COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0683-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEON S. GROESCHL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Leon S. Groeschl has appealed from a judgment convicting him upon no contest pleas of two counts of delivery of cocaine in violation of WIS. STAT. § 961.41(1)(cm)1 (1997-98)[1] and one count of possession

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

of cocaine with intent to deliver within 1000 feet of a school in violation of WIS. STAT. §§ 961.41(1m)(cm)1 and 961.49(1)(b)6. He has also appealed from an order denying his motion for sentence modification. We affirm the judgment and the order.

¶2 Groeschl was initially charged in both the complaint and information with three counts of delivery of cocaine within 1000 feet of a school, one count of maintaining a drug house, and one count of possession of cocaine with intent to deliver within 1000 feet of a school. Together these charges subjected him to a potential penalty of sixty-one years in prison and approximately $2,000,000 in fines.

¶3 On June 10, 1998, Groeschl entered no contest pleas to the charges for which he was convicted. As part of the plea agreement, the charge of maintaining a drug house and one count of delivery of cocaine within 1000 feet of a school were dismissed. In addition, the sentence enhancers for delivery within 1000 feet of a school were dropped from the two remaining counts of delivery of cocaine. The enhancer remained only on the count of possession of cocaine with intent to deliver within 1000 feet of a school. Pursuant to this agreement, Groeschl's potential prison exposure was reduced to thirty-five years.

¶4 As part of the plea agreement, the parties jointly recommended that the trial court sentence Groeschl to three years in prison on the charge of possession of cocaine with intent to deliver within 1000 feet of a school. They recommended that the trial court impose and stay five-year prison terms on the remaining counts, with three-year terms of probation to be served consecutive to the three-year prison term. After accepting Groeschl's pleas, the trial court sentenced him in accordance with the parties' recommendations.

¶5 Groeschl subsequently moved the trial court for modification of his sentence. He contended that modification of the three-year prison sentence imposed for the school-zone enhanced charge was warranted because it was based upon the trial court's mistaken belief that a minimum three-year prison term was mandatory and that probation was not an option. He also contended that sentence modification was warranted because his trial counsel rendered ineffective assistance when he advised him that a minimum three-year prison term was mandatory, but that he would be eligible for parole in less than three years. The trial court denied the motion after reiterating its belief that a minimum three-year term was mandatory and finding that counsel correctly advised Groeschl that he would have to serve the entire three years.

¶6 As conceded by the State in its respondent's brief, the trial court was incorrect in its belief that a minimum sentence of three years was mandatory. This belief was apparently shared by defense counsel and the prosecutor at sentencing and was reiterated by the trial court and prosecutor at the postconviction hearing.

¶7 As set forth by Groeschl in his brief on appeal, the three-year sentence for the school-zone enhanced charge of possession of cocaine was a presumptive minimum, not a mandatory minimum. Groeschl's conviction under WIS. STAT. §§ 961.41(1m)(cm)1 and 961.49(1) subjected him to § 961.49(2)(am), which provides: "The court shall sentence a person … to at least 3 years in prison .... Except as provided in s. 961.438, the court shall not place the person on probation." WISCONSIN STAT. § 961.438 further provides:

> Any minimum sentence under this chapter is a presumptive minimum sentence. Except as provided in s. 973.09(1)(d), the court may impose a sentence that is less than the presumptive minimum sentence or may place the person on probation only if it finds that the best interests of the

> community will be served and the public will not be harmed and if it places its reasons on the record.

¶8 Pursuant to WIS. STAT. § 961.438, the trial court could have sentenced Groeschl to less than three years in prison or placed him on probation, provided it set forth reasons for concluding that the best interests of the community would be served and the public would not be harmed. The reference to WIS. STAT. § 973.09(1)(d) in § 961.438 did not preclude probation or a prison term of less than three years. Section 973.09(1)(d) applies only to cases where a defendant is exposed to a sentence of one year or less. *See* ***State v. DeLeon***, 171 Wis. 2d 200, 205, 490 N.W.2d 767 (Ct. App. 1992). When a defendant is exposed to a potential sentence exceeding one year, as here, the remainder of § 961.438 applies, and the trial court may impose a sentence that is less than the presumptive minimum or place the defendant on probation, provided the proper findings are made on the record. *See* ***DeLeon***, 171 Wis. 2d at 203-05.[2]

¶9 Groeschl contends that because the trial court erroneously believed it had to sentence him to at least three years in prison and could not consider probation, it misused its discretion at sentencing, entitling him to sentence modification and a new sentencing hearing. He also contends that his trial counsel rendered ineffective assistance by incorrectly advising him that the three-year prison term was mandatory.

¶10 Although we agree that the trial court and Groeschl's trial counsel were incorrect in their assumptions and advice, sentence modification is not an appropriate remedy and relief on appeal is therefore denied. As part of the plea

[2] ***State v. DeLeon***, 171 Wis. 2d 200, 490 N.W.2d 767 (Ct. App. 1992), discusses WIS. STAT. § 161.438 (1991-92), which has been renumbered as WIS. STAT. § 961.438.

agreement, Groeschl and the State jointly recommended that a three-year prison term be imposed for the school-zone enhanced possession charge. Groeschl's current request that a sentence less than three years in length be imposed would be a breach of that agreement.

¶11 Groeschl may return to the trial court to file a motion to withdraw his no contest pleas, contending that his pleas were not knowingly, voluntarily and intelligently entered because they were based upon an erroneous belief that a three-year sentence was mandatory, a belief shared by the trial court and the prosecutor. *Cf.* ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992). Similarly, he may move to withdraw his pleas on the ground that his trial counsel rendered ineffective assistance by advising him that the three-year term was mandatory and probation was not an option.[3] However, we caution Groeschl that if he is successful on such a motion, the case will return to its original posture with all five charges pending against him.[4]

¶12 This is a choice Groeschl will have to carefully consider. However, he cannot circumvent his plea agreement, seeking a sentence less than he bargained for on the school-zone enhanced possession charge, while retaining the

[3] If he moves to withdraw his pleas based on ineffective assistance of counsel, Groeschl must allege sufficient facts to establish that he would not have entered the pleas but for the misinformation. *See* ***State v. Bentley***, 201 Wis. 2d 303, 318, 548 N.W.2d 50 (1996).

[4] We have considered the State's argument that Groeschl failed to make any showing that probation or a sentence of less than three years was warranted under the criteria set forth in WIS. STAT. § 961.438. However, because the trial court ruled that the three-year sentence was mandatory under the statutes and thus gave Groeschl no opportunity to argue for probation or a lesser sentence at the postconviction hearing, we do not accept the State's contention that Groeschl has waived his right to seek probation or a lesser sentence.

benefit of his agreement on the dismissed charges and enhancers. For this reason, his motion for sentence modification was properly denied.[5]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[5] An appellate court may uphold a trial court's order on grounds other than those relied on by the trial court. S*ee* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).