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DISTRICT IV

October 7, 2016

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

2015AP1974-CR State of Wisconsin v. Darrion D. Brown (L.C. # 2012CF1077)

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

Darrion Brown appeals a judgment of conviction for first-degree reckless endangerment by use of a dangerous weapon, for which he was sentenced to nine years of initial incarceration and five years of extended supervision. He also appeals an order that denied his motion for postconviction relief from his sentence. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We reject Brown's challenges to his sentence and affirm for the reasons discussed below.

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

Brown first contends that the circuit court erroneously exercised its discretion by failing to adequately explain the sentence it imposed according to the framework set forth in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

Gallion directs a court imposing sentence to discuss relevant factors such as the severity of the offense and character of the offender and to relate them to identified sentencing objectives such as the need for punishment, protection of the public, general deterrence, rehabilitation, restitution, or restorative justice. ***Id.***, ¶¶39-46. We afford discretionary sentence determinations a strong presumption of reasonableness because the circuit court is in the best position to evaluate the relevant factors and the demeanor of the defendant. ***State v. Klubertanz***, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 713 N.W.2d 116. Therefore, in order to demonstrate a misuse of sentencing discretion, a defendant generally must show that the record contains an unreasonable or unjustifiable basis for the circuit court's action. ***State v. Schreiber***, 2002 WI App 75, ¶9, 251 Wis. 2d 690, 642 N.W.2d 621.

Brown has not pointed to anything unreasonable or unjustifiable in the circuit court's discussion that would overcome the strong presumption that the circuit court acted within its discretion. To the contrary, the record demonstrates that the circuit court properly considered and based its decision upon relevant sentencing factors and objectives. For instance, regarding the severity of the offense, the court noted that shooting into a crowd of people was in some ways worse than shooting at some person for a reason because it indicated that Brown had "not give[n] the slightest concern to where those bullets were going to go." With respect to Brown's character, the court stated that what struck it the most was Brown's lack of remorse and his justifications for his actions; his failure to appear at the originally scheduled sentencing hearing where the State had agreed not to recommend a prison term; and the presence of a .357 Magnum

in the car Brown had been driving when he was arrested on drug charges while this case was still pending.

Brown complains that the circuit court "focused exclusively on the protection of the public without regard to Brown's obvious rehabilitative needs," and, in particular, did not discuss information that defense counsel presented to the court at the sentencing hearing about Brown's diagnoses of bipolar disorder, schizophrenia and major depression. However, it is within the circuit court's discretion to determine what, if any weight, to give to the factors present in a particular case. ***Id.***, ¶8. Part and parcel of that determination is the court's view of what objective it is trying to achieve with its sentence. Here, the circuit court explained that the primary sentencing objective was the need to protect the public because Brown's conduct during the two years that the case was pending "made it real clear that [he was not] going to change anything," and that he was still "the same guy that shot two people." The court was not required to discuss Brown's mental health issues because rehabilitation was not the primary objective that the court stated that it was aiming to achieve with its sentence.

Brown next claims that his sentence was unduly harsh, "especially in light of the significantly lower sentence contemplated in the PSI and the sentence recommended by defense counsel." As the circuit court noted, however, the PSI agent's recommendation for one and one-half years of initial incarceration and two and one-half years of extended supervision was prepared *before* Brown failed to appear for sentencing and committed additional offenses.

The nine years of initial incarceration imposed by the court was less than the ten years requested by the State after Brown's bail jumping voided the plea agreement on sentencing, and it constituted only 72% of the maximum initial incarceration that Brown faced, while Brown's

total sentence including the five-year term of extended supervision constituted 80% of the maximum imprisonment that the court could have imposed. *See* WIS. STAT. §§ 941.30(1) (classifying first-degree reckless endangerment as a Class F felony); 973.01(2)(b)6m. and (d)4. (providing maximum terms of seven and one-half years of initial confinement and five years of extended supervision for a Class F felony); 939.63(1)(b) (increasing maximum term of imprisonment for offense otherwise punishable by more than five years by five additional years for using or threatening to use a dangerous weapon); 973.01(2)(c)1. (enlarging maximum initial incarceration period by the same amount as the total term of imprisonment based upon a penalty enhancer).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and we are not persuaded that the sentence imposed here was "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, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. That is particularly true considering that two additional charges of first-degree reckless endangerment were dismissed and read-in as part of a plea deal. The dismissal of those charges had already reduced Brown's sentence exposure by twenty-five years, not including penalty enhancers. *See* ***State v. Straszkowski***, 2008 WI 65, ¶93, 310 Wis. 2d 259, 750 N.W.2d 835 (the circuit court may consider read-in charges when imposing sentence). The court could also take into account the seriousness of the dismissed charges, which resulted in three people being shot—two by Brown, and one by a rival gang member who returned fire. We therefore conclude that the sentence was not unduly harsh.

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals