

2003 DRAFTING REQUEST

Bill

Received: 09/04/2003

Received By: rnelson2

Wanted: As time permits

Identical to LRB:

For: Glenn Grothman (608) 264-8486

By/Representing: Jim

This file may be shown to any legislator: NO

Drafter: rnelson2

May Contact:

Addl. Drafters:

Subject: Courts - courts/judges/commsrs

Extra Copies:

Submit via email: YES

Requester's email: Rep.Grothman@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Circuit court authority to reduce forfeiture or fine by the amount of jail time

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rnelson2 09/08/2003			_____			S&L
/1	mlief 09/19/2003	kgilfoy 09/23/2003	pgreensl 09/23/2003	_____	lemery 09/23/2003	Inorthro 10/10/2003	

FE Sent For:

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FE Sent For:

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Court of Wisconsin

**OFFICE OF THE ATTORNEY GENERAL
DIRECTOR OF STATE COURTS**

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

16 East State Capitol
Telephone 608-266-6828
Fax 608-267-0980

John Voelker
Interim Director of State Courts

J.V.

Condon?

Grothman?

4-84 PG

*Bill to give
Circ Ct's same power
Judges
Clerks of Circuit Court*

FROM: John Voelker
Interim Director of State Courts

RE: Attorney General Opinion

Attached is an opinion letter from the Office of the Attorney General, addressing the question of whether a circuit court judge may reduce a defendant's fine or forfeiture by some amount of money for each day that the defendant is incarcerated for failure to pay. The Attorney General's Office concludes that circuit courts may not reduce a defendant's obligation to pay a fine or forfeiture on the basis of time spent in jail.

JV:MV/lai
Enc.
cc: District Court Administrators

*800.095
(4)(b) 1. - memo of
auth*

JAMES E. DOYLE
ATTORNEY GENERAL

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October 29, 2002

Mr. J. Denis Moran
Director of State Courts
Supreme Court of Wisconsin
P.O. Box 1688
Madison, Wisconsin 53701-1688

Re: Circuit Court Authority to Reduce Fines and Forfeitures for Days Spent in Jail

Dear Mr. Moran:

I am writing in response to your letter to Attorney General Doyle requesting an opinion on whether a circuit court judge may reduce a defendant's fine or forfeiture by some amount of money for each day that the defendant is incarcerated for failure to pay.

It is our opinion that circuit court judges lack the authority to reduce a defendant's obligation to pay a fine or forfeiture on the basis of time spent in jail.

The supreme court has concluded that there is no statutory authority to reduce a criminal fine -on the basis of time spent in jail, and the courts lack the inherent power to fashion terms of criminal sentences that the Legislature has not authorized.

The authority of the circuit court to order the imprisonment of a defendant who has failed to pay a fine derives from Wis. Stat. § 973.07, which provides:

If the fine, costs, penalty assessment [or other applicable surcharge or assessment] are not paid or community service work under s. 943.017(3) is not completed as required by the sentence, the defendant may be committed to the county jail until the fine, costs, penalty assessment, [and other applicable surcharges and assessments] are paid or discharged, or the community service work under s. 943.017(3) is completed, for a period fixed by the court not to exceed 6 months.

As you note, the supreme court construed this provision in *State ex rel Pedersen v. Blessinger*, 56 Wis. 2d 286, 290, 201 N.W.2d 778 (1972), in which the court held that an indigent defendant

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could not be imprisoned for failure to pay a fine beyond the defendant's means. The court examined § 973.07 and explained that imprisonment pursuant to the statute was an enforcement method for collection of a fine rather than a means by which the fine could be extinguished. Apropos of the question you raise, the court explained that the statutes did not provide for "imprisonment in terms of payment of a fine, much less at a certain dollar rate per day." 56 Wis. 2d at 290. It also stated that "Wisconsin does not have a sentencing alternative of imprisonment as the equivalent or in payment of a fine." Id. at 295. In case there were any doubt on the point, the court added, "Certainly, sec. 973.07, Stats., which contemplates imprisonment until the fine and costs are paid, does not provide even by implication that such imprisonment is in satisfaction of the debt." Id. at 295, n.6.

