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**DISTRICT II**

June 16, 2021

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

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2020AP324-CR                      State of Wisconsin v. Brian J. Splivalo (L.C. #2016CF228)

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).**

Brian J. Splivalo appeals a judgment convicting him of first-degree reckless homicide and an order denying his postconviction motion for resentencing. 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).<sup>1</sup> Because the circuit court did not rely on an improper factor at sentencing, we affirm.

Splivalo was charged as a party to the crime in connection with the drug-related death of his girlfriend, Jessie Prochaska. Jessie was found dead of a heroin overdose in her apartment, and the jury found that Splivalo assisted in providing the heroin to Jessie.

At sentencing, the circuit court followed the State’s recommendation and imposed fifteen years of initial confinement followed by ten years of extended supervision. The court considered the offense to be very grave, noting the impact on Jessie’s grieving family. It determined that there was a great need for community protection based on Splivalo’s criminal history and poor performance on supervision, as well as his failure to call 9-1-1 after finding Jessie nonresponsive. The court highlighted Splivalo’s history of doing “just enough to skate by” without considering the consequences of his behavior or its effect on others. In discussing character, the court expressed concern over Splivalo’s pattern of blaming other people for his poor conduct despite his supportive upbringing, and determined that he had not demonstrated an ability to make lasting change, making him a poor candidate for swift rehabilitation. It stated that

the lack of calling 9-1-1, the lack of remorse, the lack of accepting responsibility really alarmed me. You’ve indicated to the PSI writer just as you indicated now that you feel badly for what the family’s gone through.

But I’ve never heard you say, I’ve never heard through the PSI that you’ve taken any responsibility for what happened. And it seems, again, when I look at your criminal history that that’s always been

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

the case. It's always because people pressured you to do something or someone else was the cause behind it.

Splivalo moved for resentencing, alleging that the circuit court relied on improper factors at sentencing, namely, Splivalo's lack of remorse and failure to accept responsibility. Relying on *Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286 (1974), Splivalo argued that by considering these factors at sentencing, the court impermissibly punished him for refusing to admit guilt in derogation of his Fifth Amendment right against self-incrimination. Referring to *State v. Baldwin*, 101 Wis. 2d 441, 304 N.W.2d 742 (1981), the court denied the postconviction motion, explaining that it had based Splivalo's sentence on myriad relevant factors and not solely on his lack of remorse or failure to accept responsibility for the crime. The court also explained that it had considered the complained-of factors in the context of Splivalo's history and character rather than in isolation, and "certainly wasn't trying to compel" Splivalo to admit guilt. Splivalo appeals.

The primary factors to be considered at sentencing are the gravity of the offense, the character of the offender, and the need to protect the public. *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). A sentencing court may consider a defendant's lack of remorse in light of these factors, including in the context of personal deterrence and amenability to rehabilitation. See *State v. Wickstrom*, 118 Wis. 2d 339, 355-56, 348 N.W.2d 183 (Ct. App. 1984). However, a sentencing court may not impose a harsher sentence solely because a defendant refuses to admit his or her guilt following a jury's guilty verdict. *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

Splivalo maintains that the circuit court's references at sentencing to his lack of remorse and inability to accept responsibility run afoul of *Scales*. We are not persuaded. First, the

court's remarks are not reasonably construed as an attempt to coerce an admission of guilt or an intent to punish Splivalo for maintaining his innocence. The rule against compelling a confession at sentencing seeks to avoid punishing a defendant for exercising his or her right to a trial or right against self-incrimination, distinct from the sentencing court's obligation to consider the defendant's demeanor, need for rehabilitation, and danger to the public. *Baldwin*, 101 Wis. 2d at 458-59. As explained postconviction, though the sentencing court indicated that the acceptance of responsibility might be a mitigating factor, it "certainly wasn't trying to compel" or "to coerce Mr. Splivalo in any way" to confess guilt.

Second, the sentencing court considered Splivalo's lack of remorse and inability to accept responsibility for proper purposes. It discussed them in terms of Splivalo's character, observing that Splivalo generally lacked remorse about all of his bad acts and did not take responsibility for, or care about, consequences to others, making his chances for meaningful reform low. *See Wickstrom*, 118 Wis. 2d at 355-56. In addressing Splivalo's failure to accept responsibility for Jessie's death, the sentencing court focused on the fact that Splivalo knew Jessie was in danger and did not call 9-1-1, but simply left her in her apartment to die, locked the door behind him, and tried to hide any connection between them by taking her phone and throwing it in a storm drain. The court said that this reaction gave it "grave concerns about community safety." The court's remarks reflect a proper exercise of discretion.

Third, as stated by the postconviction court and demonstrated by the record, Splivalo's failure to accept responsibility was not the sentencing court's sole consideration, nor was this consideration given undue weight. *See Baldwin*, 101 Wis. 2d at 458-59; *Fuerst*, 181 Wis. 2d at 915. The court determined that the nature and severity of the offense "weigh[ed] very heavily against" Splivalo. It explained that "[h]eroin addiction is a terrible, terrible burden" that was

plaguing the community, and that causes “a special kind of grief that happens to families whose children die of an overdose death” due to people often blaming the victim. In terms of character and community safety, the sentencing court considered that while on supervision, Splivalo did not follow the rules, changed residences, did poorly in treatment programs, and lied to his agent about his drug use. More recently, Splivalo did complete an inpatient treatment program as an alternative to revocation. However, Jessie’s overdose occurred shortly after Splivalo was released from that program, showing a lack of meaningful change. Similarly, the court determined that Splivalo’s history of charges for crimes such as bail jumping, obstruction, and resisting arrest, showed his inability to comply with orders and rules, even while under some sort of supervision.

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.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*