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DISTRICT I

October 25, 2022

To:

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

2021AP1439-CR State of Wisconsin v. Tajh Malik Cooper (L.C. # 2020CF3661)

Before Donald, P.J., Dugan and White, 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).

Tajh Malik Cooper appeals a judgment of conviction entered upon his guilty plea to one count of hiding a corpse as a party to a crime. *See* WIS. STAT. §§ 940.11(2), 939.05 (2019-20).[1] He also appeals the postconviction order that denied him relief from the evenly bifurcated six-year term of imprisonment imposed at sentencing. He alleges that the sentencing court relied on inaccurate information, considered improper sentencing factors, and imposed a sentence that was

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

unduly harsh. Based upon a review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

According to the criminal complaint, City of Milwaukee sanitation workers found a body when they emptied a trash bin into a garbage truck on October 9, 2020. The deceased was determined to be Richard Williams. His cellphone led investigators to Cooper and Lasmonte S. McGowan.

Cooper gave a statement to police. He said that on October 9, 2020, he and McGowan "were out selling weed and ecstasy" when Williams contacted Cooper. Williams, who had purchased marijuana from Cooper the previous day, requested two ecstasy pills. Cooper and McGowan met with Williams, and the three men got into McGowan's car. During the subsequent exchange of money for drugs, Williams displayed a handgun and demanded "everything." While Williams was emptying Cooper's pockets, McGowan produced a handgun of his own and shot Williams three times. Cooper and McGowan then drove to an alley and put Williams's body into a garbage cart. Cooper went on to tell police that he had marijuana, ecstasy pills, and money in his basement, but he stated that the drugs were for his personal use.

The State charged both Cooper and McGowan, as parties to a crime, with one count of hiding a corpse with intent to conceal a crime. The offense is a Class F felony carrying maximum penalties of twelve years and six months of imprisonment and a $25,000 fine. *See* WIS. STAT. §§ 940.11(2), 939.05, 939.50(3)(f). Pursuant to a plea agreement, Cooper pled guilty as charged. The State agreed to seek a prison sentence without specifying a recommended term of imprisonment. The circuit court accepted Cooper's guilty plea, and the matter proceeded to sentencing.

At the outset of the sentencing hearing, three members of Williams's family—his wife, his daughter, and his sister—addressed the circuit court. Each described the grief caused by Williams's death; Williams's sister also expressed disappointment with the decision not to charge Cooper with homicide. The family members asked the circuit court to keep their loss in mind when passing sentence.

The State, as promised, recommended a prison sentence. In reviewing the circumstances of Cooper's crime, the State noted that Williams was killed while engaged in a drug transaction with Cooper, but the State "stress[ed] that obviously [Cooper] is not charged with any form of homicide offense.... Cooper was the individual, based on his [and McGowan's] statement[s] ... whose life appeared to be in danger."

Cooper spoke on his own behalf and also presented statements from friends and relatives attesting to his work ethic and devotion to family. His trial counsel then asked the circuit court to impose probation, arguing that Cooper had made panicked choices while not "in the right state of mind" due to the traumatic threat he had just experienced. His trial counsel urged the circuit court to consider that Cooper had a strong support system, operated his own home repair company, and had a limited prior record that consisted solely of possessing marijuana. Emphasizing that Cooper had no alcohol or drug issues beyond some experimentation with marijuana, trial counsel contended that Cooper's limited probationary needs warranted only a year of community supervision with some jail time as a condition.

The circuit court considered the statements describing Cooper as a loving and supportive father, brother, and son, and the circuit court took into account his limited criminal record. The circuit court also noted Cooper's characterization of the offense as an isolated incident, the result

of a panicked response to a frightening event, but the circuit court declined to disregard the circumstances surrounding the crime. In the circuit court's view, Cooper "left the house with the purpose of selling drugs to someone," he "made th[e] decision ... to conduct a drug deal in a car with at least one person who was armed," and he was therefore "not the innocent person caught in the bad situation." Taking into account trial counsel's statements that Cooper had no significant probationary needs and "no alcohol or drug issues," the circuit court concluded that the appropriate sentence was an evenly bifurcated six-year term of imprisonment and found Cooper ineligible for the Wisconsin substance abuse program.

In postconviction proceedings, Cooper claimed that he was sentenced on the basis of inaccurate information. As grounds, he alleged that the circuit court wrongly denied him eligibility for the Wisconsin substance abuse program because he had "drug issues" and was otherwise qualified to participate in the program. He also claimed that the circuit court considered improper factors and that his sentence was unduly harsh. The circuit court denied the postconviction motion in a written order, and Cooper appeals.

Cooper first renews his argument that he was sentenced on the basis of inaccurate information. "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 who seeks resentencing based on an alleged violation of this right must show by clear and convincing evidence both that "(1) some information at the original sentencing was inaccurate, and (2) the circuit court actually relied on the inaccurate information at sentencing." ***State v. Coffee***, 2020 WI 1, ¶38, 389 Wis. 2d 627, 937 N.W.2d 579. Our review is *de novo*. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶9.

Cooper asserts that the circuit court incorrectly found that he did not have any substance abuse problems and relied on that finding to make sentencing decisions.[2] According to Cooper, he has "a clear drug problem" because "[a]ll of Cooper's past legal issues and criminal charges have been related to drugs." Cooper also points to his statement to police in which he claimed that he possessed marijuana and ecstasy solely for his personal use. These arguments fail to demonstrate that Cooper was sentenced on the basis of inaccurate information.

The information available to the sentencing court included statements from Cooper's trial counsel regarding her exploration of the possibility that Cooper had substance abuse treatment needs. Trial counsel advised that Cooper had "no problems with alcohol whatsoever" and had done no more than "experiment with ... marijuana." Further, the criminal complaint included Cooper's admissions that he had sold marijuana in the past, he "was out selling weed and ecstasy" on the day of the offense, and he was selling ecstasy pills to Williams shortly before the shooting. These admissions belie the claim that Cooper possessed drugs solely for personal use. The sentencing court concluded that, while Cooper apparently had ongoing problems with drug dealing, he did not have any current problems with substance abuse.

Cooper believes that the circuit court should have reached a different conclusion, but the well-established law in Wisconsin is that the circuit court may draw reasonable inferences from the record in the exercise of its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶19,

[2] Cooper supports his claim with a citation to an unpublished court of appeals opinion issued in 2006. Pursuant to WIS. STAT. RULE 809.23(3), unpublished opinions issued by this court before July 1, 2009, may not be cited as precedent or authority in any court of this state "except to support a claim of claim preclusion, issue preclusion, or the law of the case[.]" Cooper's citation does not satisfy any of these narrow exceptions. We caution Cooper's appellate counsel that improper citation of unpublished opinions may result in sanctions. *See* ***Tamminen v. Aetna Cas. & Sur. Co***., 109 Wis. 2d 536, 563-64, 327 N.W.2d 55 (1982).

270 Wis. 2d 535, 678 N.W.2d 197. Here, the circuit court's findings about Cooper's substance abuse treatment needs were reasonably drawn from the facts in the record and the information presented at sentencing. Cooper's postconviction motion did not include any information from outside the record to refute those finding. Cooper merely offered alternative inferences that he would have preferred the circuit court to draw. Accordingly, he failed to establish that the circuit court relied on inaccurate information regarding his use of alcohol and drugs.

Cooper also raises a claim that the circuit court inaccurately concluded that the nature of his criminal conviction disqualified him from participating in the Wisconsin substance abuse program. The program is a substance abuse treatment program for prison inmates. *See* WIS. STAT. § 302.05(1)(am). An inmate who successfully completes the program will have his or her remaining period of confinement converted to extended supervision, thus earning an early release from confinement, but the length of the inmate's sentence does not change *See* § 302.05(3)(c)2. A circuit court imposing a bifurcated sentence normally has discretion to decide whether the defendant is eligible for the privilege of participating in the Wisconsin substance abuse program. *See* WIS. STAT. § 973.01(3g).[3] However, a person incarcerated for a crime codified in ch. 940 is statutorily disqualified from participation. *See* WIS. STAT. § 302.05(3)(a)1. Notwithstanding that statutory disqualification, Cooper argued in his postconviction motion, and argues again in his opening appellate brief, that his conviction under

[3] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05, 973.01(3g).

WIS. STAT. § 940.11(2) did not disqualify him because "the actual crime he committed was party to a crime in violation of Chapter 939."

The circuit court correctly rejected this argument, explaining that "party to a crime" under WIS. STAT. § 939.05 "is not a stand-alone offense." Rather, § 939.05 provides alternative ways that a defendant is guilty of the crime charged. As our supreme court pointed out long ago, "the purpose behind the enactment of [§] 939.05, Stats., was to abolish the common law distinctions between principals and accessories to a crime." *See* ***Holland v State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979). Thus, "a party to the crime is guilty of that crime, whether or not he intended that crime or had the intent of its perpetrator." ***State v. Stanton***, 106 Wis. 2d 172, 178, 316 N.W.2d 134 (Ct. App. 1982).

We will not dwell further on Cooper's misstatements of the law governing party to a crime liability. Cooper conceded in his reply brief that "someone pleading guilty for an offense under [c]h. 940 is pleading guilty to that crime rather than to Wis. Stat. § 939.05." We accept his belated concession without additional comment.

In sum, Cooper has not satisfied his burden to prove that he had a substance abuse problem, and he has withdrawn the unsustainable claim that his crime of conviction was not codified in ch. 940. Accordingly, we agree with the circuit court that he fails to show that he was sentenced on the basis of inaccurate information.

Next, Cooper claims that his statutory ineligibility for the Wisconsin substance abuse program violates his constitutional right to equal protection. *See* U.S. CONST. amend. XIV, § 1; WIS. CONST. art. I, § 1. He is wrong.

The equal protection clauses ensure that those who are similarly situated will be treated similarly. *See* ***State v. Heidke***, 2016 WI App 55, ¶6, 370 Wis. 2d 771, 883 N.W.2d 162. "To prove an equal protection clause violation, the party challenging a statute's constitutionality must show that 'the state unconstitutionally treats members of similarly situated classes differently.'" ***Waupaca Cty. v. K.E.K.***, 2021 WI 9, ¶33, 395 Wis. 2d 460, 954 N.W.2d 366 (citations omitted). When a statute is challenged on equal protection grounds, we first determine whether to apply strict scrutiny or the deferential rational basis standard of review, and we use the latter standard unless the statute impinges on a fundamental right or discriminates against a suspect class. *See* ***State v. Alger***, 2015 WI 3, ¶39, 360 Wis. 2d 193, 858 N.W.2d. 346. Under rational basis review, we uphold a statute against an equal protection challenge unless the statute "is 'patently arbitrary' and bears no rational relationship to a legitimate government interest." ***Id.*** (citations and some quotation marks omitted).

We have previously considered and rejected an equal protection challenge to the statutory scheme that excludes those convicted of a crime codified in ch. 940 from participating in the Wisconsin substance abuse program. *See* ***State v. Lynch***, 2006 WI App 231, ¶¶1-4, 297 Wis. 2d 51, 724 N.W.2d 656. In reaching our conclusion, we first determined that we should consider the challenge using the rational basis standard, rejecting the suggestion that fundamental rights are implicated when classifications of crimes affect sentencing. *See* ***id.***, ¶¶14-15. We then held that "there is a rational basis for not allowing persons convicted of crimes under WIS. STAT. ch. 940 to participate in the [Wisconsin substance abuse program]." ***Lynch***, 297 Wis. 2d 51, ¶18. Specifically, "participation in the program is an opportunity to have a lesser punishment than that originally imposed[, and e]xcluding persons who have committed more serious crimes from this

opportunity for reduced confinement is rationally related to the legitimate purpose of punishing more serious crimes more severely." ***Id.***

Cooper appears to believe that ***Lynch*** countenances statutory exclusion from the Wisconsin substance abuse program only for those inmates convicted of crimes resulting in death or great bodily harm.[4] He is wrong. Pursuant to ***Lynch***, excluding inmates convicted of any crime under ch. 940 survives rational basis review because such an exclusion is rationally related to the legislative purpose of punishing more serious crimes more severely. *See* ***Lynch***, 297 Wis. 2d 51, ¶18. Cooper was convicted of a crime under WIS. STAT. § 940.11(2). The holding in ***Lynch*** therefore controls this case. We are not at liberty to ignore or modify that holding. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

Cooper next claims that the circuit court sentenced him on the basis of improper factors, namely, "the uncharged homicide of the victim" and the "statements of grief" from Williams's family members. We reject these claims; they do not identify any improper sentencing considerations.

