COURT OF APPEALS
DECISION
DATED AND RELEASED

December 18, 1996

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

NOTICE

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

No. 95-3432-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GINIENE P. QUICK,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Green Lake County: WILLIAM M. MC MONIGAL, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Giniene P. Quick appeals from an amended judgment of conviction[1] and challenges her sentence. Because we conclude that the trial court properly exercised its sentencing discretion, we affirm.

[1] Quick filed a motion to modify her sentence on the grounds that it was excessive. The motion was denied as memorialized by the amended judgment of conviction.

Quick was convicted of one count of delivering a controlled substance (tetrahydrocannabinol or THC) within 1000 feet of a school. For this crime, the legislature has imposed a minimum three-year sentence. *See* §§ 161.41(1)(h)1 and 161.49(2)(a), STATS. Under these statutes, a defendant is not eligible for parole until the minimum three-year term has been served. However, under § 161.438, STATS., a trial court may impose a sentence less than the minimum or may impose probation if the court finds "that the best interests of the community will be served and the public will not be harmed and if it places its reasons on the record."[2] ***Id.***

Quick entered a guilty plea to the charge.[3] She filed a sentencing memorandum arguing facts which supported less than the minimum penalty. She stressed that she did not sell THC to children, during school hours or near the school, although her home, where the one-time sale to an undercover officer occurred, is approximately one block from a high school. She argued that probation was appropriate and in the community's best interests because she is purchasing a home and is a single mother with two children. She also cited her employment history and lack of previous criminal activity. She requested a three-year sentence, stayed in favor of three years of probation, with a jail sentence and Huber privileges as a condition of probation, a fine and community service.

At sentencing[4] the State argued that the drug sale occurred near a school and that the legislature had expressed its intent to impose a minimum sentence on such offenders. The State sought three years in prison without parole. Quick renewed the arguments she made in her sentencing memorandum and presented character testimony in support of her request for probation.

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[2] Section 161.438, STATS., effectively transforms what would otherwise be mandatory minimum penalties in ch. 161 into presumptive minimum penalties. ***State v. DeLeon,*** 171 Wis.2d 200, 203, 490 N.W.2d 767, 769 (Ct. App. 1992).

[3] Although the amended judgment of conviction refers to a no contest plea, it is clear from the plea hearing transcript that Quick pled guilty.

[4] Quick had two sentencing hearings. The second hearing was held to permit Quick her right of allocution, which she was not permitted at the initial sentencing. We review the argument and the trial court's sentencing remarks from the second hearing.

In its sentencing remarks, the court noted that it had to determine whether probation would be in the best interests of the community and whether the community would be harmed by such a disposition. The court noted that to be a deterrent, the enhanced penalty for drug activity within 1000 feet of a school "[has] to be given appropriate weight and significance and applied where appropriate." In considering whether there would be harm to the community in imposing less than the minimum sentence, the court had to be convinced that there was no chance whatsoever of any further criminal activity, especially drug activity, aside from Quick's assurance that she would no longer engage in such activity. The court found that if Quick resumed her drug activity, the community would be endangered.

With regard to the best interests of the community, the court stated that certain consequences flow from criminal conduct and that rescuing a defendant from those consequences is not necessarily in the community's best interests. The court noted that while Quick's personal circumstances might support deviation from the minimum sentence, those hardship factors which might warrant deviation from the minimum sentence were within Quick's control at the time she committed the crime. The court found that the facts supporting the penalty enhancer (the size of the drug transaction, the location of the transaction and whether to transact drugs at all) were within Quick's control. The court further stated:

> The Court finds it impossible to deem that it's in the community's best interest to have that type of conduct permitted, and to vary from the prescribed sentence as the State has indicated, and as the Court indicated previously, signals to a community that demand tough law enforcement, particularly in drug enforcement, that if you have special circumstances that were present before you took the risk, you can manipulate those and present those in a matter that constitutes a mitigation. You can turn reasons that should have kept you out of the conduct to begin with into reasons why you shouldn't be punished for the conduct. And this Court simply is unwilling to be brought into that type of circumstance.

The court then sentenced Quick to three years imprisonment without parole and the minimum mandatory $500 fine. Quick appeals.

Public policy strongly disfavors appellate courts interfering with the sentencing discretion of the trial court. ***State v. Teynor,*** 141 Wis.2d 187, 219, 414 N.W.2d 76, 88 (Ct. App. 1987). We review whether the trial court misused its sentencing discretion. ***State v. J.E.B.,*** 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied,* 503 U.S. 940 (1992). We presume that the trial court acted reasonably, and the defendant must show that the trial court relied upon an unreasonable or unjustifiable basis for its sentence. ***Id.*** The weight given to each of the sentencing factors is within the sentencing judge's discretion. ***Id.*** at 662, 469 N.W.2d at 195.

The trial court examined Quick's character, the gravity of the offense and the need to protect the public, appropriate factors in sentencing, *see* ***State v. Paske,*** 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991), and determined that probation was not appropriate after considering the § 161.438, STATS., criteria for probation or less than the minimum sentence. The weight to be accorded these sentencing factors is for the sentencing court to determine in its discretion. *See* ***State v. Spears,*** 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988). Quick did not persuade the trial court that anything other than the minimum sentence would be in the public's best interests. We discern no misuse of discretion in declining to place Quick on probation or imposing less than the minimum sentence.

Quick argues that the trial court erroneously believed it lacked discretion to deviate from the minimum sentence and that imposition of the minimum sentence was unjust. As is apparent from our summary of the trial court's sentencing remarks, the court was fully aware that it had discretion to deviate from the minimum sentence and on two occasions discussed the factors it would consider in deviating and its reasons for finding those factors insufficient. While the court lamented the minimum sentence statute as detracting from its sentencing discretion, the court also gave its reasons for sentencing in this case within the framework the legislature had created. The court considered that legislative directive, weighed and balanced the facts which might have favored a less harsh sentence, and concluded that the facts were not sufficient. This was a proper exercise of the trial court's discretion.

By the Court.—Judgment affirmed.

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