COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3192-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARK L. DRYDEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: RICHARD L. REHM, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

¶1 PER CURIAM. Mark Dryden appeals from an order denying his motion for sentence modification. The issue is whether the court erred by concluding that Dryden's sentence should be consecutive. We affirm.

¶2 Dryden pleaded no contest to a felony charge in March 1998. The court sentenced him to two years in prison. At that time Dryden was also facing charges in Florida. For reasons that are not entirely clear on the record, but apparently at Dryden's request, the court stayed the sentence "until conclusion of Florida matters." Dryden then signed papers to allow his extradition to Florida, where he was convicted and sentenced.

¶3 In October 1998, the trial court held a hearing in response to a proposed stipulation and order that had been submitted. Although that document is not of record, the court described it as: (1) increasing the amount of restitution Dryden would be obliged to pay, and (2) setting his sentence in this case to run concurrently with a Florida sentence. Dryden's counsel stated that the stayed Wisconsin sentence was operating as a "detainer" in the Florida correctional system and was preventing his transfer to a minimum security facility where he could participate in treatment programs. Although both parties spoke in support of the proposed order, the court declined to sign it, and instead ordered that the judgment of conviction be amended to make the sentence consecutive.

¶4 Dryden argues that he seeks specific performance of a plea agreement in which the parties agreed that his sentence would be concurrent after he was sentenced in Florida. However, the plea hearing record does not show that any agreement was made or discussed as to whether the sentence would be consecutive or concurrent. Indeed, such a decision would be unusual because whether a sentence is concurrent or consecutive is usually decided by the later sentencing court, which in this case was the Florida court. At the time of Dryden's plea in this case there was no Florida sentence to make this one concurrent or consecutive to.

¶5 The State contends that the real issue is whether the court properly declined to sign the proposed order and then amended the judgment of conviction to make the sentence consecutive. We conclude that it did. The court concluded that it should be consecutive because it involved a separate course of conduct from the Florida sentence, and it would send Dryden the wrong message to allow them to be combined. This was a reasonable exercise of discretion.

¶6 In his reply brief Dryden argues that if his sentence is not going to be concurrent, his plea was entered without an accurate understanding of the situation, and he should be allowed to withdraw the plea. However, at this point no plea withdrawal motion has been presented to or decided by the trial court, and we decline to address this question for the first time on appeal.

By the Court.—Order affirmed.

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