



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 III

February 8, 2022

To:

Hon. Jay N. Conley
Circuit Court Judge
Electronic Notice

Trisha LeFebre
Clerk of Circuit Court
Oconto County
Electronic Notice

Edward D. Burke, Jr.
Electronic Notice

Winn S. Collins
Electronic Notice

Jacob J. Wittwer
Electronic Notice

David M. Dolecki
1604 River Street
Niagara, WI 54151

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

2021AP415-CR

State of Wisconsin v. David M. Dolecki (L. C. No. 2017CF166)

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).

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

David Dolecki, pro se, appeals an order denying his petition for sentence adjustment pursuant to WIS. STAT. § 973.195 (2019-20).¹ Dolecki argues that the circuit court erroneously exercised its discretion when it denied his petition without explanation. 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. We agree with Dolecki that the court failed to

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

properly exercise its discretion when denying his petition. Therefore, we summarily reverse the order and remand the matter with directions.

In 2017, the State charged Dolecki with theft of between \$5,000 and \$10,000 in a business setting. The charge arose from allegations that Dolecki entered into a written contract to replace the roof of a home and, after accepting \$10,000 for a down payment and supplies, he refused to perform the work or refund the money. Dolecki pled no contest to the crime charged.

At a July 2019 sentencing hearing, the circuit court considered proper sentencing factors, including the seriousness of the offense, Dolecki's character, the need to protect the public and the mitigating circumstances Dolecki raised. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. In addressing Dolecki's character and rehabilitative needs, the court recognized that Dolecki had a "heck of a problem throughout [his] life with alcohol and substance abuse," though this history was not the court's "primary concern" in this case. The court ultimately emphasized that protection of the public was the "biggest objective" of the sentence based on Dolecki's long history of property crimes. Out of a maximum possible six-year sentence, the court imposed a five-year term, consisting of two years' initial confinement and three years' extended supervision, to run concurrent with a sentence Dolecki was serving in another case.

In February 2021, Dolecki filed a form petition for sentence adjustment, checking boxes to indicate that he had satisfied the eligibility criteria for sentence adjustment—specifically, that he was not convicted of a Class A or B felony, and that he had served the applicable percentage of his confinement in prison. As grounds for his petition, Dolecki checked boxes asserting that: (1) his "conduct, efforts at and progress in rehabilitation, or participation and progress in

education, treatment, or other correctional programs since being sentenced” supported his request; and (2) sentence adjustment was in the interest of justice. Submitted with the petition was a verification of time served; documentation of his efforts to make payments toward restitution; and certificates showing completion of prison programs addressing substance abuse, criminal thinking and behavior, and domestic violence. In a personal statement, Dolecki argued that obtaining early release to allow him to work full time to pay the victim’s restitution was in the interest of justice. The district attorney filed a form response, checking a box to signal his objection to the petition for sentence adjustment, but providing no other explanation for opposing the petition. After receiving the State’s objection, the court denied Dolecki’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).² 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.*

Here, the circuit court checked a box on a form order that denied the petition for sentence adjustment because there was an objection. The court then hand-wrote “district attorney” to indicate the party raising the objection, but it provided no further explanation for its decision to deny the petition. Dolecki argues that the court erroneously exercised its discretion by failing to adequately provide its rationale for denying the petition, and the State concedes the error.

Despite the concession, the State 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).

The State argues that the denial of sentence adjustment is consistent with the sentencing court’s “primary objective” of protecting the public from Dolecki’s serial criminality, as well as other stated sentencing goals. However, in denying the petition, the circuit court did not check

² 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.

the available box on the form order indicating that sentence adjustment was “not in the public interest.” Moreover, 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 on interpretation of the statute’s language). This statement tacitly shows that relying on the sentencing record alone is insufficient—particularly where, as here, there is no evidence that the court considered Dolecki’s efforts and progress in rehabilitation or his participation in education, treatment and other correctional programs as well as factors considered by the court when imposing the sentence that appear to have been addressed by Dolecki’s completion of various programs in prison.

Finally, based on how the circuit court completed the form order, it appears the petition may have been denied based on the court’s erroneous belief that it was required to deny the petition based solely on the district attorney’s objection. Because we cannot discern the extent to which this possible 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 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 court's order and remand the matter with directions for the court to address the petition on the record in the proper exercise of its discretion.

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