COURT OF APPEALS
DECISION
DATED AND FILED

July 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2504-CR **Cir. Ct. No. 2009CF4599**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARLOS FLORES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO and CHARLES F. KAHN, JR., Judges.[1] *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

[1] The Honorable Jean W. DiMotto presided over the sentencing proceedings and entered the judgment of conviction. The Honorable Charles F. Kahn, Jr., presided over the postconviction proceedings and entered the amended order denying postconviction relief.

¶1 PER CURIAM. Carlos Flores appeals from a judgment of conviction entered upon his guilty plea to possessing a firearm while subject to a domestic abuse injunction. He also appeals from an amended order denying his postconviction motion seeking sentence modification or, alternatively, resentencing.[2] Because we conclude that the circuit court properly exercised its sentencing discretion, Flores was not sentenced upon inaccurate information, and his postconviction motion did not necessitate a hearing, we affirm.

I.

¶2 In August 2007, Keisha Ewing obtained a domestic abuse injunction against Flores. Among the terms and conditions of the injunction was an order prohibiting Flores from possessing a firearm until the injunction expired in August 2011. On October 2, 2009, Flores went to a gun shop. Video surveillance equipment in the shop recorded Flores handling guns. Flores left the shop after buying ammunition and making a $200 down payment towards the purchase of a semi-automatic pistol.

¶3 Based on Flores's activity in the gun shop on October 2, 2009, the State charged Flores with one count of possessing a firearm while subject to a domestic abuse injunction. Flores pled guilty as charged.[3]

¶4 The matter proceeded to sentencing in March 2011. The parties advised the circuit court that Flores had no criminal convictions when he

[2] The circuit court entered an amended postconviction order after Flores objected that the initial order denying postconviction relief contained an error in the caption and misstated the length of his sentence.

[3] The transcript of the guilty plea proceeding is not in the appellate Record.

committed the offense in this case but that he had several charges pending against him at that time and warrants had been issued for his arrest. The parties further advised that, by the time of the sentencing hearing, Flores had been convicted of bail jumping and violating a domestic abuse injunction, and he was within a few months of completing his term of probation for those offenses.

¶5 The sentencing transcript reflects that Ms. Ewing, her father, and several other members of the Ewing family wrote letters to the circuit court describing Flores's on-going behavior towards the family as threatening and harassing.[4] Flores's trial lawyer objected to the circuit court considering the Ewings' submissions because the Ewings were not victims of Flores's crime of unlawfully possessing a firearm, and because Flores "denies a lot of what's in those letters." Flores added that he worked long hours at his contracting business and had "no time to be bothering [any]body." The circuit court overruled Flores's objections and elected to consider the letters when fashioning Flores's sentence.

¶6 Pursuant to the terms of the parties' plea bargain, the State made no sentencing recommendation. Flores argued that "this is about the least serious possession of a handgun case" imaginable, and he suggested a sentence that required community service without any incarceration. The circuit court imposed a bifurcated term of imprisonment comprised of thirty months of initial confinement and twenty-four months of extended supervision, and the circuit court ordered that Flores serve the sentence consecutively to any other sentence.

[4] The letters are not in the appellate Record.

¶7 Flores moved for sentence modification or resentencing. He argued that the circuit court erroneously exercised its sentencing discretion by imposing an unduly harsh term of initial confinement and that the circuit court should not have considered the Ewings' letters. The circuit court denied the postconviction motion without a hearing, and this appeal followed.

II.

¶8 Sentencing lies within the circuit court's discretion, and appellate review is limited to considering whether the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 231, 688 N.W.2d 20, 23. We defer to the circuit court's "great advantage in considering the relevant factors and the demeanor of the defendant." *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631, 640 (1993).

¶9 The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82. The circuit court may also consider additional factors, including:

> (1) [p]ast record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Gallion, 2004 WI 42, ¶43 & n.11, 270 Wis. 2d at 558 & n.11, 678 N.W.2d at 207 & n.11 (citation and quotation marks omitted). The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d at 237, 688 N.W.2d at 26.

¶10 Flores first contends that the circuit court erroneously assessed the seriousness of his crime. In his view, the circuit court should have deemed the gravity of the offense mitigated because he was not a felon when he possessed a gun, he handled guns only briefly, he committed the offense in the controlled environment of a gun shop, and he did not use a gun to commit an additional crime. The circuit court considered these arguments at sentencing and rejected them, pointing out that Flores possessed a gun "in preparation for buying it" and describing Flores's actions as "dangerous conduct." The circuit court acknowledged that Flores did not use a gun to shoot or injure anyone, but the circuit court noted that this demonstrated only that Flores had not committed crimes in addition to possessing a firearm while subject to a domestic abuse injunction. The circuit court reasonably analyzed the gravity of the offense, and therefore we will not disturb the circuit court's conclusions. Our inquiry is whether the circuit court properly exercised its discretion, not whether the circuit court could have exercised discretion differently. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 439, 766 N.W.2d 206, 218.

¶11 Flores next contends that the circuit court erroneously exercised its sentencing discretion because "thirty months of prison confinement was unduly harsh." We are not persuaded.

¶12 A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 651, 648 N.W.2d 507, 517 (citation omitted). Flores faced ten years of imprisonment and a $25,000 fine upon his conviction. *See* WIS. STAT. §§ 941.29(2)(e), 939.50(3)(g). The sentence imposed is within the range of penalties authorized by law. A sentence well within the limits of the maximum sentence is presumptively neither unduly harsh nor unconscionable. ***Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d at 651, 648 N.W.2d at 517. We therefore examine the Record to determine whether it reveals any basis to conclude that the sentence was nonetheless unduly harsh. *See* ***id.***, 2002 WI App 106, ¶32, 255 Wis. 2d at 651–652, 648 N.W.2d at 517. No such basis exists.

¶13 The circuit court properly considered not only the gravity of the offense, as discussed above, but also the additional mandatory sentencing factors of Flores's character and the need to protect the public. *See* ***Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d at 606, 712 N.W.2d at 82.

¶14 The circuit court characterized Flores as "hardworking," but it also took into account a letter from one of Flores's customers describing Flores's loss of control during an argument with a co-worker. The customer "had to step in and threaten to call the police" when the argument became physical. The circuit court further observed that Flores did not exhibit "one scintilla of anything that ... could be considered remorse."

¶15 The circuit court considered the community's need for protection and summarized the history of harassment and threats described by the Ewings in their letters:

> There's a restraining order against you as to [Mr.] Ewing and there's also the domestic abuse injunction against you by K[ei]sha Ewing. There's information in these letters that the Ewing family has suffered, quote, detrimental harassment and emotional pain from Carlos Flores's behavior since 2007 ....
>
> He threatened to hurt family members of the Ewings. Told that family member that he knew the place of employment of that family member and that -- told that person you will come up missing. No one would find you when I get through with you.
>
> ....
>
> There's fear because of his ongoing behavior. It's written that he's stalked, called, threatened the life of different members of the family including Keisha and children and that's been on numerous occasions. He also threatened to go to Mr. Ewing's church and, quote, blow his brains out as well as the pastor's brains.

¶16 The circuit court explained that "the community has a need to be protected and the privilege of probation here doesn't work. Being a hard-working person doesn't prevent you from doing illegal things .... [T]he domestic abuse injunction and its firearm prohibition should turn [] Flores away from [the Ewing] family, but it hasn't." The circuit court also emphasized that Flores failed to participate in anger management classes during his probation, and therefore, in the circuit court's view, "he hasn't done the one [thing] that addresses a central core issue for Mr. Flores and that is his incredible anger and the length he's willing to go because of his anger." The term of initial confinement selected by the circuit court was not unduly harsh in light of the factors it deemed relevant.

¶17 We turn to Flores's claims that the circuit court should not have considered the letters submitted by the Ewings. Flores is simply incorrect in contending that the circuit court should have disregarded the letters because no one in the Ewing family was a victim of the crime considered at sentencing. Victims are not the only members of the community who may be heard before sentence is pronounced. The circuit court may permit any person to make or submit a statement if his or her remarks are relevant. *See* WIS. STAT. § 972.14(3)(a). Moreover, the circuit court has broad discretion in determining the information relevant to the sentencing decision. *See* ***State v. Marhal***, 172 Wis. 2d 491, 500 n.7, 493 N.W.2d 758, 763 n.7 (Ct. App. 1992). "[T]he permissible scope of inquiry by the sentencing court is 'largely unlimited either as to the kind of information ... or the source from which it may come.'" ***Ibid.*** (citation omitted, ellipsis in ***Marhal***). Here, the circuit court explained that the letters described "the context of the crime." The circuit court's conclusion was reasonable, and we will not disturb it. *See* ***Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d at 439, 766 N.W.2d at 218.

¶18 We next reject the theory that the circuit court relied on inaccurate information by considering the Ewings' letters. A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185, 717 N.W.2d 1, 3. Whether a defendant suffered a denial of due process at sentencing is an issue of constitutional law that we review *de novo*. ***Ibid.***

¶19 A defendant who alleges that a sentencing decision is based on inaccurate information has the burden to show both that the information at issue was inaccurate and that the circuit court actually relied on the inaccurate information. ***Id.***, 2006 WI 66, ¶31, 291 Wis. 2d at 195, 717 N.W.2d at 8–9. Here,

Flores failed to carry his burden. He "denie[d] a lot of what's in [the Ewings'] letters," but his denial did not demonstrate that anything in the letters is untrue. Therefore, Flores did not demonstrate that the circuit court violated his right to due process by considering the letters. Moreover, a sentencing court may consider evidence that the defendant disputes, including "'uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted.'" ***Prineas***, 2009 WI App 28, ¶28, 316 Wis. 2d at 435, 766 N.W.2d at 216 (citation omitted). Accordingly, Flores does not demonstrate that the circuit court erred here by considering the Ewings' letters.

¶20 Flores contends that the circuit court cited inapplicable case law when addressing his motion to disregard the Ewings' letters. This argument is unavailing because we have already explained that the circuit court did not err by considering the letters. Assuming without deciding that the circuit court relied on unpersuasive legal authority, "if a circuit court reaches the right result for the wrong reason, we will nevertheless affirm." *See* ***Milton v. Washburn Cnty.***, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 325 n.5, 797 N.W.2d 924, 927 n.5.

¶21 Flores complains for the first time on appeal that the circuit court erred at sentencing by remarking that he "violated a harassment restraining order against Mr. Ewing," when in fact Flores violated a domestic abuse injunction that protected Ms. Ewing.[5] He also complains for the first time on appeal that the circuit court erred by failing to explain why it ordered him to serve his sentence consecutively to, rather than concurrently with, any other sentence. Because

[5] Both parties confirmed on the Record that Mr. Ewing obtained a harassment restraining order against Flores after Flores committed the offense in this case.

Flores did not present either of these complaints to the circuit court, we will not address them. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730 (we do not consider issues raised for the first time on appeal); *see also* ***State v. Walker***, 2006 WI 82, ¶30, 292 Wis. 2d 326, 339, 716 N.W.2d 498, 504 (rules of appellate procedure governing sentence modification embody policy that defendant should allow circuit court to correct any errors it may have made).

¶22 Finally, Flores contends that the circuit court erroneously denied him postconviction relief without conducting a hearing. We do not agree. "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 580, 682 N.W.2d 433, 439. We determine *de novo* whether a defendant alleged sufficient material facts to require a postconviction hearing. *See* ***id.***, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437. "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the [R]ecord conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Ibid.***

¶23 In his postconviction motion, Flores offered conclusory assertions about alleged inaccuracies in the Ewings' letters, and he complained that the circuit court should not have assessed the sentencing factors as it did when exercising sentencing discretion. We conclude that Flores failed to allege sufficient material facts that would entitle him to relief from his sentence. Accordingly, the circuit court did not erroneously exercise its discretion by denying his claims without a hearing. *See* ***id.***, 2004 WI 106, ¶34, 274 Wis. 2d at 593, 682 N.W.2d at 445.

By the Court.—Judgment and order affirmed.

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