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DISTRICT I

December 18, 2019

To:

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Hon. Dennis P. Moroney
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You are hereby notified that the Court has entered the following opinion and order:

2019AP535-CR	State of Wisconsin v. Nykia K.L. Smith (L.C. # 2016CF3636)
2019AP536-CR	State of Wisconsin v. Nykia K.L. Smith (L.C. # 2017CF984)

Before Brash, P.J., Dugan 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).

Nykia K.L. Smith appeals from judgments of convictions entered upon her pleas. She also appeals from an order denying her postconviction motion. Smith contends the circuit court erroneously exercised its discretion by failing to consider her character at sentencing and that trial counsel was ineffective for failing to object to that lack of consideration. Based upon our review of the briefs and record, we conclude at conference that these cases are appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ The judgments and order are summarily affirmed.

In Milwaukee County Circuit Court case No. 2016CF3636, Smith was charged with one count of first-degree reckless injury after she allegedly stabbed her neighbor, K.P.,² during an argument on July 20, 2016. Smith was released on bond. An amended information later increased the charge to one count of attempted first-degree intentional homicide with a dangerous weapon. In Milwaukee County Circuit Court case No. 2017CF984, Smith was charged with one count of first-degree recklessly endangering safety with a dangerous weapon and one count of felony bail jumping, both as an act of domestic abuse, based on allegations that Smith had intentionally hit her boyfriend, D.F., with his car on February 23, 2017.

Smith resolved her cases with separate plea agreements.³ In the 2016 case, she pled no contest to an amended charge of second-degree reckless injury; the parties were free to argue the appropriate sentence. In the 2017 case, Smith pled guilty to the felony bail jumping charge. The endangering safety charge was dismissed and read in, and the State agreed not to make any particular sentencing recommendation.

The cases were consolidated for sentencing, prior to which Smith's attorney filed a three-page sentencing memorandum and several supportive letters on Smith's behalf, which extolled

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

² We observe that Smith's main appellate brief refers to her victims by their first names and last initials. We remind counsel that under WIS. STAT. RULE 809.86(4), "the briefs of the parties shall not, without good cause, identify a victim by any part of his or her name[.]"

³ The Honorable Dennis R. Cimpl accepted Smith's plea in the 2016 case, and the Honorable Michael J. Hanrahan accepted Smith's plea in the 2017 case.

positive aspects of Smith's character. After hearing arguments from both sides and statements from Smith, her mother, and K.P., the court made its sentencing remarks. Ultimately, the sentencing court⁴ sentenced Smith to six years' initial confinement and four years' extended supervision for the reckless injury conviction and a consecutive two years' initial confinement and two years' extended supervision for the bail jumping conviction.

Smith filed a postconviction motion, seeking a new sentencing hearing. She claimed the sentencing court "never referred to any aspects of defendant's character, i.e criminal record, family support, acceptance of responsibility, or any other aspect of Defendant's background." Smith further alleged trial counsel was ineffective for failing to object to the sentencing court's lack of consideration of her character. The circuit court⁵ denied the motion without a hearing, concluding that "[t]he defendant's allegation that the court did not consider her character or the mitigating information presented by counsel is belied by the totality of the sentencing record" and that the record reflects a proper exercise of sentencing discretion. The circuit court thus also rejected the claim of ineffective assistance of counsel. Smith appeals.

Sentencing is committed to the sentencing court's discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has "the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." *See State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with the

⁴ The Honorable Dennis P. Moroney imposed the sentences. We will refer to him in this opinion as the sentencing court.

⁵ Judge Cimply reviewed and denied the postconviction motion. We will refer to him in this opinion as the circuit court.

presumption that the sentencing court acted reasonably. *See id.* We do not interfere with a sentence if discretion was properly exercised. *See id.* at 418-19.

In its exercise of discretion, the sentencing court is to identify the objectives of its sentence. *Gallion*, 270 Wis. 2d 535, ¶40. These objectives include but are not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Id.* In determining its objectives, we expect the sentencing court to consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See id.*, ¶43 n.11; *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the sentencing court's discretion. *Harris*, 326 Wis. 2d 685, ¶28.

Smith asserts that her sentencing memorandum “provided substantial evidence concerning the positive aspects” of her character and complains that the sentencing court “[did] not mention or refer to any of these factors” in its comments. She contends that any comments appearing to refer to her character are really about the seriousness of her offense, and she claims the sentencing court “merely gave lip service” to considerations of her character. She further argues that the sentencing court “must ... consider Defendant’s otherwise exemplary character in fashioning a balanced and proper sentence,” but the “failure to consider anything at all concerning [Smith’s] character is a violation of the requirements of *Gallion*.” We disagree that *Gallion* requires consideration of the defendant’s character in the manner Smith suggests.

Gallion requires sentencing courts “to explain the reasons for the particular sentence they impose” through “reference to the relevant facts and factors[.]” *See id.*, 270 Wis. 2d 535, ¶¶39, 46. The *Gallion* requirements are not, however, “intended to be a semantic trap for [sentencing]

courts” or “a call for more ‘magic words.’” *Id.*, 270 Wis. 2d 535, ¶49. While a sentencing court must explain the reasons for its sentence, it is not required to “enumerate all of the factors that might have been considered in reaching the decision.” See *State v. Grady*, 2007 WI 81, ¶41, 302 Wis. 2d 80, 734 N.W.2d 364. Rather, “[i]t ‘remains within the discretion of the circuit court to discuss only those factors it believes are relevant.’” *Id.* (citing *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20).

Here, our review of the sentencing transcript satisfies us that the sentencing court appropriately considered Smith’s character when imposing sentence, even if such consideration is not as explicit as Smith believes is or should be required. The sentencing court observed that:

there is a lot of dysfunction going on here, and as perhaps a good a person as Miss Smith can be at times and in certain situations, it’s clear to say she was not so under these two circumstances at least. And, you know, and so that’s what we’re here on today.

And I’ve got to take a look at the extreme nature of the conduct, extreme nature of the conduct in the [injury] case. Why? Because I have to protect society and I have to render an appropriate punishment consistent in conjunction with the conduct and the resultant injuries that she was involved with and caused.

It is evident here that the sentencing court considered the multiple opinions that Smith was a good person—*i.e.*, that she had positive character attributes—but determined that the gravity of the offenses and the need to protect the public were factors to which greater weight was due.

The sentencing court additionally commented that Smith hitting D.F. with his own car “indicates a person who is capable of doing some very, very, very bad things.” It expressed its concern that “I don’t know how she’s going to get her whole life together and—and if these are the aberrational situations or this is the way she confronts any type of situation that might be of unhappy nature[.]” From these observations, it is evident that the sentencing court also noted

some potentially negative aspects to Smith's character, such as an apparent difficulty with conflict resolution, which it found necessary to address through sentencing.

The relative weight assigned to the various facets of Smith's character, whether positive or negative, was ultimately a matter for the sentencing court's discretion. While Smith clearly hoped the sentencing court would give greater weight to the positive aspects of her character that she highlighted, the sentencing court was not obligated to do so. We are unpersuaded that discretion was improperly exercised or that *Gallion* was not followed.

Because the sentencing court properly exercised its discretion, any objection by trial counsel to its sentencing comments would have been overruled. Counsel is not ineffective for failing to pursue a meritless objection. See *State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). Thus, the circuit court also properly rejected Smith's claim of ineffective assistance of trial counsel, and it appropriately denied Smith's postconviction motion without a hearing.

Upon the foregoing, therefore,

IT IS ORDERED that the judgments and order are summarily affirmed. See 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