



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 II

May 6, 2020

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Pamela Moorshead
Asst. State Public Defender
735 N. Water Street, Ste. 912
Milwaukee, WI 53202-4116

Michael D. Graveley
District Attorney
912 56th Street
Kenosha, WI 53140-3747

Sara Lynn Shaeffer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2018AP1746-CR State of Wisconsin v. Lonny L. McNair (L.C. #2017CF215)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Lonny L. McNair appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court erroneously exercised its discretion at sentencing. 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

(2017-18).¹ We modify the judgment, affirm the judgment as modified, affirm the order, and remand for entry of an amended judgment consistent with this opinion.

McNair was convicted following a guilty plea to delivering between one and five grams of cocaine. The circuit court sentenced him to fifty-two months of initial confinement and five years of extended supervision. It also ordered, as a condition of extended supervision, that he not “reside in any place where children reside without permission of the Court.”

McNair filed a motion for postconviction relief. In it, he accused the circuit court of erroneously exercising its discretion at sentencing in two ways: (1) by relying on irrelevant factors² and (2) by imposing an unreasonable and unconstitutionally overbroad condition of extended supervision. The court denied the motion without a hearing. This appeal follows.

Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court’s sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

² At sentencing, the circuit court discussed a number of topics that McNair found objectionable. They included America’s failed war on drugs, the heroin epidemic, Singapore’s approach to drug offenders, the efficacy of drug treatment courts, intimate partner violence, and the physical and sexual abuse of children.

A circuit court erroneously exercises its discretion at sentencing when it relies on clearly irrelevant factors. *State v. Dalton*, 2018 WI 85, ¶36, 383 Wis. 2d 147, 914 N.W.2d 120. A defendant bears the burden of proving by clear and convincing evidence that the court actually relied on irrelevant factors. *State v. Alexander*, 2015 WI 6, ¶17, 360 Wis. 2d 292, 858 N.W.2d 662.

It is within the circuit court's broad discretion to impose conditions of extended supervision as long as they are reasonable and appropriate. *State v. Miller*, 2005 WI App 114, ¶11, 283 Wis. 2d 465, 701 N.W.2d 47. Whether a condition is reasonable and appropriate is determined by how well it serves the dual goals of supervision: rehabilitation and protection of a state or community interest. *Id.* We review the constitutionality of a condition de novo. *See State v. Lo*, 228 Wis. 2d 531, 534, 599 N.W.2d 659 (1999).

Here, we are not persuaded that McNair has shown that the circuit court actually relied on irrelevant factors at sentencing. As noted by the State, the complained-of remarks were intended to illustrate the court's larger points about the danger of the drug trade, the need to focus on deterrence and punishment when combatting it, and the risk intimate partners and children face of domestic violence. These larger points were relevant when addressing the sentencing factors and objectives in McNair's case. After all, he pled guilty to a drug distribution offense and had prior convictions for domestic violence.

We are also not persuaded that a condition of extended supervision prohibiting McNair from residing with children without permission is unreasonable or unconstitutionally overbroad. Again, given McNair's history of domestic violence, such a condition is reasonably related to his rehabilitation and protection of a state or community interest. Moreover, the condition is not a

blanket ban on McNair's ability to reside with children; rather, it is simply a requirement that he obtain permission first.

On this last point, we conclude that the circuit court lacked authority to require McNair to return to it, rather than the department of corrections, when seeking permission to reside with children. The legislature has tasked the department of corrections, not the courts, with supervising offenders. *See* WIS. STAT. § 301.03(3). The condition of extended supervision must be amended to reflect that.³ Accordingly, we modify the judgment, affirm the judgment as modified, affirm the order, and remand for entry of an amended judgment consistent with this opinion.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is modified; the modified judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21 and the cause is remanded for entry of an amended judgment consistent with this opinion.

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

Sheila T. Reiff
Clerk of Court of Appeals

³ The judgment of conviction currently states, "Do not reside with any person in any place in which children reside without permission of the Court." It shall be amended to read, "Do not reside with any person in any place in which children reside without permission of the supervising agent."