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DISTRIFCT II

March 19, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP781-CR

State of Wisconsin v. Zachary C. Mallon (L.C. # 2010CF340)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Zachary C. Mallon appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that he is entitled to resentencing because his sentence was unduly harsh. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the judgment and order of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

Mallon was convicted following a jury trial of delivery of heroin (three grams or less). The circuit court imposed the maximum sentence of seven years and six months of initial confinement and five years of extended supervision. Mallon subsequently filed a motion for postconviction relief, arguing that the sentence was unduly harsh. The court denied his motion. This appeal follows.

A circuit court's exercise of its sentencing discretion is presumptively reasonable and our review is limited to determining whether a court erroneously exercised its discretion.² *State v. Harris*, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. At sentencing, a court must consider the gravity of the offense, the character of the defendant, and the need to protect the public. *Id.*, ¶28. The weight a court gives to each of these factors is left to its discretion. *Id.*

A defendant challenging a sentence as an erroneous exercise of discretion on the ground that it was unduly harsh must show that the sentence was “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).

On appeal, Mallon renews his argument that his sentence was unduly harsh. He submits that he did not deserve the maximum sentence because he was selling heroin to support his own

² At times in his brief, Mallon uses the phrase “abuse of discretion.” We have not used the phrase “abuse of discretion” since 1992, when our supreme court replaced the phrase with “erroneous exercise of discretion.” See, e.g., *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

addiction. According to Mallon, if he is able to address his addiction, he need not spend so much time in prison.

Reviewing the circuit court's remarks, we are not persuaded that it erroneously exercised its discretion and imposed a sentence that was unduly harsh. Here, the court properly considered the gravity of the offense, Mallon's character, and the need to protect the public. In discussing these factors, the court noted Mallon's lengthy criminal record dating back to his days as a juvenile, his anger management issues, his lack of motivation to follow the rules, and his repeated failures to defeat his addictive tendencies. Given these facts, the circuit court reasonably concluded that Mallon posed a high risk of reoffending that warranted the maximum sentence.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals