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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT II**

July 13, 2022

To:

Hon. Laura F. Lau  
Circuit Court Judge  
Electronic Notice

Monica Paz  
Clerk of Circuit Court  
Waukesha County Courthouse  
Electronic Notice

Eric Michael Muellenbach  
Electronic Notice

Susan Lee Opper  
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George Tauscheck  
Electronic Notice

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

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2021AP547-CR	State of Wisconsin v. Kevin O. Harper (L.C. #2018CF359)
2021AP548-CR	State of Wisconsin v. Kevin O. Harper (L.C. #2017CF1595)

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).**

In these consolidated cases, Kevin O. Harper appeals from judgments of conviction and an order denying his postconviction motion. He contends that two of his convictions are multiplicitous. He further contends that the circuit court relied upon inaccurate information at sentencing. Based upon our review of the briefs and records, we conclude at conference that

these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup>  
We affirm.

On May 31, 2017, police responded to a report of a deceased person (E.S.) at a home in the Village of Elm Grove. They found a package of cocaine near E.S.'s body. A DNA test on the packaging revealed the presence of Harper's DNA. Police also recovered E.S.'s phone. A forensic analysis of the phone showed a text exchange between Harper and E.S. in which Harper agreed to deliver E.S. drugs on May 30, 2017. Harper was subsequently charged with manufacturing/delivering cocaine as a repeater.

While Harper was in jail awaiting trial, he engaged in actions that led to an additional criminal case against him. First, he refused a lawful order related to meal service. Several minutes later, he complained of an asthma attack. The jail's medical staff temporarily removed Harper from his cell to administer his inhaler and, when they were done, told Harper to return to his cell. When Harper refused, correctional officers attempted to escort him back to his cell. In response, Harper physically resisted their efforts and spat on one of them.

The cases against Harper eventually resolved with a global plea agreement. In the first case, he pled no contest to a reduced charge of possession of cocaine as a repeater. In the second case, he pled no contest to obstructing an officer, resisting an officer; and prisoner throwing/expelling a bodily substance. For his actions, the circuit court imposed an aggregate sentence of three years of initial confinement and one year of extended supervision. It also imposed and stayed a separate jail sentence, ordering two years of probation.

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

Harper filed a postconviction motion seeking to withdraw his pleas or, in the alternative, be resentenced. He argued that his convictions for obstructing and resisting were multiplicitous, as they arose from “a single criminal episode.” He also accused the circuit court of relying upon inaccurate information at sentencing when it “seemingly emphasized [his] culpability for [E.S.’s] death despite the lack of evidence for any such conclusion.”<sup>2</sup> After a hearing on the matter, the court denied the motion. These appeals follow.

On appeal, Harper renews the claims in his postconviction motion. We begin with the issue of multiplicity.

The issue of multiplicity arises when a defendant is charged in more than one count for a single offense. *State v. Ziegler*, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. The test to determine whether multiple counts are permissible is first, whether the charges are identical in law and fact, and second, whether the legislature intended to allow more than one unit of

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<sup>2</sup> In making this argument, Harper cited the following remarks of the circuit court at sentencing:

I have a family sitting in the courtroom who has lost a child. And I have someone who pled no contest when we took the plea. I am not even hearing the ownership of the behavior.

...

In my opinion you have shown a total disregard for life, total disregard for authority. The behaviors that you have engaged in are dangerous. We have the loss of life for [E.S.], and I have someone who is saying that I didn't do it, I didn't supply the drugs, I don't know how my DNA got on the baggy ....

Again, that is not somebody who is showing remorse or taking responsibility. You can't give these people back their son. I mean, he is gone.

prosecution. *See State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). If the offenses are different in law or fact, then there is a presumption that the legislature intended multiple punishments. *Id.* at 751. The presumption may be rebutted only by showing clear intent to the contrary. *Id.* Questions of multiplicity and legislative intent are questions of law that we review de novo. *See State v. Davison*, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1.

Here, we are satisfied that Harper’s convictions for obstructing and resisting are different in law. Although the charges involve the same statute, WIS. STAT. § 946.41, they require proof of different elements. *See* WIS JI—CRIMINAL 1765 and 1766. That is, the obstruction charge requires proof that a defendant prevented or made more difficult the performance of the officer’s duties, while the resisting charge requires proof that a defendant opposed the officer by force or threat of force. *Id.* Accordingly, we presume that the legislature intended multiple punishments for the behavior in question. *See Anderson*, 219 Wis. 2d at 751. Because Harper has not met his burden of overcoming this presumption, we reject his multiplicity challenge.

Turning to Harper’s next issue, a defendant has a “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. To succeed on such a claim, a defendant must show both that the information was inaccurate and that the circuit court actually relied upon it at sentencing. *Id.*, ¶26. Whether a defendant has been denied this due process right is also a question that we review de novo. *Id.*, ¶9.

We are not persuaded that Harper has shown that the circuit court relied upon inaccurate information at sentencing. Again, the facts in the original complaint indicate that Harper provided E.S. with cocaine shortly before his death. Moreover, the autopsy of E.S., which was referenced in the complaint, revealed that he died of “Op[i]oid intoxication” and that “other significant conditions contributing to death” included cocaine. From these facts, the circuit court could reasonably fault Harper for failing to take any responsibility for E.S.’s death.

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.

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