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**DISTRICT II/IV**

September 13, 2018

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

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2017AP2372-CR	State of Wisconsin v. Sean A. Nichols (L.C. # 2006CF134)
2017AP2373-CR	State of Wisconsin v. Sean A. Nichols (L.C. # 2009CF46)

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).**

In these consolidated appeals, Sean Nichols appeals from circuit court judgments and orders denying his postconviction motion for resentencing. Nichols contends that the circuit court did not adequately explain the basis for the sentences it imposed following the revocation of Nichols' probation for two counts of bail jumping and two counts of failure to pay child support. Nichols also argues that his sentences were harsh and excessive. 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).<sup>1</sup> We reject Nichols' arguments and affirm.

In 2006, Nichols was charged with thirteen counts of failure to pay child support. The complaint alleged that Nichols had not made any child support payments following his divorce in 2000, and that he owed \$17,269 as of November 2004. Nichols was released on cash bail and ordered not to leave the State of Wisconsin. After forfeiting his bail by failing to appear at a subsequent hearing, Nichols was arrested in South Carolina for various drug offenses. Nichols was then charged with two counts of felony bail jumping.

In 2009, Nichols entered *Alford*<sup>2</sup> pleas to four counts of failing to pay child support and also pleaded guilty to the two bail jumping counts. Pursuant to the parties' joint recommendation, the circuit court imposed concurrent sentences of six years of probation for two of the failure to support counts and two of the bail jumping counts, during which time Nichols was required to pay his child support arrearages.<sup>3</sup> At the time, Nichols expressed confidence that he would be able to pay his arrearages and successfully complete probation, even though he was also supporting children in Colorado and Maine.

However, Nichols did not make any payments toward his Wisconsin child support obligations. Instead, Nichols absconded from supervision in 2010 and remained on the run until

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

<sup>2</sup> *See North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>3</sup> The two remaining counts for failure to pay child support are not subjects of this appeal.

2016, when he was arrested in Oregon on ten different charges including hit and run, reckless endangerment, driving under the influence, possession of methamphetamine, and giving a false name to law enforcement. The Department of Corrections initiated revocation proceedings in 2017, with Nichols owing more than \$45,000 on his court-ordered obligations. At Nichols' post-revocation sentencing hearing, the circuit court sentenced Nichols to eighteen months of initial confinement and two years of extended supervision for each of the failure to support counts, concurrent to each other. The court also imposed concurrent sentences of three years of initial confinement and three years of extended supervision for the two bail jumping counts, and ordered that these sentences be served consecutive to the failure to support sentences.

Nichols filed a postconviction motion for resentencing, arguing that the circuit court did not adequately explain its sentence and that the sentences were harsh and excessive. The circuit court denied this motion after a hearing. Nichols appeals.

We review sentencing after revocation “on a global basis, treating the latter sentencing as a continuum of the” original sentencing hearing. *State v. Wegner*, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289. At sentencing after probation revocation, the court considers many of the same objectives and factors that it considered at the original sentencing hearing. *See id.* The discretion of the sentencing judge must be exercised on a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). “When imposing a sentence, the trial court must consider the gravity of the offense, the offender’s character and the public’s need for protection.” *State v. Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112. “There are several additional factors, related to the primary factors, that the court is allowed to consider if deemed appropriate.” *State v. Owens*, 2006 WI App 75, ¶8, 291 Wis. 2d 229, 713 N.W.2d 187. The weight given to any of these factors is left

to the circuit court's broad discretion. *Steele*, 246 Wis. 2d 744, ¶10. "A trial court misuses its discretion when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one factor in the face of other contravening factors." *Id.*

At the original sentencing hearing, the circuit court explained that failing to pay child support was "a really serious offense in my mind" and discussed at length the seriousness of Nichols' decision to turn his back on his child. The circuit court also noted the significance of the fact that Nichols forfeited his bail only to end up committing other felonies in South Carolina, far from any of his children.

At the post-revocation sentencing hearing, the prosecutor argued that Nichols had "engaged in probably one of the worst efforts to avoid responsibility for pending legal obligations as I've ever seen." Among other things, Nichols was now facing new criminal charges in Oregon and Utah, and law enforcement determined that Nichols had used approximately ten different aliases to avoid detection. The prosecutor concluded that "the bottom line for this defendant is that ... he has proven to be completely untrustworthy and disobedient to certain basic essential rules of society" and has "declared himself by his own conduct to be an outlaw." Accordingly, the State requested prison sentences of one and a half years initial confinement and two years extended supervision on the failure to pay child support charges, concurrent to each other, and three years initial confinement and three years extended supervision on the bail jumping counts, concurrent to each other but consecutive to the child support counts.

In arguing for a lower sentence, Nichols explained that he had three other children to support. Nichols claimed that the judge's comments at the earlier sentencing hearing had made a strong impact on him and inspired him to be a good father to his other children. Nichols also asserted that he had not been the driver of the vehicle involved in the Oregon hit and run and that he "got the charges dismissed."

The circuit court began its comments by saying, "believe it or not, I remember you." The court questioned whether "the story you're telling me is exactly the way this developed," but agreed to give Nichols' statements the benefit of the doubt on the pending Oregon charges. However, the court stated that it took "a dim view" of Nichols' abandonment of his parental obligations. The court explained that, in failing to support his child, "not only do you fail to fulfill your parental obligations but you foist that onto the state." The fact that Nichols argued that he needed a lower sentence in order to support his other children "just rubs salt in the wound ... because it says you have the ability and you've just chosen not to deal with this." Immediately before imposing sentence, the circuit court noted that it had previously given Nichols "the opportunity to get this straightened out," but Nichols had failed to do so. The circuit court then imposed the sentences recommended by the State.

Nichols now argues that the court did not identify the factors it was considering in imposing these sentences, nor did it explain the objectives of its sentences. At the hearing on Nichols' postconviction motion for resentencing, the circuit court explained that the two relevant factors at sentencing were Nichols' character as well as the gravity of his offenses. However, Nichols argues that the court should have also considered the need to protect the public and the need for deterrence. In its ruling on the postconviction motion, the circuit court explained that it did not address either of these objectives because this case was not about protecting the public,

nor did the court believe that Nichols' sentence would have any deterrent effect. A sentencing court is not required to "enumerate all of the factors that might have been considered in reaching the decision." *State v. Grady*, 2007 WI 81, ¶41, 302 Wis. 2d 80, 734 N.W.2d 364. Instead, the court has "discretion ... to discuss only those factors it believes are relevant." *Id.* We see no error in the fact that the circuit court did not address sentencing factors that it did not believe were relevant to this particular case.<sup>4</sup>

Nichols also argues that the circuit court did not adequately address his character because the court focused only on Nichols' failure to pay child support and did not identify any other positive or negative aspects of Nichols' character. But Nichols only points to one potentially mitigating factor, namely, his efforts to support his three other children. "Whether a particular factor or characteristic relating to a defendant will be construed as either a mitigating or aggravating circumstance will depend upon the particular defendant and the particular case." *State v. Thompson*, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992). Here, the circuit court treated Nichols' desire to support his out-of-state children as a negative factor in light of Nichols' complete failure to support his Wisconsin child. The court specifically addressed the significance of this factor, explaining, "What message does that send to the child in the State of Wisconsin that's your child? That I don't give a rip about you because I'm taking care of my others kids." Nichols has not shown that the court's assessment of this factor was unreasonable or unjustifiable. *See State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 435, 351 N.W.2d 758

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<sup>4</sup> We further note that the circuit court's determination that there was no need to protect the public from Nichols likely worked in Nichols' favor. Indeed, the court chose to disregard the incident that occurred in Oregon, even though the court questioned whether Nichols reliably reported the Oregon charge had been dismissed.

(Ct. App. 1984) (The strong policy against appellate interference with sentencing discretion places the burden on the defendant to “show some unreasonable or unjustifiable basis in the record.”).

Nichols further argues that the circuit court failed to explain what its goal was in imposing sentence, or how the confinement portion of its sentences furthered that goal. During the postconviction hearing, the circuit court explained that “[t]his is pretty much a punishment sentence, taking in the two factors.” Punishment of the defendant is a valid sentencing objective. See *Gallion*, 270 Wis. 2d 535, ¶40. Nonetheless, Nichols argues that the sentencing transcript contains no indication that this was the court’s intent. We disagree. As explained above, the circuit court’s comments at both sentencing hearings focused on the seriousness of Nichols’ offenses and the court’s negative view of Nichols’ character. In addition, the court imposed its post-revocation sentences immediately after explaining that the more lenient sentences that it had previously imposed were not effective. In sum, the circuit court satisfied its obligation to make the rationale for its sentencing decision “knowable and subject to review.” *Id.*, ¶51. While the court’s explanation at the postconviction hearing was clearer than its explanation at the sentencing hearing, the duty to provide an explanation “is not intended to be a semantic trap for circuit courts” or “a call for more ‘magic words.’” *Id.* We therefore conclude that the circuit court adequately explained the basis for its sentence as well as the punitive objectives that it furthered.

Finally, Nichols argues that the sentence was harsh and excessive. We disagree. A circuit court has “discretion in determining the length of sentence within the permissible range set by statute.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We will find an erroneous exercise of 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.” *Id.* We presume that a court has properly exercised its discretion when the sentence is well within the applicable statutory maximums. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Here, the court imposed the maximum terms for each of the four counts, and also ordered the bail jumping sentences to run consecutive to the failure to support sentences. However, the court ran the two failure to support sentences concurrent to each other, and did the same for the two bail jumping sentences. Accordingly, the aggregate sentence for the four counts was half of the total sentence that Nichols was facing. Because the aggregate sentence is well within the applicable statutory maximums, Nichols has not overcome the presumption that the circuit court properly exercised its discretion.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*