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DISTRICT I

January 24, 2023

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

2022AP466-CR State of Wisconsin v. Christopher Terry Roberson
(L.C. # 2019CF468)

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).

Christopher Terry Roberson appeals a judgment of conviction entered upon his guilty plea to felony intimidation of a victim as a party to a crime and as a repeat domestic abuse offender. He also appeals the order denying his postconviction motion. He alleges that the circuit court erroneously denied his requests for relief from his evenly bifurcated eight-year term of imprisonment. He seeks sentence modification or resentencing. 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 (2019-20).[1] We summarily affirm.

The State alleged in a criminal complaint that on February 1, 2019, police responded to a 911 call from a Milwaukee address. Upon arrival, police encountered Roberson, who said that he was trying to retrieve his belongings from the home of his former girlfriend, V.P.B. When officers began speaking with V.P.B., Roberson became agitated and threatened V.P.B. He also admitted to the officers that he had kicked in the door of her home on a prior occasion. Roberson then got into the passenger seat of a waiting car and rode away with a group of people, but he returned while police were still present. The officers arrested him. Roberson resisted getting into the squad car, and he told his companions to attack V.P.B. One of the members of his group threw a bottle at V.P.B.'s residence and threatened her. V.P.B. later gave a statement to police and said that on January 29, 2019, Roberson had come to her home, argued with her, and then bit her.

The State filed an information charging Roberson with five crimes. In counts one and two, respectively, the State charged him with the misdemeanor offenses of battery and disorderly conduct based on his alleged actions on January 29, 2019. In the remaining three counts, the State charged Roberson with crimes arising out of his conduct on February 1, 2019. Specifically, in count three, the State charged him with disorderly conduct; in count four, the State charged him with felonious intimidation of a victim as a party to a crime; and in count five, the State charged him with felonious violation of a no-contact order. Further, because the State determined that in 2017 Roberson had been convicted of offenses in which a domestic abuse surcharge was either

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

imposed or waived, the State charged him in this case as a repeat domestic abuse offender as to each count.

Roberson resolved the charges with a plea agreement. Pursuant to the agreement, Roberson pled guilty to count four, namely, felonious intimidation of a victim as a party to a crime and as a repeat domestic abuse offender. *See* WIS. STAT. §§ 940.45(3), 939.05, 939.621(1)(b). The State moved to dismiss counts three and five and read them in for sentencing purposes. As to counts one and two, the State moved to dismiss them outright because V.P.B. was unavailable to testify for the prosecution.

During the course of the plea colloquy, Roberson said that he understood the charge that he faced in count four, and he told the circuit court that he was pleading guilty to the charge because he was guilty. He acknowledged that upon conviction he faced a maximum penalty of twelve years of imprisonment and a $25,000 fine. *See* WIS. STAT. §§ 940.45(3), 939.50(3)(g), 939.05, 973.055(1), 939.621(1)(b), (2). He also acknowledged that the circuit court was free to impose the maximum statutory penalty if the circuit court believed that such a penalty was warranted.

At sentencing, V.P.B. appeared and spoke on Roberson's behalf. She said that she did not view herself as a victim and that she had lied to the police about Roberson's conduct. In response, the State advised that the conduct supporting Roberson's conviction for feloniously intimidating a victim occurred in the presence of the police, who had recorded that conduct on their body cameras. Roberson's trial counsel then confirmed that the conduct was "all on body cam." Roberson himself apologized for threatening V.P.B.

Regarding a disposition, the State asked the circuit court to impose an evenly bifurcated seven-year term of imprisonment. Roberson, by counsel, asked the circuit court to impose a

sentence that did not include "any lengthy prison term," and to order that the sentence run concurrently with the revocation sentence previously imposed for his 2017 conviction for reckless injury. The circuit court imposed an evenly bifurcated eight-year term of imprisonment, without expressly stating whether the sentence was concurrent with or consecutive to Roberson's revocation sentence.

Roberson filed a postconviction motion alleging that he was entitled to sentence modification or resentencing. He contended that, "despite the recantation provided by V.P.B., the circuit court sentenced Roberson beyond even the recommendation of the parties," and that the circuit court did not "properly tak[e] the victim's recantation into account." The circuit court denied the postconviction motion without a hearing, concluding that Roberson failed to demonstrate any basis for relief. The circuit court did clarify, however, that the sentence it imposed in this case was concurrent with any previously imposed sentence.[2] Roberson appeals.

In this court, Roberson contends that the circuit court "improperly overlooked" and "fail[ed] to consider" the victim's recanting statement on his behalf at the sentencing hearing. The precise bases on which he seeks relief, however, are not clearly defined. Indeed, as the State colorfully and correctly asserts, Roberson "believes the sentencing court should have accepted the

[2] In the postconviction motion, Roberson pointed out that the sentencing court did not explicitly state whether the sentence in this case was consecutive to or concurrent with his revocation sentence. He went on to assert that the sentence was presumptively consecutive. The postconviction order explained that a sentence is presumed concurrent unless the record demonstrates otherwise, *see* ***State v. Oglesby***, 2006 WI App 95, ¶21, 292 Wis. 2d 716, 715 N.W.2d 727, and that the presumption governed the instant case. Surprisingly, Roberson asserts anew in his appellant's brief that his sentence was presumptively consecutive to his revocation term and, within the body of that brief, he asks this court for the alternative relief of a concurrent sentence. The postconviction order clearly shows that Roberson does not require a decision from this court to establish that the sentencing court ordered a concurrent sentence.

victim's purported recantation at sentencing," but he "conflates multiple legal theories and careens between them all without fully developing an argument along the way."

Roberson first suggests that the victim's sentencing statement on his behalf is a new factor warranting relief from his sentence. A new factor is "a fact or set of facts 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 ... it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court has inherent authority to modify a defendant's sentence upon a showing of a new factor. *See* ***id.***, ¶35. However, "any fact that was known to the [circuit] court at the time of sentencing does not constitute a new factor." ***Id.***, ¶57. V.P.B.'s statement to the circuit court at sentencing, by definition, does not constitute a "new factor" within the meaning of ***Harbor***. Accordingly, we reject this claim.

Roberson next asserts that he is entitled to relief because the circuit court relied on an improper factor. We have defined an "'improper sentencing factor'" as "'a factor that is totally irrelevant or immaterial to the type of decision to be made.'" ***State v. Samsa***, 2015 WI App 6, ¶8, 359 Wis. 2d 580, 859 N.W.2d 149 (citation and one set of quotations marks omitted). For example, neither gender nor race may play a part in a sentencing decision. *See* ***State v. Harris***, 2010 WI 79, ¶33, 326 Wis. 2d 685, 786 N.W.2d 409. Roberson is vague in regard to the factor that he deems "improper" here, but at one point he indicates that the sentencing court improperly relied on the State's description of the evidence that was recorded on police body cameras rather than on

V.P.B.'s statement at sentencing.[3] Roberson, however, fails to cite any authority—and we know of none—suggesting that the evidence available to prove the defendant's crime is "totally irrelevant or immaterial" to the sentencing decision. To the contrary, the gravity of the offense is a mandatory sentencing consideration. *See* ***State v. Williams***, 2018 WI 59, ¶46, 381 Wis. 2d 661, 912 N.W.2d 373. Accordingly, we reject this claim.

Roberson next appears to argue that he was sentenced on the basis of inaccurate information. A defendant has a due process right to be sentenced on the basis of accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a violation of that right, the defendant must make a two-prong showing that the information at issue was inaccurate and that the sentencing court actually relied on the misinformation when imposing sentence. *See* ***id.***, ¶28.

Here, Roberson suggests that the prosecutor's description of the body camera video conveyed "inaccurate information" to the circuit court. Accordingly, Roberson was required to demonstrate both that the prosecutor provided inaccurate information and that the circuit court relied on that information. *See* ***id.***, ¶¶28, 31. Roberson, however, did not satisfy the first prong of the analysis. Specifically, he neither offered the body camera video as evidence in support of his postconviction claim nor did he otherwise demonstrate that the prosecutor's description of the

[3] Under the heading "improper factor," Roberson also asserts that "[i]n this case, the inaccurate information of a punch instead of a push was used at sentencing." Roberson does not include a record citation for this assertion, and it appears unrelated to either the facts underpinning the charge or the arguments presented at sentencing. As did the State, we conclude that the assertion is a scrivener's error, and we do not discuss it further.

video was wrong. Accordingly, we reject this claim without considering the second prong of the analysis.[4] *See* ***id.***, ¶31.

Roberson next asserts that his sentence was unduly harsh and unconscionable. A sentence is unduly harsh or unconscionable "only where 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." *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). A sentence well within the statutory limits is presumptively not unduly harsh or unconscionable. ***Id.***, ¶32. Here, Roberson received an eight-year term of imprisonment, a penalty far less than the twelve years of imprisonment and $25,000 fine that he faced upon conviction. His sentence was therefore presumptively neither unduly harsh nor unconscionable. *See* ***id.*** Roberson suggests, however, that the circuit court erred in postconviction proceedings when it concluded that he failed to overcome the presumption. We disagree.

We review a circuit court's conclusion that a sentence was not unduly harsh or unconscionable for an erroneous exercise of discretion. ***Id.***, ¶30. A party challenging the circuit court's exercise of sentencing discretion must shoulder a heavy burden, however, consistent with our strong public policy against interfering with the circuit court's sentencing discretion. *See* ***Harris***, 326 Wis. 2d 685, ¶30.

[4] We add that, because Roberson failed to offer the body camera evidence to support his postconviction allegation that the prosecutor misrepresented that evidence, we presume that the body camera recordings would instead support the order denying postconviction relief. *See* ***State v. Benton***, 2001 WI App 81, ¶10, 243 Wis. 2d 54, 625 N.W.2d 923.

A circuit court exercises its broad sentencing discretion guided by familiar standards. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-38, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court must identify the sentencing objectives, which may "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentencing court may also consider a wide range of other factors relating to the defendant, the offense and the community. *See* ***id.*** The circuit court's discretion extends to the determination of the factors that are relevant to the sentencing decision and the weight to afford those factors. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court in this case identified punishment, deterrence, and protection of the community as the primary sentencing objectives, and the circuit court thoroughly discussed the sentencing factors it deemed relevant to achieving those objectives. The circuit court found that Roberson's conduct was frightening and that the gravity of the offense was aggravated because Roberson committed it while serving a term of extended supervision for an earlier conviction. In considering Roberson's character, the circuit court emphasized his extensive criminal record, which included armed robbery, fleeing, and reckless injury, the last of which involved an act of domestic abuse in which he set V.P.B. on fire. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (holding that a significant criminal record is evidence of character). As to the need to protect the public, the circuit court considered Roberson's assertion that the conduct underlying his reckless injury conviction stemmed from his wish to commit suicide, and

the circuit court concluded that this highlighted the risk that he posed to the community and reflected his need for treatment in a controlled setting.

Although the foregoing demonstrates that the circuit court identified appropriate sentencing goals and considered proper sentencing factors, Roberson contends that the circuit court nonetheless imposed an unduly harsh sentence because the circuit court "did not consider" V.P.B.'s recantation. This contention is not supported by the record. As Roberson appears to recognize at other points in his appellate briefs, the circuit court in fact listened to V.P.B.'s sentencing remarks and then posed questions to both V.P.B. and the State about the specifics of her assertions.[5] The circuit court ultimately concluded, however, that her recanting statements were "of no significance" because Roberson's criminal conduct was "captured on video" and because he "admitted to and apologized for the conduct" underlying the criminal charge. We conclude that Roberson fails to demonstrate an erroneous exercise of discretion in the circuit court's treatment of V.P.B.'s sentencing remarks when fashioning his sentence.

Finally, Roberson contends that his sentence was unduly harsh because it was "much harsher" than either party's recommendation. This argument runs counter to our sentencing jurisprudence. "The sentencing court always has an independent duty to look beyond the recommendations and to consider all relevant sentencing factors." ***State v. Scott***, 230 Wis. 2d 643, 664, 602 N.W.2d 296 (Ct. App. 1999) (citation omitted). The parties' sentencing

[5] Roberson's brief-in-chief and reply brief both include lengthy excerpts from the sentencing transcript reflecting the circuit court's dialogue with V.P.B.

recommendations thus cannot bind a circuit court's exercise of sentencing discretion.[6] *See* ***State v. Robinson***, 2001 WI App 127, ¶18, 246 Wis. 2d 180, 629 N.W.2d 810. Accordingly, a circuit court does not impose an unduly harsh or unconscionable sentence merely by imposing a sentence that exceeds the parties' recommendations.

In sum, the record shows that the circuit court discussed relevant sentencing factors, explained the basis for its sentencing decision, and imposed a sentence well within the limits of the maximum allowed by law. Although Roberson would have preferred that the circuit court give controlling weight to the victim's statements in his support and fashion a more lenient disposition, our inquiry is whether discretion was exercised, not whether the circuit court might have exercised its discretion differently. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment 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

[6] For the sake of completeness, we observe that Roberson fails to demonstrate that the circuit court imposed a sentence harsher than he proposed. Roberson's recommendation at sentencing was for "a concurrent sentence" and "not any lengthy prison sentence." He further asserted that "supervision is appropriate." The circuit court imposed the concurrent sentence he requested, a fact that Roberson has perplexingly ignored throughout his postconviction litigation. As to whether the four-year term of initial confinement was "lengthy," that is a matter of subjective assessment. *Cf.* ***State v. Wuensch***, 69 Wis. 2d 467, 470, 476-77, 230 N.W.2d 665 (1975) (examining a circuit court's postconviction finding that "lengthy" incarceration was unwarranted and the circuit court's accompanying order reducing a seven-year prison sentence to a sentence of four years and six months).