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DISTRICT IV

February 22, 2017

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

2016AP343-CR

State of Wisconsin v. Jeffry A. Schultz, Jr. (L.C. # 2003CF118)

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

Jeffry Schultz, pro se, appeals the circuit court's order that denied his petition for sentence adjustment. 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 (2015-16).¹ We summarily affirm.

In March 2004, Schultz was convicted and sentenced for multiple crimes, including hiding a corpse, threats to injure/accuse of crime, resisting or obstructing an officer, carrying a

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

concealed weapon, and operating a firearm while intoxicated, all as a repeater. In December 2015, Schultz petitioned for sentence adjustment as to his sentence for hiding a corpse on the ground that his “conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs since being sentenced” supported the request. *See* WIS. STAT. § 973.195. In support of the petition, Schultz submitted an order from the Department of Corrections (DOC) stating that Schultz had satisfied the conditions for parole eligibility; numerous DOC program completion certificates; offender performance evaluations; verification of time served; and Schultz’s offender conduct record. The circuit court denied the petition, checking the box on the form order indicating that sentence adjustment was not in the public interest. Additionally, the court checked the box marked “other” and hand wrote: “sentence is having intended effect, and should continue.”

A circuit court’s decision to deny a petition for sentence adjustment is reviewed for an erroneous exercise of discretion. *See* WIS. STAT. § 973.195(1r)(c) (upon receipt of a petition for sentence adjustment, circuit court *may* deny petition or hold petition for further consideration); *State v. Stenklyft*, 2005 WI 71, ¶¶81-82, 281 Wis. 2d 484, 697 N.W.2d 769 (sentence adjustment is left to the circuit court’s discretion) (Abrahamson, C.J., concurring/dissenting but writing for a majority on the issue of the circuit court’s discretion). If a petition for sentence adjustment sets forth a statutory basis for the petition, a circuit court may grant the petition if it determines that sentence adjustment is in the public interest. WIS. STAT. § 973.195(1r)(a), (b), and (f).

Schultz contends that the circuit court’s decision that sentence adjustment was not in the public interest was not supported by the record. Schultz asserts that the record before the circuit court at the time it decided Schultz’s petition was limited to Schultz’s petition and supporting documents because the record for Schultz’s underlying circuit court case was in this court in a

separate appeal. Schultz asserts that the circuit court's decision was not supported by the petition and supporting documents alone. Thus, Schultz asserts, the circuit court's decision to deny sentence adjustment was an erroneous exercise of discretion. *See State v. Delgado*, 223 Wis. 2d 270, 280-81, 588 N.W.2d 1 (1999) (proper exercise of discretion requires court to rely on facts in the record to reach its decision). We disagree.

To the extent that the circuit court did not rely on specific facts from the record in its exercise of discretion—because the record was in this court at the time—we may nonetheless independently review the record to determine whether it contains facts to support the circuit court's exercise of discretion. *See Peplinski v. Fobe's Roofing, Inc.*, 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (we will uphold the circuit court's exercise of discretion if there are facts of record that would support the circuit court's decision). The order denying Schultz's petition indicates that the court considered “relevant factors including the nature of the crime, the character of the inmate, the protection of the public,” and Schultz's institutional conduct and progress in treatment before deciding that sentence adjustment was not in the public interest. Additionally, the court hand wrote that the court determined that Schultz's sentence was having its intended effect and should continue. Our review of the record indicates that the sentencing court, with the same judge presiding, stated at sentencing that it had considered the serious and dangerous nature of the conduct underlying the charges and Schultz's need for sufficient time to figure out how to prevent himself from getting involved in further criminal behavior. Thus, the record supports the circuit court's determination that sentence adjustment was not in the public interest as a proper exercise of its discretion.

Schultz also contends that the circuit court erred by interpreting WIS. STAT. § 973.195(1r) as allowing Schultz's positive conduct in prison to provide a basis to deny Schultz's petition for

sentence adjustment. Schultz contends that, because the statute provides that an inmate's good conduct in prison is a basis to petition for sentence adjustment, *see* § 973.195(1r)(b)1., the court erred by using Schultz's good conduct as a basis to deny Schultz's petition. However, § 973.195(1r)(b)1. provides that an inmate's positive conduct in prison simply provides the initial basis for petitioning for sentence adjustment. Even if the inmate establishes good conduct and progress in treatment, as here, the circuit court must still exercise its discretion to determine whether sentence adjustment is in the public interest. As explained, the circuit court properly exercised its discretion in determining that, despite Schultz's good conduct, sentence adjustment was not in the public interest.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals