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DISTRICT II

September 5, 2018

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

2017AP1649-CR State of Wisconsin v. Anthony R. Lanier (L.C. #2015CF431)

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).

Anthony R. Lanier appeals from a judgment of conviction and the denial of his postconviction motion seeking resentencing. Lanier argues that he is entitled to resentencing as the circuit court based his sentence on uncharged and unproven allegations of sexual assault. 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 of conviction and order denying postconviction relief.

Lanier was charged with two counts of incest with Lanier’s adult daughter, both as a repeater. Lanier reached a plea agreement in which he pled no contest to one count of incest, and, in exchange, the repeater charge would be dropped, the second incest count would be read in at sentencing, and both parties would jointly recommend five years’ probation with one year conditional jail time. The court accepted the plea and ordered a Presentence Investigation Report (PSI). The PSI included allegations by the victim in this case that the number of times Lanier engaged in incest was more than reported in the criminal complaint and that some of the nonreported acts of incest were not consensual.

At sentencing, the State honored the plea agreement and also argued that Lanier was not a sexual predator, but asked for a long period of no contact between Lanier and the victim. The victim requested, through the PSI writer, that Lanier receive the “maximum sentence.” The court imposed the maximum sentence of seven and one-half years’ initial confinement (IC) followed by five years’ extended supervision (ES). Postconviction, Lanier moved for resentencing on the grounds that the court sentenced him on uncharged crimes—sexual assault of the victim—and that his due process rights were violated as the uncharged allegations were not proven by a preponderance of the evidence pursuant to *Nichols v. United States*, 511 U.S. 738, 748 (1994). The circuit court denied Lanier’s motion.

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

Whether a defendant has been sentenced based on inaccurate information and therefore denied due process is a constitutional issue that we review de novo. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. When a defendant moves for resentencing on the ground that the circuit court relied on inaccurate information, he or she must establish that there was information before the sentencing court that was inaccurate and that the court actually relied on the inaccurate information. *Id.*, ¶¶26, 31. “Whether the court ‘actually relied’ on the incorrect information at sentencing [is] based upon whether the court gave ‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *Id.*, ¶14 (citation omitted).

When imposing a sentence, the circuit court must set forth the reasons for its sentence on the record and, in so doing, it is to consider the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. *State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197; *McCleary v. State*, 49 Wis. 2d 263, 276, 281-82, 182 N.W.2d 512 (1971). A court has the discretion to consider the weight it places on sentencing factors. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Information as to uncharged or unproven offenses, regardless of whether the defendant agrees to have them read in at sentencing, is relevant information a court may consider at sentencing. *State v. Frey*, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436. As sentencing is a discretionary act by the circuit court, we search the record for reasons to sustain a circuit court’s exercise of sentencing discretion. *McCleary*, 49 Wis. 2d at 282.

We conclude that the sentencing court did not rely on inaccurate information when sentencing Lanier and properly applied the appropriate sentencing factors. Both Lanier and the victim changed their recitation of the facts multiple times between the beginning of the

investigation and the PSI interview in this case. However, we need not delve into whether the information contained in the PSI, concerning the number of alleged sexual encounters and whether those encounters were consensual or not, was “inaccurate” as the court clearly did not rely on that information at sentencing. As the court explained, “[I]t’s not really so much as to how many times they had sex or when they started or where they took place, it really deals with the inappropriate nature of the relationship and the impact and the harm to the victim.” The court continued, “As the prosecutor noted, there have been different versions of those facts.... And it’s not my purpose to choose one version or the other version. I go by the conviction and that’s what we have here is one count ... [and] one count was dismissed and read in.”

On appeal, Lanier frames this case as an “*insufficient* evidence” case as opposed to an “*inaccurate* evidence” case. He argues that *Tiepelman* involves the due process right to be sentenced on accurate information, while *Nichols* represents the “right to require the information to add up to a preponderance of the evidence.” We find *Nichols* inapplicable under the facts of this case as the sentencing court did not rely on the alleged inaccurate information. To find differently would require us to disregard the express statements of the circuit court on the record stating that it was not “choos[ing] one version or the other version” where “there have been different versions of [the] facts.” The circuit court sentenced Lanier solely on his conviction for one count of incest. We refuse to find that the court was being untruthful; thus, there was no need to apply the preponderance of the evidence standard established in *Nichols*.

The court held an extremely thorough sentencing hearing, and in explaining its sentence, touched on all factors that courts are to consider at sentencing. The court first addressed the severity of the offense and commenced its sentencing remarks by noting that society has classified incest as a Class F felony subjecting a defendant to a maximum term of 12.5 years (7.5

IC and five ES)—a crime with “significant consequences.” The court acknowledged the severe psychological problems inflicted upon the victim by the act of incest, and it noted for the record that the victim was asking for a maximum sentence. The court did not, however, accept all of what the victim asserted, which reflects a proper act of discretion in weighing the information provided to it. The court ultimately concluded that Lanier’s crime “is extremely serious.”

The court then addressed Lanier’s character, calling it “very poor” and “just not good.” The court described Lanier as a “career” criminal: a five-year prison term at seventeen years of age for theft, followed shortly thereafter by a twenty-six-year prison term for homicide, followed by disorderly conduct and battery (domestic violence), theft, resisting an officer, and bail jumping. The court also addressed Lanier’s failures on probation and his drug and alcohol use.

The court finally addressed the need to protect the public and found that “there’s a high need to protect the public.” The court explained that in its opinion “it’s only a matter of time before Mr. Lanier reoffends in some capacity.... He’s had ample time in corrections. He’s had probation. He hasn’t learned.” The court specifically concluded that the victim needed protection as well as others given Lanier’s history of domestic violence. The court concluded that Lanier “has been extremely violent in his youth, in his past, as well as crimes against persons in Fond du Lac,” and he is a danger to the community. Concluding that “this case really is about confinement to protect the public,” the court imposed the maximum sentence.

The court thoroughly considered all factors we ask courts to consider when sentencing. There is no support in the record for Lanier’s argument that the court improperly considered uncharged crimes—it expressly did not do so, and from an examination of Lanier’s past history, it did not need to do so to support a maximum sentence. As the circuit court did not rely on the

alleged discrepancies in number and nature of other incestual acts and as the sentence imposed has a logical rationale founded upon the *McCleary* factors, we affirm Lanier's judgment of conviction and denial of postconviction motion for resentencing.

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.

Sheila T. Reiff
Clerk of Court of Appeals