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DISTRICT II

December 14, 2022

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

2021AP113-CR

State of Wisconsin v. Kenneth D. Evans (L.C. #2017CF1480)

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).

Kenneth D. Evans appeals from a judgment convicting him of first-degree recklessly endangering safety and using a vehicle to flee from or elude an officer. Evans also appeals from a circuit court order denying his postconviction motion after he declined to be transported to court for the motion hearing. On appeal, Evans challenges his sentence and contends that his trial counsel was ineffective. 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 because the circuit court properly denied Evans's postconviction motion, and the court did not err at sentencing.

We first address the ineffective assistance of trial counsel claim. The circuit court found that Evans declined to be transported to court for the hearing² on his postconviction motion, and therefore he waived his right to a hearing on the motion. Postconviction counsel told the court that he had informed Evans that he must attend the hearing. Because Evans refused to attend the hearing and the motion could not be addressed within the required sixty days, WIS. STAT. RULE 809.30(2)(i), the court denied the motion.

On appeal, Evans argues that he should have been permitted to withdraw his no contest pleas because his trial counsel was ineffective in the following respects: counsel did not meet with Evans until twenty days before the scheduled trial date and counsel failed to file a motion to suppress or object to the circuit court's reference to the passenger's report that during the high-speed pursuit, Evans threw a firearm from the vehicle. Evans did not appear for the evidentiary hearing on his postconviction motion. Because there was no evidentiary hearing addressing Evans's ineffective assistance of trial counsel claims, these claims are not properly before this court. *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (evidentiary hearing required for ineffective assistance of counsel claims); *see also State v. Mosley*, 201

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

² Evans had refused to be transported to court for other hearings. The reply brief explains that Evans had concerns about Covid-19, but the brief does not direct us to that portion of the record where Evans expressed these concerns to the circuit court in conjunction with the postconviction motion hearing he declined to attend. We will not address this issue further. *Keplin v. Hardware Mut. Cas. Co.*, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964) (we will not sift the record for facts that support an argument).

Wis. 2d 36, 50, 547 N.W.2d 806 (Ct. App. 1996). We will not address the ineffective assistance of trial counsel claims further.

We turn to Evans's sentence modification request as set forth in his postconviction motion. Because Evans refused to attend the postconviction motion hearing, the circuit court did not reach the merits of the sentence modification motion. Nevertheless, we will consider the appellate arguments made in connection with Evans's challenge to the sentence.

Evans, the vehicle driver, fled the scene of a traffic stop. The amended complaint related the passenger's statement that Evans had a black handgun and threw it out of the window during the high-speed pursuit. A handgun was later found on the gravel shoulder along the route of the pursuit. Evans was not charged with a firearms offense, and none of the other charges against him, including those that were dismissed and read-in, related to the firearm. At the plea hearing, the circuit court indicated that it would consider the facts alleged in the amended complaint, including the facts relating to Evans's alleged possession of a firearm. At sentencing, the circuit court referred to the passenger's statement about the firearm.

Evans contends that the circuit court relied upon an improper factor when it considered that he disposed of a firearm during the pursuit. We disagree. Having the "responsibility 'to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence,'" the sentencing court may consider an array of factors, *State v. Salas Gayton*, 2016 WI 58, ¶23, 370 Wis. 2d 264, 882 N.W.2d 459 (citation omitted), including "[e]vidence of unproven offenses involving the defendant," *State v. McQuay*, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990). We conclude that the circuit court did not misuse its sentencing discretion when it considered the passenger's statement about the firearm even though there was no offense

charged in connection with the firearm. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (sentencing is discretionary with the circuit court).

Evans next argues that the circuit court improperly relied upon irrelevant information at sentencing: his brothers were then imprisoned for murder. At sentencing, the circuit court stated:

Defendant is 37 years of age. I don't know a great deal about his upbringing. I know he has two brothers and they are both doing 40 years for murder in Wisconsin state prisons. But I have no idea whether that's reflection of the difficult upbringing or just happenstance.³

A defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To obtain resentencing, a defendant must establish that the information was inaccurate and the court actually relied upon it at sentencing. *Id.*, ¶28. Whether the circuit court sentenced a defendant based on inaccurate information presents a question of law that we decide independently of the circuit court. *Id.*, ¶9.

We reject Evans's challenge because the record shows that the circuit court did not rely upon information about his brothers at sentencing. The circuit court's comment about Evans's brothers was made in passing, and the circuit court conceded that it did not know what to make of the circumstances of Evans's brothers in the context of Evans's life. Furthermore, a defendant's family circumstances and upbringing are appropriate considerations at sentencing for purposes of assessing "a defendant's life and characteristics." *Salas Gayton*, 370 Wis. 2d 264, ¶23.

³ The family section of the presentence investigation report mentioned the circumstances of Evans's brothers. At sentencing, Evans elaborated on some of the information in the presentence investigation report, but he did not present information about his brothers or argue that the presentence investigation report was erroneous in this regard.

Finally, Evans claims that the circuit court erroneously denied his request to be made eligible for the Challenge Incarceration Program. We do not address this issue, which appears to be raised for the first time on appeal. Evans does not cite to that portion of the record in which he made this request, and he did not make this argument in connection with his postconviction motion seeking sentence modification. See *Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (“It is well-established law in Wisconsin that those issues not presented to the trial court will not be considered for the first time at the appellate level.”).

Upon the foregoing reasons,

IT IS ORDERED that 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