COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP323-CR **Cir. Ct. No. 2007CF98**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH J. HYNES,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Kenneth Hynes, pro se, appeals an order denying his WIS. STAT. § 973.195[1] motion for sentence adjustment, and an order denying a motion for reconsideration. Hynes argues the court failed to honor the intent of the original sentencing court when denying his petition.[2] Alternatively, Hynes contends the court erroneously exercised its discretion by failing to adequately set forth its rationale. We hold that the original sentencing court did not express any intent that Hynes should be granted sentence adjustment. However, we agree that the sentence adjustment court inadequately set forth its rationale. Nonetheless, we affirm because our independent review of the record reveals grounds to support the court's discretionary decision.

BACKGROUND

¶2 Hynes pled guilty to a charge of delivering between one and five grams of cocaine, as a repeater. Two other repeater charges, delivery of one gram or less of cocaine and felony bail jumping, were dismissed and read in at sentencing. Hynes was sentenced to twelve years of imprisonment, consisting of seven years of initial confinement and five years of extended supervision. The court found Hynes eligible to participate in the Challenge Incarceration Program and the Earned Release Program, both of which permit an inmate to earn an early discharge from the confinement portion of his or her sentence.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Judge Benjamin D. Proctor presided at Hynes's sentencing. Following Judge Proctor's retirement, Judge Jon M. Theisen decided the motions underlying this appeal.

¶3 Hynes did not successfully complete either of the early discharge programs. Hynes made substantial progress in the Challenge Incarceration Program, but in October 2011 was involuntarily discharged from the program shortly before completion due to a medical problem. Hynes was subsequently denied entry into the Earned Release Program due to bad conduct.

¶4 In October 2012, Hynes petitioned the circuit court for sentence adjustment under WIS. STAT. § 973.195. The petition was supported by a verification of time served; Hynes's offender conduct record; a statement from Hynes; a congratulatory note from the sentencing court concerning Hynes's then-imminent graduation from the Challenge Incarceration Program; twelve certificates of completion of behavioral and educational courses; a resume; a summary of Hynes's institution conduct reports; a Challenge Incarceration Program medical-termination discharge summary that indicated Hynes had performed at a high level; a hospital emergency room summary noting viral bronchitis; a summary of Hynes's work, housing, and support programming goals upon release; and letters of support from Hynes's mother and sister.

¶5 The circuit court notified the district attorney of Hynes's petition as required by WIS. STAT. § 973.195(1r)(c), and the notice was returned by the assistant district attorney who handled Hynes's case, indicating objection to the petition.[3] The court subsequently denied Hynes's petition without a hearing. The court utilized a form order,[4] checking a box indicating "denied because," after

[3] Both WIS. STAT. § 973.195(1r)(c) and the CR-259 form notice refer exclusively to notice to, and objection by, "*the* district attorney." (Emphasis added.) Hynes, however, has raised no issue concerning completion of the form by an assistant district attorney.

[4] Circuit court form CR-260, 08/11 "Order Concerning Sentence Adjustment § 973.195."

which the court hand wrote "adjustment unjustly depreciates the seriousness of this crime."

¶6 Hynes moved for reconsideration, primarily asserting the denial appeared to conflict with the sentencing court's determination that Hynes was eligible for the early discharge programs. The court denied that motion via a rubber stamp to the cover letter of Hynes's motion.[5] Hynes now appeals.

DISCUSSION

¶7 Pursuant to WIS. STAT. § 973.195, Hynes was allowed to petition for sentence adjustment after serving seventy-five percent of his initial confinement term. If granted, the remainder of the confinement term would be converted to extended supervision. WIS. STAT. § 973.195(1r)(f), (g). As relevant here, the "ground for a petition" is "[t]he inmate's conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs since he or she was sentenced."[6] WIS. STAT. § 973.195(1r)(b)1. In determining whether to grant or deny a sentence adjustment petition, the applicable standard is "the public interest." WIS. STAT. § 973.195(1r)(f). Sentence adjustment is left to the circuit court's discretion. *See* ***State v. Stenklyft***, 2005 WI 71, ¶¶81, 126, 281 Wis. 2d 484, 697 N.W.2d 769.

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[5] The red-ink stamp indicates, "**ORDER**," below which it states, "The court having reviewed the request to which this order is affixed: IT IS HEREBY ORDERED, the request is: ___APPROVED ____DENIED[.]" The stamp then includes a space for the date, the court's signature, and "cc." In this instance, the court circled "DENIED."

[6] Hynes also sought sentence adjustment on the ground that "[s]entence adjustment is otherwise in the interests of justice." *See* WIS. STAT. § 973.195(1r)(b)5. However, aside from checking the corresponding box on the form petition, neither his petition nor appellate briefs addressed this ground.

