation order and warrant within ten days or that it failed to do so. The parties do not identify a statutory remedy for DOC’s violation of this deadline.

application of the equitable estoppel doctrine.” *Drown*, 332 Wis. 2d 765, ¶6. “The party asserting equitable estoppel as a defense must prove the elements of estoppel by clear, satisfactory and convincing evidence.” *Milas*, 214 Wis. 2d at 12 n.14.

Orange argues that he relied on DOC’s delay in filing the request for a sentencing after revocation hearing to his detriment because: (1) he canceled his ride home from the prison that he had arranged upon completion of another sentence because he believed that he would be brought to the jail pending sentencing after revocation; and (2) by the time he was sentenced after revocation in this case, he had already completed his other sentence, and therefore he was denied the opportunity to receive a concurrent sentence. However, Orange does not allege that he relied on DOC’s delay in any way that led to the harm he alleges. In fact, Orange states that he cancelled his ride home on the belief that DOC *had* requested a sentencing hearing and that he would therefore be transported to the jail pending sentencing. And, he does not allege any action or inaction on *his* part in reliance on DOC’s delay that resulted in the unavailability of a concurrent sentence.³

Moreover, Orange has not established that the reasoning in *Drown* does not apply in this case to bar the application of equitable estoppel. In *Drown*, we stated that “as a matter of law, equitable estoppel cannot be applied to preclude the State from prosecuting a criminal charge.” *Drown*, 332 Wis. 2d 765, ¶1. We explained that “we will ‘not allow[] estoppel to be invoked against the government when the application of the doctrine interferes with the police power for

³ Even if Orange had asserted any reliance on his part, we are not persuaded that he has shown any harm based on DOC’s delay. While he asserts that he cancelled his ride home, he also acknowledges that DOC provided him transportation home by bus. And, at sentencing after revocation in this case, the circuit court determined that a consecutive, not concurrent, sentence was warranted.

the protection of the public health, safety or general welfare.” *Id.*, ¶8 (alteration in original; quoted source omitted). We explained further: “This rule perhaps explains why *Drown* is unable to cite a single Wisconsin case where the State has been estopped from prosecuting a criminal charge or, for that matter, where the State has been equitably estopped *in any capacity in a criminal case.*” *Id.* (emphasis added).

Orange argues that *Drown* is meaningfully distinguishable because *Drown* concerned a claim of equitable estoppel against the State for delayed prosecution, while Orange sought equitable estoppel against DOC for delayed sentencing after revocation. Orange contends that, because revocation proceedings are noncriminal, he was not entitled to the due process protections that *Drown* recognized are adequate safeguards of a defendant’s rights, so that equitable estoppel was not a necessary remedy. *See id.*, ¶10 (explaining that extension of equitable estoppel against the State in criminal cases is unnecessary “because defendants already benefit from various due process protections in the event of either inaction or action by the State that is allegedly unjust”). We are persuaded that the reasoning in *Drown* applies here.

While revocation proceedings themselves are civil in nature, *see State ex rel. Flowers v. DH&SS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978), the proceeding Orange sought to bar—sentencing after revocation—is criminal. *See, e.g., State v. Wegner*, 2000 WI App 231, ¶7 n.1, 239 Wis. 2d 96, 619 N.W.2d 289 (a circuit court’s duty at a sentencing after revocation is the same as its duty at the original sentencing). For the same reason that equitable estoppel cannot bar the State from pursuing criminal charges, it did not bar the State from pursuing Orange’s sentencing after revocation. *See Drown*, 332 Wis. 2d 765, ¶10 (“[T]he public interest would be unduly harmed if the State were equitably estopped from prosecuting criminal charges. There is

a compelling societal interest in convicting *and punishing* criminal offenders.” (emphasis added)).

In any event, even if we were to conclude that equitable estoppel could be applied to bar a sentencing after revocation, we conclude that Orange has not met his burden to establish that it applies here. As explained above, Orange has not shown that DOC’s delay caused him to act (or fail to act) in any way that was to his detriment.

Therefore,

IT IS ORDERED that the order 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