



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 20, 2020

To:

Hon. James K. Muehlbauer
Circuit Court Judge
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Theresa Russell
Clerk of Circuit Court
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mark Bensen
District Attorney
Washington County
P.O. Box 1986
West Bend, WI 53095-1986

Thomas F. Ball II, #312026
New Lisbon Correctional Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2019AP1051-CR State of Wisconsin v. Thomas F. Ball, II (L.C. #2000CF358)

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).

Thomas F. Ball, II, appeals from an order denying his request for sentence adjustment pursuant to WIS. STAT. § 973.195 (2017-18).¹ Based upon our review of the briefs and record,

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

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm as the court did not err in denying sentence adjustment on the grounds that sentence adjustment was not in the public interest.

In 2000, Ball robbed a bank, assaulted and disarmed an officer, escaped from custody, and twice led police on car chases. Ball pled guilty in 2001 to one count of armed robbery by threat of force, as party to a crime, with habitual criminality and concealing identity penalty enhancers. In 2001, armed robbery by threat of force was a Class B felony. WIS. STAT. § 943.32(2) (2001-02). He also pled guilty to first-degree recklessly endangering safety and endangering safety by use of a firearm, and a jury convicted him of first-degree recklessly endangering safety, disarming a peace officer, battery to a peace officer, escape, using a weapon to take a vehicle without the owner's consent, and possession of a firearm by a felon.

In 2019, Ball petitioned for sentence adjustment under WIS. STAT. § 973.195 as he served more than eighty-five percent of his confinement time.² The district attorney objected to Ball's petition. The circuit court denied the petition without a hearing, finding Ball statutorily ineligible for sentence adjustment as he was serving a Class B felony. *See* sec. 973.195(1r).

Ball moved for reconsideration on the grounds that as armed robbery by threat of force had been reclassified to a Class C felony, he was statutorily eligible for sentence adjustment and cited to *State v. Tucker*, 2005 WI 46, 279 Wis. 2d 697, 694 N.W.2d 926. The court denied Ball's motion for reconsideration, concluding that Ball misread *Tucker*, and it also found that

² The State does not dispute that Ball has served at least eighty-five percent of his confinement time.

even if *Tucker* allowed for sentence adjustment, the court would deny sentence adjustment on the ground that adjustment would not be “in the public interest.” Ball appeals.

On appeal, the State does not dispute that *Tucker* allows Ball to petition for sentence adjustment as Ball was sentenced under TIS-I and the armed robbery by threat of force was reclassified to a Class C felony under TIS-II. *See Tucker*, 279 Wis. 2d 697, ¶¶22-23. We accept for purposes of this appeal that Ball is eligible for sentence adjustment pursuant to WIS. STAT. § 973.195. The fact that Ball is eligible for sentence adjustment, however, does not mandate an adjustment.

To be considered for sentence adjustment, an inmate must establish one of four grounds specified in WIS. STAT. § 973.195(1r)(b).³ *State v. Stenklyft*, 2005 WI 71, ¶25, 281 Wis. 2d 484, 697 N.W.2d 769. A court’s decision to grant or deny a petition for sentence adjustment is reviewed by this court under the erroneous exercise of discretion standard. *Id.*, ¶¶81-82, 112 (Abrahamson, C.J., concurring in part and dissenting in part). The applicable standard that the circuit court must apply is whether the “sentence adjustment is in the public interest.” Sec. 973.195(1r)(f). “When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court’s

³ “Upon receipt of a petition filed under par. (a), the sentencing court may deny the petition or hold the petition for further consideration. If the court holds the petition for further consideration, the court shall notify the district attorney of the inmate’s petition. 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.” WIS. STAT. § 973.195(1r)(c). Our supreme court has interpreted “shall” contained in § 973.195(1r)(c) to be permissive to avoid violating the separation of powers doctrine. *State v. Stenklyft*, 2005 WI 71, ¶¶82, 85, 281 Wis. 2d 484, 697 N.W.2d 769 (Abrahamson, C.J., concurring in part and dissenting in part) (noting that the concurrence/dissent formed a four-person majority on this specific issue). As a result, the circuit court may consider the district attorney’s objection, but the court is not bound by it. *Id.*, ¶82.

exercise of discretion.” *State v. Hunt*, 2003 WI 81, ¶¶44-45, 263 Wis. 2d 1, 666 N.W.2d 771 (citation omitted). Further, an inmate has no protected liberty interest in early release from prison through sentence adjustment and a court’s decision to grant sentence adjustment is “purely discretionary” and an inmate is not “entitled” to sentence adjustment “under any set of facts.” *Stenklyft*, 281 Wis. 2d 484, ¶5.

The circuit court denied the petition because Ball’s request was “not in the public interest.” Based on our review, we conclude there is a reasonable basis in the record to determine the court properly exercised its discretion when determining that sentence adjustment was not in the public interest. Ball robbed a bank at gunpoint while wearing a mask; led police on a thirty-eight mile car chase through three counties, during which an officer was injured; later attacked a detective that was guarding him at the hospital; attempted to stab the detective with his IV; choked the detective to the point of loss of consciousness; took the detective’s gun and fired it three times; attacked a nurse; stole a car from an elderly woman; led the police on another high-speed chase through two counties, putting pedestrians in danger; crashed the vehicle; entered a nursing home; and was ultimately shot before being apprehended.

Given Ball’s crimes and the court’s weighing of his progress while in prison, the court did not erroneously exercise its discretion in concluding that Ball’s petition for sentence adjustment was not in the public interest.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to 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