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**DISTRICT I**

May 31, 2023

To:

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

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2020AP1150-CR

State of Wisconsin v. Dionte Cordell Phillips (L.C. # 2017CF3798)

Before Brash, C.J., Donald, P.J., and White, J.

**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).**

Dionte Cordell Phillips appeals from a judgment, entered on his guilty pleas, convicting him on two counts of armed burglary and one count of possession of a firearm by a felon. He also appeals from an order that denied his postconviction motion for resentencing. 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 (2021-22).<sup>1</sup> The judgment and order are summarily affirmed.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On July 29, 2017, K.E. parked in his garage and left the overhead garage door open while he went to retrieve something from inside the residence. When he returned to the garage, he was confronted by a man he did not know, who pointed a pistol at K.E. The man told K.E. not to say anything. K.E. began talking to the man; the man backed out of the garage and ran to a red car parked nearby.

On August 1, 2017, M.E. was in her residence, talking on the phone, when someone knocked on the front door and rang the doorbell. M.E. looked out a window and saw a man she did not know and a red car parked in front of her house. M.E. called 911 and watched the man move the red car into her driveway. M.E. tried to take photos and record a video while she waited for police. As M.E. waited, the man forced open the locked back door and entered the home. When he saw M.E., he ran back to the driveway and pointed a gun at her before getting into the vehicle and driving away.

K.E. and M.E. both viewed a photo array. M.E. did not identify anyone in the array. K.E. selected a different individual, but noted that Phillips had similar eyes and cheeks. After Phillips was arrested on August 15, 2017, both K.E. and M.E. viewed an in-person lineup. Both selected Phillips from the lineup, and both were certain of their identification.

The State filed a criminal complaint charging Phillips with two counts of armed burglary. The complaint listed five additional counts being held as potential read-in offenses. Phillips was later charged with four of those offenses—two counts of burglary, possession of a firearm by a felon, and operating a motor vehicle without the owner’s consent (OMVWOC)—in an amended information.

In April 2018, Phillips filed a motion to suppress the out-of-court identifications of him made at the lineup and any subsequent in-court identifications. He alleged that the identification in this case was unreliable because the procedure employed—a live lineup after a photo array—was unduly suggestive because he was the only subject to appear in both groups.

The circuit court delayed ruling on the suppression motion until just before trial. The morning of trial, Phillips pled guilty to the felon-in-possession charge. Later that afternoon, the circuit court heard and denied the suppression motion. Voir dire began. The following morning, Phillips then agreed to plead guilty to the armed burglaries. The two remaining burglary charges and the OMVWOC charge, plus another OMVWOC charge from a separate case, would be dismissed and read in.

As part of its sentencing remarks, the circuit court noted that Phillips “accepted responsibility ... [but] at the last minute. Okay. He’ll get some points for acceptance of responsibility but not as many if he had done it early on in this case.” The circuit court eventually sentenced Phillips to consecutive sentences totaling twenty years imprisonment out of a maximum possible forty years.

Phillips filed a postconviction motion, arguing that the circuit court’s sentencing remarks reflect that it was punishing him for exercising a constitutional right to litigate the suppression motion. The circuit court denied the motion, explaining that the sentencing decision “was based upon a fair consideration of all of the relevant sentencing factors in this case and was not imposed more harshly because the defendant waited until after his suppression motion was denied to enter his pleas.” Phillips appeals.

Phillips raises two issues on appeal. The first is whether the circuit court erred in denying his suppression motion; the second is whether the circuit court sentenced him on an improper factor and improperly punished him for exercising a constitutional right.

We review a motion to suppress pretrial identification in two steps. *See State v. Roberson*, 2019 WI 102, ¶66, 389 Wis. 2d 190, 935 N.W.2d 813. First, the defendant has the initial burden to show that the identification procedure used “was impermissibly suggestive such that there was a very substantial likelihood of misidentification.” *See id.*, ¶34. If the defendant makes such a showing, the burden shifts to the State to prove that, under the totality of the circumstances, the identification was reliable despite the suggestive confrontation procedure. *See id.*, ¶35.

Phillips argues that although the photo array or the lineup are separately unproblematic, “together the identification procedures were arranged to be impermissibly suggestive.” It is not necessary for us to resolve the question of suggestiveness; for purposes of this opinion, we will assume without deciding that Phillips has satisfied his burden to show the procedures used were impermissibly suggestive. We must now consider whether the identification was nevertheless reliable under the totality of the circumstances.

The non-exclusive list of reliability factors includes: (1) the witness’s opportunity to view the suspect at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description of the suspect, (4) the level of certainty demonstrated at the time of identification, and (5) the time between the crime and the identification. *See id.*

Here, both K.E. and M.E. had ample opportunity to view the suspect. Although K.E.’s encounter with Phillips was brief, Phillips had made no attempt to conceal his identity, and the

encounter was in broad daylight. M.E. observed Phillips for several minutes; she saw him outside her door, watched him walk to the car, photographed him at her back door, and encountered him inside her home after he forced the door open. The witnesses' degree of attention was also high. While Phillips tries to argue that their attention was diverted, perhaps to his firearm, both victims were clearly focused on Phillips himself; there is no evidence that the witnesses' attention was diverted by some other incident occurring simultaneously. In M.E.'s case, Phillips did not brandish his weapon until after he forced open the door and encountered her, several minutes after she had already been observing him.

Although neither witness conclusively identified Phillips in the photo array, both were certain of their identification of him at the lineup. Of particular import in this case, both witnesses separately informed police that they recognized Phillips because of his gait. This is a characteristic neither could have seen in the array, but one they both had ample opportunity to observe during their encounters with Phillips. Accordingly, we are satisfied that the identification, even if done through impermissibly suggestive procedures, was nevertheless reliable under the totality of the circumstances. Thus, the circuit court properly denied the suppression motion.

Phillips also complains that the circuit court erroneously punished him at sentencing for litigating the suppression motion. Sentencing is committed to the circuit court's discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court must consider the primary objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In seeking to fulfill the sentencing objectives, the circuit court must consider three main factors including the gravity of the offense, the character

of the offender, and the need to protect the public, and may consider secondary factors. *See State v. Williams*, 2018 WI 59, ¶46, 381 Wis. 2d 661, 912 N.W.2d 373.

It is an erroneous exercise of sentencing discretion if the circuit court “actually relies on clearly irrelevant or improper factors.” *See State v. Dodson*, 2022 WI 5, ¶8, 400 Wis. 2d 313, 969 N.W.2d 225 (citation omitted). “Sentencing courts may not vindictively punish a defendant solely for exercising a constitutional right.” *Williams*, 381 Wis. 2d 661, ¶51. A defendant challenging a sentence because the circuit court relied on an improper factor must prove, by clear and convincing evidence that the challenged factor is irrelevant or improper and that the circuit court actually relied on that factor. *See Dodson*, 400 Wis. 2d 313, ¶8.

The circuit court began its sentencing remarks by discussing the “serious nature of the crime[s].” It discussed the burglary at K.E.’s garage and that K.E. later identified Phillips, then commented, “Yeah, there were ... motions to suppress the photo arrays.... [T]here was no problem with either one of them. The defense talks about, Well, he had to listen to the motions before he could plead. No. He knew he did this stuff. The identities were sound.” Further on in its remarks, the circuit court began discussing Phillips himself. It acknowledged that he “accepted responsibility” but commented that he “did so at the eleventh hour ... waiting to come in here at the last minute. Okay. He’ll get some points for acceptance of responsibility but not as many if he had done it early on in this case.”

Phillips contends that these comments reflect that the circuit court was punishing him for litigating the suppression motion. In particular, he notes that the circuit court scheduled the motion hearing for the morning of trial, making it responsible for last-minute litigation, not him.

When we consider the actual reliance prong of an improper factor claim, “we review the sentencing transcript as a whole and assess any allegedly improper comments within that context.” *See id.*, ¶10. Within the context of the entire sentencing transcript, it is clear that the circuit court did not punish Phillips for exercising his right to litigate a suppression motion. Rather, the circuit court had an overarching concern about Phillips’ reluctance to accept responsibility for his actions. The specific commentary about Phillips having to listen to the motions before he could plead reflects only the reality that a ruling on the suppression motion was not a legal prerequisite to entering a plea.

Factors a sentencing court may consider include a defendant’s character, any expressions of remorse, and degree of cooperation. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. A defendant’s acceptance of responsibility, or lack thereof, informs on each of these factors. As the circuit court explained in the order denying the postconviction motion:

*State v. Baldwin*, 101 Wis. 2d 441, 459[, 304 N.W.2d 742] (1981) held that a court may consider a defendant’s failure to admit guilt and lack of remorse provided that those factors are not given undue or overwhelming weight. In this instance, the evidence connecting the defendant to the burglaries was very strong; however, he did not admit to them until after *voir dire* had commenced. The court did not punish the defendant more harshly because of the timing of his admissions; the court considered this factor because it could not give it as much mitigating weight as it might for a defendant who admitted guilt early on in the face of compelling evidence....

The timing of the defendant’s admissions was one of many factors the court could and did consider in this case. The court also considered other relevant factors, including the serious nature of his crimes, the impact upon the victims and the community, his character in terms of his prior record and rehabilitative needs and his expression of contrition, which was seriously undercut by his expletive-filled outburst at the court immediately after being sentenced. The sentence imposed in this case was intended to punish and deter the defendant and to protect the community from

further victimization. As it stands, the court imposed less confinement time than the State recommended. The court's sentencing decision was based upon a fair consideration of all of the relevant sentencing factors in this case and was not imposed more harshly because the defendant waited until after his suppression motion was denied to enter his pleas.

We agree with this summation. Because the circuit court did not rely on an improper factor at sentencing, the postconviction motion was appropriately denied.

Therefore,

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