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DISTRICT III

July 7, 2020

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

2019AP280-CR State of Wisconsin v. Joseph D. Lussier (L. C. No. 2018CF7)

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).

Joseph Lussier appeals from a judgment, entered upon a jury's verdicts, convicting him of being a party to the crimes of first-degree intentional homicide by use of a dangerous weapon and hiding a corpse, with the latter count as a repeater. Lussier argues the circuit court violated his constitutional right to present a defense because the court denied his request to adjourn his sentencing to a later date to permit him to present evidence, and instead sentenced him on the

same day the jury returned its verdicts. In the alternative, he argues the court erroneously exercised its discretion by denying Lussier's request to adjourn sentencing. 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).[1] We affirm.

After a six-day trial, a jury found both Lussier and his co-defendant, Richard Allen, guilty of the crimes listed above in connection with the December 2017 death of Wayne Valliere, Jr. The State's theory of the case was that the two men killed Valliere because they believed he was a police informant, and they then hid his body in a remote, forested area of Iron County.

During an in-chambers conference prior to closing arguments, the circuit court informed the parties that it intended to proceed directly to sentencing if the jury returned guilty verdicts. Allen's counsel later objected on the record to that procedure, indicating he would like to request a presentence investigation report (PSI) and a later sentencing date. Lussier's counsel joined the objection, explaining: "I don't know that we would be asking for a PSI, but we would intend to put on evidence at a sentencing hearing."

The circuit court then reiterated that it would proceed directly to sentencing if the jury returned guilty verdicts "at a reasonable hour." The court stated it would not order PSIs because it had been "fully informed of all the facts and circumstances necessary to render a decision, and the Court will give each of the defendants a right of allocution, which will enable them to explain anything that I should consider in addition to all the facts presented at trial."

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

After the jury returned its guilty verdicts, both Allen and Lussier renewed their objections to proceeding directly to sentencing. The circuit court again denied their objections, stating: "I believe that the Court is fully advised on all the issues. The Court has the authority to proceed. The Court is going to proceed." In response to a question from Allen's counsel, the court indicated it would allow testimony from the defendants' family members. The court then took a thirty-four minute recess before proceeding with the sentencing hearing.

After the circuit court sentenced Allen, the State and Lussier's counsel made their sentencing recommendations. Lussier did not call any individuals to speak on his behalf, and his counsel informed the court that Lussier's "family had to leave." When asked by the court if he wished to say anything, Lussier simply responded, "Give me what I got coming. I won't scream."

The circuit court ultimately sentenced Lussier to life imprisonment without the possibility of release to extended supervision on the homicide count, plus an additional five years for the dangerous weapon enhancer. On the hiding a corpse count, the court imposed a consecutive sentence of eleven years' initial confinement and five years' extended supervision. This appeal follows.

Lussier first argues "his basic right to present a defense" was violated when the circuit court "refused to allow him to present evidence at sentencing." The Confrontation and Compulsory Process Clauses of the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution each grant defendants a constitutional right to present evidence in their own defense. ***State v. St. George***, 2002 WI 50, ¶14, 252 Wis. 2d 499,

643 N.W.2d 777. Whether this right was violated presents a question of constitutional fact, which we review independently. *See* ***id.***, ¶16.

The State and Lussier agree that no state or federal court has held that the constitutional right to present a defense applies at sentencing. They dispute, however, whether existing law supports a conclusion that the right should apply at sentencing. For his part, Lussier contends it would be "fundamentally unfair for sentencing to continue as a one-sided proceeding," and we should therefore "endorse the right to present a defense at sentencing."

The State responds that the rights to confrontation and compulsory process do not apply at sentencing. Further, the State argues that although a defendant "has due process rights at sentencing," those rights are limited to the rights to be present and to allocution, to be represented by counsel, and to be sentenced based on true and correct information. *See* ***State v. Gallion***, 2004 WI 42, ¶56, 270 Wis. 2d 535, 678 N.W.2d 197.

We need not, and do not, resolve the parties' dispute over whether the constitutional right to present a defense applies at sentencing. Instead, we assume without deciding that that right does apply at sentencing.[2] Still, we conclude that Lussier has failed to show that the circuit court violated that right in this case when it proceeded directly to sentencing after the jury returned its guilty verdicts. "[T]he test for whether the exclusion of evidence violates the right to present a defense has been stated as an inquiry into whether the proffered evidence was 'essential to' the

[2] We also decline the State's invitation to deem Lussier to have forfeited his argument by failing to raise it with specificity before the circuit court. Even assuming the State is correct that Lussier failed to adequately preserve his argument, the forfeiture rule is one of judicial administration and whether to apply it is a matter addressed to our discretion. ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702. We choose to address the merits of Lussier's argument.

defense, and whether without the proffered evidence, the defendant had 'no reasonable means of defending his case.'" ***State v. Williams***, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919 (citation omitted).

Applying that test here, Lussier falls far short of showing that the circuit court violated his right to present a defense at sentencing. We first note that Lussier was permitted to introduce evidence at sentencing. The court permitted Lussier to call family members to offer testimony. When the time came to do so, his family members had apparently left the proceeding for reasons unknown. Nonetheless, the court did not prohibit their testimony.

In addition, Lussier does not identify what evidence or other information he was prevented from introducing as a result of the circuit court's decision to proceed directly to sentencing. To explain, Lussier does not assert he would have called someone to speak on his behalf, or explain what information anyone would have testified to, if sentencing had been delayed. Nor does he argue that he would have asked for a PSI to be prepared—and his counsel at trial specifically informed the court that he did not anticipate making such a request. Instead, as the State aptly notes, "Lussier does not even suggest that anything might have happened differently had the court delayed sentencing." Therefore, even assuming that Lussier had a right to present evidence at sentencing, he has not shown how the court's decision did anything to violate that right.

In the alternative, Lussier argues that the circuit court erroneously exercised its discretion by prohibiting him from presenting evidence at sentencing. It is a well-settled principle of law that a circuit court exercises discretion at sentencing. ***Gallion***, 270 Wis. 2d 535, ¶17. A court

erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record. ***St. George***, 252 Wis. 2d 499, ¶37.

Lussier's cursory argument that the circuit court erroneously exercised its discretion in this case rests on his assertion that the court violated the "strong public policy that the sentencing court be provided with all relevant information." *See* ***State v. Guzman***, 166 Wis. 2d 577, 592, 480 N.W.2d 446 (1992). Again, however, he fails to acknowledge the court did permit him to present testimony from family members. Further, he made no offer of proof at the sentencing hearing as to the relevant information the court required, and he fails to identify on appeal what relevant information the court did not have before it. As a result, he has not shown the court erroneously exercised its discretion in finding that it was "fully informed of all the facts and circumstances necessary to render a decision" and proceeding directly to sentencing after the jury returned its guilty verdicts.

Therefore,

IT IS ORDERED that the judgment is 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