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DISTRICT II

April 6, 2022

To:

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Circuit Court Judge
Electronic Notice

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Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP210-CR State of Wisconsin v. Christopher S. Barry (L.C. #2019CF253)

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

Christopher S. Barry appeals a judgment of conviction for aggravated battery and an order denying his postconviction motion, in which he sought resentencing or sentence modification based on a witness's recantation of her statement to police. Barry argues that the circuit court erroneously exercised its sentencing discretion by relying on inaccurate information that he punched, rather than pushed, the victim.¹ Alternatively, he argues the witness recantation

¹ Barry uses the phrase "abuse of discretion." Our supreme court abandoned that terminology decades ago in favor of the phrase "erroneous exercise of discretion." See *State v. Plymessenger*, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

constitutes a new factor that warrants resentencing or sentence modification. 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).² We affirm.

Barry was charged with second-degree reckless homicide. Steven Mallas was found deceased on October 12, 2018, the result of “asphyxia due to an airway obstruction” caused by “complications of mandibular fracture.” Mallas’s fractured jaw had occurred on October 7, 2018, during an altercation with Barry outside a bar. Jamie Nickels, who was present during that altercation, told police that Barry had punched Mallas in the face. Nickels had told another individual the same thing—that Barry had punched Mallas. Police also interviewed Mallas after the altercation, who denied that he had been in a fight with anyone and claimed he had been thrown to the ground by an unidentified male.

Pursuant to a plea agreement, Barry pleaded guilty to an amended charge of aggravated battery and proceeded immediately to sentencing. The circuit court imposed the maximum sentence, a six-year term of imprisonment consisting of three years each of initial confinement and extended supervision. After sentencing, Nickels “recanted”³ portions of her statement to police, asserting that she was heavily intoxicated at the time of the incident, did not remember the altercation, and had merely told police “what they wanted to hear” because she felt

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

³ While Barry styles Nickels’s statement as a recantation, Nickels in fact stated she only meant to “clarify” her statement to police. The circuit court, too, questioned whether it was truly a recantation when Nickels now claimed only that she could not remember the altercation. Cognizant of these issues, we nonetheless use the term “recantation” to refer to Nickels’s postconviction statement.

threatened and rushed. Nickels claimed that only after reading what Mallas had told the police did she realize that she was “the only person that had a different version of the incident.”

Barry filed a postconviction motion seeking resentencing or sentence modification, asserting that he was sentenced based on inaccurate information (i.e., that he had punched rather than pushed Mallas) and that Nickels’s recantation constituted a new factor. The circuit court denied the motion after a hearing, at which it explained that it was clear at sentencing that there was a dispute about whether a punch or a push had occurred. The court stated that it considered many other factors, including Barry’s prior record and the need to protect the public, and it was more concerned with the fact that “it was obviously a violent enough incident for which this gentleman lost his life.” Barry now appeals.⁴

First, Barry argues that Nickels’s recantation demonstrates that the circuit court relied on inaccurate information at sentencing—namely, that Barry had punched rather than pushed Mallas. Sentencing decisions are left to the sound discretion of the circuit court. *State v. Alexander*, 2015 WI 6, ¶16, 360 Wis. 2d 292, 858 N.W.2d 662. We adhere to a strong policy against interference with a court’s sentencing decisions, and we presume the court acted reasonably. *Rosado v. State*, 70 Wis. 2d 280, 289, 234 N.W.2d 69 (1975). Nonetheless, a defendant has a constitutionally protected due process right to be sentenced upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant

⁴ Barry’s brief discusses other injuries Mallas apparently suffered between his examination by medical personnel following the bar incident and his death. Our review encompasses only the sentencing issues actually raised by Barry on appeal. In addition to Barry’s failure to develop any other arguments, the guilty plea waiver rule precludes Barry from raising nonjurisdictional defects or defenses. See *Racine Cnty. v. Smith*, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). Moreover, as the circuit court recognized, the amended charge in this case undoubtedly reflected the strength of the State’s case.

demonstrates a circuit court erroneously exercised its sentencing discretion by showing both that the information was inaccurate and that the court actually relied on the inaccurate information at sentencing. *Id.*, ¶26.

Barry failed to show the trial court actually relied on inaccurate information about whether he had pushed or punched Mallas.⁵ At sentencing, the court acknowledged that there were “two different versions here as to what occurred in terms of aggravation and mitigation.” The court then expressed its belief that the more likely scenario, given the severity of Mallas’s injuries, was that Barry had done more than shove Mallas. Before moving on to address the protection of the public and Barry’s rehabilitative needs, the court acknowledged that Barry likely did not intend his strike to cause Mallas’s death.

Nickels’s postconviction claim that she was too intoxicated to recall what occurred during the altercation is insufficient to demonstrate that the circuit court erred in construing the stipulated facts as giving rise to an inference that Barry had punched Mallas. Nickels’s assertion that she felt pressured into telling police what they wanted to hear does not account for her also telling another individual that Barry had punched Mallas. There was information before the circuit court—unchallenged by Barry even now—from which the court could fairly infer that a punch, not a push, had occurred, including the fact that Mallas had suffered a broken jaw.⁶

⁵ It is undisputed the circuit court otherwise articulated appropriate sentencing considerations.

⁶ The circuit court also noted that the complaint included an officer’s report of what appeared to be dried blood on Barry’s hand after the altercation. On appeal, Barry contends the substance was merely sauce from chicken wings. He cites absolutely no record support for this contention, and we therefore will not consider this information. *See State v. Shaffer*, 96 Wis. 2d 531, 546, 292 N.W.2d 370 (Ct. App. 1980).

Additionally, Barry has failed to demonstrate the circuit court actually relied on the specific nature of Barry's battery. While the circuit court certainly gave the matter explicit attention, Barry must also demonstrate that, in the context of the whole sentencing transcript, the allegedly inaccurate information formed part of the basis for the sentence. *Alexander*, 360 Wis. 2d 292, ¶29. Here, the court's sentencing remarks demonstrate its focus was on the effect of Barry's conduct, not the means. The court, when concluding its analysis of how the various accounts of the altercation affected the aggravating or mitigating nature of the offense, opined that the balance tilted toward an aggravating circumstance because of "the fact that through a violent act this victim's life ended." The court's comments while denying Barry's postconviction motion are fully consistent with its sentencing comments, with the court emphasizing that it was focused on the fact that Barry's conduct was violent enough "to cause the gentleman to die." See *State v. Helmbrecht*, 2017 WI App 5, ¶13, 373 Wis. 2d 203, 891 N.W.2d 412 (citing *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994)) (noting that an analysis of whether a circuit court erroneously exercised its sentencing discretion includes consideration of any postconviction reasoning).

Second, Barry argues that Nickels's recantation constitutes a new factor. To prevail on this argument, Barry must make a threshold showing by clear and convincing evidence that there exists a fact or set of facts that was "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado*, 70 Wis. 2d at 288; see also *State v. Harbor*, 2011 WI 28, ¶¶36, 40, 333 Wis. 2d 53, 797 N.W.2d 828. Whether the fact or facts put forth by the defendant constitutes a new factor is a question of law. *Harbor*, 333 Wis. 2d 53, ¶36.

Barry has failed to demonstrate the existence of a new factor. Even if Nickels's recantation was not known at the time of sentencing, the circuit court was aware of the different claims about the manner in which the battery had occurred. The court also was aware of Barry's doubts about the veracity of Nickels's statements about a punch, as Barry argued at sentencing that "Jamie Nickels has absolutely no credibility because that night, when questioned by the police, she tells them that she had, quote, no, F word, clue what went on."

Nickels's recantation also is not highly relevant to the imposition of the sentence. As set forth above, based on our review of the entire sentencing transcript, the precise nature of the battery was not the animating principle behind the sentence imposed. Rather, the circuit court was focused on the fact that Mallas's death directly resulted from Barry's violent conduct. This fatal result—not the difference between a push or a punch—is what illustrated to the court the need to protect the public from Barry, who also had a prior criminal history.

In short, Nickels's recantation is insufficient to demonstrate the falsity of the information that led the circuit court to believe that Barry more likely punched Mallas, thereby foreclosing his inaccurate information claim. Moreover, the court was aware of Nickels's disputed credibility, diminishing the significance of Nickels's postconviction recantation. Further, Barry has not demonstrated that the court actually relied on the distinction between a push and a punch when imposing sentence, nor that such a distinction was highly relevant to that determination.

Therefore,

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