

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 25, 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. 95-1043-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK S. SMITH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Frank S. Smith appeals from a judgment convicting him of delivering cocaine and from an order denying his motion for postconviction relief. He contends that the trial court erroneously instructed the jury on his entrapment defense and erroneously exercised its sentencing discretion. We disagree, and therefore affirm.

An undercover police officer gave Smith money to purchase cocaine for her, which he did. Because the officer and a police agent initiated the transaction, Smith presented an entrapment defense. The trial court instructed the jury on that defense as follows:

If Mr. Smith had no prior intent or predisposition to commit either or both of the offenses charged and was improperly induced or persuaded to do so by law enforcement officers or their agents, then he was entrapped. If, however, Mr. Smith had prior intent or predisposition to commit either or both of the offenses charged, then he was not entrapped, even though law enforcement officers or their agents induced or persuaded him to commit the offense, made committing the offense easier, or even participated in acts essential to the offense.

....

In determining whether Mr. Smith had a prior intent or predisposition to commit the offense charged, you may consider his personal background as well as the nature and degree of any inducement or persuasion of ... law enforcement officers or their agents.

During the trial, Smith presented evidence that he was addicted to cocaine and spent \$800 per week buying it. To support his entrapment defense, he argued that he was so heavily addicted that he could not function as a dealer and therefore had no predisposition to deal drugs. At sentencing, Smith's counsel again noted Smith's problem with cocaine abuse and described him as suffering from a long-time cocaine addiction. The presentence investigator described him in similar terms and recommended probation. Although arguing for a prison term, the prosecutor also acknowledged Smith's habitual use of cocaine.

The trial court sentenced Smith to a four-year prison term. In doing so the court stated "and in this case I don't view [Smith] as being a victim. [Cocaine] is a nonaddictive drug that you took here. Now, I realize that getting

caught up in a lifestyle that involves drugs has a certain appeal to it, but it isn't physically addictive"

Smith moved for postconviction relief and argued that the trial court, by describing cocaine as nonaddictive, relied on a mistake of fact in sentencing him. The trial court responded that it had meant that cocaine was a "social addiction," adding:

I don't think with respect to this case it makes any difference. Mr. Smith was sentenced to four years in prison which makes him eligible for parole in one year. In one year, that is enough time for intensive control over his lifestyle so that if, in fact, he is addicted to cocaine, either a social addiction or if Counsel is right that it's a physical addiction, that that's enough time to be able to do that and to have the parole officials determine whether or not that is a problem that has been solved, and I believe that with respect to whether this is a physically addictive drug, if, in fact, it is a physically addictive drug, we are talking here about delivery of that drug ... then he's done even more harm to the community than anything than I had anticipated or contemplated at the time of sentencing.

....

... whether [cocaine] is physically addictive or socially addictive, I don't think that that is an unreasonable sentence

On that basis, the court denied the motion, and this appeal followed.

Smith argues error in the jury instruction on entrapment because it may have allowed the jury to mistakenly focus on Smith's predisposition immediately before the crime, rather than before the police inducements to commit the crime. He concedes that the issue is waived because he did not

object to the instruction, but argues that we should nevertheless reverse in the interest of justice. We decline to do so. The instruction plainly told the jury to consider the nature of the inducement in determining predisposition, an irrelevant question if the predisposition need only exist immediately before the crime, when the inducement had ceased.

The trial court properly exercised its sentencing discretion. On Smith's postconviction motion, the court fully and reasonably explained why its belief regarding cocaine addiction made no difference in the sentence it imposed. As the court's remarks at sentencing plainly indicated, the most significant factor in the sentence was not Smith's abuse of cocaine, but the evidence that he delivered it to others. The decision to primarily emphasize the harm to others, rather than the defendant's individual needs or condition, was a decision within the court's discretion. *State v. J.E.B.*, 161 Wis.2d 655, 662, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied*, 503 U.S. 940 (1992).

By the Court.—Judgment and order affirmed.

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