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DISTRICT II

September 24, 2014

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

2013AP2640-CR

State of Wisconsin v. Shawn A. Hodgkins (L.C. #2004CF1254)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Shawn A. Hodgkins appeals from a judgment entered following his sentencing after probation revocation and from an order denying his postconviction motion. Based upon 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.

In 2005, Hodgkins pled guilty to one count of burglary and the trial court withheld sentence in favor of a five-year term of probation to run consecutive to a prison sentence imposed at the same hearing, but in a separate case. Hodgkins was released from prison and

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

began his probationary term in December 2012.² Within a day of his release, he “began to amass violations of his [electronic monitoring program] schedule.” He was taken into custody, released on January 9, 2013, and failed to report to his agent. Though he showed up at the agent’s office the next day, he removed his electronic bracelet while in the waiting room, left the office, and remained in absconder status until his arrest the next month. Hodgkins’s probation was revoked, and less than four months after his release from prison, he appeared in front of a different judge for sentencing after revocation.

The trial court confirmed that it had familiarized itself with the record of the original sentencing. It verified with the parties that due to repeated revocations, the entirety of Hodgkins’s prior bifurcated sentence was served in prison, and that Hodgkins was on probation in connection with the instant case for less than a month prior to absconding:

Well, Mr. Hodgkins, it’s hard to imagine having done a worse job than you did on probation supervision. [The original sentence judge] sat here seven, eight years ago. He said you know I’m going to put you in prison. You deserve to go to prison. You get a chance to get out. Each time you get out you get thrown back in because you can’t follow the basic rules in the community. You’re barely out on that sentence. You get out of that one finally. You serve the last day of the sentence in prison rather than on extended supervision. You get released here, your 23 days and you’re right back where you started from.

The trial court determined that Hodgkins’s immediate flight from the relatively minor constraints of supervision demonstrated that he posed a threat to the community. The trial court imposed a five-year bifurcated sentence comprised of equal two and one-half year portions of initial confinement and extended supervision.

² Hodgkins’s probation in the instant case began immediately upon his release from prison because the extended supervision portion of his prior prison sentence was repeatedly revoked.

Hodgkins filed a postconviction motion arguing that (1) the sentencing-after-revocation court improperly considered the length of his now-revoked probationary term in determining sentence and (2) trial counsel rendered ineffective assistance by failing to object to the court's reliance on this allegedly improper factor. Hodgkins cited to the following comment made at the sentencing hearing after revocation: "Well, [the original sentencing judge] is to be respected with respect to the length of all of this. He said five years of probation. Sir, it's five years in prison now in this case for what you did." The postconviction court denied the motion, and Hodgkins appeals.

We reject Hodgkins's underlying premise that the length of a revoked defendant's original probationary term is irrelevant to and cannot be considered at a sentencing-after-revocation hearing.³ Hodgkins has not cited to and we are not aware of any authority which precludes the court from considering the length of a revoked probationary term as a guidepost when imposing sentencing after revocation. To the contrary, sentencing after probation revocation is reviewed "on a global basis, treating the latter sentencing as a continuum of the" original sentencing hearing. See *State v. Wegner*, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289. The term of probation presumably accounts for the original court's assessment of Hodgkins's rehabilitative needs and the length of supervision necessary to protect the public.

In this case, the original sentencing court considered that all of Hodgkins's prior probationary terms were revoked and that Hodgkins was exhibiting a pattern of behavior. The

³ Because we conclude that the trial court did not consider an improper factor, we need not address Hodgkins's claim that trial counsel was ineffective for failing to object at sentencing. *State v. Jackson*, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (counsel's failure to raise meritless objections is not ineffective assistance).

original sentencing court identified the same concerns present at Hodgkins's sentencing after revocation, noting that incarceration seemed to have no impact on Hodgkins and "over the course of the last two years you've been incarcerated more than you've been out in the community, and soon as you're out you do something else." When presented with the same pattern of behavior and no indication that Hodgkins had made any rehabilitative progress, it is perfectly reasonable that the sentencing-after-revocation court would consider the original length of probation as a guide.

To the extent Hodgkins's argument may be construed as an assertion that the trial court erroneously exercised its discretion by rigidly imposing a sentence equal to the probationary term in a formalistic fashion, we disagree. The court's reference to the length of Hodgkins's probation was brief and in the context of additional considerations. The court's primary focus was on Hodgkins's criminal record, failed intervention history, and unwillingness to be supervised in the community for even one month. Further, in determining that five years was the appropriate sentence length, the trial court explicitly stated that it was considering as mitigating factors Hodgkins's age and the nature of the underlying burglary offense. This underscores the trial court's reliance on well-established sentencing factors and demonstrates an appropriate exercise of its sentencing discretion.

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