STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 14-AP-982-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMIE R. ANDERSON,

Defendant-Appellant.

ON REVIEW OF A DECISION AND ORDER DENYING THE DEFENDANT'S PETITION FOR SENTENCE ADJUSTMENT, ENTERED IN THE MONROE COUNTY CIRCUIT COURT ON FEBRUARY 11, 2014, HON. MARK L. GOODMAN PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT, JAMIE RUSSELL ANDERSON

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ARGUMENT

I. ANDERSON'S ISSUE PRESENTED IS PROPERLY BEFORE THIS COURT AND APPROPRIATE FOR REVIEW.

The State's brief includes three numbered arguments questioning whether the circuit court's order is subject to appellate review. First, the State argues that "[t]he defendant's appeal is without merit because the defendant was treated as if he was eligible for sentence adjustment." (State's Brief at 2-4.) Second, the State argues that "[t]he court's explanation of the denial of the petition for sentence adjustment is irrelevant dicta, therefore does not warrant any consideration by the court of appeals." (State's Brief at 4-6.) Third, the State argues that "Anderson's case does not present the issues he is asking the court to make new law on. Therefore his appeal should be denied." (State's Brief at 6-7.) Each of the above arguments fails for a single reason—the circuit court's sole basis for denying Anderson's petition was his statutory ineligibility for sentence adjustment.

To understand that Anderson was *not* treated as if he was eligible for sentence adjustment—even though the circuit court sent the petition to the district attorney and received an objection—it is necessary to fully examine the court's order. The court denied Anderson's petition in a three-page order using circuit court form CR-260 and an attached written explanation. (App. F.) Notably, the court left the form blank as to whether "The inmate [has or has not] served the applicable percentage of his/her confinement in prison (85 percent for a Class C to E felony and 75 percent for a Class F to I felony)." (App. F at 1.)

Most importantly, the court failed to note anywhere on the form order whether and upon which grounds the petition was denied. (App. F at 1-2.) Instead of marking grounds for its decision, the court marked the box on the form order noting that "[w]ritten reasons are attached." (App. F at 2.) Thus, without the attached explanation, the circuit court's form order would not have decided Anderson's petition. (App. F at 1-2.)[1] (App. F at 2.)

In its attached explanation, the circuit court explicitly treated Anderson as if he was ineligible for sentence adjustment. The circuit court explained:

> The relief available under *sec. 973.195, Wis. Stats.,* is only available to those defendants who were convicted of Class C to Class I felonies. Since this defendant was convicted of misdemeanors and not convicted of any Class C to Class I felony, he is ineligible to have his misdemeanor sentences adjusted under *sec. 973.195, Wis. Stats.*

(App. F at 3.)

Nevertheless, the State bases its argument regarding the appropriateness of Anderson's appeal on the process the circuit court followed in this case. (State's Brief at 3-4.) The State argues that because the district attorney objected to the court's notice of Anderson's petition under Wis. Stat. § 973.195(1r)(c), the circuit court's attached explanation is "irrelevant dicta" not worthy of appellate review. (State's Brief at 4-6.)

[1] Notably, the form explicitly allows for this sort of supplementation. At the bottom of the form, there is a statement that "This form shall not be modified. It may be supplemented with additional material." Thus, the court did exactly what it should have done if, after asking for the State's input, it determined that Anderson was statutorily ineligible for sentence adjustment.

In making that argument, the State overstates the holding of ***State v. Stenklyft***, 2005 WI 71, ¶¶121-23, 281 Wis. 2d 484, 697 N.W.2d 769. Justice Crooks, writing for a four justice concurrence/dissent[2], explained that

> Here, it is necessary to construe "shall" as directory *and permissive*, in order to save the constitutionality of the statute …. I concur with the mandate of the lead opinion to reverse, but I would decide this case by holding that the apparent veto given to a district attorney by the Wisconsin Legislature in Wis. Stat. §§ 973.195(1r)(c) and (f) (2003-04) is one where a circuit court has *discretion to accept or reject the objection* of a district attorney on a sentence adjustment petition.

Stenklyft, 281 Wis. 2d 484, ¶¶121-23 (Crooks, J., concurring in part and dissenting in part) (emphasis added). Thus, the State errs when it claims that "[t]he Court did deny the petition as it was supposed to do under the statute" because the district attorney objected. (State's Brief at 3.)

While the State acknowledges the "findings" of the ***Stenklyft*** court, the State's brief overstates the legal significance of the district attorney's objection. If the circuit court had treated Anderson as if he was eligible for sentence adjustment, the court would have been obligated to exercise discretion in determining whether to grant or deny Anderson's petition based on the grounds listed in the statute and on the form order.[3] However, as the record demonstrates,

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[2] Because a majority of the justices joined in Justice Crooks' opinion, it is the holding of the case. ***State v. Stenklyft***, 2005 WI 71, ¶¶82-83, 281 Wis. 2d 484, 697 N.W.2d 769. (Abrahamson, C.J., concurring in part and dissenting in part).

