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DISTRICT II

December 20, 2017

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

2017AP394-CR

State of Wisconsin v. Alexandria Michelle Kitral
(L.C. #2014CF220)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Alexandria Michelle Kitral appeals from a judgment of conviction for possession of heroin as a repeater and an order denying her motion for postconviction relief. 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

Kitral was charged with possession of heroin as a repeater, and she pled guilty to the charge. The court withheld sentence and imposed two years of probation conditioned on her participation in drug court. Kitral violated the terms of her probation, and her probation was revoked. During her sentencing after revocation, the State recommended three years of initial confinement, while Kitral argued for eighteen months. The court concluded that eighteen months of confinement was too brief given that Kitral had already served about eight months of presentence confinement and would be incarcerated for less than one year as a result. Accordingly, the circuit court imposed two years of initial confinement, less than the State's recommendation, but more than Kitral's. Kitral filed a postconviction motion seeking a new sentencing hearing because the court improperly considered her presentence incarceration in fashioning a sentence. The circuit court denied her request, and she appeals.

Kitral's sole argument on appeal, as in her postconviction motion, is that the circuit court erroneously exercised its discretion by considering the amount of pretrial custody for which she would receive credit. We disagree and affirm.

Sentencing is committed to the circuit court's discretion, and we will only reverse a sentence if the court erroneously exercised its discretion. *State v. Fenz*, 2002 WI App 244, ¶6, 258 Wis. 2d 281, 653 N.W.2d 280. A court erroneously exercises its discretion when it relies on a clearly improper factor. *Id.*, ¶7. The defendant bears the burden to show an unreasonable or

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

unjustified basis in the record for the sentence. *Id.* Although the court may not determine sentence credit and then reverse engineer a sentence merely to avoid giving a defendant sentence credit to which he or she would otherwise be entitled, *see Struzik v. State*, 90 Wis. 2d 357, 367, 279 N.W.2d 922 (1979), the circuit court may consider presentence incarceration as part of a “specific time-related incarceration goal” like “treatment in an institutional setting.” *Fenz*, 258 Wis. 2d 281, ¶¶10-11. In such cases, presentence incarceration is a relevant factor “to fashion a sentence appropriate to achieve the court’s goal in the first instance.” *Id.*, ¶11.

The circuit court here permissibly considered Kitral’s presentence incarceration as part of its goal that she be rehabilitated in a confined setting based on her failure to set her life on course outside of prison. The court emphasized Kitral’s failure to comply with the terms of drug court and her past bad behavior, which included a burglary “fueled by her drug use,” driving under the influence, and “finding ways to beat the system” to continue her drug use. Accordingly, the court determined that “treatment can most effectively be provided if you are confined.”

Based on the time Kitral had already served, the court determined that the defense request of eighteen months of initial confinement would be inadequate for Kitral’s treatment and rehabilitative needs. Instead, the court sentenced Kitral to two years of initial confinement, which would result in “about 16 months initial confinement.”

I also don’t think that 18 months is enough with your dead time credit. If you didn’t have the dead time credit I would consider it. But you’ve got almost 8 months of dead time credit; that means you go in for less than a year. And given everything I have talked about here, I don’t think that’s enough either.

[Two years of confinement] means you’re going to do about 16 months initial confinement. And I’m hopeful enough that gets you into the system, gets you transferred and maybe gets you into some kind of treatment, because I don’t want it to just be a warehousing.

Under the circumstances, the circuit court permissibly considered Kitral's presentence incarceration in fashioning a sentence based on her treatment needs.

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.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals