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DISTRICT II

April 12, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2164-CR

State of Wisconsin v. Thomas R. Austin (L.C. # 2006CF259)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Thomas R. Austin appeals pro se from orders denying his petitions for sentence adjustment and positive adjustment time. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).¹ We affirm the orders of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

In 2007, Austin was convicted following an *Alford* plea² of injury by operation of a vehicle with a prohibited alcohol concentration and operating a vehicle with a prohibited alcohol concentration, fifth or subsequent offense. The circuit court imposed an aggregate sentence of ten years and six months of initial confinement and eight years of extended supervision.

On July 29, 2015, Austin filed a petition for sentence adjustment under WIS. STAT. § 973.195. The petition indicated that the relevant forms were being sent in a separate envelope.³ Over three weeks passed, and the forms had not arrived. At that point, the circuit court denied the petition on the merits using a modified form order.⁴

On November 23, 2015, Austin filed a petition for positive adjustment time under WIS. STAT. § 973.198. Again, the circuit court denied Austin's petition, albeit using the wrong form order.⁵ The court indicated that granting positive adjustment time was "not in the public interest." This appeal follows.

On appeal, Austin contends that the circuit court erred in denying his petitions for sentence adjustment and positive adjustment time. He asks that we either grant the petitions ourselves or allow a different circuit court judge to entertain them.

² *North Carolina v. Alford*, 400 U.S. 25 (1970).

³ The forms in question were CR-258 (Petition for Sentence Adjustment 973.195) and CR-261 (Verification of Time Served 973.195).

⁴ Because Austin's petition was titled "supplemental," the circuit court added the word "supplemental" to its form order. We conclude that this modification was proper, as it connected the court's order to Austin's filing.

⁵ The circuit court mistakenly used form CR-260 (Order Concerning Sentence Adjustment 973.195) instead of form CR-283 (Order Concerning Positive Adjustment Time 973.198).

The decision to grant or deny a petition for sentence adjustment involves the exercise of the circuit court's discretion. See *State v. Stenklyft*, 2005 WI 71, ¶112, 281 Wis. 2d 484, 697 N.W.2d 769 (Abrahamson, C.J., concurring/dissenting). The same is true regarding a petition for positive adjustment time. See *State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶23, 353 Wis. 2d 520, 846 N.W.2d 820, *aff'd in part on other grounds and rev'd in part on other grounds*, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86.

We will sustain a circuit court's exercise of discretion if the court reaches a conclusion that a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. *State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. Moreover, we will search the record for reasons to sustain a discretionary decision. *State v. Thiel*, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388.

Here, we are satisfied that the circuit court properly exercised its discretion when it denied Austin's petition for sentence adjustment. Although the court had not received the relevant forms at the time of its ruling, it could assume Austin's eligibility for sentence adjustment and consider his petition on the merits. On the merits, the court concluded that "the sentence imposed reflected a fair and thorough analysis of the sentencing factors" and that "any adjustment would unduly depreciate the seriousness of the offense." As this conclusion is supported by the record, it is one that a reasonable judge could reach.

We are also satisfied that the circuit court correctly denied Austin's petition for positive adjustment time. Under WIS. STAT. § 973.198(1), an inmate may petition for positive adjustment time after having "served the confinement portion of his or her sentence less positive adjustment time earned between October 1, 2009, and August 3, 2011." For Austin, the confinement portion

of his sentence (ending December 25, 2016) less positive adjustment time earned resulted in a date later than November 23, 2015. Thus, his petition for positive adjustment time was premature. Had the circuit court used the correct form, that would have been the proper basis for denying relief. *See State v. Copeland*, 2011 WI App 28, ¶20, 332 Wis. 2d 283, 798 N.W.2d 250 (“we may affirm a circuit court if it reaches a proper result for the wrong reason”).⁶

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

⁶ To the extent we have not addressed an argument raised by Austin on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).