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DISTRICT II

December 16, 2020

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

2019AP1048

State of Wisconsin v. Eric S. Conley (L.C. #2013CF1205)

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).

Eric S. Conley appeals pro se from an order denying his postconviction motion. He seeks resentencing on several grounds. 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.

In 2013, the State charged Conley with two counts of armed robbery as a repeater for robbing two stores. In the first robbery, Conley told the store clerk, “I need the money. Nothing personal. I just need the money,” and he lifted up his shirt to show a handgun. In the second, Conley demanded money from the store clerk and said, “I’m not playing. I have a gun. I will shoot you.” The second store clerk saw a bulge in Conley’s waistline that he thought was a gun.

Conley pled to the first charge with the repeater enhancer dismissed. The second charge was dismissed and read-in.

During its sentencing remarks, the circuit court said that Conley’s crime “involve[d] a gun, a loaded gun, in the face of a store clerk which, you know, is extremely dangerous.” It added, “[a]nd you’re going into a store and you’re sticking [a gun] in someone’s face and telling them your money or your life basically.” It further observed, “you know, the decision to pull that trigger or not pull the trigger is just so dangerous. You know, it’s one of the worst offenses that a person can be involved in.”

Ultimately, the circuit court sentenced Conley to twenty years of initial confinement and ten years of extended supervision. It found him eligible for the early-release Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP), but only after he served ten years of confinement. The court ordered Conley to pay a DNA surcharge. It also ordered

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

him to pay restitution as a condition of extended supervision. The judgment of conviction authorized the department of corrections (DOC) to take fifty percent of all money Conley receives while in prison to pay restitution.

Conley did not have a direct appeal. However, in July 2018, he sent the circuit court a letter challenging aspects of his conviction.² Conley argued, among other things, that the DNA surcharge was an ex post facto violation and that the court infringed upon his due process rights by authorizing the DOC to withhold money he received to pay restitution. The court rejected the arguments.

In March 2019, Conley filed a postconviction motion pursuant to WIS. STAT. § 974.06. In it, he maintained that the circuit court sentenced him based on inaccurate information when it said that he put a gun in a store clerk's face and implied that he was ready to pull the trigger. Additionally, he complained that the court gave him the "near maximum allowable sentence," which was unduly harsh. Finally, he alleged that the court erroneously exercised its discretion by requiring him to serve ten years of confinement before he would be eligible for the CIP and SAP. The court summarily denied his motion. This appeal follows.

On appeal, Conley contends that the circuit court erred in denying his postconviction motion. He renews his arguments made therein and seeks resentencing.

As a threshold matter, we conclude that Conley's claims are procedurally barred. That is because he could have raised them in his previous challenge to his conviction and has not

² Conley's letter was effectively a WIS. STAT. § 974.06 motion, as it raised constitutional challenges to his conviction after the time for seeking a direct appeal had expired.

provided a sufficient reason for failing to do so. *See* WIS. STAT. § 974.06(4); *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756; *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

In any event, we are not persuaded that Conley is entitled to relief on the merits of his claims. The circuit court engaged in hyperbole when it said that Conley put a gun in a store clerk's face and implied that he was ready to pull the trigger. However, this was not an unreasonable characterization of his actions. Conley did display a gun during the robbery of the first store clerk. Likewise, he did tell the second store clerk, "I'm not playing. I have a gun. I will shoot you." The second store clerk saw a bulge in Conley's waistline that he thought was a gun. Thus, we cannot say that the court's statement was wholly inaccurate. At any rate, there is no indication that the statement contributed to the sentence imposed. *See State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423 (a claim of sentencing based on inaccurate information is subject to harmless error).

Conley's remaining arguments fare no better. With respect to the length of the sentence imposed, Conley faced forty years of imprisonment for his crime. *See* WIS. STAT. §§ 939.50(3)(c), 943.32(2). He received thirty years. A sentence well within the statutory maximum is presumed not to be unduly harsh. *See State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. Conley has not met his burden of showing otherwise, especially in light of his lengthy criminal history and the read-in charge.

Finally, with respect to the circuit court's requirement that Conley serve ten years of confinement before he would be eligible for the CIP and SAP, the record demonstrates a proper exercise of discretion. The court explained that, given all of Conley's failed attempts at

substance abuse treatment, he “need[ed] some time in the prison system to really decide whether” he was really serious about cleaning up his act. That was a reasonable conclusion given that Conley’s criminal history was a direct result of his untreated substance abuse. Accordingly, we perceive no error.³

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court 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

³ To the extent we have not addressed an argument raised by Conley on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

