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DISTRICT II

July 20, 2016

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

2015AP2069-CR State of Wisconsin v. Kurt Schwochert (L.C. #2013CF83)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Kurt Schwochert appeals from a judgment convicting him of armed robbery, contrary to WIS. STAT. § 943.32(2) (2013-14)[1] and an order denying his motion seeking resentencing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. We affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Under a plea agreement, Schwochert pled to one count of armed robbery of a gas station, with one count of felony bail jumping dismissed and read in. Schwochert asserts the trial court erroneously exercised its discretion in imposing his sentence, claiming the sentence was excessive because it was based upon "aggravating factors that are not supported by the record."

On appeal, our review is limited to determining whether the trial court erroneously exercised its sentencing discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. In fashioning a sentence, a trial court must consider the three primary sentencing factors: "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. A proper exercise of sentencing discretion mandates a court provide a rational and explainable basis for the sentence. ***Gallion***, 270 Wis. 2d 535, ¶39. The trial court is generally afforded a strong presumption of reasonability, and if our review reveals that discretion was properly exercised, we follow "a consistent and strong policy against interference with the [trial court's sentencing discretion]." ***Id.***, ¶18 (citation omitted).

Schwochert concedes on appeal "that the record shows that [the] trial court judge, at sentencing, based his decision upon consideration of the gravity of the offense, the character of the offender, and the need to protect the public." His sole appellate complaint stems from the following three sentences of the court's sentencing comments:

> You concealed your identity, you then destroyed evidence afterwards to attempt to hide what it is that you did. This leads the Court to believe that there was some forethought … in this it was not a spur of the moment thing. This was something that you had time to reflect upon before and after doing it.

Schwochert argues that the court erroneously "conflate[d]" his "*post-robbery* conduct" of "disposal of the clothes that he was wearing" during the robbery "as part of a plan that was in existence *prior to the time*" he robbed the gas station. He adds that the specifics of how he subsequently disposed of the clothes he wore during the robbery indicate he had time "after" the robbery to reflect, and that "given that time," "he decided to get rid of the clothes that he was wearing" to minimize his chance of being identified as the robber and apprehended. Schwochert claims there is nothing in the record showing he entered the gas station with a preconceived plan to destroy or dispose of the clothes he wore for the robbery. He asserts, "[T]he record shows only that the defendant made a spur of the moment decision to rob that gas station as he was passing it." He contends "that the court's apparent reliance on those post-robbery actions for the purpose of establishing the existence of a detailed pre-robbery scheme constitutes an erroneous exercise of discretion."

Schwochert misreads the sentencing comments at issue. Of significant note, Schwochert does not dispute he concealed his identity during the robbery, and the record clearly supports the trial court's sentencing statement to this effect. The complaint indicates the clerk at the gas station reported that Schwochert was wearing a mask and gloves during this mid-August robbery;[2] and at sentencing, the prosecutor repeated, with no contrary statement from Schwochert, that Schwochert had concealed his identity.

Utilization of a mask and gloves, particularly in mid-August, supports the trial court's conclusion that Schwochert "concealed [his] identity" and put "some forethought" into the

[2] At the plea hearing, Schwochert stipulated, via counsel, to the trial court's use of the criminal complaint as providing a factual basis for his plea.

robbery, "it was not a spur of the moment thing," and Schwochert "had time to reflect upon" the robbery "before … doing it." As the prosecutor pointed out at the postconviction hearing with regard to the mask: "The [robbery] took place in August. It is not the time of year when people wear face masks or have them with them when going about their business, so I think the record does support the Court's conclusion that the robbery was at least, to some degree, planned…." We agree.

Also as reflected in the complaint, Schwochert admitted to the police that after the robbery, he destroyed and otherwise disposed of various articles of clothing he wore during the robbery. This admission supports the trial court's statement that Schwochert "then destroyed evidence afterwards to attempt to hide what it is that you did," and that he "had time to reflect upon" the robbery "after doing it."

In short, there is nothing inaccurate about the sentencing comments Schwochert challenges and those comments are fully supported by the record. As these comments present Schwochert's only challenge to his sentence, we conclude the trial court did not erroneously exercise its discretion in sentencing Schwochert.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the trial court are summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals