State of Wisconsin: **Circuit Court:** **Milwaukee County**

State of Wisconsin,

Plaintiff,

v. Case No. F965165

Josh Jensen,

Defendant.

Motion for Resentencing

Now comes the above-named defendant, by his attorney, Jeffey W. Jensen, and hereby moves the court to vacate the defendant's sentence on the child abduction charge, and to order resentencing on that count for the reason that a rote application of § 973.13, Stats., in this case frustrates the intention of the sentencing judge that Jensen receive some consideration for his decision to plead guilty.

As grounds, the undersigned shows to the court as follows:

1. In 1997 the defendant, Josh Jensen (hereinafter "Jensen") pled guilty to abduction of a child contrary to § 948.30(1)(b), Stats., and second degree sexual assault contrary to § 940.225(2)(a), Stats.

2. At the time of sentencing, the prosecutor told the judge that each of the counts that Jensen pleaded guilty to was a "twenty year felony", and the judge apparently believed that the maximum penalty for the abduction count was twenty years in prison. (Trans. 4-25-97 p. 3) Significantly, Jensen's attorney did not object to the prosecutor's statement.

3. In sentencing Jensen, the judge said that Jensen was entitled to "some consideration" for the fact that he pleaded guilty, and thereby spared the child victim the trauma of coming to court to testify about the incident. (Tran. 4-25-97 p. 25) Plainly,

then, the judge did not intend that Jensen be sentenced to the absolute maximum penalty on each count consecutive to one another.[1] The judge sentenced Jensen to twenty years in prison on the second degree sexual assault (which was the statutory maximum), and to thirteen years on the abduction of a child count (which was seven years less than what the judge believed the statutory maximum to be).

4. Under 1996 statutes, the maximum penalty for the child abduction count was actually ten years in prison. Thus, the original thirteen year sentence was invalid.

5. In January, 2014, the Department of Corrections contacted the court and pointed out the sentencing error. In response, and without conducting a hearing or inviting input from Jensen, the court entered an order "commuting" Jensen's sentence on the abduction count to ten years in prison, the maximum provided for by law[2]. Under the commuted sentence, Jensen received no consideration for the fact that he pleaded guilty. That is, under the commuted sentence Jensen is serving the statutory maximum on each count consecutive. This frustrates the intent of the sentencing judge that Jensen receive consideration for his decision to plead guilty.

6. Because the original sentence was invalid, and because a rote application of § 973.13, Stats. frustrates the intent of the sentencing judge, the court must order resentencing. § 973.13, Stats. does not restrict the court's sentencing discretion. When application of that statute would frustrate the intent of the sentencing judge, the proper remedy is resentencing. *State v. Holloway,* 202 Wis. 2d 694, 699, 551 N.W.2d 841, 844 (Ct. App. 1996) At a resentencing hearing, the court must consider all sentencing information up to the date of resentencing.

7. Thus, at a resentencing hearing, the court may consider Jensen's conduct in prison. Jensen's performance while in prison has been generally good. Additionally, the length of Jensen's original illegal sentence made him ineligible for certain

[1] Judge Dallet's order commuting Jensen's sentence to ten years on the abduction charge amounts to a statutory maximum sentence on each count.

[2] Apparently the circuit judge relied on § 973.13, States., which provides that, "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."

rehabilitative programming while in prison. Jensen is serving an "old law" sentence and, therefore, he becomes eligible for discretionary parole after serving one-third of the sentence. Jensen's ineligibility for rehabilitative programming, though, contributed to his inability to obtain discretionary parole.

Wherefore, it is respectfully requested that the court vacate Jensen's sentence and order resentencing..

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2014

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Memorandum of Law in Support of Motion for Resentencing

Argument

I. Merely commuting the excessive portion of the sentence frustrates the intent of the sentencing judge and, therefore, the court must order resentencing.

In January, 2014, the Department of Corrections informed the court that the sentence imposed on the child abduction count exceeded the statutory maximum. Thereupon, without conducting a hearing, the circuit court commuted Jensen's sentence from thirteen years to ten years, which is the true statutory maximum. The court was evidently relying upon the provisions of § 973.13, Stats., which 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."

However, the court must not apply § 973.13, Stats. where doing so would restrict the court's sentencing discretion, or where it would frustrate the original intent of the sentencing judge. As the court of appeals explained:

> On the issue before us, § 973.13, Stats., is more remarkable for what it does

> not say than what it does. The statute clearly invalidates the excess portion of an enhanced repeater sentence which is not properly proven. [internal citations omitted] . . . . However, the statute does not otherwise address other components or conditions of the sentence which do not directly bear upon the duration of the term imposed.

State v. Holloway, 202 Wis. 2d 694, 698, 551 N.W.2d 841, 843 (Ct. App. 1996). Thus, the court concluded:

> Sentences are to be individualized to meet the facts of the particular case and the characteristics of the individual defendant. *See State v. Thompson,* 172 Wis.2d 257, 265, 493 N.W.2d 729, 733 (Ct.App.1992). The sentencing court's original sentences in this case served this purpose. The commuted sentences for which Holloway argues, without more, do not serve this purpose. Instead, the sentences would be artificial, as if imposed in a vacuum. We should not restrict the discretionary authority of a court at resentencing when the underlying premise for an original sentence no longer exists. Resentencing is generally the proper method of correcting a sentencing error. *State v. Walker,* 117 Wis.2d 579, 583-84, 345 N.W.2d 413, 415 (1984); *Grobarchik v. State,* 102 Wis.2d 461, 470, 307 N.W.2d 170, 175 (1981).

Holloway, 202 Wis. 2d at 699-700.

In this case, resentencing is required. The court's recent order-- done without a hearing-- commuting Jensen's sentence to ten years frustrates the intent of the sentencing judge that Jensen receive some consideration for pleading guilty. As the judge said at sentencing:

> You have, to your credit, taken responsibility in this case, at least to the extent of pleading guilty to these two charges, acknowledging you committed a sexual assault and accepted the authority of the court to impose a sentence of up to the maximum sentences for the crimes you were charged with, without having the victim go through the process, the indignity of coming into court and testifying.
>
> *I think you are entitled to some consideration for that*. . . . . You have

> accepted responsibility . . . *and I think you are entitled to some consideration for that.*

(4-25-97 trans. p. 25) Thereafter, on the child abduction count, the court gave Jensen consideration by sentencing him to thirteen years of the twenty year maximum penalty that the judge thought was available to him. In other words, the judge imposed sixty-five percent of what he thought was the statutory maximum.

The order commuting the sentence to ten years amounts to the maximum sentence, and frustrates the judge's intention that Jensen receive some consideration for his decision to plead guilty. Thus, the statute should not apply. Resentencing is the proper remedy.

Additionally, a rote application of the statute without affording Jensen the opportunity to be heard violates due process; and also denies Jensen his Sixth Amendment right to effective assistance of counsel..

"The right to be heard is a fundamental requisite of due process of law." *State ex rel. Kaufman v. Karlen*, 2005 WI App 14, 278 Wis. 2d 332, 336, 691 N.W.2d 879, 881 Here, Jensen's sentence was modified without affording Jensen the right to be heard. Certainly, the state will argue that Jensen's sentence was *reduced* by three years and, therefore, he could not possibly object. However, his sentence was not truly reduced. The original sentence was illegal. The circuit court modified the sentence to make it *legal*, but-- for all of the reasons stated-- it not what the sentencing judge intended. Moreover, where a sentence is *illegal*, the court must conduct a resentencing hearing. When a resentencing hearing is conducted, the court may consider the defendant's performance in prison to that point. Therefore, Jensen was denied his right to be heard on what should be the nature of the modification.

Furthermore, the court's order denied Jensen his Sixth Amendment right to counsel. "A defendant is entitled to the assistance of counsel at all critical stages of prosecution." *State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279, 321, 746 N.W.2d 457, 479 This, of course, includes sentencing and during any legal proceeding to modify the sentence. Here, Jensen's trial counsel, just like the prosecutor and the judge, was

apparently under the misapprehension that the maximum penalty for child abduction was twenty years. The attorney offered no objection when the prosecutor told the judge that the maximum penalty was twenty years. Similarly, the attorney offered no objection when the judge imposed a sentence that was three years longer than the actual statutory maximum.

This is indisputably deficient performance by the attorney. There could be no tactical reason for not objecting; and, similarly, it is not matter of professional judgement. As the record now stands, counsel's error was prejudicial. Jensen presently is serving the maximum sentence on each count consecutive. This was not the sentencing judge's intention. Therefore, Jensen is serving a longer sentence than was intended by the judge.

In sentencing Jensen, the judge said that Jensen was entitled to "some consideration" for the fact that he pleaded guilty and spared the victim the need to testify about the incident. Thereafter, the court deducted seven years from what the judge believed to be the maximum penalty for child abduction. This is only sixty-five percent of the statutory maximum. Thus, the "consideration" that the original sentencing judge gave Jensen for pleading guilty was a forty-five percent decrease from the maximum.

The amended judgment, though, imposes the maximum sentence on each charge consecutive. In order words, Jensen got no consideration for pleading guilty. In order for the corrected sentence to be consistent with the intent of the original sentence, Jensen should be sentenced to sixty-five percent of the maximum or, in other words, six and one-half years.

II. When the court orders resentencing, the judge may consider the defendant's performance while in prison.

When the court orders resentencing, the court must consider all relevant sentencing information as of the date of the resentencing hearing. In other words, the court may consider the defendant's performance while in prison serving the illegal

sentence. The Supreme Court explained:

> First, we cannot discern a generally applicable distinction between resentencing following an invalid conviction and resentencing solely to correct an invalid sentence. The nature of the error necessitating the resentencing does not bear on the scope of information that a resentencing court should consider. When a resentencing is required for any reason, the initial sentence is a nullity; it ceases to exist. The role of the resentencing court is the same regardless of the procedural history leading to the resentencing. We reiterate what the *Leonard* court stated in 1968: "[W]e see no good reason for distinguishing those cases [in which the conviction was invalid] from situations involving only resentencing." *State v. Leonard,* 39 Wis.2d 461, 465, 159 N.W.2d 577 (1968).

State v. Carter, 208 Wis. 2d 142, 154-55, 560 N.W.2d 256, 261 (1997); *abrogated on other grounds* by, *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

Thus, since the original sentence was illegal, the court was obligated to vacate the illegal sentence and order resentencing. Here, the court did not do so.

Jensen's performance in prison been generally good. However, his eligibility to rehabilitative programs-- especially those designed for sex offenders-- was driven by the length of his original illegal sentence. In other words, he has not yet become eligible for many of these programs.

Had he been eligible, he could have completed them and then enhanced his position before the parole board.[3] Had he been serving a legal sentence from the beginning, he may have already been released on discretionary parole.

Conclusion

For these reasons, it is respectfully requested that the court vacate Jensen's original sentence on the child-abduction count, and order resentencing.

[3] This is an "old law" sentence and, therefore, Jensen became eligible for discretionary parole after serving one-third of his total sentence.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2014

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