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DISTRICT III

January 7, 2020

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

2018AP1371-CR

State of Wisconsin v. Eugene Donald Songetay
(L. C. No. 2013CF92)

Before Stark, P.J., Hruz and Seidl, 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).

Eugene Songetay appeals from an order denying his motion for resentencing. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21 (2017-18).¹

This matter stems from a one-man serial crime wave in northwest Wisconsin, motivated by the defendant's addiction to methamphetamine. Songetay pleaded guilty to three counts of burglary, one count of receiving stolen property in excess of \$10,000, and one count of felony theft of property in excess of \$10,000. In exchange for his pleas, numerous remaining charges and seven uncharged cases were dismissed and read into the record for sentencing purposes. The circuit court sentenced Songetay to consecutive terms of five years' initial confinement and three years' extended supervision on each of two of the burglary counts; four years' initial confinement and three years' extended supervision on the third burglary count; and one year initial confinement and two years' extended supervision on each of the receiving stolen property and felony theft of property counts.

One of the victims provided a victim impact statement that was read aloud at the sentencing hearing by the State's victim witness coordinator.² In her statement, the victim discussed the burglary and claimed that she arrived home while the burglary was still in progress, but that she was too scared to do anything about it. The victim had apparently suffered a stroke

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

² Songetay erroneously states in his brief to this court that the victim impact statement was read to the court by a "Mr. Teague [sic]." Songetay's mistake is difficult to understand, especially given the fact that Songetay was present at sentencing when Ms. Teague read the victim's statement, and the prosecutor pointed out Songetay's error in response to Songetay's motion for resentencing.

and was placed out of the home before the burglary occurred. It appears the victim may have been confused and was in fact not on the premises when Songetay burglarized her home.

Songetay filed a postconviction motion for resentencing, alleging that inaccurate information was provided in the victim impact statement, and that the circuit court relied upon it to increase his sentence. The court issued a decision denying Songetay's postconviction motion without a hearing, holding that the court did not rely on the allegedly inaccurate information when imposing sentence.³

Songetay again argues on appeal that the victim impact statement was "almost wholly untrue," and that the circuit court relied on it to increase his sentence. Songetay insists the court denied him due process of law and otherwise erroneously exercised its sentencing discretion by denying his motion for resentencing without an evidentiary hearing.⁴

A defendant must prove by clear and convincing evidence that the circuit court actually relied upon irrelevant or inaccurate factors at sentencing. *See State v. Harris*, 2010 WI 79, ¶66, 326 Wis. 2d 685, 786 N.W.2d 409. Here, four victim impact statements were presented at the sentencing hearing. Unlike the victim's statement at issue in this appeal, the other three victims

³ The Honorable Kenneth Kutz presided at sentencing. The Honorable Melissa Mogen issued the decision and order denying postconviction relief.

⁴ The State argues that Songetay forfeited his claim that the circuit court relied on inaccurate information by not objecting or otherwise bringing it to the court's attention at sentencing. Songetay failed to object to the victim impact statement at the sentencing hearing. Instead, Songetay waited more than one year and seven months to file a postconviction motion. The right to appellate review of even a structural constitutional violation—such as Songetay's due process challenge—may be forfeited by the failure to timely object. *See State v. Pinno*, 2014 WI 74, ¶¶8, 56-57, 356 Wis. 2d 106, 850 N.W.2d 207. In our discretion, however, we decline to apply this rule here and, rather, proceed to a discussion of the merits.

appeared in person at sentencing. One victim described the loss of many items collectively worth thousands of dollars, including personal keepsakes that could not be replaced. He stated, “Pretty much all of my belongings were stolen,” and that Songetay was “arrested with my truck in his possession.” He also stated, “The privacy, obviously, safe feeling in my home is gone forever.” Another victim described how his female friend was at home when Songetay burglarized his house, and how “I bought this place for my retirement and this man took it from me.” The last victim described how he was devastated when Songetay burglarized his home while “I was overseas fighting for my country.”

Songetay does not challenge the accuracy of anything in the other three victim impact statements. Indeed, Songetay does not deny committing the serial burglaries as alleged in the criminal complaint, or stealing tens of thousands of dollars’ worth of property and personal keepsakes. Songetay admits that he was caught red-handed inside the residence of the victim at issue in this appeal when police arrived to investigate.

Songetay only denies the insignificant fact that one of the victims stated in her victim impact statement that she arrived during Songetay’s burglary of her home but was too afraid to do anything about it. However, Songetay did not consider this fact significant enough to alert the circuit court when the statement was read at sentencing, and he also fails to explain on appeal why it took him so long to raise it postconviction.

In any event, although the information in the victim impact statement at issue in the present appeal was somewhat inaccurate—insomuch as the victim was not present at the scene—there is no indication in the record that the circuit court relied on the specific part of this particular victim impact statement where the victim claimed to have arrived home while the

burglary was in progress. Significantly, the court did not mention it when exercising its sentencing discretion. As the court stated in its postconviction decision, “[E]ach of the victims was significantly impacted by the defendant’s actions and conduct, regardless of whether they were at home at the time of the intrusion.”

Instead, the record clearly demonstrates the circuit court’s sentences were primarily motivated by Songetay’s horrendous criminal record of burglaries and dealing in stolen property. The court highlighted “just the sheer volume as well as the fact that you continued to commit offenses while you were out on supervision.” An aggravating factor was also that many of the victims “were friends of [Songetay].” As the court stated in the order denying postconviction relief:

In sentencing the defendant, the Court used the multiple dismissed but read-in counts, as well as the multiple uncharged matters, for purposes of sentencing and restitution. The Court at sentencing counted 18 felony and multiple misdemeanor read-ins, with 7 uncharged offenses, some of which were additional felony offenses. The Court viewed all of the offenses, in particular all of the burglaries, as “extremely serious.”

The circuit court properly determined from all four victim impact statements—as well as from two presentence investigation reports (PSI),⁵—that Songetay violated the victims’ security and peace of mind when he burglarized their homes. These violations resulted in severe emotional and financial impacts on the many victims. In the sentencing court’s words, “At the

⁵ As the decision and order denying postconviction relief noted, “the PSI by the Department of Corrections and the Alternative PSI prepared at the defense’s request, both to a large extent recommended holding defendant accountable for his actions, including initial prison time and extended supervision.” The court-ordered PSI recommended consecutive prison sentences, whereas Songetay’s PSI recommended concurrent sentences.

end of the day, their property was violated, their trust was violated, and they ended up with losses only some of which can be compensated through the criminal court system.”

The record also reveals that the circuit court was motivated by the obvious need to protect the public from someone as dangerous and incorrigible as Songetay. The court emphasized Songetay’s abject failure while on supervision and in drug rehabilitation, stating that his “horrendous track record” outweighed his belated desire to be rehabilitated for his two-decade-long methamphetamine addiction. As the postconviction order stated:

The Court stated that it structured a sentence by balancing the factors and considerations specified, along with the need for rehabilitation and treatment and reviewing the history of the defendant in failing to voluntarily seek treatment options while on supervision or even when he was not subject to supervision by the Department of Corrections.

Quite simply, the circuit court did not impose its sentence based on inaccurate information, and Songetay has failed to prove by clear and convincing evidence that it did so. The court properly rejected Songetay’s meritless argument without an evidentiary hearing. Indeed, Songetay does not explain what testimony he would have elicited at an evidentiary hearing, other than from “the law enforcement officers who investigated the incident to establish that [the victim in the matter at issue in this appeal] was not home during the burglary.” However, the fact that the victim was mistaken when she stated that she arrived home during, rather than after, the burglary does not demonstrate Songetay was entitled to relief. *See State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. Therefore, Songetay has failed to show that an evidentiary hearing would have proven anything of any import.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. 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