

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 27, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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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. 2005AP747-CR**

**Cir. Ct. No. 2000CF3913**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EDDIE S. POWE,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County:  
TIMOTHY G. DUGAN and CHARLES F. KAHN, JR., Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Eddie S. Powe appeals from a reconfinement order and a related postconviction order.<sup>1</sup> The issue is whether the trial court

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<sup>1</sup> The Honorable Timothy G. Dugan entered the reconfinement order. The Honorable Charles F. Kahn, Jr. entered the postconviction order.

erroneously exercised its discretion in imposing a reconfinement period that exceeded all of the recommendations. We conclude that the trial court properly exercised its discretion in determining the reconfinement period, and that the postconviction court demonstrated the trial court's exercise of discretion along with its own when denying Powe's postconviction motion. Therefore, we affirm.

¶2 Powe pled guilty to delivering no more than five hundred grams of marijuana as a subsequent drug offense, and as a party to the crime. The trial court imposed a six-year sentence comprised of two- and four-year respective periods of confinement and extended supervision. Powe violated several conditions of his supervision, principally by his continued use of marijuana.<sup>2</sup> The entirety of Powe's available reconfinement period was three years, eleven months and nine days. The Department of Corrections agent recommended nine months, the State recommended two years and three months, and Powe requested that he be limited to time he had already served. The trial court imposed a two-year, five-month reconfinement period. Powe moved for postconviction relief, seeking to reduce his reconfinement period to one year. The postconviction court denied his motion, reiterating the trial court's comments demonstrating that court's proper exercise of discretion. The postconviction court also provided its own explanation and reasoning for denying Powe's motion. Powe appeals from the reconfinement and postconviction orders.

¶3 Powe challenges the trial court's failure to explain its deviations from the reconfinement recommendations. He also challenges the length of his

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<sup>2</sup> Powe's other violations include his failures to attend treatment, possessing a cellular telephone, and being terminated from a treatment program.

reconfinement period as unduly harsh and excessive, particularly when he faced no new charges, and he challenges the trial court's failure to explain how the two-year, five-month period constituted the minimum amount of custody necessary to achieve the reconfinement considerations ("minimum custody standard").

¶4 WISCONSIN STAT. § 302.113(9)(am) (amended Feb. 1, 2003) provides:

If a person released to extended supervision ... violates a condition of extended supervision, the reviewing authority may revoke the extended supervision of the person. *If the extended supervision of the person is revoked, the person shall be returned to the circuit court for the county in which the person was convicted of the offense for which he or she was on extended supervision, and the court shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence.*<sup>3</sup>

*Id.* (emphasis and footnote added).

¶5 At the reconfinement hearing, the trial court characterized Powe's performance once released on extended supervision as "abysmal." It recited the litany of violations Powe accumulated during his period of supervision, and the numerous times he had used marijuana. It concluded that the Department "finally decided it was time to revoke." It then explained why supervision was not effective, namely because Powe

continu[ed] to violate the law. And unfortunately, what [he] demonstrated through this period of time is [he] can't be supervised in the community. [He is] unwilling to follow those rules.

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<sup>3</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

And so at this point the court finds that the appropriate time for reconfinement is a period of two years and five months. That will leave approximately 18 months when [he is] released, and [the trial court] can only tell [him], at this point ... that if [he] do[es]n't succeed when [he] get[s] released on this next one, [the trial court] can't see the court's going to do anything other than sending [him] back for the remaining 18 months. And then if [he] do[es]n't turn [his] life around, the next time [he is] in front of a judge, the judge is going to look at it, say he's not going to turn his life around.

[Powe is] only 23, but [he has] shown no indications that [he is] ready to turn [his] life around and move away from crime. And then the choice is that we have to protect society. But [Powe] get[s] to make that decision. [He] do[es]n't have to commit crimes. And [he] do[es]n't – won't face any more prison or jail time. But [he] ha[s] to make that choice. And [the trial court] hope[s] this next two year period is going to convince [him] to do that, and [he]'ll take advantage of any treatment programs that are offered while [he is] in that setting.

