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DISTRICT II

November 21, 2018

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

2017AP1660-CR

State of Wisconsin v. Zachary M. Hurt (L.C. #2016CF44)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Zachary M. Hurt appeals from a judgment of conviction and an order denying his postconviction motion seeking sentencing relief. 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.

Hurt was charged with committing four sexually-related offenses against a twelve-year-old member of his immediate family. Hurt digitally penetrated the victim while she was sleeping. Hurt admitted that the assault occurred but told police he was so high on a cocktail of drugs that he thought the young victim was his girlfriend who had recently moved out. Hurt pled no contest to one count of incest.

The presentence investigation report (PSI) prepared for sentencing did not include a Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment.² At sentencing, the court asked the PSI writer about the basis for her recommendation. The PSI writer said her recommendation was based on Hurt's COMPAS scores, which she characterized as "off the charts," and on the Felony C offense grid.

The *Loomis* decision was released after Hurt's sentencing. It held that the COMPAS assessment could be used at sentencing with certain limitations. The COMPAS tool cannot be used at sentencing "(1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence." *State v. Loomis*, 2016 WI 68, ¶98, 371 Wis. 2d 235, 881 N.W.2d 749. Further, "risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community." *Id.*

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

² Prior to Hurt's sentencing, Department of Corrections (DOC) staff were directed to remove from all PSIs "any reference to the COMPAS assessment" due to the pending case of *State v. Loomis*, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749, which was expected to address the permissible use of the COMPAS tool at sentencing.

Hurt filed a postconviction motion for resentencing on grounds that his due process rights were violated because the circuit court improperly considered his COMPAS scores and because the COMPAS scores were inaccurate. Because the circuit court ordered no contact with minor females as a condition of Hurt's extended supervision, he asked the court to modify this condition to permit contact with his young daughter. The circuit court denied the postconviction motion in full, by written decision. Hurt appeals.

Hurt maintains that the circuit court improperly considered the COMPAS scores to determine that incarceration was necessary.³ We disagree. The circuit court specifically stated that its sentencing determination was not based upon Hurt's COMPAS scores, which it never even saw. The record of Hurt's sentencing bears this out. The court considered the PSI narrative, the defense's alternative evaluation, both parties' recommendations, and the relevant sentencing factors. The circuit court determined that Hurt presented a risk to the community based on his extensive history in juvenile court and his failure to follow through with rehabilitative services. At sentencing, the court meticulously detailed its exercise of discretion, considering aggravating and mitigating factors independent of the COMPAS data. Hurt received a highly individualized sentence directly related to the severity of the crime, his character and rehabilitative needs, his history of not taking responsibility for his actions, and community safety. He is not entitled to resentencing based on the PSI writer's reference to his COMPAS scores.

³ The *Loomis* court also directed that any PSI containing a COMPAS risk assessment include language warning the sentencing court about the limitations and permissible uses of the COMPAS tool. We reject Hurt's argument that the lack of the *Loomis* warnings in his PSI violated due process; his PSI did not contain a COMPAS assessment.

Nor is Hurt entitled to resentencing based on his assertion that the PSI writer incorrectly calculated his COMPAS scores, thereby misrepresenting his recidivism risk as “off the charts.” Here, Hurt relies on the notion that while the PSI writer scored him in the tenth decile for two categories and in the ninth decile for a third, his COMPAS numbers have since been corrected to place him in the eight, ninth, and tenth deciles. Hurt has not demonstrated that the circuit court relied on inaccurate information at sentencing. *See State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1. Aside from the fact that the changes in decile appear immaterial, the sentencing court never saw the original COMPAS chart and, in fact, specifically disclaimed any consideration of the COMPAS numbers. There was no actual reliance on Hurt’s decile scores.

Finally, the sentencing court properly exercised its discretion in imposing as a condition of extended supervision that Hurt was to have no contact with minor females, including his daughter. “Sentencing courts have wide discretion and may impose any conditions of probation or supervision that appear to be reasonable and appropriate.” *State v. Stewart*, 2006 WI App 67, ¶11, 291 Wis. 2d 480, 713 N.W.2d 165. Conditions of supervision “may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person’s rehabilitation.” *Id.*, ¶12. Hurt sexually assaulted a twelve-year-old, closely related female with whom he was in a position of trust. His daughter will be around the same age when Hurt is released to supervision. Hurt, who blamed his “mistake” on drugs and alcohol, has a history of failing to follow through with treatment. The circuit court could reasonably determine that the no contact condition was appropriate to assist Hurt in conforming his conduct to the law, and to protect the community. *See State v. Rowan*, 2012 WI 60, ¶10, 341 Wis. 2d 281, 814 N.W.2d 854.

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