COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1263-CR **Cir. Ct. No. 2008CF852**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES J. POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Judgment modified and as modified, affirmed; order affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Charles Powell appeals a judgment of conviction and an order denying his postconviction motion. He contends that because the criminal information and judgment reference the wrong statutory paragraph, his

conviction for felon in possession of a firearm should be vacated and the charge dismissed. He also claims that the sentencing court erroneously exercised its discretion in sentencing him to consecutive terms on crimes that involved the same act. We reject his claims. We modify the judgment of conviction and direct that on remand the judgment be corrected to reflect the correct statutory paragraph; we affirm the judgment as modified and affirm the order denying postconviction relief.

¶2 Powell was charged with eight crimes after he entered, without permission, the home of his former housemate and the mother of his child and armed himself with a gun found in the home. He held the gun to the victim's head and threatened to kill her. When he pulled the trigger, the gun did not fire because there was no bullet in the chamber. The victim said Powell loaded the gun. Powell forced the victim out to her car and when the victim was able to prevent Powell from entering the car, Powell ran off with the victim's keys and gun. Pursuant to a plea agreement, Powell entered a no-contest plea to four charges: possession of a firearm by a felon, pointing a firearm at another (a misdemeanor), theft, and false imprisonment.[1] The other charges, including a charge for attempted intentional homicide, were dismissed as read-ins at sentencing.

¶3 Powell's first appellate issue relates to his conviction of possession of a firearm by a felon. The criminal complaint charged this as a violation of WIS. STAT. § 941.29(2)(a) (2009-10),[2] which provides that a person is guilty of a felony

[1] The first three charges included a repeater sentencing enhancer.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

if he or she possesses a firearm subsequent to being convicted of a felony. The complaint recited that Powell had previously been "adjudicated delinquent of felony first-degree recklessly endangering safety." The criminal information also charged Powell with a violation of § 941.29(2)(a). At the plea hearing it was confirmed that Powell's underlying record for the felon-in-possession charge was a felony delinquency adjudication when Powell was twelve years old. Powell personally confirmed the prior felony delinquency adjudication. The judgment of conviction indicates that Powell violated § 941.29(2)(a).

¶4 In reality, Powell violated WIS. STAT. § 941.29(2)(b), which provides that a person is guilty of a felony if he or she possesses a firearm subsequent to being adjudicated delinquent for an act that if committed by an adult would be a felony. *See also* § 941.29(1)(bm). Powell points out that because his underlying record supporting the felon-in-possession charge was a juvenile delinquency adjudication, the proper statutory reference for the crime must be to paragraph (b), not (a). His postconviction motion sought to withdraw his guilty plea. He argues that he entered a no-contest plea to a crime he did not commit because he was not previously convicted of a felony.

¶5 No objection was made to the information's citation to the wrong statutory paragraph. WISCONSIN STAT. § 971.31(2) provides that "defenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment … shall be raised before trial by motion or be deemed waived." WISCONSIN STAT. § 971.26 provides that "[n]o indictment, information, complaint or warrant shall be invalid, nor shall the … judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." Powell was not prejudiced by reference to the wrong statutory paragraph because the penalty is the

same under both paragraphs and he admitted the requisite juvenile adjudication which served as a basis for the felon-in-possession charge. Both §§ 971.26 and 971.31(2) statutory waiver rules apply to a claim that the information failed to cite the correct statutory paragraph. *See* ***Craig v. State***, 55 Wis. 2d 489, 493, 198 N.W.2d 609 (1972); *see also* ***Verser v. State***, 85 Wis. 2d 319, 326-27, 270 N.W. 2d 241 (Ct. App. 1978) (the information is deemed amended to conform to the plea agreement and proof; the validity of the proceeding is maintained under § 971.26 when correction of the defect does not prejudice the defendant).

¶6 Powell attempts to avoid waiver by casting his claim of error as one violating his right to due process.[3] "Simply to label a claimed error as constitutional does not make it so." ***State v. Scherreiks***, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989). The failure of the complaint and information to designate the crime as one under paragraph (b) is a technical defect from which no prejudice can be claimed in light of Powell's admission at the plea hearing. *See* ***Craig***, 55 Wis. 2d at 493. We modify the judgment to reflect that Powell's conviction is under WIS. STAT. § 941.29(2)(b), and to conform to the actual determination of the trial court. All that remains is a mere defect in the judgment of conviction which may be corrected at any time. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. The trial court may either correct the clerical error on the judgment or may direct the clerk's office to make such a correction. ***Id.***, ¶5. Thus, we remand with direction that the judgment be

[3] The trial court held that Powell waived the defect in the complaint and information. Powell's postconviction motion did not raise a due process claim. Powell has not provided a transcript of the May 5, 2011 postconviction motion hearing and it is not known if a due process claim was raised at the hearing.

corrected to reflect that Powell's conviction for felon in possession of a firearm is in violation of § 941.29(2)(b).

¶7 The other appellate issue Powell asserts is that the sentencing court erroneously exercised its discretion in sentencing him to consecutive terms for his felon- in-possession and pointing-a-gun-at-another convictions, and to consecutive terms for his felon-in-possession and theft convictions. Powell contends that these crime pairs involve the same act and therefore only support concurrent sentences.

¶8 As the State explains, this issue can quickly be dispatched for the reason that it is based on the incorrect premise that the crimes involved the same conduct. As soon as Powell picked up the gun in the victim's home, he committed the crime of being a felon in possession of a firearm. When Powell subsequently pointed that gun at the victim, he committed the crime of pointing a firearm at another. When Powell ran off with the victim's gun in his possession, he committed a theft. Each of these crimes involved a separate volitional act for which separate consecutive sentences would be appropriate. *See* ***State v. Bautista***, 2009 WI App 100, ¶1, 320 Wis. 2d 582, 770 N.W.2d 744 ("when a defendant comes to a 'fork in the road' and commits to a separate volitional act, it is different conduct" (quoting another source)).

¶9 To the extent that Powell's claim is that the sentencing court failed to give an adequate sentencing rationale for consecutive rather than concurrent sentences, we reject it. The sentencing court has "wide discretion in determining whether to impose a concurrent or consecutive sentence." ***State v. Davis***, 2005 WI App 98, ¶27, 281 Wis. 2d 118, 698 N.W.2d 823. Moreover, the sentencing court need not provide a separate rationale for why it chose consecutive rather than concurrent sentences. *See* ***State v. Berggren***, 2009 WI App 82, ¶45, 320 Wis. 2d

209, 769 N.W.2d 110. Consecutive sentences are presumptively reasonable and to challenge the imposition of consecutive rather than concurrent sentences, the defendant must show that there was an unreasonable or unjustifiable basis for the sentence. *See* ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483.

¶10 Powell cannot meet his burden of showing an unreasonable basis for the cumulative sentence. The sentencing court found Powell's conduct to be "extremely serious" and "extremely violent," and an affront to the existing restraining order prohibiting him from having contact with the victim. It noted Powell's lengthy prior record and that it included other violent offenses against women. It further observed that Powell had a history of committing new offenses while on community supervision. The court considered Powell's rehabilitative needs in relation to drug use, anger management, and violent behavior. The court identified the sentencing objectives of protecting the public, deterrence of others, meeting Powell's rehabilitative needs, and punishment. The sentencing court made a demonstrated and proper exercise of discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Powell's claim that consecutive sentences were an erroneous exercise of discretion fails.

By the Court.—Judgment modified and as modified, affirmed; order affirmed and cause remanded with directions.

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