

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 09, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2005AP1575-CR  
2005AP1576-CR**

**Cir. Ct. Nos. 2003CF3703  
2003CF3524**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARVELL CLAYTON,**

**DEFENDANT-APPELLANT.**

---

APPEAL from orders of the circuit court for Milwaukee County:  
JOHN SIEFERT, Judge. *Affirmed.*

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

¶1 KESSLER, J. Marvell Clayton appeals from an order reconfining him to the Wisconsin State Prison System due to revocation of his extended supervision in two criminal cases, and from an order denying his motion for

resentencing. He argues that he is entitled to a new reconfinement hearing because the trial court “erroneously exercised its discretion when it failed to adequately explain its reconfinement decision.” We reject his argument and affirm the orders.

## **BACKGROUND**

¶2 On August 27, 2003, Clayton pled guilty to one count of possessing cocaine as party to a crime (case number 2003CF3524), and one count of escape (case number 2003CF3703). The Hon. Timothy G. Dugan was the sentencing judge. In case number 2003CF3524, Clayton was sentenced to twelve months of initial confinement and twenty-four months of extended supervision. In case number 2003CF3703, he was sentenced to thirteen months of initial confinement and thirty-six months of extended supervision, to run concurrently with the sentence in 2003CF3524.

¶3 Clayton was released on extended supervision on August 31, 2004. The Department of Corrections filed a notice of violation on November 23, 2004, based on behavior occurring between October 2, 2004, and November 9, 2004. Clayton waived his right to a revocation hearing and was returned to the trial court for a reconfinement hearing on January 21, 2005, before the Hon. John Siefert.<sup>1</sup>

¶4 In a written report, the Department of Corrections recommended total reconfinement of ten months and twenty-three days. The memo detailed numerous violations, including using crack cocaine and marijuana, failing to

---

<sup>1</sup> The case was reassigned to the Hon. John Siefert due to judicial rotation.

reside at transitional housing, absconding from supervision, shoplifting, possession of drug paraphernalia and others.

¶5 The State recommended a total of twenty-four months, arguing that the Department's recommendation was too lenient. The State explained:

The defendant has had several violations.... He left his placement for a period of time. He used both cocaine, and ... marijuana during his period of supervision. He picked up a new case for possession of drug paraphernalia. He just hasn't done well at all on extended supervision, and going back to the original cases, my understanding is that when the case ending 3524 was issued, he was actually out on release from a different drug case. So he has a history here of drug related matters. He's continuing to use controlled substances while on extended supervision. He's not reported to his programming as required.

¶6 Clayton urged the trial court to adopt the Department's recommendation. His counsel argued:

In talking to Mr. Clayton, he has accepted responsibility for his actions and acknowledges the need for help with the substance abuse problem. I have been in contact regularly with Mr. Clayton, and it seems obvious that is the case yet nothing has really been done with supervision or otherwise to address perhaps the substance abuse problem.... [T]reatment is needed. I don't know he necessarily is going to get that while incarcerated. He does understand that there is a punitive aspect to revocation but in light of the factors surrounding this, and in light of his admission and statement of need for help, I would suggest that the Department's recommendation is fair....

¶7 The trial court rejected both recommendations and ordered reconfinement of two years, eleven months and twenty-eight days in case number 2003CF3703. Reconfinement in 2003CF3524, which continues to run concurrent to 2003CF3703, was four months and twenty-eight days. The trial court explained:

[T]he court finds that he's not responded well to extended supervision. He continues to use drugs. He steals, continues to commit criminal violations. I think the Department's recommendations are too lenient. I think the State's recommendation ... [i]s in fact lenient and that the full amount of reconfinement time ... [in 2003CF3703] would be appropriate in that case, and I'm going to so order.

¶8 Clayton filed a motion seeking resentencing on grounds that the trial court had not provided adequate reasons for its reconfinement order.<sup>2</sup> In a written decision, the trial court denied the motion, finding that “sufficient reasons were given for the court’s reconfinement decision.” The trial court stated: “The court had before it the revocation summary which set forth the defendant’s violations while on extended supervision. His abysmal performance under supervision was the key factor that the court considered when it concluded that a significant period of reconfinement was warranted.... The defendant’s actions spoke for themselves.” This appeal followed.

## DISCUSSION

¶9 Clayton challenges the trial court’s exercise of discretion at the reconfinement hearing. *See* WIS. STAT. § 302.113(9) (2003-04).<sup>3</sup> We have recognized that a hearing to determine the length of reconfinement is a sentencing.

---

<sup>2</sup> The motion alleged as another basis for resentencing that the trial court should have referenced the original sentence transcript at the reconfinement hearing. Because that issue is not raised on appeal, we will not discuss the trial court’s denial of the motion on that ground. We will also not address other issues Clayton raised in his motion for resentencing that are not raised on appeal.

<sup>3</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

*State v. Brown*, 2006 WI App 44, ¶9, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_.<sup>4</sup> This sentencing is within the trial court’s discretion, and on appeal we review the sentence to determine whether that discretion was erroneously exercised. *Id.*

¶10 In reviewing that exercise of discretion, we must bear in mind that “a reconfinement hearing is simply an extension of the original sentencing proceeding, and thus, the trial court need not address all relevant factors” in explaining its sentence. *Id.*, ¶17. *Brown* explained that “resentencing does not require an explicit delineation of the *McCleary*<sup>5</sup> sentencing factors, as long as the court considered them earlier.” *Brown*, 2006 WI App 44, ¶17. Thus, where the defendant did not contend that his initial sentencing hearing was deficient in any way, this court assumed that the trial court “touched on all the appropriate factors when deciding [the defendant’s] original sentence” and considered only whether the trial court gave sufficient reasons for its reconfinement decision and whether its reasoning was sound. *Id.*, ¶¶17, 18.

¶11 Applying these standards here, we conclude that the trial court properly exercised its discretion. The trial court explained the reason for its imposition of a greater reconfinement sentence than that recommended by the Department and the State: Clayton’s significant, repeated failures while on extended supervision. The trial court was made aware of Clayton’s numerous

---

<sup>4</sup> In support of this proposition, *State v. Brown*, 2006 WI App 44, ¶9, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_, cites *State v. Swiams*, 2004 WI App 217, 277 Wis. 2d 400, 690 N.W.2d 452, the case that decided that defendants could appeal a trial court’s decision on reconfinement using WIS. STAT. RULE 809.30. See *Swiams*, 277 Wis. 2d 400, ¶23. Both Clayton and the State discuss *Swiams* in an effort to define the extent of explanation a trial court must offer at a reconfinement hearing. We decline to discuss *Swiams* because *Brown*, decided after briefing in this case, is directly on point and addresses the same issues raised in the instant case.

<sup>5</sup> See *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

violations of extended supervision rules and criminal violations. This reason is supported by the undisputed facts, which showed continued drug use and theft. Like the court in *Brown*, we conclude that the trial court “met its obligation” *see id.*, ¶15, to provide sufficient and sound reasons for its decision, *see id.*, ¶18. We affirm the orders reconfining Clayton and denying his motion for resentencing.

*By the Court.*—Orders affirmed.

Not recommended for publication in the official reports.

