COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP266-CR **Cir. Ct. No. 2009CF80**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. WIELAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Mark Wieland appeals a judgment of conviction for two counts of manufacture/delivery of cocaine and an order denying postconviction relief. Wieland argues a new factor warrants sentence

modification. Wieland also argues the circuit court erroneously exercised its initial sentencing discretion. We reject his arguments and affirm.

¶2 A criminal complaint alleged that Wieland sold cocaine to an undercover informant. Wieland was charged with one count of manufacture/delivery of cocaine in an amount between five and fifteen grams, and a second count of manufacture/delivery of cocaine in an amount between one and five grams. Both counts were enhanced for being a repeat offender due to Wieland's 2003 conviction in Michigan for a controlled substance offense. Wieland's maximum penalty exposure, as enhanced, was thirty-five and one-half years in prison.

¶3 Wieland entered a no contest plea. Count one was reduced to a charge of manufacture/delivery of cocaine in an amount between one and five grams, and count two remained unchanged. The State dismissed the repeat offender enhancements. This plea agreement reduced Wieland's maximum penalty exposure to a total of twenty-five years in prison.

¶4 The circuit court imposed a sentence of four years' initial confinement and two years' extended supervision on each count, consecutively. Wieland filed a motion to reduce his sentence, which was denied after a hearing. Wieland now appeals.

¶5 Wieland essentially claims his roommate Richard Giese was a bigger cocaine dealer than he was, yet Giese's sentence was not much longer than Wieland's. According to Wieland, this information was undeveloped in the presentence investigation report and constitutes a new factor warranting sentence modification. This contention is meritless.

¶6 The circuit court was fully aware of Giese's role in not only selling drugs, but also in coaxing Wieland into the drug business. That is why the court imposed as a condition of sentencing no further contact with Giese. Giese was also convicted of only one count, rather than Wieland's two, and his sentence was imposed by a different judge. In any event, the court was primarily concerned with the fact that Wieland was "totally immersed" in the drug world, he was likely selling cocaine to others at the workplace, he would continue to sell drugs unless caught, and he had a bad criminal record. Even so, the court granted Wieland's request to participate in the risk reduction, challenge incarceration and earned release programs which, if successfully completed, could substantially reduce his sentence.

¶7 Simply put, Wieland failed to satisfy his burden of proving by clear and convincing evidence that Giese's sentence qualified as a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶¶33, 36-38, 333 Wis. 2d 53, 797 N.W.2d 828. Giese's sentence imposed by another judge did nothing to frustrate the purpose of Wieland's sentence. The mere fact that Giese may have been a bigger cocaine dealer does not render unjust the reasonable sentence imposed on Wieland for his own admitted cocaine dealing. The sentencing record was not deficient. The court properly exercised its discretion in denying Wieland's sentence modification motion.

¶8 The circuit court also properly exercised its initial sentencing discretion. The court considered the proper sentencing factors, including Wieland's character, the gravity of the offenses and the need to protect the public. *See* ***State v. Harris***, 2010 WI 79, ¶65, 326 Wis. 2d 685, 786 N.W.2d 409. The court considered Wieland's positive traits, but also considered his criminal record, his immersion in the drug world, and the fact that he had been on probation three

times in the past. The court also emphasized the seriousness of cocaine dealing and the need to punish him. Wieland's sentence of eight years' initial incarceration and four years' extended supervision was approximately one-third of the maximum before the plea agreement, and less than one-half of his total exposure after the plea deal. A sentence that is less than the maximum allowable by law is presumptively neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).