As you also note, 73 Op. Att'y Gen. 24 (1984) made the same point: "In *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 295 n.6, 201 N.W.2d 778 (1972), the court said that section 973.07, which contemplates imprisonment until the fine and costs are paid, does not provide even by implication that such imprisonment is in satisfaction of the debt. This is the rule in this state although in many other states the contrary is true." 73 Op. Att'y Gen. at 25.

Lacking statutory authority, circuit courts may not invoke their inherent authority to craft the terms of criminal sentences. In *Grobarchik v. State*, 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981), the supreme court clearly set forth the limits on courts' inherent authority in this area:

The fashioning of a criminal disposition is not an exercise of broad, inherent court powers. We have recently observed based upon separation of powers principles, that it is for the legislature to prescribe the punishment for a particular crime and it is the duty of the court to impose that punishment. *State v. Machner*, 101 Wis.2d 79, 81, 303 N.W.2d 633 (1981). If the authority to fashion a particular criminal disposition exists, it must derive from the statutes. Id. at 82.

See also *State v. Torpen*, 2001 WI 273, ¶7, 248 Wis. 2d 951, 637 N.W.2d 48 1; *State v. Setagord*, 211 Wis. 2d 397, 565 N.W.2d 506 (1997) at 114.

The courts have construed § 973.07 in subsequent cases. See *State v. Oakley*, 2000 WI 37, 234 Wis. 2d 528, 609 N.W.2d 786; *State v. Schuman*, 173 Wis. 2d 743, 496 N.W.2d 684 (Ct. App. 1993). However, no later decision has cast doubt on the *Pedersen* court's interpretation of the provision. There has been no statutory change in the authority of the circuit courts in this regard. Accordingly, we conclude that there is no statutory authorization for a circuit court to provide that imprisonment discharges an obligation to pay a fine at a specified rate.

The authority of the circuit court to impose imprisonment on a non-indigent defendant who has failed to pay a forfeiture derives from Wis. Stat. § 778.09. This section provides: "Where judgment is recovered pursuant to this chapter it shall include costs and direct that if the

judgment is not paid the defendant, if an individual, shall be imprisoned in the county jail for a specified time, not exceeding six months, or until otherwise discharged pursuant to law." We are unaware of any convincing basis on which to conclude that this section provides circuit courts with authority to order the discharge of a forfeiture obligation on the basis of time spent in jail. We also note that the 1984 Opinion of the Attorney General cited above concluded that the reasoning of Pedersen, which considered imprisonment for failure to pay a fine, applies equally to unpaid forfeitures imposed under Wis. Stat. § 345.47(1)(a). 73 Op. Att'y Gen. at 25. In addition, the supreme court has interpreted the Wisconsin Constitution to prohibit imprisonment as punishment for civil violations. See *State ex rel. Keefe v. Schmiede*, 251 Wis. 79, 85, 28 N.W.2d 345 (1947). It seems likely that Wisconsin courts would conclude, following this reasoning, that offsetting a forfeiture with time served in jail amounts to imposing jail time as a punishment for a civil violation.

We appreciate that in a June 2001 letter to Judge Moeser, a representative of the public defender's office came to a different conclusion. The reasoning was that "[b]ecause the 'or discharged' language appears in the statute authorizing imprisonment, imprisonment can be a method of discharge, so long as it does not exceed 6 months." The letter also noted that municipal courts are expressly authorized to credit a defendant's forfeiture obligation by a specified amount based on time spent in jail, and raised the possibility of an equal protection problem if the same opportunity was not provided to a defendant subject to a fine or forfeiture in a circuit court proceeding.

