

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 15, 1995

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.

NOTICE

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

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STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN D. KNAPP,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Shawn D. Knapp appeals from judgments and a postconviction order denying his motion for resentencing. The issue is whether

the trial court violated Knapp's First Amendment rights by considering his aspirations to affiliate with a racist prison gang that requires Knapp to "pick a fight with a black person." We conclude that the court's sentence, partially combined with probationary terms, was designed to deter disruptive behavior, not mere association with a racist gang. Because the court explicitly based Knapp's revocation exposure on his anticipated disruptive conduct as required by gang membership and not on membership alone, we affirm.

Knapp pled no contest to five burglary charges.¹ The trial court imposed a nine-year sentence and imposed but suspended, probationary terms to run concurrently to the sentence.² Knapp moved for resentencing contending the court extended his sentence based on his aspirations to affiliate with the Aryan Brotherhood, a racist prison gang. The court denied the motion. Knapp appeals.

At sentencing, the trial court was concerned about Knapp's statement to a psychologist reported in the Presentence Investigation Report. The presentence investigator reported that Knapp commented to the psychologist that,

the swastika [tattoo] on his shoulder blade which is an emblem of the gang he wants to hang out with in prison and how in order to be accepted into that gang, he will have to pick a fight with a black person. He mentions doing this when they tried to put a black person as his roommate while at Eau Claire

¹ A no contest plea means that the defendant does not claim innocence, but refuses to admit guilt. Section 971.06(1)(c), STATS.; *Cross v. State*, 45 Wis.2d 593, 599, 173 N.W.2d 589, 593 (1970).

² The nine-year sentence was actually composed of one four- and one five-year consecutive sentences.

Academy and winding up in the Crisis Intervention Center.

Based on that remark, the court reminded Knapp that "[he is] the one who offers the comment about you'd like to get with the Aryan Brotherhood so you could tease some black person into a fight and so that you can establish your relationship with the Aryan Brotherhood, mentioned on a couple of occasions" It then warned Knapp that by imposing concurrent probationary terms with the imposed sentences,

[t]hat whether you join the Aryan Brotherhood or not in prison is up to you. But I warn you if you do *and* you violate there, you're going to find yourself extended for a longer term in prison because I'm going to put you on probation while you're in prison; and so your behavior there is going to be monitored according to probation, too; and you're going to have the opportunity to extend your time for longer and longer and longer periods. It's going to be up to you.

(Emphasis added.)

Knapp moved for resentencing based primarily on a violation of his First Amendment rights to free speech and association but also on an erroneous exercise of discretion. The trial court acknowledged that it had considered Knapp's interest in affiliating with the Aryan Brotherhood during sentencing, but denied the motion for resentencing because "[it] imposed the probation term to control his behavior, not his beliefs."

Knapp contends that the trial court violated his First Amendment rights to free speech and association. We disagree. The court explained that

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probation was designed to deter Knapp's conduct, not his beliefs. However, Knapp's beliefs and associational rights to become a member of the Aryan Brotherhood, included disruptive conduct by Knapp's own admission. The court expressly warned Knapp that if his affiliation with the Aryan Brotherhood included disruptive conduct such as "pick[ing] a fight with a black person," his sentence would be extended. It mentioned association only as it related to future conduct. The probation structure imposed was designed to deter his conduct, not his association, unless association necessarily included disruptive conduct, which Knapp claimed it would. There is nothing improper about imposing probation to deter improper conduct.

By the Court.—Judgments and order affirmed.

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