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DISTRICT IV

December 22, 2022

To:

Hon. Guy D. Dutcher
Circuit Court Judge
Electronic Notice

Kathleen Henry
Electronic Notice

Katrina Rasmussen
Clerk of Circuit Court
Waushara County Courthouse
Electronic Notice

Eric Michael Muellenbach
Electronic Notice

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

2021AP1798-CR	State of Wisconsin v. Kortez R. Smith (L.C. # 2019CF180)
2021AP1799-CR	State of Wisconsin v. Kortez R. Smith (L.C. # 2019CF210)

Before Blanchard, P.J., Graham, and Nashold, 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).

Kortez Smith appeals judgments of conviction and an order denying his postconviction motion. 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 (2019-20).¹ We affirm.

Smith was convicted of one count of failing to maintain sex offender registry, one count of failure to update registry information, and one count of battery by a prisoner, all as a repeater. On the registry counts, the circuit court imposed concurrent sentences of four years of initial

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

confinement and three years of extended supervision. On the battery count, the court withheld sentence and placed Smith on probation for three years, consecutive to the prison terms.

Smith filed a motion for sentence modification on the ground that the circuit court erroneously exercised its discretion and imposed unduly harsh sentences. The court denied the motion in a letter.

On appeal, Smith argues that the circuit court erred by denying his motion without holding an evidentiary hearing. He argues that he was entitled to such a hearing because he alleged facts which, if true, would entitle him to relief. This argument fails for at least the following reasons. First, Smith did not ask the court for an evidentiary hearing, and did not describe evidence or identify witnesses that he wanted to present. His motion simply asked for a hearing by telephone. Second, assuming without deciding that the case law Smith cites in the context of motions to withdraw pleas applies equally to sentence modification motions, his motion did not allege any new *facts* that were not already in the record. Instead, his motion presented only argument based on facts in the record.

Turning to Smith's challenges to the individual sentences, the parties agree on the applicable legal standards, which we need not repeat here. Smith argues that the concurrent sentences of four years of initial confinement and three years of extended supervision on the registry counts were excessive. Smith argues that this was not the minimum necessary to meet the applicable sentencing objectives, which he defines as being that he should comply with the registration requirements. He asserts that these sentences "will not allow him to show he can register in compliance with the law."

Smith's description of the sentences is inaccurate. He will have a chance to show his compliance with the law after his confinement is over. Furthermore, it is not Smith who decides what the sentencing objectives are. Here, the circuit court considered protection of the public to be one of the sentencing objectives. Referring to Smith's history of sexually exposing himself, the court regarded him as a "pretty significant" risk to the public. The court also referred to the need for rehabilitation by noting the sex offender treatment that Smith is in need of. Smith fails to explain why these were not appropriate objectives.

Smith argues that the circuit court improperly considered earlier offenses that he was not charged with, and earlier comments by him. However, the conduct and statements were appropriate to consider in assessing Smith's need for rehabilitation and the need to protect the public.

On the offense of battery by a prisoner, Smith argues that his term of probation should be reduced. In response, the State argues that circuit courts lack the inherent authority to reduce imposed terms of probation. However, the argument overstates the effect of the case that it relies on, *State v. Schwind*, 2019 WI 48, 386 Wis. 2d 526, 926 N.W.2d 742.

Schwind sought early termination of his probation after serving thirteen years of his twenty-five-year term. *Id.*, ¶4. Our supreme court stated that circuit courts do not have inherent authority to grant early termination of probation, and may do so only under the circumstances provided in WIS. STAT. § 973.09(3)(d). *Schwind*, 386 Wis. 2d 526, ¶¶33-34. However, the opinion does not state, and cannot reasonably be read to imply, that a circuit court lacks authority to reduce a term of probation when the defendant argues on direct postconviction review that the

circuit court erroneously exercised its discretion in imposing the probation. Therefore, we address the merits of Smith's argument.

Smith argues that the probation term should be reduced because the battery occurred as a result of provocation by other prisoners. However, the sentencing court was informed of Smith's version of events in the presentence investigation report, including his allegations of provocation. The circuit court said that it was giving Smith the benefit of "a level of understanding for how it is you felt that you needed to respond," but explained that the problem was that Smith responded at the level that he did. Smith immediately agreed that he "took it too far." Smith fails to persuade us that the court did not give proper consideration to the circumstances of the battery in determining the length of probation.

IT IS ORDERED that the judgment and order appealed from are summarily affirmed under 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