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

2016AP989-CR State of Wisconsin v. Benjamin J. Biese (L.C. # 2013CF218)

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

Benjamin J. Biese appeals from a judgment of conviction and postconviction order. The only issue on appeal is whether the circuit court properly exercised sentencing discretion. 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 (2015-16).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

A jury found Biese guilty of four counts of making threats to a judge and three counts of making threats to injure or accuse another of a crime, all as a repeater. *See* WIS. STAT. § § 940.203(2), 943.30(1), and 939.62(1)(b). The court sentenced Biese to a total of nineteen years of initial confinement and seven years of extended supervision, to run consecutively to another sentence.[2] The court ruled that Biese was not eligible for the Challenge Incarceration Program.

In a postconviction motion, Biese argued that the total sentence is excessive, that the court erroneously exercised discretion when it imposed a ten-year sentence on one count, and that the court erred when it found Biese not eligible for the Challenge Incarceration Program. The court denied the motion. Biese renews his arguments on appeal.

A. Excessive sentence

Biese argues that the sentence violates the Eighth Amendment proscription against cruel and unusual punishment. In his view, a sentence of nineteen years of initial confinement is grossly disproportional to conduct he describes as merely mailing three letters to two judges.

We first set forth the familiar principles that guide a sentencing court.

Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI

[2] More particularly, the court sentenced Biese to three years of initial confinement and one year of extended supervision on each of four counts, and to seven years of initial confinement and three years of extended supervision on one count. The court ordered that those sentences be served consecutively. On each of the two remaining counts, the court imposed concurrent sentences of three years of initial confinement and one year of extended supervision on one count, and three years of initial confinement and three years of extended supervision on the other count.

42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We presume that the circuit court acted reasonably, and the defendant must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. ***Id.***, ¶¶17-18. That presumption is rooted in the sentencing court's greater familiarity with the facts of the case and with the defendant's demeanor. *See* ***id.***, ¶18. Public policy strongly disfavors appellate court interference with the circuit court's sentencing discretion. ***Id.***

The circuit court is "required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. The weight to be given to each sentencing factor remains within the wide discretion of the court. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

The standard for determining whether a sentence is cruel and unusual is the same under both federal and Wisconsin law. *See* ***State v. Ninham***, 2011 WI 33, ¶85, 333 Wis. 2d 335, 797 N.W.2d 451. "'If the sentence is within the statutory limit, appellate courts will not interfere unless [the sentence is] clearly cruel and unusual.'" ***Id.*** (quoted source omitted). A sentence is cruel and unusual only if "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." ***Id.*** (quotation marks and source omitted). A successful proportionality challenge to a sentence within the statutory maximum is "'exceedingly rare.'" ***Solem v. Helm***, 463 U.S. 277, 289-90 (quoted source omitted).

Biese was convicted of seven Class H felonies. *See* WIS. STAT. § § 940.203(2) and 943.30(1). The maximum term of imprisonment for a Class H felony is six years. *See* WIS.

STAT. § 939.50(3)(h). Biese was convicted as a repeater, adding four years to the potential sentence on each count. *See* WIS. STAT. § 939.62(1)(b). Thus, Biese faced a maximum sentence of seventy years—forty-nine years of initial confinement and twenty-one years of extended supervision. *See* WIS. STAT. § § 973.01(2)(b), 973.01(2)(c), and 973.01(2)(d)5.

In its sentencing comments, the circuit court considered Biese's mental health issues and his rehabilitative need for treatment. The court considered the seriousness of the offenses and the need to protect society. The court noted that one of the letters contained a suspicious substance that led to the closing of the county courthouse. The court also stated that the victims have the right to not fear for their safety or the safety of their families. In light of Biese's long history of committing this and similar offenses, the court recognized that any sentence would likely have little, if any, deterrent effect. The court considered appropriate sentencing factors.

Biese was sentenced to nineteen years of initial confinement and seven years of extended supervision. That sentence is "well within the limits of the maximum sentence" and it is "not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

B. Correction of the sentence for count three

In its sentencing remarks, the circuit court emphasized the impact on the public from count three, which arose from a letter purporting to contain "poop and biological anthrax." After receipt of that letter, the courthouse was shut down for a period of time. After imposing consecutive sentences of three years of initial confinement and one year of extended supervision on counts one, two, four, and five, and confirming that count three involved the courthouse, the

court stated, "[t]en years, five in and five out, consecutive to any other sentence previously imposed." The prosecutor responded, "You can't have more than three years of extended supervision, Judge. If you are going to do ten, you have to do seven years of initial confinement by law." The court then stated, "Seven and three, and a $10,000 fine."

Biese argues the circuit court erroneously exercised its discretion by increasing the amount of initial confinement on count three without stating any reason for the increase. Biese also suggests that the court was "told by the State that it had to" change the length of the initial confinement to seven years. We reject Biese's interpretation of the record.

The maximum bifurcated sentence for a Class H felony with a repeater enhancement is ten years and the maximum length of extended supervision for a Class H felony is three years. *See* WIS. STAT. § § 939.50(3)(h), 939.62(1)(b), and 973.01(2)(d)5. The court's initial sentence on count three was ten years, a legal sentence, but the length of extended supervision would have violated § 973.01(2)(d)5. The State merely brought the potential error to the court's attention by stating "[i]f you are going to do ten," the length of initial confinement needed to be changed. The court then corrected itself, reaffirming that Biese's sentence was ten years, ordering the maximum extended supervision allowed by the statute, and then ordering that the rest of the sentence be served as initial confinement. We see no error.

C. Challenge incarceration program

The circuit court was required, as part of the exercise of sentencing discretion, to decide whether Biese was eligible for the challenge incarceration program. *See* WIS. STAT. § 973.01(3m). The convictions for threatening a judge rendered Biese statutorily ineligible for

the program, but Biese was eligible under the other convictions. *See* ***id.*** (a person convicted of a crime under ch. 940 is ineligible). The court ruled that Biese was not eligible.

Biese argues that the court intended to find him eligible for participation in the challenge incarceration program. To support that position, Biese points to the court's inquiry into statutory eligibility, an inquiry which Biese states would have been unnecessary if the court did not intend to declare him eligible. Biese reads too much into the court's remarks. A sentencing court "must first determine whether the offender meets the preliminary criteria" and then "exercising its own sentencing discretion [decide] whether an offender … is eligible" for the challenge incarceration program. ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112. By ascertaining that Biese was eligible under some convictions but not others, the court was merely performing the required analysis. The discussion did not preordain a finding of eligibility.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals