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September 20, 2017

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

2016AP1843-CR State of Wisconsin v. Virgil M. Smith (L.C. # 2013CF69)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Virgil Smith appeals a judgment of conviction for battery by a prisoner. He also appeals a circuit court order denying postconviction relief. Smith argues that the circuit court relied on inaccurate information in sentencing him and that he is therefore entitled to resentencing. 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] Because Smith has not presented clear and convincing evidence that the circuit court relied on inaccurate information when it sentenced him, we reject his arguments and affirm.

Smith was charged with one count of battery by a prisoner as a repeater following an incident at Waupun Correctional Institution in which he threw a food tray at an officer, hitting the officer in the face. Smith was convicted after a jury trial and sentenced to four years in the Wisconsin prison system, which included two years of initial confinement and two years of extended supervision, consecutive to any sentence previously imposed. Smith filed a postconviction motion raising several claims. The circuit court amended the judgment to eliminate the repeater enhancer, but otherwise denied the motion. The only claim for this appeal is whether he is entitled to resentencing. Specifically, Smith argues that the circuit court relied on his status as a repeater at sentencing and that this was inaccurate because the State had failed to prove that the repeater enhancer applied.

A defendant is entitled to resentencing if: (1) information at the original sentencing was inaccurate and (2) the circuit court relied on the inaccurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Smith has the burden of proving both factors by clear and convincing evidence. *See* ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423.

Regarding the first factor, Smith argues that the State failed to prove that he was a repeater, so the State's argument at sentencing that Smith was eligible for an enhanced sentence

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

was inaccurate information. The State concedes this argument. Therefore, the only question for this appeal is whether Smith has presented clear and convincing evidence that the circuit court relied on his inaccurate repeater status in sentencing him. In denying his postconviction appeal, the circuit court stated that it did not consider Smith's status as a repeater at all when it sentenced him. However, "[a] circuit court's after-the-fact assertion of non-reliance" is not dispositive. *See* ***State v. Travis***, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491. Instead, we independently examine the record to determine whether the circuit court actually relied on the inaccurate information. *See* ***id.***

Under the facts here, Smith faces an uphill battle in convincing us that the circuit court actually relied on the inaccurate repeater status when sentencing him. This is because the circuit court imposed a sentence that was well below the unenhanced maximum available for a first offender. Specifically, the maximum sentence with the repeater enhancer was a total of ten years of incarceration. The maximum sentence without the repeater enhancer was six years. Smith's four-year sentence was thus well below the unenhanced maximum. Smith concedes that this means that the repeater enhancer was not applied to him. *See* ***State v. Harris***, 119 Wis. 2d 612, 619-20, 350 N.W.2d 633 (1984) (circuit court cannot, as a matter of law, apply the statutory repeater enhancer to a sentence that is below the maximum for a first offender).

Smith argues that this should not matter to whether he is eligible for resentencing. He correctly points out that the defendant in ***Harris*** was entitled to resentencing because the sentencing court had improperly imposed a more severe sentence based in part on the court's belief that the defendant was a repeater. *See* ***id.*** at 625. In so holding, our supreme court flatly rejected the State's argument that it does not matter if a sentencing court acts under the mistaken assumption that repeater enhancement applies so long as the total sentence is still within the

available unenhanced maximum sentence. *See* ***id.*** at 621, 625. However, a critical distinction in ***Harris*** is that the sentencing court explicitly stated that it was imposing six months more than it otherwise would have because of its belief that the defendant was a repeater. *See* ***id.*** at 625. In other words, there was no question that the sentencing court in ***Harris*** actually relied on the court's perception of the defendant's repeater status. In contrast, Smith concedes that the circuit court here did not specifically enhance Smith's sentence based on repeater status. Accordingly, ***Harris*** does nothing to help Smith establish that he is entitled to resentencing without a showing that the circuit court actually relied on the repeater status when it sentenced him. *See* ***Payette***, 313 Wis. 2d 39, ¶46 (defendant must establish actual reliance by clear and convincing evidence).

Smith argues that we should not accept the circuit court's statement that the court did not consider Smith's repeater status when imposing Smith's sentence. Smith focuses on the circuit court's comment at sentencing that his behavior was on "the medium to low end of the scale." Smith contends that this comment signaled the court's intention to sentence him at the medium to low end of the applicable range of sentencing. He further contends that the four-year sentence imposed by the circuit court was at the medium to low end of the range of sentencing for a repeater (10 years), but was actually at the medium to high end of the unenhanced maximum sentence (6 years). From this premise, he then argues that the court must have had the range for a repeater in mind when it sentenced him.

We reject this argument for two reasons. First, Smith attaches far too much significance to a single statement in an otherwise lengthy sentencing transcript. Smith's argument rests on the premise that the guiding factor in the circuit court's imposition of a four-year sentence was its view that his behavior was on the "medium to low end of the scale." However, other statements by the court cast doubt on Smith's interpretation of this isolated phrase. For example,

the court's discussion about the gravity of the offense started with a lengthy condemnation of any behavioral infractions within a prison setting. Immediately before imposing its sentence, the court also considered the need to protect the community, stating that "to do anything but to confine would unduly depreciate the seriousness of the offense." We therefore reject Smith's premise that the circuit court's characterization of Smith's behavior signaled the court's intent to impose a sentence on the medium to low end of the sentencing range.

Second, Smith's argument about how the circuit court must have arrived at its four-year sentence is patently inconsistent with a sentencing court's duty. S*ee* ***State v. Gallion***, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197 ("'[T]he sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" (quoted source omitted)). Smith argues that choosing the proper sentence necessarily requires a circuit court to identify a precise point within the legislatively prescribed range of penalties, but that is not what our case law says. Instead, our case law emphasizes that a proper exercise of discretion "does not lend itself to mathematical precision." *See* ***id.***, ¶49. We see nothing in the record to suggest that the circuit court did anything other than what ***Gallion*** requires, namely, to impose the minimum amount of custody in light of the appropriate sentencing factors. We therefore see no reason to question the circuit court's assertion that the court did not even consider Smith's repeater status when it imposed a sentence of four years.

Finally, Smith argues that the circuit court must have relied on his status as a repeater because otherwise a four-year sentence is too high in light of all of the positive factors that the court considered at sentencing. But Smith's argument overlooks the court's countervailing concern about the need to protect the public by imposing a sentence that would not "unduly

depreciate" the seriousness of an offense committed while behind bars. Further, in denying the postconviction motion, the circuit court explained that it had balanced all of the positives against the fact that Smith committed his offense while he was an inmate in the Wisconsin prison system. Circuit courts exercise discretion in balancing the relevant sentencing factors, and their sentences are entitled to a strong presumption of reasonableness. *See* ***id.***, ¶¶17-18. Here, the circuit court determined that a four-year sentence was the appropriate way to balance the factors it identified, and we will not second-guess this determination. *See* ***id.***, ¶18 ("'Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence.'" (quoted source omitted)).

In sum, while Smith has shown that there was inaccurate information at sentencing, he has not presented clear and convincing evidence that the circuit court actually relied on it. He is therefore not entitled to resentencing. Accordingly, we affirm the circuit court's decision denying his motion for postconviction relief.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals