COURT OF APPEALS
DECISION
DATED AND RELEASED

January 18, 1996

No. 94-2869-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRUCE HOEFS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Jefferson County: ARNOLD SCHUMANN, Judge. *Affirmed and cause remanded with directions*.

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Bruce Hoefs appeals from a judgment of conviction and an order denying his postconviction motion. The issue is whether the court erroneously exercised its discretion in sentencing him. We affirm and remand for amendment of the judgment.

Hoefs pleaded no contest to one count of delivery of tetrahydrocannabinols, 500 grams or less, contrary to § 161.41(1)(h)1, STATS.,

and one count of keeping a vehicle used for delivering controlled substances, contrary to § 161.42, STATS., both as second offenses under § 161.48, STATS.[1] The court sentenced Hoefs to four years on the first count and two years on the second, to be served concurrently.

Hoefs argues that the court erroneously exercised its discretion because it did not consider certain sentencing guidelines. This is not an appealable issue. ***State v. Elam***, 195 Wis.2d 683, 538 N.W.2d 249 (1995).

Hoefs argues that the court was first obligated to consider whether he should be placed on probation. However, the court did discuss and reject probation, noting that Hoefs had a lengthy record and was on probation at the time of these offenses.

Hoefs argues that the court erred by not considering him for the intensive sanctions program before sentencing him to prison. He argues that if it is error to impose a sentence of incarceration without first considering probation, it is also error to incarcerate him without consideration of intensive sanctions. Hoefs cites no law for this proposition, and does not develop the argument beyond this simple assertion. Furthermore, Hoefs did not request intensive sanctions as an alternative at sentencing.

Hoefs argues that the presentence report did not note that he had successfully completed a similar program in Dane County, and that his completion is a new factor upon which he should be resentenced. A new factor for resentencing must be one which was either not then in existence or which was then in existence, but unknowingly overlooked by the parties. ***State v. Ambrose***, 181 Wis.2d 234, 240, 510 N.W.2d 758, 761 (Ct. App. 1993). Hoefs' completion of the program was in existence at the time of sentencing. He has not shown that it was unknowingly overlooked. Moreover, to justify resentencing, a new factor must be one which frustrates the purpose of the original sentence, something which strikes at the very purpose for the sentence. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989).

[1] We note that the second amended judgment of conviction identifies only one of the counts as a second offense. The judgment should be amended on remand.

Discovery of a fact which the sentencing court could have considered, but did not, does not satisfy this standard. ***Id.*** at 99-100, 441 N.W.2d at 280. We conclude the trial court did not err in rejecting Hoefs' completion of the Dane County program as a new factor.

Hoefs argues that the court erred by not stating why, once it chose prison, it set a sentence of the length it did. When imposing sentence, a trial court must consider the gravity of the offense, the offender's character and the public's need for protection. ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). The weight given to each sentencing factor is left to the trial court's broad discretion. ***Id.*** The sentencing transcript shows that the court considered the relevant factors on the record.

Hoefs also argues that his sentence was excessive. A trial court exceeds its discretion as to the length of the sentence only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Id.*** The sentence here was not so excessive or unusual. Rather than four years of concurrent sentences, the court could have imposed consecutive sentences of six and two years and substantial fines.

On remand, the court shall amend the judgment of conviction as discussed above in footnote 1.

By the Court.—Judgment and order affirmed; cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.