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**DISTRICT II**

June 12, 2019

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

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2018AP1107-CR

State of Wisconsin v. Damont L. Carey (L.C. #2010CF729)

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).**

Damont L. Carey appeals from a judgment of conviction for first-degree intentional homicide as party to a crime and an order denying his postconviction motion for resentencing. Carey argues that the sentencing court erroneously exercised its discretion by punishing Carey for declining to testify against his codefendant. 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 (2017-18).<sup>1</sup> As the circuit court properly exercised its sentencing discretion, we affirm the judgment of conviction and order denying postconviction relief.

In the middle of the night on July 23, 2008, Carey and his codefendant broke into the victim's home to rob him of his money and drugs. Carey's codefendant murdered the victim during the robbery. Carey was charged with first-degree intentional homicide with use of a dangerous weapon, armed robbery with use of force, and armed burglary all as party to a crime. Pursuant to a plea agreement with the State, Carey pled guilty to first-degree intentional homicide and agreed to testify as a witness at his codefendant's trial.<sup>2</sup> In exchange, the State agreed to dismiss the penalty enhancer, dismiss and read in the remaining charges as well as additional charges in a different case, remain silent as to his extended supervision eligibility date, and ask that Carey's sentence run concurrent to the federal sentence he was serving.<sup>3</sup>

Carey's sentencing was delayed repeatedly due to rescheduling of his codefendant's trial. Carey stated at a status hearing that he was "sick of this" and ultimately decided that he was not willing to testify against his codefendant. At sentencing, the court found that Carey had breached the plea agreement, noting that based on Carey's decision not to testify, it was "assuming that at this particular point in time the State is free to argue" at sentencing. Defense counsel agreed with the court's understanding. The State argued that Carey had "thumbed his

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

<sup>2</sup> For what the State characterizes as "a variety of reasons," over four and one-half years elapsed between the filing of the criminal complaint and Carey's plea. At the time, Carey was serving a fifteen-year federal sentence.

<sup>3</sup> At the plea hearing, the court confirmed on the record that the State's plea offer was based on Carey's agreement to testify against his codefendant, and Carey also confirmed that he understood that the recommendation was based on his truthful testimony.

nose” at the State and that “life should mean life.” Defense counsel sought eligibility for release after twenty years as well as a concurrent sentence and implied that Carey was fearful of his safety if he testified against his codefendant. The sentencing court imposed life imprisonment without eligibility for release to extended supervision.

Carey filed a postconviction motion seeking resentencing on the grounds that the sentencing court erred by relying on his decision not to testify, claiming that the court “did not appreciate the importance of the reason for Mr. Carey’s choice not to cooperate” and that his noncooperation was “*the* factor in imposing a sentence which allowed no possibility for release.” The circuit court denied the motion after a hearing, explaining that Carey was not given more confinement time because he failed to testify.

On appeal, Carey argues that the circuit court erroneously exercised its sentencing discretion. Sentencing lies within the trial court’s discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. “Under the erroneous exercise of discretion standard, ‘the circuit court’s determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record.’” *State v. Salas Gayton*, 2016 WI 58, ¶20, 370 Wis. 2d 264, 882 N.W.2d 459 (citation omitted). We afford the sentencing court “a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.” *Gallion*, 270 Wis. 2d 535, ¶18 (citation omitted). “To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record.” *State v. Cooper*, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983).

“When making a sentencing determination, a court must consider the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant, as well as any appropriate mitigating or aggravating factors.” *Salas Gayton*, 370 Wis. 2d 264, ¶22. The weight of the various sentencing factors is within the circuit court’s discretion. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The sentencing court’s discretion is not unlimited, however, and we will find an erroneous exercise of discretion where the court imposes a sentence that is “based on or in actual reliance upon clearly irrelevant or improper factors.” *Salas Gayton*, 370 Wis. 2d 264, ¶24 (citation omitted). “A defendant will prevail on a challenge to his or her sentence if he or she proves by clear and convincing evidence that the circuit court actually relied on an improper factor at sentencing.” *Id.*

Carey argues that the sentencing court erroneously exercised its discretion by punishing Carey for declining to testify against his codefendant. Carey acknowledges that “[a]s a general proposition, a sentencing court may consider a defendant’s refusal to assist law enforcement when factoring a sentence.” He suggests, however, that the “motive for not testifying is crucial to whether the choice not to testify is an appropriate aggravating sentencing factor.”

We summarily affirm the sentencing court’s decision based on *Roberts v. United States*, 445 U.S. 552 (1980), and *State v. Kaczynski*, 2002 WI App 276, 258 Wis. 2d 653, 654 N.W.2d 300. In *Roberts*, the United States Supreme Court held that the sentencing court may consider a defendant’s refusal to cooperate with the government. *Roberts*, 445 U.S. at 556-58. “[G]ross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship,” explained the Court, which went on to state that “[t]his deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination ... the criminal

defendant no less than any other citizen is obliged to assist the authorities.” *Id.* at 558. The Court concluded that a defendant’s failure to cooperate spoke to his or her character and prospect for rehabilitation.<sup>4</sup> *Id.* at 557.

In *Kaczynski*, a case factually on point, this court examined whether a sentencing court erroneously exercised its discretion by considering the defendant’s refusal to cooperate with law enforcement and reveal his accomplice where the defendant argued that he was afraid of retaliation for being “labeled a snitch going into the prison system.” *Kaczynski*, 258 Wis. 2d 653, ¶¶1-3, 10. The circuit court stated that it ordered a higher sentence than it “would have otherwise ordered” due to Kaczynski’s refusal to name his accomplice. *Id.*, ¶8. We affirmed the circuit court’s sentencing decision, explaining that

we cannot ... decree that it is an erroneous exercise of sentencing discretion for a trial court to enhance a sentence when a defendant’s refusal to cooperate is based on his or her incantation of a fear of retaliation—even when that fear might be justified. To do so, would be to enact the “Tony Soprano” “code of silence” into the substantive law of this state. This we refuse to do.

*Id.*, ¶11.

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<sup>4</sup> Carey argues that the circuit court failed to make findings, as required by *Roberts*, as to why the defendant refused to assist law enforcement. As the State explains, the *Roberts* majority made no such mandate as it was Justice Brennan’s concurrence that suggested that “sentencing judges should conduct an inquiry into the circumstances of silence where a defendant indicates before sentencing that his refusal to cooperate is prompted by constitutionally protected, or morally defensible, motives.” *Roberts v. United States*, 445 U.S. 552, 563 (1980) (Brennan, J., concurring). Further, the circuit court in this case did accept defense counsel’s offer of proof at the postconviction hearing that Carey would likely be subject to repercussions if he testified, but it also found that Carey was frustrated by the delays. See *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20 (“[W]hen we review a sentence, we still look to the entire record, including any postconviction proceedings and to the totality of the court’s remarks.”).

In this case, Carey cannot establish by clear and convincing evidence that the circuit court relied on an improper sentencing factor as, under *Roberts* and *Kaczynski*, the sentencing court properly considered his refusal to testify against his codefendant. The record reveals that the circuit court considered Carey’s fear of retaliation, but it gave greater weight to other sentencing factors, including the severity of the crime—a “home invasion” with the victim killed “execution” style while his family was in the house—as well as Carey’s long criminal history, noting that “as much as [it] would like to think that Mr. Carey can be rehabilitated, [it does not] think he can be.” Further, Carey entered into a plea agreement with the State with the understanding that it was based, at least in part, on his willingness to testify against his codefendant. Carey broke that agreement—that promise—which speaks to his character and his rehabilitative prospects. The court also appropriately noted mitigating factoring, including Carey’s difficult childhood, the fact that he was an intelligent man, and Carey’s wish to mentor younger men in prison. The court was under no obligation to follow defense counsel’s sentencing recommendation of eligibility for extended supervision after twenty years, which the court repeatedly stated it was rejecting due to Carey’s lengthy criminal history. We conclude that the sentencing court properly exercised its discretion.

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.

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