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April 23, 2018

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

2017AP1117-CR

State of Wisconsin v. Shane D. Foster (L.C. # 2015CF4267)

Before Lundsten, P.J., Kloppenburg 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).

Shane Foster appeals a judgment of conviction for second-degree reckless homicide, as party to a crime, and for being a felon in possession of a firearm. Foster also appeals a circuit court order denying his postconviction motion for resentencing. Foster argues that the circuit court erroneously exercised its discretion in sentencing him to consecutive sentences reflecting the statutory maximum terms of initial confinement and in denying him eligibility for early release programs. 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 we conclude that the circuit court acted within its discretion when sentencing Foster, we affirm.

Foster was charged with first-degree reckless homicide, while armed, as a party to a crime, and being a felon in possession of a firearm after shooting and killing the victim during a fight. Based on these charges, Foster faced a total sentence of seventy years imprisonment. As part of a plea agreement, the State amended the first-degree reckless homicide charge to second-degree reckless homicide and removed the firearm enhancer from the charges. Following the amendment, Foster faced a total sentence of thirty-five years imprisonment. Foster pleaded guilty to both counts, as amended.

The court sentenced Foster to twenty years on the reckless homicide charge, consisting of fifteen years of initial confinement and five years of extended supervision; and ten years on the felon in possession charge, consisting of five years of initial confinement and five years of extended supervision. The court ordered the sentences to run consecutively, as well as consecutively to any sentences that Foster was currently serving. Foster filed a postconviction motion for resentencing, which the circuit court denied. Foster appeals.

Foster argues that the circuit court erroneously exercised its discretion because it imposed the maximum terms of initial confinement despite the presence of mitigating circumstances. “Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the

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

defendant, rehabilitation of the defendant, and deterrence to others.” *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. “Courts must also identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision.” *Id.*, ¶43. The weight to be given each sentencing factor remains “within the wide discretion of the sentencing” court. *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. “[T]o properly exercise its discretion, a circuit court must provide a rational and explainable basis for the sentence.” *Id.*, ¶8.

Here, the circuit court explained that it considered three factors: the nature of Foster’s offense, Foster’s character, and the needs of the public. Regarding the nature of the offense, the court stated that homicide was “the highest and most aggravated categor[y]” of offense. The court noted that the autopsy report indicated that Foster had fired at least three bullets that went through the victim’s lung, heart, and body. The court then considered the positive aspects of Foster’s character, including his family support network and the fact that he turned himself in and entered a plea.² The court further noted that although Foster’s character was “not without good parts,” the need to protect the public was very strong. In particular, the fact that Foster should not have had access to a gun made his involvement in a gun homicide an “enormously serious event.” The court explained that a lengthy sentence was necessary in order to send a sufficient message that gun violence will not be tolerated. For these reasons, the court determined that the “positive aspects of [Foster’s] character [were] very much overwhelmed by

² The circuit court also noted that Foster had a “minimal” criminal history with only one prior conviction for burglary. However, this history—though limited—did not reflect positively on Foster’s character, as the court observed that Foster had failed to fully accept responsibility for his prior offense as well.

the violence and aggravated nature” of his offense. In sum, the court identified the relevant factors and provided a rational and explainable basis for its sentence.

Nonetheless, Foster contends that the circuit court was simply using the “magic words” to evade meaningful review of its determination of how to weigh the various factors. See *Gallion*, 270 Wis. 2d 535, ¶37 (explaining that a sentencing judge must do more than state “magic words,” detail some facts, and impose a sentence within statutory limits). More particularly, he contends that the fact that the circuit court imposed the maximum term of initial confinement means that the court impermissibly disregarded Foster’s character. See *State v. Krueger*, 119 Wis. 2d 327, 337-38, 351 N.W.2d 738 (Ct. App. 1984) (a sentencing court erroneously exercises its discretion by giving “too much weight to one factor in the face of other contravening considerations”). We disagree because, when boiled down to its essence, Foster’s argument would require us to conclude that a circuit court lacks discretion to impose the maximum term of initial confinement whenever there are favorable sentencing factors. We are hard-pressed to think of a case in which there are absolutely no favorable sentencing factors, which in turn would mean that a circuit court could never impose the maximum term of initial confinement. This is not the law. Instead, as noted above, our case law gives sentencing courts wide discretion to determine how much weight to give each sentencing factor. *Stenzel*, 276 Wis. 2d 224, ¶9.

Here, as discussed above, the circuit court explained in great detail why the nature of the offense and the need to protect the public “very much overwhelmed” Foster’s positive character factors. We see no erroneous exercise of discretion in the circuit court’s weighing of the factors, particularly in light of the circuit court’s determination that Foster had already benefitted from a plea agreement that significantly reduced the maximum sentence he faced. We conclude that the circuit court acted well within its discretion in determining that, for a reckless homicide, the

nature of Foster's offense was extremely violent and aggravated, thereby warranting the maximum term of initial confinement.

Foster also argues that the court failed to state an adequate reason for imposing consecutive terms of confinement for the reckless homicide and felon in possession charges. *See State v. Hall*, 2002 WI App 108, ¶14, 255 Wis. 2d 662, 648 N.W.2d 41 (citing ABA Standards for Criminal Justice Sentencing, § 18-6.5(c)(ii) at 230) (when multicount offenses are connected, the sentencing court must take the connections between the offenses into account in deciding whether to impose consecutive sentences). This argument goes nowhere because the circuit court took the connection between the two offenses into account when it explained that Foster's status as a felon who should not have access to guns made his involvement in this homicide "an enormously serious event." A sentencing court has "wide discretion in determining whether to impose a concurrent or consecutive sentence." *State v. Davis*, 2005 WI App 98, ¶27, 281 Wis. 2d 118, 698 N.W.2d 823. We see no inadequacy in the court's explanation as to why it chose to impose a consecutive sentence.

Foster next takes issue with a phrase in the circuit court's order denying his postconviction motion in which the circuit court referred to Foster's decision to hold or pick up a gun as a "separate volitional act." Foster points out that this phrase is commonly used in evaluating a multiplicity challenge under the double jeopardy clauses of the Wisconsin and United States Constitutions. *See State v. Anderson*, 219 Wis. 2d 739, 755-56, 580 N.W.2d 329 (1998); *State v. Bergeron*, 162 Wis. 2d 521, 534-36, 470 N.W.2d 322 (Ct. App. 1991). Foster's argument on this point is not entirely clear, but to the extent he is suggesting that the circuit court erred by using an incorrect legal standard when imposing a consecutive sentence, we disagree. While the circuit court's choice of phrase in denying the postconviction motion may not have

been as clear as one would prefer, it did not undermine the clarity of the circuit court's explanation at sentencing, which we have already concluded was adequate. Foster further argues that we should disregard the sentencing court's rationale because it amounts to an impermissible statement that the court was imposing consecutive sentences merely because it could. *See State v. Cherry*, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (“[I]n exercising discretion, the trial court must do something more than stating it is imposing [a penalty] simply because it can.”). We reject this argument as a dismissive characterization of the circuit court's extended discussion of why a long sentence was necessary based on the very serious and aggravated nature of Foster's offenses and the need to protect the public.

Finally, Foster challenges the circuit court's decision to deny him eligibility for early release programs,³ even though the court noted that Foster might benefit from this programming. A circuit court has discretion to declare an offender ineligible for early release programs, even if the offender meets all the requirements of the programs. *See State v. Steele*, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112. Here, the circuit court determined that making Foster eligible for early release was not consistent with its intention to impose a lengthy sentence. Foster argues that the court did not give sufficient consideration to the option of making him eligible for early release only on the felon in possession count, which would ensure that Foster would serve fifteen years on the homicide count while allowing Foster to access helpful rehabilitative programming during his final few years of initial confinement. However, the circuit court rejected this option on the ground that it would “eviscerate the purpose of the

³ Foster asserts that the proper statutory names for these programs are the “Substance Abuse Program” (or “SAP”) and the “Challenge Incarceration Program” (or “CIP”). To avoid unnecessary acronyms, we refer to these programs collectively as “early release programs.”

sentence and completely frustrate the court’s sentencing goals.” While Foster disagrees with this analysis, the circuit court’s determination that Foster should serve the full twenty years of initial confinement is both legally permissible and adequately explained. We therefore affirm the circuit court’s exercise of discretion.

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.

Sheila T. Reiff
Clerk of Court of Appeals