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DISTRICT IV

September 13, 2019

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

2018AP2013-CR State of Wisconsin v. Demonz Amonte McClain
(L.C. # 2016CF122)

Before Fitzpatrick, P.J., Blanchard and Kloppenburg, 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).

Demonz McClain, by counsel, appeals his judgment of conviction and an order denying his postconviction motion for resentencing. On appeal, McClain argues that the circuit court erroneously exercised its discretion by imposing an excessive sentence. Based upon our review

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

The State charged McClain with four counts of false imprisonment and one count of armed robbery, all as a party to a crime. Pursuant to a plea agreement, McClain pled no contest to one count of armed robbery and one count of false imprisonment, and the remaining charges were dismissed and read in. McClain faced a maximum of twenty-eight years of initial confinement and eighteen years of extended supervision.[2] The circuit court sentenced McClain to four years of initial confinement and four years of extended supervision in connection with the armed robbery count, and one year of initial confinement and two years of extended supervision in connection with the false imprisonment count, to be served concurrently. McClain argues on appeal that the court imposed an excessive sentence and placed undue weight on his initial failure to cooperate with the police investigation of the robbery.

In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). We may find that the circuit court erroneously exercised its discretion in setting the length of a sentence when "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." ***Ocanas v. State***, 70

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

[2] *See* WIS. STAT. §§ 943.32(2) (classifying armed robbery as a Class C felony), 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony); 940.30 (classifying false imprisonment as a Class H felony); and 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony).

Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A sentence that is well within the maximum is not so disproportionate as to shock the sense of what is right and proper. ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

We note that the sentences McClain received were well within the maximum the circuit court could impose, and also were less than the State's recommendation, which was a total imprisonment term of sixteen years. In addition, the record reflects that the court properly considered the standard sentencing factors and how they applied to McClain's case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶ 39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court noted that armed robbery is one of the most serious crimes that society recognizes. With respect to character, the court discussed McClain's criminal history and stated that his record did "not suggest someone who is taking responsibility" for his actions. The court discussed McClain's youth and his potential for rehabilitation. However, the court also stated that McClain's history did "[not] bode well for his ability to be supervised on probation" and that the serious nature of the offense, and the impact it had on the victims, warranted a prison term.

We reject McClain's argument that the sentencing court erroneously exercised its discretion in considering his failure to cooperate with police. McClain's lack of cooperation was only one sentencing factor among many that the court considered. In addition, the State asserts in its response brief that a defendant's failure to cooperate with law enforcement may be considered by a sentencing court as part of the defendant's character, citing ***State v. Kaczynski***, 2002 WI App 276, ¶9, 258 Wis. 2d 653, 654 N.W.2d 300. McClain has failed to file a reply brief to respond to this assertion. A proposition asserted by a respondent on appeal and not

disputed by the appellant in the reply brief is taken as admitted. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

In sum, we are satisfied that the record reflects a proper exercise of the circuit court's sentencing discretion, and that the court properly denied McClain's postconviction motion for resentencing.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals