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DISTRICT II

February 14, 2018

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

2017AP141-CR State of Wisconsin v. Dennis L. Schwind (L.C. #2000CF407)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Does a circuit court have the inherent authority to reduce a period of probation? The circuit court denied Dennis L. Schwind's motions to terminate his probation and to reconsider the denial of that motion. Upon reviewing the briefs and the record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the order.

In 2001, Schwind pled guilty to numerous acts of sexual assault of the same child, including incest. At issue is his twenty-five years' probation. The judgments of conviction state: "NOTE: Court would consider early termination of supervision after [defendant] has served a minimum of 15 years, upon recommendation of the Agent."

In 2014 Schwind asked the court to exercise its inherent authority to terminate his probation. His counsel advised the court that a Department of Corrections policy had changed, such that DOC no longer files petitions for early release from probation "in this type of case," a phrase he did not explain. Schwind's probation agent stated that he nonetheless could verbally weigh in on a discharge request. As Schwind was "doing exemplary," he endorsed Schwind's release. Without ruling that it possessed inherent authority, the court said it would not exercise the power even if it did and denied the motion under WIS. STAT. § 973.09(3)(d). In 2011, the statute was recreated to provide that a court "may modify a person's period of probation" and discharge the person from probation if six conditions are met.[2] Schwind did not meet two: DOC did not petition the court and he is a registered sex offender. *See* § 973.09(3)(d)1., 6.

Schwind tried again in 2016. The court once more denied his motion under WIS. STAT.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] *See* ***State v. Dowdy***, 2012 WI 12, ¶1 n.2, 338 Wis. 2d 565, 808 N.W.2d 691. There was no comparable statute to WIS. STAT. § 973.09(3)(d) when Schwind was sentenced.

§ 973.09(3)(d). Schwind moved for reconsideration, asking the court to exercise its inherent authority under § 973.09(3)(a). After a hearing, the court denied the motion. Schwind appeals.

WISCONSIN STAT. § 973.09(3)(a) provides: "Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof." Aware that our supreme court has made clear that the statute's "plain language" "does not grant a circuit court authority to reduce the length of probation," ***State v. Dowdy***, 2012 WI 12, ¶27, 338 Wis. 2d 565, 808 N.W.2d 691 (***Dowdy II***), Schwind focuses instead on the statute's "for cause" standard. He asserts it imbues circuit courts with broad inherent authority to reduce a period of probation when necessary to accomplish probation's twin goals of rehabilitation of the offender and protection of society. *See* ***State v. Gray***, 225 Wis. 2d 39, 68, 590 N.W.2d 918 (1999). Intrinsic to § 973.09(3)(a), he argues, is the circuit court's continued power to effectuate those purposes. *See* ***State v. Sepulveda***, 119 Wis. 2d 546, 554, 350 N.W.2d 96 (1984).

"The question of the circuit court's inherent authority presents a question of law that we review de novo." ***State v. Dowdy***, 2010 WI App 158, ¶23, 330 Wis. 2d 444, 792 N.W.2d 230 (***Dowdy I***), *aff'd*, ***Dowdy II***. In ***Dowdy I***, this court did not decide whether a circuit court possesses the inherent authority to reduce a defendant's probation period. ***Dowdy I***, 330 Wis. 2d 444, ¶31. We said that, even assuming it does, such power would be comparable to the court's inherent authority to reduce sentences, as the policy favoring finality in sentencing "logically applies" to the probationary component as well. ***Id.***, ¶¶31-32. A court may consider sentence modification in limited situations: clear mistake, a new factor, or undue harshness or unconscionability. ***Id.***, ¶28. If circuit courts have inherent authority to reduce a period of probation akin to their inherent authority to reduce a sentence, post-sentence conduct is not a

new factor for sentence modification purposes. ***Id.***, ¶1.[3] Courts thus would have no inherent authority to reduce probation based on successful—even "exemplary"—rehabilitation. ***Id.***

The ***Dowdy II*** court acknowledged this court's sentencing-standard conclusion but itself declined to address what standard would apply. ***Dowdy II***, 338 Wis. 2d 565, ¶¶23, 43. Our determination remains intact. Schwind implores this court to abandon the ***Dowdy I*** sentencing standard in favor of then Chief Justice Abrahamson's dissent in ***Dowdy II***, which advocates extending the for-cause standard of WIS. STAT. § 973.09(3)(a) to recognize that circuit courts' inherent authority encompasses reducing the length of probation if it advances the goals of probation. ***Dowdy II***, 338 Wis. 2d 565, ¶¶90, 92 (Abrahamson, C.J., dissenting). We cannot.

Schwind's arguments that a court's inherent authority should extend to reducing a period of probation in the proper case are not without weight, but we are bound by what the law is now. Extending the for-cause standard would require that we disregard the sentencing standard we enunciated in ***Dowdy I***, which we cannot do. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). We also cannot adopt the ***Dowdy II*** dissent. A dissent is not the law; it is "what the law is not." ***State v. Perry***, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993).

[3] Schwind argues that the change in DOC policy, the 2011 revision of WIS. STAT. § 973.09(3)(d), and the ***Dowdy*** decisions are new factors, as the sentencing court could not have known that possible early release from supervision would become a legal impossibility. A new factor is "a fact or a set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Schwind has not shown by clear and convincing evidence that any of the three are new factors. *See* ***State v. Franklin***, 148 Wis. 2d 1, 9, 434 N.W.2d 609 (1989). Schwind offers nothing to show that the sentencing court expressly relied on the possibility of his early release, *see* ***id.*** at 15, we have no sentencing transcript, and he does not explain his counsel's statement that DOC no longer petitions for early release "in this type of case." Schwind's registration as a sex offender now precludes early release and his early years on probation were rocky. Early release was not a promise; the court only said it would be considered. Subsequent changes in the legal landscape are not highly relevant to the imposition of his sentence.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals