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DISTRICT I

November 15, 2022

To:

Hon. David L. Borowski
Circuit Court Judge
Electronic Notice

John D. Flynn
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Michael C. Sanders
Assistant Attorney General
Electronic Notice

Melinda A. Swartz
Electronic Notice

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

2020AP874-CR State of Wisconsin v. Dale Ray Swenson (L.C. # 2018CF3312)

Before Brash, C.J., Donald, P.J., and Dugan, 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).

Dale Ray Swenson appeals an order denying him early release from confinement.¹ Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).² We affirm.

¹ The Honorable Pedro Colon accepted Swenson's guilty plea and sentenced him. The order at issue in this appeal was entered by the Honorable David L. Borowski, who was assigned to this matter as a result of judicial rotation.

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Following Swenson’s conviction for operating a motor vehicle while intoxicated as a ninth offense (OWI-9th), the circuit court sentenced him to five years of imprisonment. The sentence was bifurcated as three years of initial confinement and two years of extended supervision with eligibility for participation in the Substance Abuse Program (SAP) “at any time during [his] sentence.” The Department of Corrections subsequently notified the circuit court that Swenson had completed the SAP—before serving his entire three-year term of initial confinement—and requested that the court authorize his release and convert Swenson’s remaining confinement time to extended supervision, pursuant to WIS. STAT. § 302.05(3)(c)2.³ The circuit court declined the DOC’s proposed order. The circuit court explained that because Swenson had not yet served the mandatory minimum confinement time (three years) for his offense, the court lacked the authority to release him to extended supervision. *See* WIS. STAT. § 346.65(2)(am)6.

The issues on appeal are whether the circuit court’s refusal to modify Swenson’s sentence violated WIS. STAT. § 302.05(3)(c)2.’s mandate and the double jeopardy clause. The parties agree that both of these issues were squarely addressed in *State v. Gramza*, 2020 WI App 81, 395 Wis. 2d 215, 952 N.W.2d 836, *review denied*, which controls the outcome here.

In *Gramza*, we concluded that a person sentenced to a mandatory minimum term of initial confinement must serve that term regardless of his or her completion of the SAP. *See id.*, ¶26 (“We therefore conclude that the most reasonable interpretation of these statutes, when

³ Under this statute, which authorizes the SAP, within thirty days of completion, the defendant’s sentence is required to be modified, converting the remaining period of initial confinement to extended supervision, and the defendant is to be released.

considered in conjunction with each other under these circumstances, is that the mandatory minimum term of initial confinement of the OWI-7th statute must be served in full by Gramza, regardless of his successful completion of the SAP.”). We additionally rejected Gramza’s claim that the circuit court’s decision not to grant him early release following his completion of the SAP violated his right to be free from double jeopardy. *See id.*, ¶¶27-29. In his reply brief, Swenson acknowledges that **Gramza** controls and that we must follow that decision. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) (concluding that “the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals”). Consequently, we affirm.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* 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