[3] Justice Crooks, again writing for a four justice concurrence/dissent, explained:

the circuit court instead determined that Anderson was statutorily ineligible for sentence adjustment under Wis. Stat. § 973.195. Thus, the circuit court's order completely ignores the merits of Anderson's petition and the district attorney's objection. (App. F.) As such, the circuit court did not treat Anderson as if he was eligible for sentence adjustment.

Furthermore, even if the State is correct that the procedure followed by the circuit court constitutes a discretionary decision on the merits, discretionary decisions are subject to appellate review.[4] In such cases an appellate court reviews whether the circuit court properly exercised its discretion by examining the relevant facts, applying a proper standard of law, and using a demonstrably rational process to

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> If the statutes at issue were to be interpreted as containing a directory and permissive "shall," then the 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. Here, the record does not show that the circuit court weighed all of the appropriate factors when the court reached the decision to grant sentence adjustment. Therefore, the decision of the circuit court should be reversed, and I would remand this matter for a full consideration of the factors listed above.

Stenklyft, 281 Wis. 2d 484, ¶126 (Crooks, J., concurring in part and dissenting in part) (emphasis added and footnotes omitted).

[4] On this point, the State erroneously asserts that the court may deny the petition without a reason. (*See* State's Brief at 4.) That is simply not the case. When the court completes the form order, it must indicate a reason for the denial of a petition by checking a box. (App. F.) In addition, the form gives the court an opportunity to explain its decision by attaching "written reasons," as the court in this case did.

reach a conclusion that a reasonable judge could reach. *See*, *e.g.*, ***State v. Lock***, 2012 WI App 99, ¶43, 344 Wis. 2d 166, 823 N.W.2d 378. Thus, the court's decision would be an erroneous exercise of discretion if, as Anderson asserts, it was based on an improper standard of law. ***Id.***

In other words, whether Anderson was treated as if he was eligible for sentence adjustment has no bearing on the court of appeals' ability to decide the issue of statutory interpretation presented in this appeal.

II. THE SENTENCE ADJUSTMENT STATUTE APPLIES TO MISDEMEANANTS SENTENCED TO PRISON.

The State argues that misdemeanants are not eligible for sentence adjustment under Wis. Stat. § 973.195 because the legislature failed to define "applicable percentage" as it relates to them. That argument ignores clear language in § 973.195(1r)(a) stating that inmates "serving a sentence imposed under s. 973.01 for a crime other than a Class B felony" may petition the court once they have served "at least the applicable percentage of the term of confinement."

Even more importantly, the State's argument ignores the reasoning behind our supreme court's holding in ***State v. Tucker***, 2005 WI 46, ¶¶15-16, 22, 279 Wis. 2d 697, 694 N.W.2d 926. In that case, the court held that the statute is ambiguous in terms of its application to TIS-I inmates because it applies to them on its face but fails to indicate how the applicable percentage should be calculated. Anderson is comfortable with the arguments made in his Brief-in-Chief concerning the application of § 973.195 to misdemeanants and will not rehash them here. (*See* Brief of Defendant-Appellant at 4-15.)

Finally, the State argues that "[i]t is not surprising that the legislature chose not to make misdemeanants eligible for sentence adjustment." (State's Brief at 8-10.) Presumably, the State is arguing that the legislature intended to exclude misdemeanants so this Court should interpret it to exclude Anderson and others like him.

In support of its argument, the State asserts that all misdemeanants sent to prison are repeat offenders who should be treated differently than non-repeat offenders. (State's Brief at 9.) Further, the State posits that repeat offenders are less amenable to rehabilitation. (State's Brief at 9.) The State cites no authority, legal or otherwise, for these propositions, besides Wis. Stat. § 939.62, the statute authorizing enhanced penalties for repeat offenders.[5] The logic of that argument fails. Section 939.62 applies to both repeat misdemeanants and repeat felons. Wis. Stat. §§ 939.62(1) and (2). Nothing in § 973.195 indicates the legislature intended to treat repeat offenders differently from non-repeat offenders; indeed, the fact that repeat felons are not excluded from sentence adjustment indicates that this issue was not a concern for the legislature.[6] Again, Anderson is satisfied with the arguments in his Brief-in-Chief regarding legislative intent. (*See* Brief of Defendant-Appellant, pp 7-15.)

[5] The habitual criminality statute says nothing of the criminal justice system's differing treatment or the amenability to rehabilitation of repeat offenders.

[6] As the State points out, Wis. Stat. § 973.195 accounts for any concerns the legislature may have had regarding rehabilitation for repeat offenders by incorporating rehabilitation into the grounds for eligibility for sentence adjustment. *See* § 973.195(1r)(b)1. Even if an offender applies under different grounds, the court may deny the petition as "not in the public interest" if and when it has concerns about a defendant's rehabilitation. Wis. Stat. § 973.195(1r)(f); *see also* App. F.

CONCLUSION

For the above reasons, Anderson's issue presented is properly before this Court and suitable for review. Further, Anderson was eligible for sentence adjustment under Wis. Stat. § 973.195.

Respectfully submitted this _____day of November, 2014.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1805 words.

_____

Jeremy Newman

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____

Jeremy Newman