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April 9, 2018

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

2017AP979-CR State of Wisconsin v. Jerrell L. Washington
(L.C. # 2015CF001525)

Before Brennan, P.J., Brash and Dugan, 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).

Jerrell L. Washington appeals from a judgment of conviction for eleven felonies and from an order denying his postconviction motion for resentencing. The sole issue presented on appeal is whether Washington—who was about seventeen and one-half years old when he committed these crimes—is entitled to relief on grounds that his total sentence was harsh and unconscionable, given Washington's youth. We conclude at conference that this matter is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2015-16).[1] We summarily affirm.

BACKGROUND

Washington was charged with eleven felonies for participating in a series of four robberies and assaults in a single night. It is undisputed that at the time the crimes were committed, Washington was under supervision as a juvenile offender, having been adjudicated delinquent for armed robbery with use of force and substantial battery.[2] Although he was originally ordered to be placed at the Lincoln Hills secure juvenile detention facility until his eighteenth birthday, about four months after he turned seventeen he was placed in a residential care facility so that he could transition from living at Lincoln Hills to living in the community. Washington absconded from the residential care facility and shortly thereafter committed the crimes at issue in this appeal.

Washington's case proceeded to a jury trial. Washington chose not to testify. The jury heard testimony that on four occasions, in different areas of Milwaukee County, a group of young men approached people and demanded their property. The men hit five of the six victims with guns or fists. As a result, at least four of the victims required medical attention at a hospital, and one victim needed surgery to repair an "orbital blowout" in his eye that was caused by being punched and kicked. The young men also stole two of the victims' cars.

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

[2] Washington also had prior juvenile adjudications for criminal damage to property, entry into a locked building, theft, resisting or obstructing an officer, and attempted robbery with use of force. His first adjudication was for an offense he committed when he was thirteen years old.

The jury found Washington guilty of all eleven counts, including three counts of armed robbery with use of force; two counts of substantial battery by use of a dangerous weapon; two counts of substantial battery; two counts of robbery with use of force; and two counts of taking and driving a vehicle without the owner's consent, all as a party to a crime. *See* WIS. STAT. §§ 943.32(2), 940.19(2), 943.32(1)(a), 943.23(2), and 939.05.

Washington told the presentence investigation writer that he was with the men who committed the crimes but he claimed that he did not participate in those crimes. Instead, he said he fell asleep in the car and woke up when the vehicle he was riding in was chased by police officers, at which point Washington fled the car and ran away before being apprehended nearby.

At sentencing, both the State and the trial court expressed their disbelief in Washington's explanation of his involvement. The State noted that one victim's blood was found on Washington's shoes, and the trial court pointed out that one victim identified Washington as one of the men who robbed him. When Washington briefly exercised his right of allocution, he accepted some responsibility, stating, "I'm sorry for what happened to the victims. Any mentally or physically problems that they have, my actions take full responsibility. That's it."

Before pronouncing sentence, the trial court noted that Washington was facing up to one hundred and fifteen years of initial confinement and sixty-nine years of extended supervision. The trial court said that the sentence it was imposing was not "anywhere near those [maximum] numbers" but was a "significant" sentence that was needed for reasons "including protection of the community and deterrence in addition to punishment of the defendant and rehabilitation of the defendant." The trial court imposed a series of consecutive and concurrent sentences totaling twenty-four years of initial confinement and eleven years of extended supervision.

Represented by postconviction counsel, Washington filed a postconviction motion seeking resentencing on several grounds. The trial court denied the motion in a written order. As relevant to this appeal, the decision states:

> [T]he defendant submits that the court's global sentence is unduly harsh and unconscionable because he was a minor when these crimes were committed, citing to a United States Supreme Court case in support, ***Roper v. Simmons***, 543 U.S. 551 (2005). Although the Supreme Court has recognized differences in death penalty cases between juveniles under the age of 18 and adults, this is not a death penalty case, and it does not involve mandatory life without parole dispositions or statutes requiring mandatory life without parole. It is not apposite here. Nevertheless, the defendant asserts that his sentence should be reflective of the growing body of evidence that shows juveniles as having immature brains, not dangerous anti-social personalities. However that may be, the court must base its sentence on the law of this state and consider three major factors when sentencing: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need to protect the public. The weight to be given to each of these factors is a determination particularly within the discretion of the trial court. In addition to the factors that the court must consider, the court may also consider the defendant's past record of criminal offenses, history of undesirable behavior patterns, culpability, educational and employment background, remorse and cooperativeness. The defendant's admission that the majority of his friends are either criminally involved or gang members speaks volumes about his character and his undesirable behavior patterns. His character is further revealed by the presentence writer in all of the instances in which he failed to comply with the conditions set by the juvenile court, continued to disobey orders, was sanctioned for committing more offenses, and for lying, showing disrespect, disobeying, and engaging in disruptive contact. His escape from [the residential care facility] … just before he became directly involved in this string of robberies placed him in absconder status, which demonstrated what the community can expect from him. His belief of innocence and that he was "simply in the wrong place at the wrong time" with respect to these offenses is headspinning, as well as his absurd claim that he was asleep in the car during the commission of the offenses.
>
> The sentencing transcript when reviewed in its entirety shows that the court considered the total defendant in terms of his acts and their effect on the victims and the community as a whole. The nature of the senseless violence in this case was completely

> aggravating. Given that the defendant could have been sentenced to nearly 200 years in prison, the global sentence imposed was not unduly harsh, excessive or unconscionable given the totality of the circumstances presented. The court declines to modify sentence in any respect. It would be an injustice to the community.

(Case and record citations omitted.) This appeal follows.

DISCUSSION

On appeal, Washington pursues only one issue raised in his postconviction motion.[3] He argues that his total sentence "is harsh and unconscionable in light of Mr. Washington's young age of seventeen at the time of the offenses." When a defendant argues that a sentence is unduly harsh, we will deem it "an erroneous exercise of sentencing discretion 'only where the sentence is 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.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Further, "'a sentence well within the limits of the maximum sentence 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.'" *See* ***id.*** (citation and one set of brackets omitted).

There is no question that in this case, the total sentence imposed was well within the maximum sentence of one hundred and fifteen years of initial confinement and sixty-nine years of extended supervision. Nonetheless, Washington argues that his sentence should be reduced

[3] Notably, Washington has not argued that the trial court failed to consider appropriate factors or fully explain its decision. Having reviewed the sentencing transcript, we agree that the trial court complied with the dictates of ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, and its progeny.

because he was an immature young person when he committed these crimes. Washington relies on the scientific research discussed in ***Roper v. Simmons***, 543 U.S. 551 (2005), where the United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of the death penalty on juveniles under the age of eighteen. *See* ***id.*** at 578-79. Washington also complains that he should not have been released from secure detention prior to his eighteenth birthday and faults the system for not knowing where he was staying for a month after he absconded from the residential facility. Washington further asserts:

> The public should not condone decades in prison for minors where neglect is suspected, where educational needs have not been met, where state institutions have failed on their watch, and where children are suffering from mental illness and drug and alcohol problems at a very young age. Every parent of a young person involved in a wild night would find Mr. Washington's sentence terrifying. Many parents do all they can to make sure this sort of crime spree cannot happen. But what about the children without such structure? Simply locking them up for decades is not an acceptable answer.

Like the trial court, we are not persuaded that Washington's total sentence is harsh and unconscionable. We conclude that Washington has not shown that the trial court erroneously exercised its sentencing discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449 (requiring a defendant challenging the trial court's exercise of sentencing discretion to "show an 'unreasonable or unjustifiable basis in the record for the sentence complained of'") (citation omitted). First, the initial confinement portion of the total sentence is about one-fifth of what could have been imposed—well within the maximum. *See* ***Grindemann***, 255 Wis. 2d 632, ¶31.

Second, while ***Roper*** referenced scientific and sociological studies that noted a lack of maturity in youthful offenders, *see* ***id.***, 543 U.S. at 569, it is undisputed that ***Roper***'s holding

does not prohibit the imposition of a sentence that requires Washington to spend twenty-four years in initial confinement. Indeed, Washington explicitly acknowledges in his reply brief that "[s]ending juveniles to prison for long periods of time … has not been found unconstitutional."

Third, having reviewed the record and the trial court's explanations of its sentencing decision, we are unconvinced that Washington's total sentence shocks public sentiment. *See* ***Grindemann***, 255 Wis. 2d 632, ¶31. The severity of the violence against the victims—none of whom resisted the theft of their property—and Washington's lack of acceptance of responsibility weighed in favor of a significant sentence, as the trial court explained at the sentencing hearing and in its order denying the postconviction motion.

We also reject Washington's suggestion that the trial court failed to consider his age as a factor at sentencing. The trial court explicitly referenced Washington's age several times during the sentencing hearing, such as when it considered Washington's lack of a high school degree and employment history, his juvenile adjudication history, and his eligibility for early release programs.[4]

Finally, to the extent Washington and other offenders believe the Wisconsin legislature should punish young adults differently than prescribed in the Wisconsin statutes, their remedy rests with the legislature. *See* ***Progressive Northern Ins. Co. v. Romanshek***, 2005 WI 67, ¶60, 281 Wis. 2d 300, 697 N.W.2d 417 ("When acting within constitutional limitations, the

[4] The trial court made Washington eligible for early release programs after he has served twenty-two years of initial confinement.

legislature settles and declares the public policy of a state, and not the court.") (internal quotation marks and citation omitted).

For the foregoing reasons, we reject Washington's argument that the total sentence imposed for the eleven felonies he committed was harsh and unconscionable. We summarily affirm the judgment and the order denying Washington's postconviction motion.

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

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

Sheila T. Reiff
Clerk of Court of Appeals