Turning first to Cooper's complaint that the circuit court considered an uncharged crime, we remind Cooper that, "[t]o discharge its obligation to discern a defendant's character, 'a sentencing court may consider uncharged and unproven offenses[.]'" *See* ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436 (citation and one set of brackets omitted). Here, as

[4] In ***State v. Lynch***, 2006 WI App 231, 297 Wis. 2d 51, 724 N.W.2d 656, the defendant was convicted of homicide by intoxicated use of a motor vehicle under WIS. STAT. § 940.09. *See* ***Lynch***, 297 Wis. 2d 51, ¶3. The defendant alleged that WIS. STAT. § 302.05 unconstitutionally excluded him from the substance abuse treatment program by treating him differently from those persons serving sentences for driving while intoxicated but whose crimes were not codified in ch. 940 because they did not result in death or great bodily harm. *See* ***Lynch***, 297 Wis. 2d 51, ¶¶9, 16.

the circuit court explained in its postconviction order, Cooper's sentencing involved consideration not only of Cooper's "ill-advised and indecent decision to dump the victim's body in a garbage cart in an effort to evade criminal responsibility," but also his decision to participate in a drug transaction that culminated in the victim's death.

As to Cooper's complaint that the circuit court considered statements from Williams's bereaved family, the Wisconsin Constitution protects the right of crime victims to speak at sentencing. *See* ***State v. Bokenyi***, 2014 WI 61, ¶59, 355 Wis. 2d 28, 848 N.W.2d 759; *see also* WIS. CONST. art. I, § 9m(2)(i). Williams's family members who addressed the court at sentencing were victims as defined in WIS. CONST. art. I, § 9m(1)(a)2., and WIS. STAT. § 950.02(4)(a)4.a. Cooper fails to show that the circuit court acted improperly by honoring the victims' constitutional right to speak at his sentencing.

Cooper last asserts that he received an unduly harsh sentence. The circuit court rejected this claim. "We review a [circuit] court's conclusion that a sentence it imposed was not unduly harsh and unconscionable for an erroneous exercise of discretion." *See* ***State v. Grindemann***, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507 (citation and emphasis omitted). When we conduct such a review, we will not hold that the circuit court erroneously exercised its discretion unless "the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Id.***, ¶31 (citation omitted). However, "[a] sentence well within the limits of the maximum sentence ... is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."

State v. Mursal, 2013 WI App 125, ¶24, 351 Wis. 2d 180, 839 N.W.2d 173 (citation, brackets, and quotation marks omitted).

Cooper received an evenly bifurcated six-year term of imprisonment that was less than half the statutory maximum term and did not include any portion of the possible $25,000 fine. He nonetheless asserts that his sentence was unduly harsh because the circuit court considered "improper factors" and imposed a sentence that was "significantly harsher than the only recommendation." These arguments are baseless.

"Circuit courts must consider three primary factors in determining an appropriate sentence: the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. Sentencing courts may also consider a broad range of additional factors related to the offender, the crime, and the community. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 & n.11 (citation omitted). The sentencing court has discretion to determine the factors that are relevant in imposing sentence and the weight to assign to each relevant factor. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

Cooper concedes that the circuit court considered "the ***Gallion*** factors." His claim that the circuit court also considered improper factors apparently relates back to his contentions regarding his alleged substance abuse, his statutory ineligibility for the Wisconsin substance abuse program, and the victims' sentencing remarks. We have already explained, however, that the circuit court did not err in addressing any of those matters. Accordingly, we reject the claim that he was sentenced on the basis of improper factors.

Finally, Cooper asserts that his sentence was unduly harsh because it exceeded the "only recommendation." He offers that claim without supporting authority, and we know of none. Sentencing rests within the discretion of the circuit court, not the parties, *see* ***Gallion***, 270 Wis. 2d 535, ¶17, and "[t]he sentencing court always has an independent duty to look beyond the recommendations and to consider all relevant sentencing factors," *see* ***State v. Scott***, 230 Wis. 2d 643, 664, 602 N.W.2d 296 (Ct. App. 1999) (citation omitted). A circuit court's exercise of sentencing discretion is not restrained by the defendant's sentencing recommendation. Indeed, no party's sentencing recommendation can bind a circuit court's sentencing discretion. *See* ***State v. Robinson***, 2001 WI App 127, ¶18, 246 Wis. 2d 180, 629 N.W.2d 810. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. *See* 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