¶8 Hynes argues the court erred because its decision conflicts with the original sentencing judge's intent and because the court inadequately set forth its rationale. We reject Hynes's first contention, which relies on a faulty premise. The court's denial of sentence adjustment because it "unjustly depreciates the seriousness of this crime" does not conflict with the original sentencing court's decision to make Hynes eligible for the Earned Release Program and Challenge Incarceration Program. At sentencing, the court made a forward-looking determination that Hynes could earn an early discharge by successfully completing one of the programs. In contrast, the sentence adjustment court was tasked with a retrospective determination based on Hynes's conduct *since* the time of sentencing. Because Hynes was unable to successfully complete either program, for whatever reason, the sentencing court's eligibility determinations have no bearing on the sentence adjustment petition. Further, there is no other evidence in the record suggesting the original sentencing court intended that Hynes should receive an early discharge via statutory sentence adjustment in the event he failed to complete either of the programs. The sentence adjustment court was entitled to consider Hynes's postsentencing conduct and determine that, under the circumstances, Hynes had failed to counterbalance the "seriousness of the crime."

¶9 We agree with Hynes's second argument, however, that the court erroneously exercised its discretion by inadequately setting forth its rationale. The form order that the court utilized to deny Hynes's sentence adjustment petition essentially provides for three options: deny because the petitioner failed to meet one or more of five statutory prerequisites; grant because adjustment is in the public interest; or deny because adjustment is not in the public interest. The court ticked the box for denying because statutory prerequisites were not met. However, rather than selecting any of the five options (none of which applied), the court

handwrote "adjustment unjustly depreciates the seriousness of this crime."[7] The court did not select a box concerning whether adjustment was in the public interest, or attach any written reasons. Similarly, with regard to Hynes's reconsideration motion, the court literally rubber-stamped its prior decision without providing any reasons.

¶10 We conclude the court erroneously exercised its discretion by inadequately setting forth its reasoning and not applying the "public interest" standard. "[I]n order for a discretionary decision to be upheld, 'there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.'" ***State v. Hunt***, 2003 WI 81, ¶42, 263 Wis. 2d 1, 666 N.W.2d 771 (quoting ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983)). "A circuit court's failure to delineate factors that influenced its decision constitutes an erroneous exercise of discretion." ***Id.***, ¶44 (quoting ***State v. Sullivan***, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998)). Further, concerning sentence adjustment, our supreme court demands:

> [T]he record of the proceedings must clearly demonstrate that the circuit court exercised its discretion and weighed the appropriate factors when the court reached its decision on sentence adjustment. An example of such balancing would be a record that showed that the circuit court considered the nature of the crime, character of the defendant, protection of the public, positions of the State and of the victim, and other relevant factors such as "[t]he inmate's conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs …." WIS. STAT. § 973.195(1r)(b)(1).

[7] The court form indicates at the bottom of both pages: "**This form shall not be modified. It may be supplemented with additional material**." Circuit court form CR-260, 08/11 "Order Concerning Sentence Adjustment § 973.195."

Stenklyft, 281 Wis. 2d 484, ¶126.

¶11 In ***Stenklyft***, "the circuit court considered some of these factors in the motion hearings for sentence adjustment and for reconsideration, [but] the court did not make a sufficient record demonstrating an exercise of discretion in light of all of the appropriate factors." ***Id.***, ¶126 n.2. Accordingly, the court remanded for the circuit court to properly exercise its discretion. ***Id.***, ¶¶83, 126. That result notwithstanding, "[w]hen a circuit court fails to set forth its reasoning, appellate courts [may] independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." ***Hunt***, 263 Wis. 2d 1, ¶¶44-45, n.14.

¶12 Applying the independent review doctrine, we determine the record reasonably supports a decision to deny Hynes's sentence adjustment petition. Admirably, Hynes completed a substantial number of educational and behavioral courses and performed well in the Challenge Incarceration Program until his medical discharge. On the other hand, the district attorney's office objected to Hynes's petition and his conduct while confined was less than stellar. Indeed, Hynes's conduct record is what prevented his enrollment in the Earned Release Program. Moreover, Hynes's two most severe rules violations occurred not long before his October 29, 2012 sentence adjustment petition. Hynes engaged in horseplay/fighting on April 10, 2012, resulting in thirty days' disciplinary segregation. Then, on June 5, 2012, he engaged in prohibited sexual contact with another inmate. That violation led to 120 days' segregation.

¶13 Considering the currency and severity of Hynes's bad conduct and the assistant district attorney's objection, had the circuit court properly exercised its discretion, it could have reasonably determined that sentence adjustment was

not in the public interest because it would unduly depreciate the seriousness of Hynes's crime under the circumstances—particularly given that two additional felonies were read-in at sentencing and all charges carried a repeater status. *See* ***Hunt***, 263 Wis. 2d 1, ¶45 (well-settled that a discretionary decision may be upheld if the record contains facts that would support the circuit court's decision had it fully exercised its discretion) (citing ***Hammen v. State***, 87 Wis. 2d 791, 800, 275 N.W.2d 709 (1979)).[8]

By the Court.—Orders affirmed.

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

[8] While we affirm, the better practice would have been to attach the reasons for denial to the form order, rather than relying on this court reviewing the record to find a basis to affirm. Indeed, the form order contains a check-off box indicating, "Written reasons are attached."