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DISTRICT IV

October 4, 2013

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

2012AP2436-CR

State of Wisconsin v. Michael J. Popple (L.C. # 2011CF98)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Michael Popple appeals an order denying his motion to modify the conditions of his probation. Popple argues the circuit court erred by failing to either: (1) direct the sheriff of the Iowa County jail to comply with the part of Popple's sentence granting Huber privileges; or (2) amend the conditions of Popple's probation to convert the balance of jail time to home confinement with electronic monitoring. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm.

In April 2012, Popple pled guilty to manufacturing THC, possessing drug paraphernalia, and bail jumping. Pursuant to a plea agreement, the State and Popple both recommended a sentence of probation with conditional jail time with Huber privileges. The court imposed a sentence of four years of probation, sentence withheld, with nine months of conditional jail time with Huber privileges.

In July 2012, Popple moved to modify the conditions of his probation. He argued that the Iowa County jail was denying him Huber release contrary to the court's sentencing, based on the jail's computerized classification system. Popple requested that the circuit court modify his probation from nine months of conditional jail time to two months of conditional jail time and seven months of house arrest. Following a hearing, the court denied the motion to modify the conditions of Popple's probation.

Popple contends that the sheriff of the Iowa County jail lacked authority to deny him the Huber privileges ordered by the court. He argues that, by statute, only the circuit court has authority to grant or withdraw Huber privileges. *See* WIS. STAT. § 303.08(2) ("Unless such privilege is expressly granted by the court ... the person is sentenced to ordinary confinement.... The court may withdraw the privilege at any time by order entered with or without notice."). Popple contends further that he was misclassified as maximum security under the Iowa County jail's housing classification system. Popple contends that the classification system is subjective

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

and arbitrary, and thus denied Popple his due process rights, and that, in any event, the jail miscalculated Popple's classification under its system.

Popple seeks remand to the circuit court with directions for the circuit court to order the sheriff and jail to comply with that part of Popple's sentence that granted Huber privileges. In the alternative, Popple seeks to reverse the court's order denying modification of the conditions of his probation. He argues that the circuit court has authority to modify the conditions of his probation to further the dual goals of rehabilitating the defendant and protecting society, *State v. Sepulveda*, 119 Wis. 2d 546, 554, 350 N.W.2d 96 (1984), and contends that modification from conditional jail time to home confinement would serve those goals.

The State responds that Popple may not obtain relief against the sheriff in this case because the sheriff is not a party to this appeal. It also contends that modifying the conditions of Popple's probation to require home confinement rather than conditional jail time would be a remedy going beyond the claimed injury.

At the outset, we note that this appeal is from an order denying Popple's motion to modify the conditions of his probation to require Popple to serve house arrest rather than conditional jail time. *See* WIS. STAT. § 973.09(3)(a). Thus, the only issue before us is whether the circuit court erroneously exercised its discretion by denying Popple's motion to modify the conditions of his probation.² *See State v. Edwards*, 2003 WI App 221, ¶14, 267 Wis. 2d 491,

² That is, this appeal does not arise from a certiorari action challenging the procedures employed by the jail for determining Popple's classification or a writ action seeking to enforce the part of Popple's sentence granting Huber privileges. Accordingly, the issues that would be presented in those types of actions—the validity of the procedure used to determine Popple's security classification and whether the sheriff was required to comply with the part of Popple's sentence that granted Huber privileges—are not before us in this appeal. We therefore will not address the parties' arguments as to those issues.

671 N.W.2d 371 (whether to modify the conditions of probation is left to the circuit court's discretion).

A circuit court has discretion to modify the conditions of probation for “cause,” and “the law places no limitation on what the [circuit] court may consider as cause when making that determination.” *Id.* “Whether cause exists ... is subject to the circuit court's discretion. We will uphold the circuit court's discretionary determination so long as the court reasonably applied the facts of record to the appropriate legal standard.” *State v. Dowdy*, 2012 WI 12, ¶26, 338 Wis. 2d 565, 808 N.W.2d 691 (citation omitted). Moreover, if the circuit court did not fully explain its reasoning, “we may search the record to determine if it supports the court's discretionary decision.” *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

Here, the circuit court denied Popple's motion to modify the conditions of his probation, and thus implicitly determined that there was not “cause” for modification. The circuit court explained that Huber is a privilege, not a right. The court found that Popple's classification as maximum security was within the discretion of the sheriff in the management and control of the jail. The court explained that it based its decision to deny the motion to modify the conditions of Popple's probation on Popple's classification together with the serious nature of the charges against Popple in this case.

Our review of the record and the circuit court's explanation supports the circuit court's decision as a proper exercise of its discretion. At sentencing, the circuit court expressly considered the allegations in the criminal complaint, which included possession of firearms and ammunition, controlled substances, and a machete. The court withheld sentence and placed Popple on probation, but imposed nine months of conditional jail time and other conditions of

probation, explaining that it found that Popple presented a need for rehabilitative control. The court also granted Huber privileges, but did not place any particular emphasis on that part of the sentence. The circuit court then relied on the serious charges against Popple in finding that there was not good cause to modify the conditions of probation from conditional jail time to house arrest, despite the fact that the jail was not allowing Popple Huber privileges. We discern no error in the court's exercise of discretion.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals