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October 3, 2018

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

2017AP2280-CR State of Wisconsin v. Felix D. Dixon, Jr. (L.C. #2015CF282)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Felix D. Dixon, Jr., appeals from a judgment of conviction and an order denying his postconviction motion in which he sought resentencing on grounds that the circuit court misinterpreted Dixon's remarks at sentencing and relied on that misinterpretation. 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 the circuit court's interpretation of Dixon's remarks was reasonable, there was no erroneous exercise of the court's sentencing discretion nor a violation of the due process right to be sentenced upon accurate information. We affirm.

On November 5, 2015, Port Washington Police Officer Kirstin Moertl saw a car—Dixon was later identified as the driver—traveling significantly over the speed limit, and she attempted to stop it. After briefly stopping, Dixon made a U-turn and fled at a high speed, eventually entering the interstate. As Moertl dropped her pursuit, Corporal Justin Kaas, who was on patrol, began his pursuit after observing Dixon pass him at 116 miles per hour. Kaas reached 130 miles per hour before breaking off pursuit in accordance with police policy. Hearing of the chase over dispatch, Mequon Police Officer Robert Mueller positioned his vehicle to assist. Mueller traveled up to 120 miles per hour to catch up to Dixon. The car eventually slowed and came to a stop in a traffic lane.

Dixon was arrested, and his passengers were detained, one of which was his fourteen-year-old sister. Mueller heard Dixon suggest that police would not have caught him had the car not broken down.

Pursuant to agreement, Dixon pled guilty to one count each of fleeing or eluding an officer and second-degree recklessly endangering safety. At sentencing, the State recommended an overall sentence of ten years of imprisonment, split evenly between initial confinement and

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

extended supervision. Dixon's counsel recommended four years, also split evenly between confinement and supervision.

Dixon then addressed the court:

> I would like to apologize for the events of that night. Obviously I was going—on the chase, but like my attorney said, I did panic, and I did take full responsibility for this with the whole way through regardless of whatever the events was of that night. And, you know, I also think that the five in and five out is kind of extreme in a situation like this given, you know, nobody was harmed doing—nobody was harmed during the chase. There was no damage to property or anything like that. I'm accepting full responsibility for my actions.
>
> Does five years—does five years of confinement help me in a situation like this? Probably not because I have been in prison before, and the only thing sending people to prison when you do for extended period of time for a case like this when I am feeling I should not have got that much time on it anyway, it really don't help me. It really only hurt me and it hurt my family because I got kids out there without a father and I was providing for those kids and I have a wife without a supportive system.
>
> So I would like to take full responsibility for my actions and I would like to go with the two in and two out.

The court began its sentencing remarks: "I don't know how to address your comments of it was not that big of a deal because no one got hurt. I am appalled, simply appalled that you would have enough in you with a straight face to say that to this Court." The court recounted the fear it felt as it listened to the officers' preliminary hearing testimony about the high-speed chase. The court asked Dixon rhetorically, "What are you thinking when you say it is no big de[al] because no one got hurt? Only by the grace … of some other spirit or being did no one get hurt."

At this point, Dixon attempted to speak, beginning "Your honor," but the court stopped him. "It is my turn, sir. You had a chance to say whatever you wanted to. It is my turn and you will not interrupt anymore."

The court then told Dixon to look at the officers in the courtroom, explaining that "[t]hey put their lives on the line every day" for people they do not know. It added, "And then I have someone sit in front of me and say it is not that big of a deal because no one got hurt." Dixon, the court explained, put the pursuing officers' lives in danger "because they had to stop you." It also noted the danger faced by Dixon's teenage sister and his other passenger due to his "driving around like a maniac."

After emphasizing the seriousness of the crimes, the court discussed Dixon's criminal record and character, pointing out that he is a repeat offender, having been convicted of resisting-an-officer offenses and drug-related felonies. The court also addressed the need to protect the community, explaining that Dixon is a "danger" and that is why both sides agreed that his crimes called for prison. It gave Dixon sentences totaling sixteen years overall, with nine years of initial confinement and seven years of extended supervision.[2]

Dixon filed a postconviction motion. He sought resentencing, arguing the court erroneously exercised its discretion by mistakenly stating Dixon had called his crimes "no big deal," and the court had relied on this inaccurate information when determining his sentence. In denying the motion, the court explained that it "did not attribute those words to" Dixon and that, instead, "[i]t was the Court's impression of how" Dixon evaluated his crimes—"that he saw his

[2] The maximum overall sentence was twenty-one and one-half years.

actions as no big deal simply because no one was hurt or there was no property damage." Dixon appeals.

We review a circuit court's sentencing decision for an erroneous exercise of discretion. ***State v. Vesper***, 2018 WI App 31, ¶9, 382 Wis. 2d 207, 912 N.W.2d 418. Whether a circuit court has sentenced a defendant based on inaccurate information is a question of law we review de novo. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

Because the sentencing court "is best suited to consider the relevant factors and demeanor of the convicted defendant," ***State v. Borrell***, 167 Wis. 2d 749, 781-82, 482 N.W.2d 883 (1992), we presume the court's sentencing decision is reasonable, ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). Accordingly, it is the defendant's burden to show that the sentence is unreasonable or unjustified. ***Vesper***, 382 Wis. 2d 207, ¶10. If the record "contains evidence that the circuit court properly exercised its discretion, we must affirm." ***Id.***, ¶9 (citation omitted).

"Proper sentencing discretion is demonstrated if the record shows that court examined the facts and stated its reasons for the sentence imposed, using a demonstrated rational process." ***Id.*** (citation omitted). The principal objectives of a sentence include, but are not limited to, protection of the community, punishment of the defendant, deterrence, and rehabilitation. ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. In order to meet the specified objectives, the court should consider all relevant factors, the primary ones being the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight given to each factor is within the sentencing court's broad discretion. ***Id.***

In addition, a reviewing court should not circumscribe a circuit court's discretion to draw reasonable inferences from a defendant's statements. *See* ***State v. Harris***, 174 Wis. 2d 367, 378, 497 N.W.2d 742 (Ct. App. 1993). "It is not within the province of this court or any appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one." ***Id.*** (citation omitted). We may also consider any postconviction amplification or clarification by the sentencing court of its reasoning and decision. *See* ***State v. Helmbrecht***, 2017 WI App 5, ¶13, 373 Wis. 2d 203, 891 N.W.2d 412.

Dixon asserts that his comments at the sentencing hearing neither expressed nor implied that he viewed his actions as "no big deal." His references to the absence of injury and damage, he notes, are both correct and "classic mitigating factors." Further, he argues any inference that he was minimizing the seriousness of his actions was undercut by his acknowledgement that prison was warranted and by his multiple expressions of accepting responsibility. He also asserts the court relied on this mistaken information heavily, advising Dixon at the outset of its sentencing decision that the court was "appalled" by Dixon's "no big deal" attitude and then twice returning to this point. Dixon contends, therefore, the court erroneously exercised its discretion. We disagree.

Deliberately fleeing from police, driving at strikingly high velocities, knowingly entailing high-speed pursuits by three separate officers (each had activated their lights and sirens), and exposing all those nearby—most directly his teenage sister and other passenger—to admitted danger was the conduct being considered by the court at sentencing. Though apologizing and saying he accepted responsibility, Dixon chose for his fairly brief sentencing remarks to point out that no one was injured, no property was damaged, the State's recommended sentence was extreme, and a lengthy confinement would only hurt his wife and kids. Regardless of whether

another court could have viewed his remarks differently or whether Dixon intended to minimize the seriousness of his conduct, it was at least reasonable for the sentencing court to believe that Dixon had done so and that Dixon failed to fully recognize the danger his actions posed. There was nothing inappropriate for the court to characterize its view of Dixon's attitude by using the "no big deal" idiom. Directly observing the proceedings and Dixon himself, the sentencing court was in the "best" position to weigh the "relevant factors and demeanor of the convicted defendant," and we accord full deference to the court's inferences and first-hand impressions unless clearly unreasonable. *See* ***Gallion***, 270 Wis. 2d 535, ¶18 (citation omitted); ***Harris***, 174 Wis. 2d at 747; *see also* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989).

In a related argument, Dixon asserts his due process right to be sentenced on accurate information was violated when the court relied on a statement he never made. A defendant has a due process right to be sentenced upon materially accurate information. ***Tiepelman***, 291 Wis. 2d 179, ¶9. When challenging a sentence on these grounds, the defendant must show (1) the information was inaccurate, and (2) the court actually relied on that information in determining its sentence. ***Id.***, ¶26.

For several reasons, Dixon has not shown a due process violation. As the sentencing court explained at the postconviction motion hearing, it was not attributing "no big deal" as words actually spoken by Dixon, but it was rather attributing "no big deal" as the attitude taken by Dixon of his conduct. It was the court's "impression" of Dixon's attitude. Thus, his sentence was not based on a statement he never made.

Moreover, Dixon has not shown that the court's characterization of his attitude is the type of information that can be reviewed for accuracy (as opposed to being reviewed for

reasonableness, which we have already done) and serve as grounds for a sentencing do-over. *See* ***United States v. Turner***, 864 F.2d 1394, 1400 (7th Cir. 1989) (dispute over whether defendant's attitude was "recalcitrant" and "stubborn" was not a dispute of facts but a dispute of how to characterize the facts; it was not the type of "misinformation" of "constitutional magnitude" that could justify resentencing). In this regard, the case authorities cited by Dixon do not involve such characterizations or impressions of a person's attitude or demeanor, but rather facts that can be tested for accuracy or validity. *See* ***United States v. Tucker***, 404 U.S. 443, 447 (1972) (existence or validity of a defendant's prior convictions); ***State v. Travis***, 2013 WI 38, ¶¶9-10, 347 Wis. 2d 142, 832 N.W.2d 491 (sentence imposed on the error that defendant was subject to a mandatory minimum of five-year period of confinement); ***Tiepelman***, 291 Wis. 2d 179, ¶¶6, 29 (sentence imposed based on mistake that defendant had twenty prior convictions rather than five).

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.

Sheila T. Reiff
Clerk of Court of Appeals