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January 10, 2018

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

2017AP455-CR

State of Wisconsin v. Eleonora K. Klurfeld Milshteyn
(L.C. # 2015CF176)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

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).

Eleonora K. Klurfeld Milshteyn appeals from a judgment of conviction and an order denying her postconviction motion. She contends that the circuit court erroneously exercised its discretion at sentencing. She further contends that the court relied upon inaccurate information at sentencing. 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 the judgment and order of the circuit court.

Milshteyn was in the middle of a contentious divorce when she was sentenced to jail for contempt of a court order. While in jail, she expressed frustration with the divorce judge who sentenced her and offered \$50,000 to have him killed. She also expressed frustration with her former husband because he did not “pay her anymore.” Eventually, that talk led to a fellow inmate offering to help Milshteyn hire a hitman.

One month later, Milshteyn told the inmate that she would pay \$6000 for the divorce judge and \$3000 a piece for her former husband and his girlfriend to have them “beaten up.” The inmate then arranged for a meeting with an alleged hitman, who was actually an agent with the Wisconsin Department of Justice. Milshteyn gave the alleged hitman the name of the judge that she wanted “beaten up.” She also instructed him to beat up her former husband “so that he would be impotent and could not have sex anymore” and beat up her former husband’s girlfriend “until she was ‘unconscious’ and ‘could not have kids.’” After agreeing to meet again with the alleged hitman to exchange money, police arrested Milshteyn.

Eventually, Milshteyn entered no contest pleas to solicitation of battery to a judge and solicitation of aggravated battery.² On the first count, the circuit court sentenced Milshteyn to three years of initial confinement and three years of extended supervision. On the second count,

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

² Pursuant to a plea agreement, an additional charge of solicitation of aggravated battery was dismissed and read in.

it sentenced her one and one-half years of initial confinement and two years of extended supervision, to run consecutive.

Milshteyn subsequently filed a postconviction motion seeking sentence modification. In it, she claimed that the circuit court erroneously exercised its discretion at sentencing. She also claimed that the court relied upon inaccurate information at sentencing. Following a hearing on the matter, the court denied the motion. This appeal follows.

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 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

“To properly exercise its discretion, a circuit court must provide a rational and explainable basis for the sentence.” *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. “The primary sentencing factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.” *Ziegler*, 289 Wis. 2d 594, ¶23. The weight to be given to each sentencing factor is within the discretion of the court. *Id.*

“A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tjepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant who seeks relief because the circuit court used inaccurate information must show that the information was inaccurate and that the court actually relied upon the inaccurate information

at sentencing. *Id.*, ¶26. Whether a defendant has been denied this due process right is a question of law that we review de novo. *Id.*, ¶9.

On appeal, Milshteyn contends that the circuit court erroneously exercised its discretion at sentencing. Specifically, she complains that the court erred when (1) it did not explain why it imposed consecutive sentences; and (2) it placed too much weight on the gravity of the offenses.

We are not persuaded by Milshteyn's arguments. To begin, the circuit court is not required to separately explain why it imposed consecutive rather than concurrent sentences as long as it explains the "relevant and material factors" that influenced its sentencing decision. *State v. Berggren*, 2009 WI App 82, ¶45, 320 Wis. 2d 209, 769 N.W.2d 110. That was plainly done in this case. Moreover, it is not error for a court to give greatest weight to the gravity of the offense when discussing the primary sentencing factors. See *Ziegler*, 289 Wis. 2d 594, ¶23. The court's decision to do so here was reasonable considering the aggravated nature of Milshteyn's crimes.

Milshteyn also contends that the court relied upon inaccurate information at sentencing. She focuses her argument on the circuit court's statement at sentencing that she "attempted to hire someone to kill [the divorce judge] and then when [she] couldn't come up with the money to kill him to have someone beat him up." She maintains that such a statement is not supported by the facts in the record.

Again, we are not persuaded by Milshteyn's argument. Here, the facts in the record show that shortly after she was incarcerated for contempt of a court order, Milshteyn told other inmates that she wanted the divorce judge killed and would pay \$50,000 to have it done. One month later, Milshteyn offered significantly less money—\$6000—to have the judge "beaten up." From

these facts, the circuit court could reasonably infer that Milshteyn changed her mind about hiring a hitman to kill the judge because she did not have enough money to pay for it. Accordingly, Milshteyn cannot show that the court's statement was inaccurate.

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.

Diane M. Fremgen
Acting Clerk of Court of Appeals