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December 13, 2017

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

2017AP237-CR

State of Wisconsin v. Xavier F. Wilkes (L.C. # 2013CF3894)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Xavier F. Wilkes appeals from a judgment convicting him of attempted first-degree sexual assault with the use of a dangerous weapon, armed robbery with threat of force, kidnapping, and first-degree sexual assault with use of a dangerous weapon, and an order

denying his motion for resentencing.¹ 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 809.21.² We affirm.

The charges stemmed from a sordid criminal episode where Wilkes (then nineteen years old) and several others robbed two victims at gunpoint. Wilkes and his associates then took one of the victims into an alley where they repeatedly forced her to engage in various sexual acts. At sentencing, the court focused primarily on the horrific and brutal nature of Wilkes' crimes that "struck at the heart" of his victims. Accordingly, the court sentenced Wilkes to an aggregate sentence of fifty years of initial confinement followed by twenty-four years of extended supervision. The court ordered the sentence on each count to be served consecutively. Wilkes filed a motion for resentencing. The court denied the motion, again focusing on the "horrific and brutal" nature of Wilkes' crimes. Wilkes appeals.

Wilkes asks that we remand to the circuit court for resentencing. He makes three general arguments. First, he maintains that the circuit court "failed to contemplate the sentencing objective of rehabilitation." Though he acknowledges that "the trial court mentioned the rehabilitation of the defendant as a sentencing objective," he insists that the court "wholly failed to consider such objective in fashioning Wilkes' sentence." Wilkes also argues that even if the court considered rehabilitation, it did not give adequate weight to this objective and instead gave "far too much weight" to public protection and deterrence. Second, Wilkes accuses the circuit

¹ At the first jury trial, the jury found Wilkes not guilty of one of the armed robbery counts but failed to reach a verdict on the remaining counts. The jury at the second trial convicted Wilkes of all remaining counts.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

court of failing to explain how his sentence “constituted the minimum amount of custody that is consistent with the sentencing objectives.” He claims that his lack of criminal or juvenile history, relative youth, and potential for rehabilitation should have resulted in “something less than a de facto life sentence.” Third, Wilkes argues that we must reverse the circuit court because it failed to explain its reasons for making his sentences consecutive rather than concurrent. None of these arguments has any merit.

Sentencing is committed to the circuit court’s discretion, and our review is limited to whether the circuit court erroneously exercised that discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We presume that the circuit court acted reasonably; “the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue.” *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998).

In fashioning a sentence, the circuit court must consider the following primary factors: (1) the gravity of the offense, (2) the character and rehabilitation needs of the defendant, and (3) the need to protect the public. *State v. Smith*, 207 Wis. 2d 258, 281 n.14, 558 N.W.2d 379 (1997). However, the weight to be given each of these factors is within the discretion of the circuit court. *State v. Evers*, 139 Wis. 2d 424, 452, 407 N.W.2d 256 (1987). The circuit court must also “specify the objectives of the sentence on the record.” *Gallion*, 270 Wis. 2d 535, ¶40. Sentencing objectives vary from case to case, and in some cases, “punishment and protection of the community may be the dominant objectives.” *Id.*, ¶41.

Here, the circuit court permissibly determined that the rehabilitation should take a back seat to punishment and protecting the community. The court explained that Wilkes had “rehabilitative needs,” but emphasized multiple times that Wilkes did not show any remorse and

found that Wilkes' apology was "not heartfelt, it's not sincere." Accordingly, the court concluded that Wilkes' crimes required imprisonment. The court described the horrific nature of the "gang rape" Wilkes' victim endured—"one of the worst crimes that can happen"—which had a "dramatic effect" on both of the victims. Given the serious nature of the crimes, the likelihood of reoffense, and the "strong need to protect the community from [Wilkes'] conduct," the court elected to impose a lengthy sentence. This decision was abundantly reasonable. Wilkes' lack of remorse cuts strongly against fashioning a sentence aimed primarily at rehabilitation. Given the violent and brutal crimes Wilkes committed, the court reasonably focused on crafting a sentence primarily to punish Wilkes and protect the public.

Although Wilkes is correct that circuit courts should impose the minimum amount of custody consistent with the appropriate sentencing factors, "'minimum' does not mean 'exiguously minimal,' that is, insufficient to accomplish the goals of the criminal justice system." *State v. Ramuta*, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483 (citation omitted). The court gave a reasonable explanation for why Wilkes' crimes necessitated such a long sentence. The fact that Wilkes may spend the rest of his life in prison has no bearing on our review of the circuit court's decision. The circuit court is not required to consider whether "the defendant's life expectancy, coupled with a lengthy sentence" results in a de facto life sentence. *State v. Stenzel*, 2004 WI App 181, ¶20, 276 Wis. 2d 224, 688 N.W.2d 20.

Because the circuit court adequately explained its reasons for the lengthy sentence, Wilkes' claim that we must reverse because the court did not explain its reasons for imposing the sentences consecutively fails as well. "[T]he same factors concerning trial court discretion as to the length of a sentence apply to a determination whether sentences should be served concurrently or consecutively." *State v. Hamm*, 146 Wis. 2d 130, 156, 430 N.W.2d 584 (Ct.

App. 1988). The court explained its reasons for the length of the sentence, and those reasons also support the court's determination that the sentences should be served consecutively. *See id.* at 156-57. There was no need to give additional explanation for why the sentences should be served consecutively. Wilkes has not met his burden to show that the circuit court erroneously exercised its discretion; he merely disagrees with the result. For these reasons, none of his claims succeed.

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.

Diane M. Fremgen
Clerk of Court of Appeals