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May 26, 2021

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

2020AP868-CR State of Wisconsin v. Jacob R. Upton (L.C. #2018CF532)
2020AP869-CR State of Wisconsin v. Jacob R. Upton (L.C. #2018CF538)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Jacob R. Upton seeks resentencing or, in the alternative, modification of his sentence. Upton argues that the circuit court erroneously exercised its sentencing discretion by imposing an unduly harsh and excessive sentence. Based upon our review of the briefs and record, we

conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We summarily affirm.

Upton beat his girlfriend in July 2018. According to the criminal complaint, she suffered brain bleeding—both new and old—fractures to her nasal bone and ribs, and multiple "bruises of all ages on her arms, back, legs, and face." Upton, who had prior domestic abuse charges involving the victim, was charged with domestic aggravated battery and domestic second-degree recklessly endangering safety, both as a repeater. Three months later, in October 2018, Upton again assaulted his girlfriend by pushing her to the ground, and he was charged with domestic disorderly conduct and domestic misdemeanor battery, both as a repeater. The two cases were joined. Pursuant to a plea deal, Upton pled guilty to second-degree recklessly endangering safety in the July case and disorderly conduct in the October case, with the domestic abuse and repeater enhancers intact.[2] Upton was informed and understood that the court was not bound by any plea agreement or sentencing recommendations, that the court could impose the maximum sentences "consecutively to each other," and that the dismissed charges could be considered at sentencing.

At sentencing, the State recommended a concurrent sentence of six years' initial confinement and five years' extended supervision on the second-degree reckless endangerment count and one-year initial confinement followed by one-year extended supervision on the disorderly conduct count. Upton's counsel asked for probation, with an imposed and stayed sentence of three years' initial confinement and four years' extended supervision.

[1] All references to the Wisconsin Statutes are to the 2019-20 version.

[2] The battery counts were dismissed and read in.

The circuit court concluded that Upton's crimes were "vicious" and "aggravated." According to the court, they involved severe injuries to the victim, who the court found was "intimidated or afraid to say what happened." It observed that in the PSI, Upton denied that he caused the victim's injuries, insisting instead that he had punched her only "once out of anger" and that she injured herself by falling in the driveway and kitchen. The court also noted that Upton "got the benefit of a read-in on a 15-year aggravated battery" charge.

On the subject of Upton's character and criminal history, the court noted "a common theme of abuse of alcohol and violence." The court considered statements from Upton's uncle, an attorney, who said that Upton "had a lot of good things going for him," from the victim and from Upton's mother, who both had "good things to say about him," but found that "they're all overshadowed by" Upton's violent crimes. The court observed that Upton had a good demeanor, a GED, had done factory work, had a three-year-old daughter with the victim, and had been with the victim for nearly five years.

The court ultimately concluded that "correctional treatment [was] needed in a confined setting" as Upton "was on probation at the time" of his offenses and had previously received "services ranging from fines and forfeitures to probation to jail." The court found confinement necessary "to protect the public" and that to not impose confinement "would unduly depreciate the seriousness if probation were given."

The court sentenced Upton to four years' initial confinement and five years' extended supervision on the charge of second-degree reckless endangerment and one-year initial confinement with one-year extended supervision on the disorderly conduct charge. The court imposed consecutive sentences, as the disorderly conduct count was a separate offense, and the

court explained that it was "a huge believer in separate responsibility for separate acts" and "repeat behavior."

Postconviction, Upton moved for resentencing, arguing that the court erroneously exercised its sentencing discretion by imposing an unduly harsh and excessive sentence. In the alternative, Upton moved to modify his sentence, arguing that imposing the sentences consecutively rendered them harsh and unconscionable. The court denied both requests. Upton appeals.

A court's sentencing decision is subject to deference, emanating from the circuit court's inherent advantage in considering the relevant sentencing factors and the defendant's demeanor. ***State v. Gallion***, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197. We limit our review of the sentence to determine if the circuit court erroneously exercised its sentencing discretion by relying on irrelevant or improper factors, and we follow a "consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***Id.*** (citations omitted). In reviewing an order denying a motion for sentence modification, we also consider whether the sentencing court erroneously exercised its sentencing discretion.[3] ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 653 N.W.2d 895. "We will not set aside a discretionary ruling of the [circuit] court if it appears from the record that the court applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." ***State v. Grindemann***, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507.

[3] "Within certain constraints, Wisconsin circuit courts have inherent authority to modify criminal sentences." ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A court may base a sentence modification on a "new factor," on its conclusion that the sentence is illegal or void, or upon a finding that "the sentence is unduly harsh or unconscionable." ***Id.***, ¶35 & n.8 (citation omitted).

In this case, the circuit court properly considered the primary sentencing factors: the gravity of the offense, the character of the offender, and the protection of the public. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. It also acknowledged the secondary factors that the court may consider. ***Id.*** The court described its sentencing objectives, decided how to weigh each of the primary factors as it related to Upton, and described the relevant facts applicable to Upton relevant to the primary objectives. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶39-42. Upton bears a "heavy burden" to establish that the court erroneously exercised its sentencing discretion, and he did not do so. *See* ***Harris***, 326 Wis. 2d 685, ¶30. Upton has not shown by clear and convincing evidence that the court relied upon improper or irrelevant factors. *See* ***id.***, ¶66.

"A sentence is unduly harsh or unconscionable 'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Cummings***, 2014 WI 88, ¶72, 357 Wis. 2d 1, 850 N.W.2d 915 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). There is a presumption that a sentence within the statutory maximum is not excessive or unduly harsh. ***Grindemann***, 255 Wis. 2d 632, ¶¶31-32; ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Moreover, consecutive sentences do not make the sentences unconscionable or shocking to public sentiment, *see* ***Grindemann***, 255 Wis. 2d 632, ¶31, and the decision whether to impose consecutive sentences is discretionary and based on the same factors the court is to consider when determining the length of the sentence, *see* ***State v. Johnson***, 178 Wis. 2d 42, 52-54, 503 N.W.2d 575 (Ct. App. 1993); ***State v. Douglas***, 2013 WI App 52, ¶20, 347 Wis. 2d 407, 830 N.W.2d 126.

Upton's sentences were well below the maximum, and the court appropriately explained why it was imposing the sentences for the two different crimes consecutively. We are not shocked by Upton's sentences given the primary sentencing factors, the court's explanation of its decision-making process, and the fact that Upton's sentences were well within the statutory maximum.

Upton argues that the circuit "court did not properly identify the factors it must consider in sentencing" and "failed to identify what the objectives of the sentence imposed were and which of these objectives are of the greatest importance." We disagree. The record plainly demonstrates that the court identified the proper sentencing factors, explained its sentencing objectives, and properly exercised its sentencing discretion. The court indicated that it must "consider probation unless confinement is necessary to protect the public," to provide "correctional treatment," or if probation "would unduly depreciate the seriousness of the offense" and that it must impose "the minimum amount of custody or confinement" that is "consistent" with the sentencing objectives. The court determined that since Upton had committed these crimes while on probation and previous fines and probation had been unsuccessful, probation was not appropriate in this case. Further, the court explained that probation would "unduly depreciate the seriousness" of the crimes and that considering "the severity of the injuries" to the victim, "correctional treatment … in a confined setting" was necessary and "prison is appropriate." The court made Upton eligible for substance abuse and challenge incarceration programming, which it indicated would address Upton's rehabilitation by providing "close rehabilitative control" and treatment for Upton's alcohol abuse and violent behavior.

Upton also argues that his sentences are overly harsh because he took "responsibility" and "ownership" for his crimes. This claim is belied by the record, particularly the court's findings at both sentencing and the postconviction hearing that Upton continued to deny that he caused the victim's injuries and instead blamed her injuries on the victim drinking and falling down.

Upton has failed to show that the circuit court erroneously exercised its discretion or that his consecutive sentences were excessive, harsh, or unreasonable. Therefore, he is not entitled to resentencing or a modification of his sentence.

Upon the foregoing reasons,

IT IS ORDERED that the judgments 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