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DISTRICT II

September 9, 2020

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

2019AP1254-CR State of Wisconsin v. Zackary T. Stetina (L.C. #2016CF527)

Before Neubauer, C.J., Gundrum and Davis, 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).

Zackary T. Stetina appeals from a judgment and an order denying postconviction relief.

Upon reviewing the briefs and the record, we conclude at conference this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

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

In 2016, Stetina was involved in two separate attempted armed robberies. The first took place at Carroll University, where Stetina pointed a handgun at two students, racked the gun's slide multiple times, and hit a student with the gun. The students fled and as they ran, they heard what they thought were shots being fired.

The following day, Stetina attempted to rob a New Berlin gas station. He entered the gas station, pointed a gun at the cashier, and demanded that the cashier give him the money from the register. The cashier backed away; Stetina hit the register with the gun, but it did not open. Stetina again pointed the gun at the cashier and pulled the trigger "two to three times," but the gun did not fire. The cashier started throwing things at Stetina until Stetina ran out of the gas station. Despite being tackled by a patron attempting to help, Stetina reached his getaway car and fled.

All told, the State charged Stetina with nine counts for the two events. For the gas station robbery, the State charged Stetina with:

1. Attempted first-degree intentional homicide, use of a dangerous weapon
2. Attempted armed robbery
3. Pointing a firearm at another

For attempting to rob the two university students, the State charged Stetina with:

5. Attempted armed robbery as a party to a crime²
6. First-degree recklessly endangering safety

² In count four, the State charged the getaway driver with attempted armed robbery as a party to a crime in connection with the Carroll University incident.

7. First-degree recklessly endangering safety
8. Pointing a firearm at another
9. Pointing a firearm at another
10. Misdemeanor battery

The parties reached a plea deal. The State agreed that it would amend the first count from attempted first-degree intentional homicide to first-degree recklessly endangering safety because Stetina denied forming the requisite intent to kill and would not accept the plea otherwise. Stetina then pled guilty to counts two and five, the attempted armed robbery charges. The remaining counts were dismissed but read in, and the trial court explained to Stetina that it could consider the dismissed counts as part of his sentence. The court accepted Stetina's pleas following no objections by defense counsel.

At sentencing, the court concluded that despite Stetina's difficult childhood, he still understood the difference between right and wrong. The court stated:

There is a tendency to look at and say this person was from this background or that background, or this person had this advantage or didn't have this advantage, or this person had this problem or not, *but to take a gun and point it at somebody and attempt to rob them of their life, that's pretty much a black-and-white issue.* You know right from wrong when you do that. It's not the drugs doing it, it's not the abuse from when you were younger doing it, it's you making a decision at the time, rightly or wrongly. I don't know what you were thinking, but you made a decision you wanted to try and rob these people and that decision was obviously a terrifying decision for them.

(Emphasis added.)

The court imposed a total sentence of fifteen years' initial confinement and ten years' extended supervision, "based upon the gravity of the offense and the need to protect the public." Stetina's postconviction motion for sentence modification was denied, and this appeal followed.

Stetina claims that he was sentenced based on inaccurate information because even though "the factual basis of the plea specifically exclud[ed] insinuation of attempted homicide," the trial court "said that he attempted to rob someone of their life." "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. We review de novo whether a defendant has been denied this right. *Id.* In a motion for resentencing, the defendant must prove by clear and convincing evidence that the sentencing court actually relied on inaccurate information.³ *Id.*, ¶2; *State v. Harris*, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409.

We find that there was no actual reliance on inaccurate information. First, the record does not, at least on its face, support Stetina's claim that the court equated the amended count one (the read-in charge of first-degree recklessly endangering safety) with the original count one (attempted homicide). In fact, the court did not mention the attempted homicide charge. Instead, the court stated that the armed robbery charges were "very significant" and then used those charges as a basis for the sentence. The crime of armed robbery in and of itself includes the use or threatening the use of a dangerous weapon. WIS. STAT. 943.32(2). Therefore, the court could have reasonably concluded that by pointing a gun at the victims and attempting to fire, Stetina

³ Stetina appeals from "the denial of a sentence-modification motion," but based on his argument on reconsideration and appeal, we treat his appeal as one for resentencing. See *State v. Wood*, 2007 WI App 190, ¶¶4-6, 305 Wis. 2d 133, 738 N.W.2d 81.

was indeed attempting to “rob someone of their life.” It is well established that a trial court may draw such reasonable inferences from the entirety of the record, in the exercise of its sentencing discretion. *See State v. Frey*, 2012 WI 99, ¶¶45, 47, 343 Wis. 2d 358, 817 N.W.2d 436.

Second, even assuming Stetina’s first argument—that the above inference represented the trial court’s inaccurate conclusion that Stetina attempted homicide—we find no reliance on this alleged inaccuracy. The trial court’s sentence was based on the gravity of the offenses and the need to protect the public. The court felt that armed robbery was “a very significant crime, a violent crime, a crime that gives a violent connotation to the community” and that it accordingly deserved a “significant” sentence. In that context, the fleeting “rob them of their life” reference does not appear to indicate that the court was making or relying on a finding that Stetina formed an intent to kill his victims. Indeed, in the same colloquy the court said, “I don’t know what you were thinking.” Rather, the court was convinced that Stetina’s actions were deliberate and could not be excused by his troubled past, drug problems, or abuse. This interpretation is supported by the trial court’s order denying postconviction relief, in which the court explained that Stetina was “selectively tak[ing] out of context” a comment made during its discussion of Stetina’s character. Notably, in the course of sentencing, the court did not return to its “rob them of their life” comment or otherwise suggest that it was basing its sentence on attempted homicide, further indicating that the court did not rely upon the statement.

In short, there is no clear and convincing evidence that the trial court relied on inaccurate information. Rather, the court provided a suitable rationale for imposing the sentence that it did. Accordingly, we affirm.

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.

Sheila T. Reiff
Clerk of Court of Appeals