



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

September 23, 2015

To:

Hon. Peter Anderson
Circuit Court Judge
Br. 17, Rm. 6103
215 South Hamilton
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Drew J. De Vinney
Martin Law Office
7280 S. 13th Street, Suite 102
Oak Creek, WI 53154

Nancy A. Noet
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Corey C. Stephan
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

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

2013AP2391-CR	State of Wisconsin v. Damien D. Smith (L.C. # 2008CF1010)
2013AP2392-CR	State of Wisconsin v. Damien D. Smith (L.C. # 2008CF2232)
2013AP2393-CR	State of Wisconsin v. Damien D. Smith (L.C. # 2009CF557)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Damien Smith appeals judgments of conviction and 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 (2013-14).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The circuit court originally withheld sentence and placed Smith on probation for several felonies and misdemeanors. After Smith's probation was revoked, the court imposed prison sentences. Smith filed a postconviction motion challenging the sentences, and the court denied it.

Smith's argument on appeal proceeds in the following steps. In sentencing him, the court relied in part on Smith's conduct involving heroin that led to Smith's probation revocation and was the subject of then-pending federal charges; that the heroin conduct should be considered unproven because it had not yet been proven beyond a reasonable doubt; and the sentencing court erred because unproven charges can be used only for certain purposes, and here the court went beyond those purposes.

We focus on the last of those steps. We assume, for purposes of this opinion, that the heroin charges should be considered unproven. Smith argues that use of unproven conduct is limited to only consideration of the defendant's character and need for rehabilitation, and cannot be used for other factors like the need to protect the public. However, Smith cites no case law limiting unproven conduct to these purposes. Instead, he appears to concede that no such case law exists, but notes that so far the only uses for which unproven conduct has been *expressly permitted* are the uses he cites.

We do not agree with Smith's suggestion that only the expressly permitted uses of unproven conduct are proper. In the absence of case law limiting the use of unproven conduct, we do not consider it reasonable to infer such a limit from the existing case law. Smith argues that we should create such a limit, but he does not develop a persuasive argument as to what legal or policy distinction exists to support use of unproven conduct for some sentencing factors,

but not the others that were considered by the circuit court in this case. Therefore, we conclude that the postconviction motion was properly denied.

IT IS ORDERED that the judgments and order are summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals