COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2006AP843-CR
2006AP844-CR

Cir. Ct. Nos. 2002CF1905
2002CF3237

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN A. BYRD,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Steven A. Byrd appeals from judgments of conviction for drug-related offenses, and from a consolidated order summarily denying his motions for resentencing.[1] The issues are whether the trial court erroneously exercised its discretion in failing to explain how the confinement term met the minimum custody standard and in failing to explicitly consider the sentencing recommendations, which were significantly less than the sentences imposed. We conclude that the trial court properly exercised its discretion in explaining why the sentences met the minimum custody standard, and that its explicit consideration of the primary sentencing factors constituted a proper exercise of sentencing discretion; the trial court was not obliged to explicitly reject the sentencing recommendations. Therefore, we affirm.

¶2 Incident to a global plea bargain, Byrd entered no-contest pleas to possessing no more than five grams of cocaine with intent to deliver, in violation of WIS. STAT. § 961.41(1m)(cm)1. (2001-02), and possessing no more than five hundred grams of tetrahyrdocannabinols ("marijuana") with intent to deliver, as a party to the crime, in violation of WIS. STAT. §§ 961.41(1m)(h)1. (2001-02) and 939.05 (2001-02).[2] In exchange for his no-contest pleas, the State recommended a fifty-eight-month aggregate consecutive sentence, comprised of twenty- and thirty-eight-month respective periods of initial confinement and extended supervision and placement in the Felony Drug Offender Alternative to Prison

[1] There was one consolidated order entered, disposing of both circuit court cases.

[2] By entering no-contest pleas, Byrd did not claim innocence, but implicitly acknowledged the sufficiency of the State's evidence to establish his guilt beyond a reasonable doubt. *See* WIS. STAT. § 971.06(1)(c) (2001-02); *see also* ***Cross v. State***, 45 Wis. 2d 593, 598-99, 173 N.W.2d 589 (1970). The consequences of a no-contest plea are substantially similar to those of a guilty plea. *See* ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis. 2d 646, 651, 292 N.W.2d 807 (1980).

Program. The presentence investigator recommended a stayed global sentence in the seven- to twelve-year range, comprised of a three- to seven-year period of initial confinement, in favor of a six- to ten-year probationary term. The trial court imposed an aggregate sentence of eight-and-one-half years, to run consecutive to any other sentence, comprised of five-and-one-half- and three-year respective aggregate periods of initial confinement and extended supervision.

¶3 Byrd moved for resentencing, alleging an erroneous exercise of sentencing discretion in the same respects he challenges on appeal, and also for imposing a disparately harsh sentence as compared to that of his co-defendant in the marijuana case. The trial court summarily denied the motion.

¶4 On appeal, Byrd challenges the trial court's exercise of discretion for failing to explain how its sentence was the minimum amount of custody necessary to achieve the sentencing considerations ("minimum custody standard") and for failing to explicitly consider the sentencing recommendations of the State and of the presentence investigator. He does not pursue the disparately harsh challenge.

¶5 Byrd challenges the trial court's alleged failure to explain how its sentences met the minimum custody standard. *See* ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). The trial court was particularly troubled by the fact that Byrd became involved with marijuana while released on bond for a cocaine charge. The trial court characterized Byrd as a high risk to the community because he has

> been around drug dealing for quite a while. It's formed a portion of the culture that he's lived within….
>
> [The trial court] think[s] the risk to the community here is high. That's because a second case was picked up while the first case was pending. Although there are not indications of drug use, Mr. Byrd only self-reports five or

> six times with marijuana, the interaction, the two dealing offenses, the scale packaging amounts, his reaction to the officers, and especially the second case occurring while the first case was pending, mean that in the court's judgment and the court's conclusion that Mr. Byrd was part of a drug dealing operation, he himself was dealing drugs.

In exercising its discretion in declaring Byrd ineligible for the Challenge Incarceration Program, the trial court further explained that

> the denial of full acceptance of responsibility and the sequence of events, the court is not going to find Mr. Byrd eligible in that [the trial court] believe[s] he does need this full term of confinement to bring home to him the level of what he was doing and to punish him and segregate him from the community from doing it again, as well as to deter him. So no Challenge Incarceration Program in either case.

¶6 These explanations show that Byrd's conduct reflects poorly on his character, as well as underscores his danger to the community. Byrd is a repeat drug offender who was undeserving of an opportunity for early release from confinement to again potentially endanger the community. The trial court's explanations show how the sentences met the minimum custody standard.

¶7 Byrd's second challenge is to the trial court's failure to explicitly consider the sentencing recommendations of the State and the presentence investigator, both of which were significantly less than the sentences actually imposed. The trial court may have considered the sentencing recommendations, but did not do so explicitly. As Byrd also acknowledges, the trial court is not obliged to consider any of the sentencing recommendations, much less be bound by them. *See* ***State v. Bizzle***, 222 Wis. 2d 100, 105-06 n.2, 585 N.W.2d 899 (Ct. App. 1998).

¶8 Although the trial court did not specifically explain why it disagreed with the sentencing recommendations, it referenced the comments from the

prosecutor and from the presentence investigator, demonstrating that it necessarily considered those comments and recommendations. More significantly, the trial court considered the primary sentencing factors and exercised its discretion by imposing reasoned and reasonable sentences. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426-28, 415 N.W.2d 535 (Ct. App. 1987). We are not persuaded that the trial court should now be required to explain why it disagreed with the various sentencing recommendations, particularly where the records support the conclusion that the trial court considered those recommendations, although not as specifically as Byrd wanted it to. *See* ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483 ("no appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion").

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).