We are unable to agree with this analysis. First, § 973.07 contained the same "paid or discharged" language when it was construed by the supreme court in *Pedersen* as it does today.¹ Despite the use of the term "paid or discharged" in the statute before the court, the *Pedersen* court was clear that neither this provision nor any provision of Wisconsin law authorized incarceration as a means of discharging an obligation to pay a fine. Second, "discharge" is a generic term that refers to various means by which an obligation may be released. See *Blacks' Law Dictionary* (6th ed. 1990) at 463. One may concede the larger point - that the use of the term in § 973.07 seems to contemplate some means of satisfying an obligation on a fine other than by direct payment - without agreeing to the more specific point that the particular means of satisfying the fine obligation in question - by spending a specified period in jail - is one that the

¹ Indeed, the same language has been included in the statutes for more than 120 years. See Wis. Rev. Stat. (1878) § 4633:

When a fine is imposed as the whole or any part of the punishment for any offense, by any law, the court shall also sentence the defendant to pay the costs of the prosecution and to be committed to the county jail until the fine and costs are paid or discharged, but the court shall limit the time of such imprisonment in each case in addition to any other imprisonment in its discretion, in no case however, to exceed six months, and the court may also issue an execution against the property of the defendant for said fine and costs.

(Emphasis added.)

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statute authorizes. There are means of discharging a fine obligation other than direct payment that are specifically authorized by statute. For example, a fine obligation could be satisfied through operation of a court-ordered assignment of the defendant's wages or other income pursuant to Wis. Stat. § 973.05(4)(b).

Since the *Pedersen* decision, the Legislature has enacted Wis. Stat. § 800.095, which authorizes a municipal court to order a defendant who has failed to pay a judgment for restitution or a forfeiture to be imprisoned for up to ninety days, with the defendant reducing the amount owed at a rate of at least \$25 for each day of imprisonment. The enactment of this provision does not call the reasoning of *Pedersen* into question. Instead, it demonstrates that when the Legislature intends a court to be authorized to reduce a fine obligation by a period of imprisonment, it specifically so states in a statute.

We are not convinced that the enactment of Wis. Stat. § 800.095, coupled with the *Pedersen* holding that circuit courts lack the authority that § 800.095 provides for municipal courts, raises an equal protection problem. Actions may be brought in municipal court seeking forfeitures or penalties for violations of municipal ordinances. Wis. Stat. § 800.02(1). In general, if a forfeiture is imposed on a non-indigent defendant and not paid, then the municipal court may order the defendant to be imprisoned until the forfeiture is paid, except that the defendant reduces the amount owed at a rate of at least \$25 for each day of imprisonment. Wis. Stat. § 800.095(4)(b). An exception exists for forfeiture actions in municipal court for violations of traffic regulations. In that case, according to Wis. Stat. § 345.47(1m), "the court shall determine, at the time of entering judgment . . . whether incarceration may be ordered for noncompliance with a judgment or order under this section. If incarceration may be ordered because of the defendant's subsequent noncompliance with the judgment, the provisions of s. 800.095(1) to (3) and (4)(a) apply." Wis. Stat. § 800.095(4)(b) is conspicuously not applicable in this situation, which implies that a defendant who fails to pay a forfeiture imposed by a municipal court for a traffic offense does not have the opportunity to work off the obligation by spending time in jail.

Under certain circumstances, violations of municipal ordinances may be prosecuted in circuit court. It is this possibility that appears to give rise to the equal protection issue. However, in this situation the circuit court borrows municipal court procedure, including § 800.095. According to Wis. Stat. § 66.0114(1)(c), "[i]f the circuit court finds a defendant guilty in a forfeiture action based on a violation of an ordinance, the court shall render judgment as provided under ss. 800.09 and 800.095." This provision appears to eliminate the possibility that a defendant will be subject to different sanctions for ordinance violations, including sanctions for failing to pay forfeitures, depending on whether the case is prosecuted in municipal or circuit court. See *Milwaukee v. Kilgore*, 193 Wis. 2d 168, 186, 532 N.W.2d 690 (1995). Furthermore, the imposition of different sanctions, and the availability of different means of curing them, under ordinance and statutory schemes does not create an equal protection problem. Cf. *State v.*

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Karpinski, 92 Wis.2d 599, 616, 285 N.W.2d 729 (1979)(holding that the coexistence of a criminal statute and municipal ordinance regulating the same conduct did not violate equal protection).

For purposes of the equal protection issue, then, the relevant distinction does not appear to be whether an ordinance prosecution is handled in municipal court or circuit court. Instead, the difference in sanctions is attributable to the nature of the violation. If a non-indigent defendant fails to pay a forfeiture imposed for violation of a non-traffic ordinance, then the defendant may be able to work off the forfeiture obligation by spending time in jail. If a nonindigent defendant fails to pay a forfeiture imposed for violation of state law, or for violation of a traffic ordinance, then the possibility of discharging the obligation by spending time in jail is not available. In this regard, failures to pay forfeitures for violations of state law and traffic ordinances are treated like failures to pay criminal fines.

"Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage," courts "presume the constitutionality of statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). A rational basis exists for this difference in the remedial statutes applicable to failures to pay forfeitures for non-traffic ordinance violations, and failures to pay other forfeitures and fines. The Legislature could reasonably determine that a violation of an ordinance may be subject to less exacting sanctions than a violation of state law, and so a failure to pay a forfeiture imposed for a non-traffic ordinance violation may essentially be purged by spending time in jail, while this remedy is not available for failures to pay other forfeitures or fines.

The supreme court has explained that there is no statutory authority in Wisconsin law for a circuit court to offer imprisonment as a means of satisfying an obligation to pay a fine or a forfeiture imposed for a violation of state law. Accordingly, it is our opinion that circuit courts are not authorized to include such a term in a judgment imposing a fine or forfeiture, either by the terms of a particular judgment or by operation of a local circuit court rule.

Sincerely,

Edwin J. Hughes
Assistant Attorney General



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-3199/1

MJL:.....
King

2003 BILL

Due Oct 1
To ed
9/19

Sen. Cat.

at least

1 AN ACT ...; relating to: allowing a circuit court to reduce the amount of an unpaid
2 forfeiture by time served in jail for failure to pay the forfeiture.

Analysis by the Legislative Reference Bureau

Current law authorizes a municipal court to reduce the amount of an unpaid municipal forfeiture by \$25 a day for each day the defendant serves in jail for failure to pay the forfeiture. This bill gives a circuit court the same power to reduce the amount of a forfeiture imposed for violation of a state statute. ~~the~~

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 778.09 of the statutes is amended to read:
4 **778.09 Judgment, costs, commitment of defendant.** Where judgment is
5 recovered pursuant to this chapter it shall include costs and direct that if the
6 judgment is not paid the defendant, if an individual, shall be imprisoned in the
7 county jail for a specified time, not exceeding 6 months, or until otherwise discharged

BILL

1 pursuant to law, except that the defendant reduces the amount owed at a rate of at
2 least \$25 for each day of imprisonment. The commitment shall issue, as in ordinary
3 criminal actions, and the defendant shall not be entitled to the liberties of the jail.

4 

History: 1979 c. 32 s. 56; Stats. 1979 s. 778.09; 1997 a. 254.

5 **SECTION 2. Initial applicability.**

6 (1) This act first applies to persons upon whom a forfeiture ~~has been~~ imposed
7 on the effective date of this subsection.



8 (END)

Basford, Sarah

From: Emerson, James
Sent: Thursday, October 09, 2003 2:14 PM
To: LRB.Legal
Subject: Draft review: LRB 03-3199/1 Topic: Circuit court authority to reduce forfeiture or fine by the amount of jail time

It has been requested by <Emerson, James> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 03-3199/1 Topic: Circuit court authority to reduce forfeiture or fine by the amount of jail time