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DISTRICT II

October 20, 2021

To:

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Electronic Notice

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

2020AP1799-CR State of Wisconsin v. Bryan L. Urquhart (L.C. #2013CF552)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Bryan L. Urquhart appeals from a judgment convicting him of sexual assault and an order denying his postconviction motion for resentencing. Urquhart argues that the circuit court erred in basing his sentence on information that the court obtained when conducting an allegedly improper independent investigation into the victim's guardianship status. 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 affirm.

The parties do not dispute the pertinent procedural facts, which are the only facts that we need to consider in this appeal. In 2013, the State alleged that Urquhart sexually assaulted Sarah,[2] an adult woman who suffered from a developmental disability that rendered her incapable of appraising his conduct, and that Urquhart was aware of her condition. Based on these allegations, the State charged Urquhart with second-degree sexual assault in violation of WIS. STAT. § 940.225(2)(c), as a repeat offender.

The "probable cause" section of the complaint detailed the nature of the alleged assault, the nature of Sarah's developmental disability that left her with the mental capacity of a fourth-grader, Urquhart's awareness of her disability, the report of the assault by Sarah's court-appointed guardian to police, and Urquhart's denial of wrongdoing. During the discovery phase of the proceedings, Urquhart filed motions with the circuit court requesting disclosure of the court records in Sarah's guardianship file and a ***Shiffra-Green***[3] motion seeking her psychological, psychiatric, and hospital records. In his brief in support of the motions, Urquhart argued that

> according to the criminal complaint, [Sarah] suffers from a "mental disability," functions as a fourth grader, and has had a guardian.

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

[2] We refer to the victim using a pseudonym, pursuant to the policy of protecting the privacy interests of crime victims. *See* WIS. STAT. RULE 809.86.

[3] ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

> Further, the guardianship order from Case Number 12 GN 50, which was provided to the defense in discovery, indicates that [Sarah] has been determined to be incompetent based on a developmental disability…. Undoubtedly, the State intends to introduce evidence of [Sarah]'s mental condition in support of its argument that she did not consent in this case. Therefore, [Sarah]'s mental health condition is directly and completely material to the case.

At a hearing on Urquhart's disclosure motions, the circuit court agreed that the information in Sarah's guardianship file and her psychological records may be material. Therefore, the court granted Urquhart's motions, stating that it would release the guardianship file to the defense and would conduct an in camera review of the psychological records from January 1, 2011, to March 2014 before disclosing the relevant records. Following the hearing, defense counsel sent a letter to the court confirming that the court had ordered the release of Sarah's guardianship file. After the court reviewed the requested records in camera, it authorized the release to the parties of a doctor's assessment of Sarah from her guardianship file, explaining that the doctor's report contained "some relevant information about her ability to perceive and relate events." The guardian signed the release of the psychological report from the guardianship file, and the court ordered that the record be sealed and included in the case file.

In another pretrial motion, Urquhart sought to introduce evidence at trial involving Sarah's ability to say "no" on various prior occasions and "numerous instances where [Sarah] has been influenced by her guardian … to do things [and] to say things, [because] a part of the defense theory in this case is that's what happened here." The circuit court denied the motion and the case proceeded to a jury trial. At trial, Sarah testified and was cross-examined by Urquhart's counsel.

After a break following Sarah's trial testimony, the parties told the court that they had reached a plea agreement, which resulted in Urquhart entering a plea of no contest to third-degree sexual assault for having sexual intercourse with Sarah without consent and fourth-degree sexual assault for having sexual contact with Sarah without consent, both as a repeater. As part of the plea agreement, the parties entered into a deferred conviction agreement as to the third-degree charge, which the court approved, providing that Urquhart would be placed on probation and would avoid conviction and prison if he complied with the conditions of the agreement. However, Urquhart violated the terms of the deferred conviction agreement in 2016, and it was terminated in 2018. The court entered a judgment of conviction, and the court ordered a presentence investigation (PSI) report.[4]

At the sentencing hearing on the third-degree sexual assault charge, the issue of the nature of Sarah's disability, and whether it was an aggravating factor in considering Urquhart's conduct, was squarely at issue. Defense counsel told the circuit court that, among other things, the defense "regard[ed] as [an] unsubstantiated allegation[]" that Sarah "was described as disabled" and asserted that this description was "inaccurate." Defense counsel subsequently questioned again whether Sarah was disabled, "urge[d] the [c]ourt to look at this particular case and … what's proved … versus what's suggested," and "urge[d] the [c]ourt to look at what was actually the subject of contention and what was actually proved and/or admitted to." Urquhart himself also told the court that Sarah was not disabled and that she and her guardian "were

[4] The Honorable James J. Bolgert presided over the initial proceedings up through the original sentencing. The Honorable Daniel J. Borowski presided over the motions related to the deferred conviction agreement, the sentencing on the third-degree sexual assault conviction, and subsequent proceedings leading up to this appeal.

playing with the system trying to get money." The State "dispute[d] the fact that she's not mentally disabled."

Regarding Sarah's guardianship file, after some discussions at the sentencing hearing, the court indicated that it was "not going to speculate" as to the contents of the file that were not a part of the record, instead "just not[ing] in 2016 the guardianship was terminated" and stating that "[t]o the extent there are any other records, [the court was] not disclosing anything further." The court informed the parties that in preparation for the sentencing hearing, it had conducted some independent research as to the meaning of "disability" in the federal statutes and that it had reviewed Wisconsin's guardianship statutes. The court also invited the parties to correct it if they believed that it was misstating the federal or Wisconsin laws.

After hearing arguments of counsel and Urquhart's statements, the court imposed the sentence that was recommended by the PSI report: five years of initial confinement followed by five years of extended supervision. The court held that the offense was aggravated by the fact that Urquhart took advantage of someone he knew to be a vulnerable individual due to her developmental disability. As support for its determination that Urquhart knowingly took advantage of a developmentally impaired individual, the court relied on the allegations in the complaint, on information provided in the presentence investigation report, and on the psychological evaluation from Sarah's guardianship case file.

Urquhart filed a postconviction motion in April 2020 seeking a resentencing hearing, arguing that the circuit court judge engaged in an improper independent investigation—namely, Sarah's guardianship case and related information—to support the sentence it imposed. The court denied the motion, stating that it had not considered or engaged in an independent

investigation of factual matters or issues beyond what was already in the record, including the complaint, the PSI report, and the guardianship file that had been entered into the record during pretrial proceedings in 2014. Moreover, the court explained that it conducted an "investigation" at the time of sentencing "at the urging of [d]efense counsel—trying to look at what actually was in the file." Urquhart appeals.

On appeal, our "review of sentencing decisions is … limited to determining whether the circuit court erroneously exercised its discretion." ***State v. Harris***, 2010 WI 79, ¶3, 326 Wis. 2d 685, 786 N.W.2d 409. "Discretion is erroneously exercised when a sentencing court actually relies on clearly irrelevant or improper factors, and the defendant bears the burden of proving such reliance by clear and convincing evidence." ***Id.*** Our supreme court has explained that

> an [erroneous exercise] of discretion might be found under the following circumstances: (1) [f]ailure to state on the record the relevant and material factors which influenced the court's decision; (2) reliance upon factors which are totally irrelevant or immaterial to the type of decision to be made; and (3) too much weight given to one factor on the face of other contravening considerations.

Ocanas v. State, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975).

Urquhart argues that we should remand to the circuit court for resentencing because "[t]he court erroneously exercised its discretion in imposing sentence by carrying out an independent, unasked for, and ultimately inconclusive investigation into the guardianship status of [Sarah]." He relies on ***Wisconsin Judicial Commission v. Piontek***, 2019 WI 51, 386 Wis. 2d 703, 927 N.W.2d 552, in support of his arguments that the court erroneously exercised its sentencing discretion by conducting independent research and considering matters outside the record. In ***Piontek***, as is relevant to this case, a circuit court judge conducted an independent internet investigation and found extra-record evidence that later proved to be false and did so

without notice to the defendant and an opportunity for her to be heard at sentencing. ***Id.***, ¶¶16-18. The judge also relied on the false evidence to impose a harsher sentence. ***Id.*** Our supreme court concluded that the judge had erroneously exercised its discretion, holding that "it is clearly improper for a judge to both conduct an independent investigation and to fail to give a party a chance to respond to the judge's misinformed allegations based on that investigation." ***Id.***, ¶37.

Arguing that the conduct of the sentencing court here violated the prohibitions set forth in ***Piontek***, Urquhart takes issue with the court's actions in (1) "investigat[ing], on its own initiative, definitions of disability in the US Code and the statutory reasons for which a guardianship could be imposed under Wisconsin" law; (2) digging "through the [guardianship] file [on the record] in [Urquhart]'s case, on its own initiative, to unearth and read into the record a [doctor's] report"; and (3) "requir[ing] the clerk to produce the victim's guardianship file and beg[inning] to read an unidentified doctor's 2015 report from that file into the record." We address each of these three complaints in turn below.

Turning first to Urquhart's argument that the sentencing court violated the principles set forth in ***Piontek*** by conducting independent legal research into the federal and state laws regarding disability and guardianships, we reject the contention that the court acted inappropriately in so doing and further conclude that ***Piontek*** has no bearing on the circumstances surrounding this appeal. To the contrary, courts of all levels are encouraged to conduct their own research into legal issues and should not rely entirely on the parties when it comes to legal questions before the court. As we have explained, it is a judge's duty to ensure that he or she is operating under a correct understanding of the applicable law:

> A competent judge is not so naive to believe that briefs will always summarize the relevant facts and the applicable law in an accurate

> fashion. A competent judge uses the briefs as a starting line and not the finish line for his or her own independent research. Not only does a good judge confirm that the authorities cited actually support the legal propositions in the briefs, a good judge also makes sure that the authorities continue to represent a correct statement of the law. A member of the bench who fails to independently develop his or her own legal rationale does so at his or her own peril and the peril of the litigants.

Camacho v. Trimble Irrevocable Tr., 2008 WI App 112, ¶7, 313 Wis. 2d 272, 756 N.W.2d 596. Applying these principles, we conclude that the sentencing court here committed no error in conducting independent legal research.

Moreover, the court at Urquhart's sentencing informed all parties that it had conducted independent research, told the parties what it had discovered through its legal research, and invited responses from the parties if they disagreed with its characterization of the applicable law. The court's actions here are in stark contrast to those of the judge in ***Piontek***, who "prior to sentencing … did not provide the parties or their attorneys with either notice of his intent to conduct his investigation or the nature of his investigation and its results." *See* ***Piontek***, 386 Wis. 2d 703, ¶17. In sum, we conclude that the sentencing court did not erroneously exercise its discretion in conducting research into issues related to defining "disability" under the law.

We now turn to Urquhart's second complaint with the court's actions at his sentencing—namely, that "[t]he court dug through the [guardianship] file…, *on its own initiative*, to unearth and read into the record a report from" a doctor who examined Sarah in the course of her guardianship proceedings. (Emphasis added.)

At sentencing, the court noted that the issue of Sarah's disability and whether it was an aggravating factor at sentencing was at issue as a result of Sarah's allegations, the information provided in the PSI, the State's arguments, and those of Urquhart. The sentencing court properly

considered the psychological report in Sarah's guardianship file because Urquhart had successfully sought access to those records before trial to assess the existence and degree of her disability. In other words, his pretrial motions made them part of the record. At his request, the circuit court reviewed the guardianship file, ordered its disclosure, and provided copies of the psychological report from the file to Urquhart's attorney. It also allowed defense counsel to discuss the report with Urquhart so long as the report remained confidential.

Further, as set forth above, Urquhart sought to introduce evidence at trial of Sarah's relationship *with her guardian* to demonstrate that the guardian often exhibited control over Sarah's words and actions. And, at sentencing, both defense counsel and Urquhart himself attempted to convince the sentencing court that Sarah was in fact *not* disabled, while the State argued the opposite. Thus, both Urquhart and the State made Sarah's developmental disability an issue, beginning with the complaint and continuing through sentencing proceedings. Urquhart's defense counsel repeatedly implored the court to review the facts related to Sarah's developmental disability, which the court did. Thus, responding to Urquhart's postconviction argument that the court's review of the report was on its own initiative, the court noted: "[A]ll of this was done on the record in response to [Urquhart]'s own arguments and with full knowledge of the parties. [The court] went so far as to mark the documents and exhibit relative to the guardianship as an exhibit so it was in the record." In fact, Urquhart has continued to make Sarah's disability an issue through postconviction proceedings and on appeal.[5] As such, we

[5] Notably, while Urquhart continues to argue that Sarah was able to consent, he fails to develop any argument that the court relied on inaccurate information from the 2014 psychological report.

conclude the sentencing court properly considered this evidence, which was clearly a part of the record and was squarely at issue.

Urquhart's final complaint regarding the sentencing court is equally unsupported by the record. He argues that the court erred when it allegedly "required the clerk to produce the victim's guardianship file and began to read an unidentified doctor's 2015 report from that file into the record, stopping only when it was advised, apparently by one of the bailiffs, that to do so would violate HIPAA." Without citation to the record or any evidence in support of his assumptions, Urquhart goes on to argue that the court obviously "read enough" of the guardianship file to place reliance on its contents when sentencing him. Once again, however, our review of the record demonstrates that Urquhart has failed to meet his burden to show that this was the case.

There is nothing in the court's remarks that support Urquhart's contention that it considered extra-record documents or reports. Although Urquhart is correct in that the court initially *considered* reviewing a 2015 doctor's report from the file in order to determine why Sarah's guardianship had been terminated, indicating that the court sought to learn whether the termination provided more insight given Urquhart's repeated challenges to her developmental disability, and it was a report that had not yet been referenced in the proceedings, the court promptly determined that it would not pursue access to, or rely on, the report or its contents. Instead, as the following exchange demonstrates, once the court considered the parties' objections and the potential implications of relying on the report, it moved on without referencing the report further:

> THE COURT: In any event, we'll continue—we'll just continue. I'm not going to speculate.

> [DEFENSE COUNSEL]: And by definition there was no successor guardian appointed or apparently even requested.
>
> THE COURT: …[W]e'll just note in 2016 the guardianship was terminated. To the extent there are any other records, I'm not disclosing anything further. I think that's the point, but I don't know if I can look at it even, so I won't look at it, but it appears there was another report. I was just about to look at it and go over it, but it doesn't—
>
> [DEFENSE COUNSEL]: Well, thank you for not.
>
> THE COURT: Okay. So continue.

Thus, contrary to Urquhart's arguments, this exchange and our independent review of the record demonstrate that the court did not rely on extra-record information in rendering its sentence. Again, while Urquhart speculates what the court may have learned, he fails to point to anything indicating reliance on information gleaned from the report. Indeed, he repeatedly acknowledges that the alleged investigation into the reason for termination of the guardianship was "inconclusive."[6]

For the foregoing reasons, we conclude that Urquhart has not met his burden of proving "by clear and convincing evidence" that the sentencing court "relie[d] on clearly irrelevant or improper factors." *See* ***Harris***, 326 Wis. 2d 685, ¶3. The court did not erroneously exercise its sentencing discretion in conducting independent legal research (the results of which it shared with the parties and welcomed their input) or in relying on aspects of the guardianship file that

[6] The State contends that this appeal presents circumstances similar to or controlled by ***State v. Counihan***, 2020 WI 12, 390 Wis. 2d 172, 938 N.W.2d 530. In ***Counihan*** the parties did not dispute that a sentencing judge, who was relatively new to the bench, reviewed extra-record court files in other cases involving similarly-situated defendants to get a feel for the county's past sentencing practices in theft cases. ***Id.***, ¶10. As discussed herein, while the court considered reviewing the 2015 report, there is no evidence that the sentencing court did so, much less relied on the report. Thus, although we ultimately reach the same end result as in ***Counihan***, we do so for reasons other than those that supported the result in that case.

had been made a part of the record as a consequence of Urquhart's motion, nor is there support in the record for Urquhart's contention that extra-record guardianship information factored into the court's decision. Rather, the record demonstrates that the court clearly stated the factors it relied on in sentencing, none of which were immaterial, irrelevant, or improper, and the court appropriately balanced all considerations in its sentencing decision. *See* ***Ocanas***, 70 Wis. 2d at 187.

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