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DISTRICT II

January 10, 2018

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

2017AP245-CR

State of Wisconsin v. Joshua D. Jenkins (L.C. # 2015CF1380)

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).

Joshua Jenkins appeals from a judgment convicting him of possession of cocaine with intent to deliver and second-degree recklessly endangering safety and from an order denying his postconviction motion seeking resentencing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE

809.21 (2015-16).¹ We affirm because Jenkins did not establish the existence of a new factor requiring resentencing.

The sentencing hearing disposed of two cases in which the State made sentencing recommendations as part of Jenkins's plea agreements. In the 2015 case before us on appeal, in exchange for Jenkins's no contest pleas to possession of cocaine with intent to deliver and second-degree recklessly endangering safety, the State recommended concurrent terms of six years (three years of initial confinement and three years of extended supervision). In the 2016 case,² which is not before us on appeal, in exchange for Jenkins's no contest pleas to two counts of manufacturing/delivering cocaine, the State recommended concurrent terms of three years (eighteen months of initial confinement and eighteen months of extended supervision), consecutive to the 2015 case on appeal. After stating its rationale, discussed below, the circuit court imposed the following in the 2015 case: six years for possessing cocaine with intent to deliver (three years initial confinement and three years extended supervision) and a consecutive sentence of three years (eighteen months initial confinement and eighteen months of extended supervision) for second-degree recklessly endangering safety. With regard to the 2016 case, the circuit court imposed and stayed a ten-year sentence and placed Jenkins on four years of probation consecutive to the sentences in the case before us.

Postconviction, Jenkins argued that the circuit court confused the State's sentencing recommendations in the two cases such that it imposed the recommendation in the 2016 case as a

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

² *State v. Joshua Jenkins*, Racine County circuit court case No. 2016CF196.

part of the sentence in the 2015 case. The postconviction court³ rejected Jenkins's argument that the circuit court sentenced him based on inaccurate information. The postconviction court found that the circuit court was neither bound by nor confused about the State's recommendations. Jenkins appeals.

In arguments to the circuit court and this court, Jenkins argues the existence of a new factor warranting resentencing: the circuit court relied on inaccurate information arising from its misunderstanding of the State's sentencing recommendations in the two criminal cases.

We start with the sentencing proceeding. We agree with the postconviction court that a review of the sentencing transcript makes clear that the circuit court's focus in the 2015 case was to fashion a sentence that would protect the public from Jenkins's distribution of controlled substances, punish Jenkins for his criminal conduct, and confine Jenkins, a repeat offender with many prior offenses, on a sentence that would allow him to become substance-free so that he could turn around his life. In the 2016 case, after imposing and staying two ten-year sentences in favor of four years of probation, the circuit court stated the following to the then thirty-four-year-old Jenkins:

So I put a significant amount of time hanging over your head with the idea that this will help you maintain your focus when you get back into the community. I realize you have to do some significant time actually incarcerated. But you are also looking at significant period of time; that will take you almost to 50 years old.

³ The judge who presided over the postconviction motion was not same as the sentencing judge.

The circuit court's sentences focused on retaining correctional control over Jenkins until he nears fifty years of age. The sentences and probation term imposed by the court accomplish this goal.

A defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To obtain resentencing, a defendant must establish that the information was inaccurate, and the sentencing court actually relied upon it. *Id.*, ¶28. Whether the circuit court relied upon inaccurate information at sentencing presents a question of law that we decide independently of the circuit court. *See id.*, ¶9.

A circuit court is not bound to impose any sentence recommended by the parties. *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court must make an independent judgment when imposing sentence. *See State v. Williams*, 2002 WI 1, ¶24, 249 Wis. 2d 492, 637 N.W.2d 733. A circuit court is not precluded from adopting an aspect of a recommended sentence to support its sentencing rationale.

We conclude that the circuit court made an independent judgment when it imposed sentence, and the court did not rely upon any inaccurate information. Therefore, Jenkins did not show the existence of a new factor⁴ requiring resentencing.

Upon the foregoing reasons,

⁴ To show a new factor, Jenkins must show facts “highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *State v. Harbor*, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted).

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
Acting Clerk of Court of Appeals