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DISTRICT III

December 28, 2021

To:

Hon. William F. Kussel, Jr.
Electronic Notice

Gregory A. Parker
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Ethan Schmidt
Clerk of Circuit Court
Shawano County Courthouse
Electronic Notice

Mark A. Schoenfeldt
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You are hereby notified that the Court has entered the following opinion and order:

2021AP23-CR

State of Wisconsin v. Catherine R. Barker (L. C. No. 2018CF369)

Before Stark, P.J., Hruz and Gill, 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).

Catherine Barker appeals from a judgment of conviction for failing to report a child's death and for attempting to hide a child's corpse. She also challenges the denial of her motion for postconviction relief seeking resentencing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2019-20).

The issue is whether the circuit court erroneously exercised its sentencing discretion¹ regarding its consideration of a count of neglecting a child—with consequence of death, which was dismissed and read in pursuant to Barker’s plea agreement. The neglect charge stemmed from Barker’s multiple statements that she did not seek medical care for her infant when she discovered that the child was not breathing.

In its sentencing remarks, the circuit court first identified the counts for which Barker was convicted, and it then referenced the dismissed and read-in neglect charge: “That was dismissed but read in but I can take that into consideration because it was read in in this matter.” Barker concedes that a court may consider read-in charges when imposing a sentence. *See State v. Straszowski*, 2008 WI 65, ¶93, 310 Wis. 2d 259, 750 N.W.2d 835. Barker nevertheless argues the court improperly considered “neglect” because “[t]here is no evidence ... at least prior to the death of any type of neglect of this child.” Barker implies the State accused Barker of “prior neglect of the child” or claimed that “prior neglect of the child ... resulted in death.” Barker suggests the court “appears to have taken” facts related to the dismissed and read-in neglect charge “as proven.” Barker then argues “there are **no** facts and circumstances that would support a claim that it was the defendant’s prior neglect of the child that resulted in death” Barker therefore contends she is entitled to resentencing.

Barker misapprehends the factual basis for the neglect charge, which was her failure on the date of the child’s death to get medical help for the infant when she discovered that he was

¹ Barker uses the phrase “abuse” of discretion. In 1992, our supreme court replaced that phrase with “erroneous exercise of discretion.” *See, e.g., Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

not breathing. The State did not claim that Barker's prior neglect of the child resulted in death. To the contrary, the read-in charge refers to the date of death and alleges that Barker "negligently fail[ed] to provide necessary medical care so as to seriously endanger the physical ... health of the child, and the child suffered death as a consequence" That charge is well supported by the record on appeal.

Nor did the State in its sentencing remarks allege neglect prior to the date of the infant's death. The State noted the evidence was "consistent with how [Barker] reported to the police." The State also noted that in the two months since the child's birth, Barker had taken him for regular doctor visits, and medical records showed that the child had "good weight gain, no concerns at this time ... [and] is clean and well cared for."

Similarly, the circuit court specifically acknowledged at sentencing that "[t]here is no evidence ... at least prior to the death of any type of neglect of this child." The court clearly referred in its sentencing remarks to Barker's failure to obtain medical care when the child stopped breathing. The court's references were consistent with the facts Barker admitted to the police—i.e., that when the child stopped breathing Barker did not call 911, take the child to the emergency room, or tell her father, who was downstairs at the time. It was not until much later in the day that Barker sent a message to a friend stating that the child had died by "suffocat[ing] himself by covering his face up with a blanket," and that Barker planned to bury the body "out in the country." That person contacted the police. When police asked Barker about the infant, she initially told police he was "upstairs asleep" and denied any medical emergency.

Barker's resentencing argument is meritless. The circuit court's consideration of the neglect charge at sentencing did not constitute an erroneous exercise of discretion.

Therefore, upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21 (2019-20).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals