COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2961-CR **Cir. Ct. No. 2003CF65**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY T. TURONIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Reversed and cause remanded for further proceedings*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Bradley Turonie appeals a judgment sentencing him after revocation of his probation and an order denying his postconviction motion to modify that sentence. Turonie argues he is entitled to resentencing

because: (1) he was denied the effective assistance of counsel by his attorney's failure to appear in person for Turonie's sentencing hearing; and (2) the prosecutor breached a cooperation agreement that required the prosecutor to recommend a county jail sentence. Because the State concedes Turonie should be allowed a new sentencing hearing based on his attorney's failure to appear in person at the sentencing hearing, we reverse and remand for resentencing.[1]

BACKGROUND

¶2 In May 2003, Turonie pled guilty to misdemeanor battery, intimidating a victim, obstructing an officer and misdemeanor bail jumping, all as a habitual offender. The court withheld sentence and placed Turonie on probation for two years with conditions, including three months in the Lincoln County Jail.

¶3 In October 2003, Turonie was arrested for failing to serve his conditional jail time and failing to report to his probation agent. Turonie's probation was eventually revoked. His sentencing after revocation hearing was held in March 2004. Turonie appeared in person; however, his counsel appeared by telephone. The court imposed concurrent sentences totaling thirty months' initial confinement and eighteen months' extended supervision.

¶4 Turonie filed a notice of intent to pursue postconviction relief and was appointed postconviction counsel. Postconviction counsel filed a no-merit

[1] Because the State's concession results in Turonie obtaining the relief he requests, we do not discuss the facts or merits of Turonie's argument that the State breached a cooperation agreement. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (court should decide cases on the narrowest possible grounds). We note, however, our agreement with the circuit court's observation that, "to a certain extent, the system has not been fair with Mr. Turonie," and urge the State to carefully consider its position at resentencing.

appeal. Turonie responded, arguing, among other things, that his trial counsel was ineffective by failing to attend the sentencing hearing in person. This court rejected the no-merit report and ordered counsel to move for postconviction relief.

¶5 At the hearing on Turonie's motion for postconviction relief, his trial counsel testified that he appeared by telephone for the sentencing hearing because he was either ill or had overslept. The court concluded Turonie's right to counsel had not been violated by his counsel's appearance by phone because there was no showing that counsel was deficient and because Turonie consulted with trial counsel both prior to the hearing to prepare and on the day of the hearing privately by telephone.

DISCUSSION

¶6 Turonie argues he was denied the effective assistance of counsel by his attorney's failure to appear in person at his sentencing hearing. Turonie argues that we should follow the reasoning of ***Van Patten v. Deppisch***, 434 F.3d 1038, 1043 (7th Cir. 2006),[2] where the court concluded that defense counsel's failure to appear in person for a plea hearing constituted ineffective assistance because it amounted to a complete denial of counsel. Turonie contends that, like a plea hearing, a sentencing hearing is a critical stage in the prosecution and, like Van Patten, his right to counsel was denied where his attorney was not physically present in the courtroom. Thus, he argues, he was without the effective assistance of counsel and is entitled to resentencing.

[2] ***Van Patten v. Deppisch***, 434 F.3d 1038 (7th Cir. 2006), was decided after the circuit court's decision in this case.

¶7 The State asserts that ***Van Patten*** was wrongly decided and points out that we are not bound by federal decisions, other than those of the United States Supreme Court. However, the State concedes that, as a practical matter, Turonie would ultimately be able to obtain resentencing by petitioning for a writ of habeas corpus in federal district court, where the ***Van Patten*** holding is binding precedent. Accordingly, the State requests that we reverse and remand for resentencing. We neither reject nor adopt the reasoning of ***Van Patten***, but rather accept the State's concession.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

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