¶6 A proper exercise of discretion requires a reasoned and reasonable determination. *See McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The trial court recited Powe's lengthy history of violations while on release to extended supervision, and explained that a lengthy reconfinement term was warranted because of Powe's repeated inability or unwillingness to comply with the conditions imposed. Ultimately, the trial court's principal concern became protection of the public. The trial court's explanation was reasoned and its decision was reasonable. We therefore conclude that the trial court properly exercised its discretion when it imposed a reconfinement period of two years and five months.

¶7 We now address Powe's specific criticisms, mindful however that the trial court properly exercised its discretion and that the scope of the trial court's responsibility is far more limited in determining the length of a reconfinement period than it is in determining the original sentence. In the former

circumstance, sentence has already been imposed and the offender has already violated conditions of supervision. The trial court is limited to its determination of how much of the remaining period should be imposed for reconfinement for the offender's violation of conditions of supervision. See WIS. STAT. § 302.113(9)(am) (amended Feb. 1, 2003).

¶8 The trial court's proper exercise of discretion obviates any purported obligation to specifically explain why the reconfinement period deviated from the recommendations. Nevertheless, the trial court is not bound by the parties' sentencing recommendations; it is certainly not bound by recommendations in a reconfinement context. See *State v. Bizzle*, 222 Wis. 2d 100, 105-06 n.2, 585 N.W.2d 899 (Ct. App. 1998).

¶9 Powe's remaining claims are arguably fallacious in a reconfinement context. Arguably no reconfinement period can be unduly harsh or excessive since it is necessarily limited to the time remaining on the bifurcated sentence. See WIS. STAT. § 302.113(9)(am) (amended Feb. 1, 2003); accord *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) (“[a] sentence well within the limits of the maximum sentence [or remaining period available for reconfinement] is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances”). Nevertheless, we address the unduly harsh and excessive argument on its merits.

¶10 A sentence is unduly harsh and excessive when it 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.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233

N.W.2d 457 (1975). Powe’s numerous violations of the conditions of his supervision, including his repeated use of marijuana, his failures to attend various treatment programs, his repeated possession of a cellular telephone, and his driving without a valid driver’s license during which time he was shot in the head, hardly demand leniency. We cannot conclude that two years and five months of reconfinement is disproportional for these repeated violations, nor would that reconfinement period “shock public sentiment and violate the judgment of reasonable people concerning what is right.” *Id.*

¶11 Powe also criticizes the trial court for failing to address how this lengthy reconfinement period met the minimum custody standard. Insofar as it is necessary to address that standard in a reconfinement context, the trial court expressly addressed Powe’s repeated and serious failures on supervision, concluding that supervision was simply not a viable option for Powe because he “continu[ed] to violate the law” and demonstrated that he “can’t be supervised in the community. [He’s] unwilling to follow those rules.” The trial court ultimately concluded that, considering the choices Powe has made while on extended supervision, its principal concern must then become protection of the community. Regardless of the necessity to meet the minimum custody standard, the trial court has done so.

¶12 Powe’s remaining contention is that the postconviction court also erroneously exercised its discretion in denying his motion. The postconviction court began by reciting the procedural history of this case. It then specifically

reviewed the reconfinement hearing transcript and finds that Judge Dugan carefully outlined the defendant’s activities after being released from prison, finding Powe’s behavior to be abysmal. Not only did the defendant fail two formal alternatives to revocation, he was arrested for drug loitering approximately a month after his release from

prison; he tested positive for marijuana multiple times; he continuously failed to comply with the rules of supervision; he continued to drive without a license, violated no contact orders, and lied to his agent. Based on his inability to conform his conduct, the reconfinement time imposed was not unduly harsh or excessive. The record provides ample support for Judge Dugan's reconfinement order, and this court finds no reason to reduce or alter the reconfinement period.

¶13 The postconviction court has an additional opportunity to explain the trial court's sentence or reconfinement period to confirm its proper exercise of discretion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). The postconviction court demonstrated the trial court's proper exercise of discretion in determining the reconfinement period, and properly exercised its own discretion in explaining why the trial court's exercise of discretion in the first instance of reconfinement was reasoned and reasonable. *See McCleary*, 49 Wis. 2d at 277.

*By the Court.*—Orders affirmed.

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

