COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-2112-CR
97-2113-CR

STATE OF WISCONSIN — **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMAL R. JACKSON,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Jamal R. Jackson appeals from a judgment of conviction and from an order denying postconviction relief. We affirm because we reject Jackson's argument that the circuit court misused its discretion when it did not place Jackson in the Department of Intensive Sanctions (DIS) program.

In January 1996, Jackson was arrested and charged with possession of cocaine base with intent to deliver, as well as possession of THC and obstructing an officer. In June, Jackson was arrested again and charged with possession of a larger amount of cocaine base, with intent to deliver within 1,000 feet of a school. The cases were consolidated for a plea agreement and sentencing. Jackson pled no contest to the two charges of possession with intent to deliver. The other charges—including the school zone "enhancer"—were dismissed. The court sentenced Jackson to six years' imprisonment, reasoning "I'm candidly not satisfied that he can get appropriate supervision through the Department of Probation and Parole [sic], and I don't know of any other program available outside of it."

Jackson brought a postconviction motion for sentence modification, alleging that the circuit court had overlooked the alternative of sentencing him to DIS. At the postconviction hearing, the court denied Jackson's motion. The court indicated that it had considered DIS, but found it inappropriate for drug offenders for two reasons. First, the Department of Corrections had indicated that the program was not suited to drug offenders; second, in the court's own opinion, DIS was not an appropriate sentence for drug offenders because there was an insufficient rehabilitative component. The court concluded by stating that DIS was an option, but one that "is uniformly rejected by me."

Relying on this "uniformly rejected" statement, Jackson argues to this court that the circuit court erred in denying his motion for sentence modification because it employed a "preconceived policy of sentencing that is 'closed to individual mitigating factors.'" ***State v. Ogden***, 199 Wis.2d 566, 571, 544 N.W.2d 574, 576 (1996) (citations omitted). We reject this argument.

Ogden forbids a "sentence which fits the crime, but not the criminal." ***Id***. at 571, 544 N.W.2d at 576. Thus, the ***Ogden*** court reversed a circuit court decision which applied a "preconceived sentencing policy" to the crime "*before*" taking into account the facts of the individual case. ***Id***. at 572, 544 N.W.2d at 577 (emphasis in original). This policy amounted to an "abdication of the trial court's responsibility to look at the facts in each case independently before issuing a sentence." ***Id***. The ***Ogden*** court held that at a minimum, imposition of a criminal sentence must be based on "the gravity of the offense, the character of the offender and the need for the protection of the public." ***Id***. at 571, 544 N.W.2d at 576.

The court here complied with ***Ogden***. In sentencing Jackson, the court noted Jackson's failure on juvenile intensive supervision, held that supervision was insufficient to meet Jackson's needs,[1] and concluded that imprisonment was necessary. Regarding his character and the need to protect the public, the court indicated that in light of Jackson's popularity at school, permitting his return to school would permit others to be "influenced by his activities." The court also noted that Jackson had a previous juvenile record, and that he was likely to continue his drug dealing activities. Thus, the court properly imposed sentence based on consideration of the individual circumstances of the case, as required by ***Ogden***.

The court's postconviction "uniformly rejected" remark does not change our analysis. Taken in context, the remark does not indicate a "preconceived sentencing policy" in the sense of having predetermined a sentence

[1] The court was referring to ordinary adult supervision, rather than DIS, because no party raised DIS as a possibility at sentencing.

which will fit every drug offender, every time. Rather, the court specifically noted that, although it had considered the DIS program, that program was unsuitable for drug offenders because it does not offer proper rehabilitation, and because the Department of Corrections—whose views must be taken into account as the ultimate administrator of the program—does not believe the program suitable. Taken in context, the court's comment was a consideration of the limitations of the program, rather than a statement of a preconceived idea as to sentencing in disregard to the circumstances of the case.

By the Court.—Judgment and order affirmed.

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