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DISTRICT II

March 31, 2021

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

2019AP2238-CR

State of Wisconsin v. James G. Anthony (L.C. #2017CF1078)

Before Reilly, P.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).

James G. Anthony appeals from a judgment of conviction and postconviction order. The only issue on appeal is whether the circuit court properly exercised its sentencing discretion. 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 (2019-20).¹ We summarily affirm the judgment and order.

Anthony was charged with two counts of causing a child older than thirteen to view sexual activity, as a persistent repeat offender (which carries a mandatory sentence of life imprisonment), and two counts of exposing a child to harmful activity. *See* WIS. STAT. §§ 948.055(1), 939.62(2m), 948.11(2)(a) (2017-18). Anthony was charged as a persistent repeat offender because he had previously been convicted of sexual offenses involving a child under the age of sixteen. The new charges were based on allegations by two teenagers from Anthony's workplace who said that on separate occasions, Anthony showed them photos or videos of a naked woman that were of a sexual nature.

Anthony entered into a plea agreement with the State pursuant to which he pled guilty to: (1) Count 1, causing a child to view sexual activity, without the persistent repeat offender enhancer; and (2) Count 4, exposing a child to harmful activity. The other two counts were dismissed. Under the agreement, the parties were both free to argue for an appropriate sentence.

The presentence investigation report outlined Anthony's past offenses, which included child sex offenses, arson, drug offenses, bail jumping, and falsely acting as a public official. The circuit court sentenced Anthony to three years of initial confinement and three years of extended supervision on Count 1, and one year of initial confinement and two years of extended supervision on Count 4, to be served consecutively. Anthony filed a postconviction motion challenging the court's exercise of sentencing discretion. After hearing oral argument on the

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

motion, the circuit court denied the motion, concluding that it had considered the proper sentencing factors. It also reiterated Anthony's need for treatment. Anthony now appeals.

We begin with the well-settled legal principles that govern this appeal. Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We presume that the circuit court acted reasonably, and the defendant must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. *See id.*, ¶¶17-18. That presumption is rooted in the sentencing court's greater familiarity with the facts of the case and with the defendant's demeanor. *See id.*, ¶18. Public policy strongly disfavors appellate court interference with the circuit court's sentencing discretion. *Id.*

The circuit court is "required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." *Id.*, ¶40. The weight to be given to each sentencing factor remains within the wide discretion of the court. *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

The "sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *Gallion*, 270 Wis. 2d 535, ¶23 (citation omitted). The circuit court must provide its sentencing rationale on the record, but a defendant is not entitled to a mathematical breakdown of how each sentencing factor translates into a specific term of confinement. *See State v. Fisher*, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56.

Gallion requires an explanation but not “mathematical precision.” *State v. Ziegler*, 2006 WI App 49, ¶25, 289 Wis. 2d 594, 712 N.W.2d 76 (citation omitted).

Anthony argues that the circuit court erroneously exercised its sentencing discretion when it “failed to consider the mandatory sentencing factors and implicitly rejected probation with a misunderstanding of the maximum term available.” Upon review of the sentencing transcript, we conclude that the circuit court properly exercised its sentencing discretion and that Anthony is not entitled to resentencing.

The circuit court adequately explained its sentencing decision. It considered the nature of the crimes, which it called “serious” and “significant.” The circuit court noted that Anthony was on the sex offender registry and yet was “sitting around showing [sexual] pictures to kids.” The circuit court said this was “perverse behavior.” The circuit court also discussed Anthony’s character, recognizing that Anthony had in the past “been arrested and imprisoned for sex assaults.” The circuit court questioned Anthony’s ability to control himself and behave around teenagers, noting that he committed crimes that put him “at risk of being a persistent sex offender with a life sentence.” The circuit court said that it did not trust Anthony. It said he had “not quite accepted the sex offender treatment that probably he got at some point” and needed additional treatment. The circuit court said that Anthony “pose[s] a danger.”

When it came time for the circuit court to announce its decision, the circuit court explicitly said that it disagreed with the defense’s recommendation of one year of incarceration. As the circuit court began to impose a sentence on Count 1 and looked at the presentence investigation report, it stopped to address what it believed was a miscalculation in the maximum period of probation that would be available for Count 4. Specifically, the circuit court said that

only three years of probation could be ordered for Count 4, instead of the five years stated in the presentence investigation report. After addressing that issue, the circuit court said that it “would like to have the maximum amount of time to watch Mr. Anthony” and imposed consecutive sentences that included periods of initial confinement and extended supervision for both counts.

In his postconviction motion, Anthony argued that the circuit court “implicitly rejected probation on Count 4 based on a misunderstanding of the maximum term it could impose.” Anthony explained that while three years is the maximum term of probation for a Class I felony, the maximum was increased by two years based on his conviction for two felonies. *See* WIS. STAT. § 973.09(2)(b)2. Anthony reiterated this argument at the hearing on his postconviction motion, but the circuit court was unpersuaded and denied the motion.

The State urges this court to analyze Anthony’s argument concerning the circuit court’s miscalculation of the maximum potential term of probation “as a due process challenge based on the right to be sentenced upon accurate information.” *See State v. Tiepelman*, 2006 WI 66, ¶¶9, 41, 291 Wis. 2d 179, 717 N.W.2d 1 (holding that “[a] defendant has a constitutionally protected due process right to be sentenced upon accurate information” and that “[a] sentencing court misuses its discretion, as a matter of law, when it sentences in contravention” of due process rights). The State asserts that under that analysis, Anthony is not entitled to resentencing because even though the circuit court was wrong about the maximum period of probation it could order for Count 4, Anthony cannot show that the circuit court actually relied on that inaccurate information. *See id.*, ¶28 (requiring defendant to “establish two things: that some of the information presented was inaccurate, and that the sentencing court actually relied on that misinformation in reaching its determination in regard to the sentence imposed”).

In response, Anthony argues that “[t]he State has unnecessarily reframed [his] claim as seeking resentencing on the basis of inaccurate information.” Anthony urges this court to instead consider the issue in the context of determining whether the circuit court erroneously exercised its sentencing discretion. Regardless of how we frame the issue, we conclude that Anthony is not entitled to resentencing based on the circuit court’s misunderstanding of the maximum period of probation available. When viewed as a whole, the circuit court’s sentencing comments indicate that it did not believe probation was appropriate, and that decision was not dependent on whether the maximum period of probation on Count 4 was three or five years. Indeed, when this issue was brought to the circuit court’s attention in the postconviction motion and at the postconviction hearing, the circuit court denied the motion, implicitly rejecting the suggestion that it chose a prison sentence over probation because it misunderstood the number of years of probation that could be ordered on Count 4.

For the foregoing reasons, we conclude that Anthony has not shown that he is entitled to resentencing based on the circuit court’s sentencing explanation or its misunderstanding of the potential length of probation it could order on Count 4. Therefore, we summarily affirm.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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