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DISTRICT III

February 18, 2020

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

2019AP529-CR State of Wisconsin v. Bradley M. Siudzinski
(L. C. No. 2013CF151)

Before Stark, P.J., Hruz and Seidl, JJ.

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).

Bradley Siudzinski appeals an order denying his petition for sentence adjustment pursuant to WIS. STAT. § 973.195 (2017-18).[1] Siudzinski argues the circuit court erroneously exercised its discretion when it determined it "must deny" the petition because the district attorney objected. Based upon our review of the briefs and record, we conclude at conference that this case is

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We agree with Siudzinski that the circuit court failed to properly exercise its discretion when it decided the petition based on an erroneous view of the law. Therefore, we summarily reverse the order and remand the matter so that the circuit court can consider the petition and exercise its discretion under the correct legal standard.

In 2013, the State charged Siudzinski with possession of tetrahydrocannabinols ("THC") as a second or subsequent offense, second-degree recklessly endangering safety, possession of drug paraphernalia, and two counts each of misdemeanor battery and disorderly conduct—with all seven counts as a repeater. The charges arose out of a bar fight in which Siudzinski used a knife. Siudzinski entered ***Alford***[2] pleas to possessing THC as a second or subsequent offense, misdemeanor battery, and second-degree reckless endangerment, all counts as a repeater. The remaining charges were dismissed and read in at sentencing. Out of maximum possible aggregate sentences totaling twenty-three and one-half years, the circuit court imposed concurrent and consecutive sentences resulting in a total of twelve and one-half years, consisting of six and one-half years' initial confinement and six years' extended supervision, to run concurrent with a reconfinement sentence Siudzinski was then serving.

Siudzinski subsequently filed a petition for sentence adjustment, attaching to his petition a verification of time served, a personal statement, transcript pages from his sentencing hearing, certificates showing completion of some behavioral and employment courses, and a letter of support from his mother. The circuit court notified the district attorney of the petition, and the

[2] An ***Alford*** plea is a guilty or no-contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. ***State ex rel. Jacobus v. State***, 208 Wis. 2d 39, 45 n.5, 559 N.W.2d 900 (1997); *see also* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

district attorney objected. After receiving the State's objection, the court denied Siudzinski's petition. This appeal follows.

WISCONSIN STAT. § 973.195 grants an inmate the opportunity to petition for sentence adjustment if certain criteria are met. When presented with such a petition, the circuit court has two options—either summarily deny the petition or hold the petition for further consideration. Sec. 973.195(1r)(c). Where, as here, the court holds the petition, it "shall notify the district attorney of the inmate's petition." ***Id.*** The statute further provides: "If the district attorney objects to adjustment of the inmate's sentence within 45 days of receiving notification under this paragraph, the court shall deny the inmate's petition." ***Id.***

Although the statute directs the sentencing court to deny the petition on the prosecutor's timely objection, our supreme court has interpreted the use of the word "shall" under that subsection "as directory," not mandatory. ***State v. Stenklyft***, 2005 WI 71, ¶83, 281 Wis. 2d 484, 697 N.W.2d 769 (Abrahamson, C.J., concurring/dissenting but writing for a majority on the issue of the circuit court's discretion).[3] Accordingly, the statute gives the "circuit court discretion to accept or reject an objection from a district attorney on a petition for sentence adjustment." ***Id.*** When determining whether adjustment is appropriate, the circuit court can grant a petition for sentence adjustment only when it "determines that sentence adjustment is in the public's interest." WIS. STAT. § 973.195(1r)(f).

[3] Justices Ann Walsh Bradley, N. Patrick Crooks, and Louis B. Butler joined Chief Justice Abrahamson's concurrence/dissent, thus forming a four-person majority for this proposition. ***State v. Stenklyft***, 2005 WI 71, ¶82, 281 Wis. 2d 484, 697 N.W.2d 769.

Here, the circuit court checked a box on a form order that stated,

> after considering any relevant factors including the nature of the crime, the character of the inmate, the protection of the public, the positions of the State and of the victim and the inmate's institutional conduct including the inmate's efforts at and progress in rehabilitation, or lack thereof, and the inmate's participation and progress, or lack thereof, in education, treatment and correctional programs,

the petition is "denied because it is not in the public interest." The court, however, also checked an "other" box stating, in the court's own words: "I must deny the sentence adjustment as the DA objects to it."

Siudzinski argues the circuit court erroneously exercised its discretion by giving the district attorney "absolute veto power" and, thus, decision-making authority over his petition. The State concedes the court erred by proceeding on an erroneous view of the law—specifically, by concluding the district attorney's objection required it to deny the petition. Citing ***Stenklyft***, the State also concedes that the court did not adequately provide its rationale for denying the petition. In ***Stenklyft***, our supreme court stated:

> [T]he record of the proceedings must clearly demonstrate that the circuit court exercised its discretion and weighed the appropriate factors when the court reached its decision on sentence adjustment. An example of such balancing would be a record that showed that the circuit court considered the nature of the crime, character of the defendant, protection of the public, positions of the State and of the victim, and other relevant factors such as "[t]he inmate's conduct, efforts at and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs...." WIS. STAT. § 973.195(1r)(b)(1).

Stenklyft, 281 Wis. 2d 484, ¶126 (Crooks, J., concurring/dissenting, but writing for a majority).

Despite the State's concessions, it urges this court to affirm the circuit court's decision under the independent review doctrine, which permits a reviewing court to uphold a discretionary

decision if the record contains facts that would support the circuit court's decision had it fully exercised its discretion. *See* ***Hammen v. State***, 87 Wis. 2d 791, 800, 275 N.W.2d 709 (1979). The exercise of discretion requires examining the relevant facts, applying the proper legal standard, and reaching a conclusion that a reasonable judge could reach. *See* ***State v. Kennedy***, 190 Wis. 2d 252, 261-62, 528 N.W.2d 9 (Ct. App. 1994).

Here, as the State concedes, the circuit court's determination rests upon an error of law and it failed to adequately provide its rationale for denying the petition. Because we cannot discern the extent to which the error of law factored into the court's decision, we decline to search the record in an effort to determine if it supports the court's decision—doing so would be tantamount to exercising discretion in the first instance, rather than reviewing the circuit court's discretionary decision. *See generally* ***Vlies v. Brookman***, 2005 WI App 158, ¶33, 285 Wis. 2d 411, 701 N.W.2d 642. Accordingly, we reverse the circuit court's order and remand the matter so that the circuit court can exercise its discretion under the correct legal standard.

Upon the foregoing,

IT IS ORDERED that the order is summarily reversed and the cause remanded with directions. WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals