

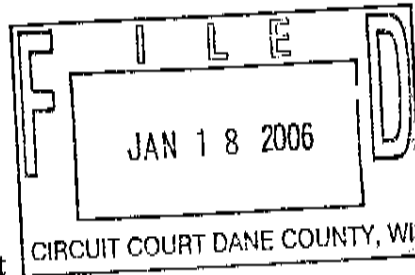
STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 14

DANE COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

BRIAN B. BURKE,
DefendantCase No. 02 CF 1476 *o***DECISION REGARDING REQUEST FOR CLARIFICATION OF SENTENCE**

On November 30, 2005, I sentenced Burke to 6 months in the county jail and approved the transfer of the sentence to Milwaukee County if Burke was accepted there. Apparently, officials at the Milwaukee County House of Corrections have placed Burke at his home. The State asks me to clarify my sentence and proposes that I communicate the following to the Superintendent of the House of Corrections:

As reflected in the portions of the sentencing transcript quoted above, the court recommends that the Superintendent of the Milwaukee House of Corrections promptly exercise his or her discretion to confine the defendant, Brian B. Burke, for the remaining period of his jail sentence within a secure facility, less any good time or other ordinarily employed inducements for good behavior while in custody. The court intended to impose, for execution by a sheriff, an in-custody jail sentence, with work release privileges, if the defendant qualifies for work release.

The defense objects. I conclude that my sentence needs no clarifying and that I lack jurisdiction to tell the Superintendent of the House of Corrections how to run the facility.

Wis. Stat. 302.425(2) provides,

Subject to the limitations under sub. (3), a county sheriff or a superintendent of a house of correction may place in the home detention program any person confined in jail who has been arrested for, charged with, convicted of or sentenced for a crime. The sheriff or superintendent may transfer any prisoner in the home detention program to the jail.

In the recent case of *State v. Galecke*, 2005 WI App 172, ___ Wis. 2d ___, 702 N.W.2d 392, a Portage County judge placed the defendant on probation and ordered that he serve 270 days in jail with work release privileges. The judge allowed Galecke to serve the jail time in Outagamie County or any other county close to his employment. Shortly after sentencing, Galecke's victims informed the judge that the Outagamie County Sheriff had placed Galecke on home detention. The judge scheduled a review hearing and modified Galecke's probation conditions to require him to refuse electronic monitoring. Alternatively, the judge stated, he would withdraw the permission to serve the jail time in another county. Galecke appealed. The Court of Appeals reversed the trial court. Its ruling is fairly summed up in a single sentence:

The statute [Wis. Stat. 302.425(2)] plainly does not give any authority to the circuit court to determine which defendant is permitted to participate in the home detention program; the sheriff manages the jail, the court does not.

Id., ¶ 10. The Court of Appeals also concluded that the trial court did not have the authority to order that Galecke be transferred from one jail to another. Recognizing that *Galecke* and *State v. Schell*, 2003 WI App 78, 261 Wis. 2d 841, prohibit me from ordering what the State seeks, the prosecution writes,

Yet, the court has the discretionary authority to communicate to those entrusted to determine forms of "jail" in Milwaukee County the fact that this court determined at the time of sentencing that this is a case that requires a period of actual confinement in a secure facility, and that transfer to Milwaukee County would not have been recommended if the court had understood home detention alone to be the outcome.

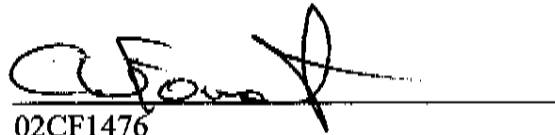
No authority for this proposition is offered. True or not, what the State seeks from me is a recommendation to the Superintendent of the House of Corrections, a recommendation that cannot be enforced or appealed. Courts do not give advisory opinions. *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991).

In *Schell*, the court wrote,

Whether a circuit court sentences a defendant to prison or imposes probation, "the adversary system has terminated and the administrative process, vested in the executive branch of the government, directed to the correctional and rehabilitative processes of the parole and probation system has been substituted in its place." Part of this administrative process is the sheriff's authority to manage the county jail.

Schell, 2003 WI App 78, ¶16. How Burke serves his sentence is now in the hands of the executive, not the judicial, branch.

Dated this 18th day of January, 2006.



02CF1476

C. WILLIAM FOUST
Dane County Circuit Court
Branch 14

DA Brian W. Blanchard
AAG Roy R. Korte
Atty. Robert H. Friebert
Sup. Ronald K. Malone