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DISTRICT II

November 18, 2020

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

2019AP1921-CR

State of Wisconsin v. Albert F. West (L.C. #2017CF61)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

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).

Albert F. West appeals from his judgment of conviction and from an order denying his postconviction motion seeking resentencing before a different judge. West argues that the sentencing court erroneously exercised its discretion by using a “preconceived sentencing

policy” and was objectively biased. 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 summarily affirm.

West pled guilty to one count of delivery of cocaine, pursuant to WIS. STAT. § 961.41(1)(cm)1g., as a repeater. Two counts of delivery of cocaine and one count of delivery of a noncontrolled substance as a controlled substance, also all as a repeater and as a second or subsequent offense, were dismissed and read in. In return for West’s plea, the State agreed to recommend two years’ initial confinement (IC), consecutive to any sentence West was serving. The State was free to argue the amount of extended supervision (ES).

After accepting West’s plea, the sentencing court ordered a presentence investigation report (PSI), which recommended three years’ IC and three years’ ES. At sentencing, the State requested two years’ IC to be served consecutively—as was agreed—with four years’ ES; West asked for two years’ IC and two years’ ES. The court sentenced West to four years’ IC and three years’ ES, consecutive to any other sentence.

West sought resentencing before a different judge in a postconviction motion, arguing that the court erroneously exercised its discretion during sentencing by relying on “a preconceived sentencing policy that ignored factors specific to the case at hand” and that the court was objectively biased. At the postconviction hearing, the court noted the various factors it considered at sentencing, most notably West’s criminal history, and reiterated that “jail and

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

prison hadn't gotten the point across that Mr. West can't sell drugs." The court denied the motion. West appeals.

On appeal, West does not dispute that the sentencing court properly referenced the *Gallion*² sentencing factors. West's challenge, then, is that the court erroneously exercised its discretion by engaging in a "mechanistic" approach to sentencing. He claims *State v. Ogden*, 199 Wis. 2d 566, 571-72, 544 N.W.2d 574 (1996) (citation omitted), prohibits a court from engaging in a "preconceived policy of sentencing that is 'closed to individual mitigating factors.'" As the *Ogden* court explained, "Such inflexibility, which 'bespeaks a made-up mind,' is unacceptable." *Id.* (citation omitted); *see also State v. Martin*, 100 Wis. 2d 326, 327, 302 N.W.2d 58 (Ct. App. 1981). West argues the court engaged in such behavior when it indicated that it "normally look[s] at escalating penalties ... if you keep committing crimes, you should be punished a little bit more," then announced that "any confinement has to exceed the three years that I gave him back in 2005 or thereabouts," and then sentenced West to four years' IC.

We begin by noting that sentencing is left to the discretion of the circuit court. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. On review, we "start with the presumption that the [sentencing] court acted reasonably," *Ogden*, 199 Wis. 2d at 571 (citation omitted), and we are limited to determining if the court's discretion was erroneously exercised, *Gallion*, 270 Wis. 2d 535, ¶17. We require courts to set forth their reasons for the sentence imposed on the record. *Gallion*, 270 Wis. 2d 535, ¶¶1-5. Specifically, sentencing courts must address the gravity of the offense, the character of the offender, and the need to protect the

² *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

public. *Id.*, ¶40; *Ogden*, 199 Wis. 2d at 571; *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984).

In *Ogden*, the erroneous exercise of discretion related to the court’s denial of Huber privileges as a matter of the court’s own “procedures and policies” without consideration of the offender’s situation. *Ogden*, 199 Wis. 2d at 572. Such a “mechanistic” approach, our supreme court said, was an error, as it evidenced that no discretion was in fact being exercised by the sentencing court. *Id.* In *Martin*, we likewise found an erroneous exercise of sentencing discretion when the court stated that it would “never grant straight probation to a person convicted of” Martin’s offense. *Martin*, 100 Wis. 2d at 327. We held that such a preconceived policy was improper, as it failed to address the offender’s individual mitigating factors. *Id.*

We conclude that the sentencing court in this case did not erroneously exercise its discretion. A sentencing court is not precluded from having “general predispositions” so long as the court takes into account the “particular circumstances of the individual offender.” *Ogden*, 199 Wis. 2d at 573. We have no hesitation in concluding that the sentencing court, while clearly having an opinion that those who do not learn from their mistakes may need escalating penalties, properly applied and considered West’s individual characteristics—both pro and con—in fashioning West’s sentence.

The sentencing court considered the severity of West’s crime, noting that his offense was “mid to high level” in severity, as West had been charged with multiple transactions and self-identified as a “good drug dealer.” The court also addressed West’s character, explaining that he has a GED, close family relationships, and no problems with alcohol or drug abuse. The court, however, also recounted West’s twenty-five-year criminal history with multiple drug

convictions, sex offenses, escape, and that he was revoked from supervision “five to six times.” The court properly considered that West’s fifteen stints in jail or prison “haven’t gotten the point across that [he] can’t sell drugs.”

Most importantly, the court considered the “need to protect the public.” The court, given West’s history, clearly did not erroneously exercise its discretion in concluding that the need to protect the public was “high,” as West continued to commit crimes and sell drugs “even though he’s been in jail and in prison.” We have no hesitation in finding that the court did not mechanistically sentence West; instead, it applied the proper sentencing factors to West’s particular circumstances and addressed West’s individual characteristics and history. The court did not err.

West next argues that he is entitled to resentencing as the court was objectively biased. West’s challenge focuses on the court’s comment, “I think any confinement has to exceed the three years that I gave him” on the 2008 sexual assault conviction, which West argues demonstrates objective bias. An objective bias claim “asks whether a reasonable person could question the judge’s impartiality.” *State v. Gudgeon*, 2006 WI App 143, ¶21, 295 Wis. 2d 189, 720 N.W.2d 114. We begin with the presumption that the court was unbiased. *Id.*, ¶20. We conclude that West’s argument is without merit.

West is simply rephrasing his first claim of erroneous exercise of sentencing discretion as an “objective” argument. As we found above, the sentencing court considered West’s history, and only after considering the primary sentencing factors, did the court comment on its general view that escalating penalties may be appropriate: “I *normally* look at escalating penalties. I mean, if you keep committing crimes, you should be punished a little bit more.” (Emphasis

added.) The sentencing court made an individualized sentence based upon all of the proper sentencing factors and appropriately sentenced West for his crime.

As West received an individualized sentence free of any erroneous exercise of discretion and one which a reasonable person would not question the sentencing court's impartiality, we affirm West's judgment of conviction and the court's denial of his request for resentencing.

Upon the foregoing reasons,

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