COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No.   2004AP1759-CR

Cir. Ct. No. 2001CF4181

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

      PLAINTIFF-RESPONDENT,

  V.

DERRICK SANDLES,

      DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Derrick Sandles appeals from an order denying his sentence modification motion, and from two orders denying reconsideration. The issue is whether the supreme court's interpretation of presumptive minimum sentence as including the extended supervision portion of a sentence, as explained

in ***State v. Cole***, 2003 WI 59, ¶10, 262 Wis. 2d 167, 663 N.W.2d 700, constitutes a new factor entitling Sandles to sentence modification. We conclude that the trial court's pre-***Cole*** interpretation of minimum sentence, as meaning the total sentence imposed, is consistent with ***Cole***, thereby obviating any new factor analysis. Therefore, we affirm.

¶2   Sandles pled guilty to possessing more than one hundred grams of cocaine with intent to deliver. The trial court imposed a twelve-year sentence, divided equally into two six-year periods of confinement and extended supervision. This court affirmed the judgment of conviction and postconviction order, rejecting a challenge to the trial court's sentencing discretion. *See **State v. Sandles***, No. 02-2622-CR, unpublished slip op. at ¶¶12-16 (WI App May 13, 2003).

¶3   Sandles moved for sentence modification, claiming that the trial court's misinterpretation of the concepts of presumptive and mandatory minimums, as later explained in ***Cole***, constituted a new factor entitling him to sentence modification. The trial court denied the motion, explaining that it was Sandles who misinterpreted the presumptive and mandatory minimum concepts, not the trial court. It also ruled that the trial court's sentence, which exceeded the presumptive minimum, was a proper exercise of sentencing discretion. Sandles unsuccessfully sought reconsideration, contending that the trial court erroneously exercised its sentencing discretion by exceeding the presumptive minimum sentence. Sandles again sought reconsideration, challenging the trial court's previous reconsideration ruling that his sentence modification motion was also untimely. The trial court again denied the motion, ruling that it would not consider successive motions seeking the same relief.

¶4   A legitimate motion seeking sentence modification predicated on a new factor was not necessarily untimely. Consequently, we consider Sandles's new factor claim, although we are not necessarily convinced of its legitimacy, or its timeliness.

¶5   A new factor is

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that "new factor … frustrates the purpose of the original sentence." *See State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶6   A new sentencing factor is Sandles's only viable contention for sentence modification at this juncture. Consistent with that contention, Sandles claims that the trial court intended to impose the minimum sentence required for this offense, and misinterpreted (as later shown by *Cole*) that the minimum referred only to the confinement portion of the sentence. The trial court's sentencing comments, however, belie his contention.

¶7   The trial court explained that it would use the (presumptive) minimum punishment as a guide to determine the appropriate sentence.[1] It

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[1] The trial court did not specify whether it was referring to the presumptive or the mandatory minimum punishment; its references were only to minimum. The clear implication, however, was that it was referring to the presumptive minimum.

inquired whether that statutory minimum should be the beginning or end of its sentencing analysis. It explained why "a sentence at the minimum level might be appropriate." It concluded that "a sentence in the minimum range [wa]s appropriate, and [it] think[s] a fair distribution of initial confinement time is approximately half of that sentence." These comments do not evince an intention to impose the minimum sentence; they explain the trial court's reasoning in beginning its analysis with the minimum sentence for this offense.

¶8 The trial court also "s[aw] no other conclusion but to find that the 10 years [minimum] should apply to the total sentence. [The trial court] assume[s] that's the conclusion that the Court of Appeals will reach." The trial court's analysis was entirely consistent with *Cole*'s later holding that a presumptive minimum sentence is a total sentence consisting of both a term of confinement and a term of extended supervision. *See Cole*, 262 Wis. 2d 167, ¶10.

¶9 Because the trial court did not evince an intention to impose the minimum sentence, and its interpretation of the minimum sentence as the total sentence (including the period of extended supervision) was entirely consistent with *Cole*, Sandles has not shown the existence of a new factor. Consequently, we affirm the trial court's successive postconviction orders denying his sentence modification and reconsideration motions.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).