



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/II

May 10, 2017

To:

Hon. Mark A. Sanders
Circuit Court Judge
Safety Building, Rm 620
821 W State St
Milwaukee, WI 53233-1427

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Michael J. Steinle
Terschan, Steinle, Hodan & Ganzer LTD
309 N. Water St., #215
Milwaukee, WI 53202-5713

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2016AP898-CR

State of Wisconsin v. Abdullah Eminovski (L.C. # 2015CF1326)

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

Abdullah Eminovski pled no contest to arson and first-degree recklessly endangering safety. Postconviction, he challenged his sentence on two bases: the sentence was harsh and unconscionable and a new factor warranted sentence modification. The circuit court rejected both challenges. 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 (2015-16).¹ We affirm the judgment and the order.

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

After positioning himself near the gas meter, Eminovski poured gasoline on the home in which the family of his former girlfriend's current companion was sleeping.² The family escaped the burning home. Earlier in the evening on which he committed these crimes, Eminovski had a physical confrontation in a bar with his former girlfriend and her current companion. Eminovski admitted to police that he purchased gasoline and used it to set fire to the companion's residence as retribution for the confrontation in the bar.

At sentencing, the circuit court considered the seriousness of the offenses, Eminovski's character, background and rehabilitation needs, and the public's interest in punishment, deterrence and community protection. The court acknowledged Eminovski's expression of remorse to the presentence investigation report author but found that this sentiment was "significantly undercut" by a text message Eminovski sent days after pleading no contest. In that text, Eminovski told the recipient of this text not to take the same path as the companion because the companion had suffered the consequences (the altercation in the bar and the arson of his family home). Trial counsel asked the circuit court not to place weight on the text message for two reasons: the message was taken out of context and someone else started the text exchange during which Eminovski essentially suggested that the companion deserved what happened to him and his family. Trial counsel argued that Eminovski was merely reacting to a text from someone else.

² The appellant's brief identifies the victims by name in violation of WIS. STAT. RULE 809.86(4) (2015-16). Future briefs filed in this court must comply with the Rules of Appellate Procedure or sanctions may be imposed on counsel.

The sentencing court considered Eminovski's text and accepted that he was responding to someone else. However, the court found the text compelling and informative with regard to Eminovski's character and lack of remorse. The court imposed concurrent terms of twenty years for arson and ten years for first degree recklessly endangering safety.

Exercise of sentencing discretion

Eminovski claims his sentences were harsh and unconscionable. A sentence that is well within the maximum available sentence is not unduly harsh or unconscionable. *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Eminovski faced fifty-two and one-half years on both offenses.³

With regard to the sentences, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court drew a reasonable inference that Eminovski intentionally poured gasoline near the gas meter, which increased the risk and danger to life and property. In fashioning the sentences, the court considered the seriousness of the offenses, Eminovski's character, including his incredible claim of remorse, the injury to the victims, and the need to protect the public. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight of the sentencing factors was within the circuit court's discretion. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

³ The maximum sentence for arson is forty years. WIS. STAT. § 943.02(1)(a) and § 939.50(3)(c). The maximum sentence for first degree recklessly endangering safety is twelve and one-half years. WIS. STAT. § 941.30(1) and WIS. STAT. § 939.50(3)(f).

Postconviction, the circuit court rejected Eminovski's challenge to his sentences. The court was not required to draw different inferences from his conduct or accept Eminovski's protestations regarding his intent. The sentences were not a misuse of sentencing discretion.

New Factor

We turn to Eminovski's new factor claim. Eminovski claimed as a new factor the text messages which allegedly provoked him to respond in a way that the circuit court characterized as inconsistent with remorse.

A new factor is:

a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). We review *de novo* the circuit court's determination that a defendant has not shown the existence of a new factor. *Id.*, ¶36.

A fact known to the circuit court at sentencing is not a new factor. *Id.*, ¶57. Eminovski's alleged new factor—that his text message was a response to a provocative message—is not a new factor. This is essentially the same argument Eminovski made at sentencing. The circuit court's focus at sentencing was on the content of Eminovski's text, which reflected poorly on his character and his claim of remorse. The court was not required to focus on whatever "provocation" caused Eminovski to respond as he did.

We agree with the circuit court that Eminovski did not show the existence of a new factor warranting sentence modification.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals