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DISTRICT IV

January 29, 2014

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

2012AP1956-CR

State of Wisconsin v. Tyler J. Dahms (L.C. #2011CF129)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Tyler Dahms appeals a judgment of conviction and sentence for first-degree reckless homicide, attempted second-degree intentional homicide, and burglary. Dahms contends that the sentencing court erred by considering facts underlying a charge that resulted in an acquittal. 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(1) (2011-12).¹ We summarily affirm.

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

Dahms was charged with multiple criminal counts based on police investigation of the stabbing death of Karen Dombrowski and stabbing injuries to Kenneth Dombrowski and Michael Dombrowski. Following a jury trial, Dahms was found guilty of first-degree reckless homicide for the death of Karen Dombrowski; guilty of attempted second-degree intentional homicide for the injuries to Kenneth Dombrowski; and not guilty of any charges for the injuries to Michael Dombrowski.

Dahms contends that the circuit court erred by considering the facts as to the stabbing of Michael Dombrowski in imposing sentence for the stabbings of Kenneth and Karen Dombrowski. Dahms cites the following statements by the court: “[W]e’ve lost one life. We had two other people that suffered horrendous injuries”; “[T]wo other people suffered major injuries”; and “Quite frankly, we’re lucky we’re not standing here with three homicides.” Dahms asserts that due process and the Sixth Amendment right to trial by jury prohibited the circuit court from considering facts as to a charge that resulted in a not guilty verdict following a jury trial. We disagree.

Dahms cites *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), for the proposition that: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” Dahms urges us to extend the reasoning in *Apprendi* to prohibit circuit courts from considering charges at sentencing if those charges resulted in acquittals after jury trials. Dahms points to cases from other jurisdictions that prohibit a sentencing court from considering charges that resulted in acquittal on a jury verdict. *See, e.g., State v. Cote*, 530 A.2d 775, 783-85 (N.H. 1987). Dahms also contends that the circuit court relied on inaccurate information at sentencing by considering the facts underlying the charge that resulted in an acquittal. *See State v.*

Tiepelman, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (holding that a defendant has a due process right to be sentenced on accurate information).

The problem with Dahms' argument is that it is contrary to the longstanding rule in this state that a sentencing court may consider dismissed charges, including "facts related to offenses for which the defendant has been acquitted." See *State v. Frey*, 2012 WI 99, ¶¶47, 110, 343 Wis. 2d 358, 817 N.W.2d 436; see also *State v. Bobbitt*, 178 Wis. 2d 11, 16-17, 503 N.W.2d 11 (1993). Here, the circuit court acknowledged that Dahms had been acquitted of the charges arising from Michael Dombrowski's injuries. However, the court also recognized that Michael Dombrowski suffered serious injuries during the same altercation in which Karen Dombrowski was killed and Kenneth Dombrowski was injured, and that both Michael Dombrowski and Kenneth Dombrowski suffered near-fatal injuries.

As in *Frey*, Dahms was afforded the opportunity to dispute the accuracy of any information presented to the court at sentencing. See *Frey*, 343 Wis. 2d 358, ¶106. While Dahms argued in the circuit court that it was improper for the court to consider Michael Dombrowski's injuries, he did not dispute that Michael Dombrowski was, in fact, injured. Under *Frey* and *Bobbitt*, it was not improper for the circuit court to consider those facts.

Following briefing, Dahms provided a citation of supplemental authorities that he asserts provides support for his argument. Dahms cites *Alleyne v. United States*, 133 S. Ct. 2151 (2013), for the proposition that the Sixth Amendment right to a jury trial is violated when a court uses facts not found by a jury to increase the mandatory minimum sentence. However, the *Alleyne* court also stated:

In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.

Id. at 2163. We conclude that the limited holding in *Alleyn* does not affect our decision in this case.

In sum, we discern no basis to disturb the court's sentence either due to the court's consideration of facts underlying a charge that resulted in acquittal or due to its consideration of the undisputed facts as to Michael Dombrowski's serious injuries.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals