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DISTRICT II

November 29, 2023

To:

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Circuit Court Judge
Electronic Notice

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

2021AP1602-CR State of Wisconsin v. Glenn E. Gipson (L.C. #2018CF33)

Before Neubauer, Grogan and Lazar, 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).

Glenn E. Gipson appeals from a judgment of conviction entered following revocation of his probation and from an order denying his postconviction motion. Gipson contends that the circuit court erroneously exercised its discretion in sentencing him without providing an adequate explanation and that the court relied on inaccurate information at sentencing and was biased against him. 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).[1] We reject Gipson's arguments and affirm the judgment and order.

Background

In March 2018, Gipson pled guilty to one count of substantial battery as an act of domestic abuse in violation of WIS. STAT. § 940.19(2). The charge arose out of an incident in which Gipson hit his fiancée, Karen,[2] in the face, causing a small laceration. Pursuant to the plea agreement, the State agreed to dismiss a disorderly conduct charge and recommend that Gipson be placed on probation without any jail time.

At Gipson's sentencing hearing, the State recommended probation but described his "lengthy history," which included assault and battery charges as well as three convictions for operating a motor vehicle while intoxicated (OWI). Noting this history, the circuit court expressed concern that Gipson is "one of these guys who goes out and gets loaded with booze and then comes home and slaps the woman around." Gipson acknowledged difficulties with alcohol and confirmed that he had "blacked out" when he hit Karen. In response, the court made comments critical of the disease theory of alcoholism, noted that there is no known cure and that people need to decide to stop, and expressed its view that "the bottom line is it is all your own decision." The court disclaimed "any tolerance for people who make the choice" to commit acts of domestic violence and asked Gipson if he thought hitting Karen was "a manly thing to do." It further expressed suspicion that incidents like this were "pretty frequent" with Gipson but stated

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] Consistent with the policy set forth in WIS. STAT. RULE 809.86(1), we refer to Gipson's fiancée by a pseudonym.

that it would not base his sentence on that suspicion. Looking to the future, the court told Gipson that "[i]f I think you'd do it again and I have got reason to believe that, it's going to be so ugly." The court withheld sentence and placed Gipson on probation for two years.

In February 2020, the Department of Corrections initiated revocation proceedings against Gipson. The Department alleged multiple violations against him, including that he had hit and choked Donna, his niece, and had pushed and hit Kylie, Karen's daughter, when Kylie attempted to separate Gipson and Donna.[3] The Department also alleged that Gipson had violated the terms of his probation by consuming alcohol, absconding from supervision, and maintaining a sexual relationship without his agent's permission. An evidentiary hearing was held concerning these allegations before an administrative law judge (ALJ) in July 2020. Following the hearing, the ALJ issued a written decision concluding that the Department had proven these violations notwithstanding the fact that Kylie denied having witnessed a fight between Gipson and Donna or being touched by Gipson, which conflicted with her initial statement to police. The ALJ concluded Kylie's initial statement was more credible because she "ha[d] a motivation to change her story … about" Gipson, her stepfather with whom she had lived all her life, at the revocation hearing. The ALJ concluded further that revocation was appropriate because there were no appropriate alternatives and "confinement [was] necessary to protect the public."

Gipson returned to the circuit court to be sentenced in September 2020. The State informed the court that it would not be pursuing criminal charges arising out of the incident involving Donna and Kylie because several witnesses "have started giving a very different

[3] Donna and Kylie are also pseudonyms.

version of the events that occurred on that date." Gipson agreed with the Department's recommendation of six to nine months in jail, noting that his probation agent testified at the revocation hearing that he had done well on probation other than the incidents that were the subject of the revocation. Gipson also highlighted the testimony given by the witnesses at the revocation hearing, which differed from their statements to police, arguing that it "actually support[ed] potentially either a self-defense claim on Mr. Gipson's part or a lack of involvement by Mr. Gipson."

The circuit court declined to revisit the ALJ's conclusions:

> the administrative law judge heard the evidence and decided in spite of what recantations existed, that the case had been proved, and actually, revocations in—Wisconsin, of course, is the only jurisdiction in the English-speaking world in which revocations are out of the control of the judiciary and are placed in the hands of administrative officials, and actually, frankly, they employ a standard in my estimation that is even more demanding on the prosecution than could occur in at least some trial courts. Maybe not in Wisconsin, so I have no reason to question the judge's decision that the defendant had committed the offenses.

The court refused to countenance Gipson's claim of innocence "because my authority under our law is totally restricted" and accepted the ALJ's decision "because that is our law." The court then reviewed what it described as Gipson's "ugly criminal history," noting the prior convictions for battery, sexual assault, resisting arrest, and OWI. Stating that Gipson's case "has to be addressed" in light of the "very serious criminal offenses in his history" and the ALJ's decision, the court sentenced him to eighteen months of initial confinement followed by two years of extended supervision.

Gipson filed a postconviction motion in which he argued that the circuit court sentenced him based on its erroneous understanding that the Department's burden of proof was higher than

the State's burden at trial and that it had no choice but to accept the ALJ's decision. He argued that the court based its sentencing decision on "irrelevant comments referencing its own … belief system" and "more problematic comments specifically focusing on Mr. Gipson's gender." Finally, Gipson argued that his sentence violated his due process rights because the court relied on inaccurate information—the misstatements of law concerning the revocation hearing—and because the court's statement at his initial sentencing hearing that it would be "so ugly" if the court had to resentence Gipson exhibited bias.

In September 2021, the circuit court issued a written order denying Gipson's motion. With respect to its "so ugly" comment, the court disagreed with Gipson that it "threaten[ed] that the maximum sentence would be imposed" and said that a court can provide "fair warning of future consequences to a defendant being granted probation." The court also wrote that it "ma[d]e no excuse for viewing [Gipson's] conduct as the result more of moral choices than as the result of a disease" but stated that it did not "sentence people for nonconformity with [those] beliefs, but for the quality of their acts." Finally, the court stated that it was not inclined to review the ALJ's decision despite the State's decision not to pursue criminal charges and Gipson's assertion of innocence. The court stated that it had no inclination to conduct a factfinding hearing because the revocation hearing was "fully litigated," Gipson had the assistance of counsel at the hearing, and the ALJ concluded that Gipson had committed the offending conduct. The court described its role in the revocation process as that of "a mere stooge" because it "had no control over revocation and it was the defendant who enjoyed the opportunity, but failed, to overturn the revocation on certiorari."

Erroneous Exercise of Discretion Claim

We will not disturb Gipson's sentence unless the court erroneously exercised its discretion. *See* ***State v. Taylor***, 2006 WI 22, ¶17, 289 Wis. 2d 34, 710 N.W.2d 466. "An erroneous exercise of such discretion occurs 'whenever it appears that no discretion was exercised … or discretion was exercised without the underpinnings of an explained judicial reasoning process.'" ***State v. Brown***, 2006 WI 131, ¶22, 298 Wis. 2d 37, 725 N.W.2d 262 (quoting ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971)). So long as the court considers "the relevant factors," does not consider "irrelevant or improper ones," and imposes a sentence within the statutory limits, we will not disturb the sentence "unless it '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.'" ***Brown***, 298 Wis. 2d 37, ¶22 (quoting ***Taylor***, 289 Wis. 2d 34, ¶18). Where, as here, the same judge presides at the original sentencing and the sentencing after revocation, we "review the two sentencing proceedings on a global basis, treating the latter sentencing as a continuum of the first." ***State v. Wegner***, 2000 WI App 231, ¶¶7-8, 239 Wis. 2d 96, 619 N.W.2d 289.

Gipson argues that the circuit court erroneously exercised its discretion because its sentencing decision rested on several erroneous understandings of law. He contends that the court incorrectly characterized the burden of proof during revocation as "more demanding on the prosecution" than its burden at trial. We disagree with that characterization of the court's remark. The court referred to a "more demanding" standard after Gipson claimed that he was not guilty of the offenses involving Donna and Kylie for which his probation was revoked. The comment was a statement of opinion ("in my estimation") made by the court in explaining why it

would not revisit the ALJ's decision. It was not, as Gipson argues, a comparison of the State's burden at trial with the Department's burden in a revocation hearing, but rather a reference to the fact that the preponderance of the evidence standard applicable during revocation could impose a higher burden of proof than "some trial courts" might apply when making factual determinations at a sentencing hearing.

Similarly, the court's comment about its "authority under our law" being "totally restricted" was a recognition of its limited role in the revocation itself (certiorari review) and also part of its explanation why it would not "accept Mr. Gipson's claim of innocence or at least offer him a fact-finding hearing before concluding that he had violated" the terms of his probation. Wisconsin revocation proceedings are handled by administrative officials. WIS. STAT. § 973.10(2). Only after a defendant is revoked is the matter referred to the circuit court for sentencing. Sec. 973.10(2)(a). However, as the court noted in denying postconviction relief, Gipson could have challenged the outcome of the revocation proceeding by filing a petition for certiorari. *See* ***State ex rel. Johnson v. Cady***, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971) (judicial review of probation revocation is by petition for certiorari in circuit court); ***State v. Horn***, 226 Wis. 2d 637, 652, 594 N.W.2d 772 (1999) (stating that certiorari provides "a meaningful review" of revocation decisions). He apparently did not avail himself of that opportunity, and the court correctly observed that it need not review the ALJ's decision at sentencing because the probation violations had been "fully litigated" with the assistance of counsel, and the administrative law judge determined that Gipson committed the offending conduct. The court's task at the sentencing hearing was to sentence Gipson for the substantial battery offense to which he pled guilty, not to review or re-hear evidence concerning the

probation violations that Gipson chose not to appeal. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978).

Gipson cites ***State v. Terry***, 2000 WI App 250, ¶8, 239 Wis. 2d 519, 620 N.W.2d 217, for his proposition that a court is not barred from rehearing a "factual issue determined by an ALJ in a revocation context." ***Terry*** does not provide useful guidance here, however, because that case concerned a criminal prosecution for a drug offense that was commenced after an ALJ determined that the Department of Corrections had not proven the defendant committed the offense during a probation revocation hearing. ***Id.***, ¶¶4-7. On appeal, we held that the doctrine of issue preclusion did not bar the subsequent criminal prosecution. ***Id.***, ¶1. ***Terry*** does not stand for the proposition that a sentencing court must conduct its own review of the sufficiency of evidence supporting a probation violation at a subsequent sentencing hearing. The court acted within its discretion in accepting the ALJ's decision as sufficient proof that Gipson committed the acts for which he was revoked.

Gipson next argues that the circuit court did not adequately consider any of the three ***Gallion***[4] factors—the seriousness of the offense, the defendant's character and rehabilitative needs, and the need to protect the public—in its sentencing decision. *See* ***State v. Bolstad***, 2021 WI App 81, ¶14, 399 Wis. 2d 815, 967 N.W.2d 164. The amount of explanation a court must give for a sentencing decision "will vary from case to case." ***State v. Gallion***, 2004 WI 42, ¶39, 270 Wis. 2d 535, 678 N.W.2d 197. No "magic words" are required, and the court need not explicitly reference the factors so long as it provides sufficient information about its reasoning to

[4] ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

allow for meaningful appellate review. ***Bolstad***, 399 Wis. 2d 815, ¶16 (quoting ***Gallion***, 270 Wis. 2d 535, ¶49).

We agree with the State that the transcripts from the initial sentencing hearing and the hearing held after Gipson's probation was revoked reflect consideration of the ***Gallion*** factors and sufficiently explain the rationale for the circuit court's sentencing decision. At the initial hearing, the court alluded to the substantial battery offense as an instance of domestic violence twice and described the offense as "a violent crime" twice at the sentencing-after-revocation hearing.

The circuit court also discussed Gipson's character and history at both hearings. At the initial sentencing hearing, the court had an extended discussion with Gipson about his problematic consumption of alcohol and its view that Gipson bore responsibility for his choice to overconsume. At the sentencing-after-revocation hearing, the court reviewed what it described as Gipson's "ugly criminal history," which included multiple prior convictions for violent offenses and several OWI convictions, and explained that his sentence "has to be addressed" in light of that history and the offenses for which his probation was revoked. Gipson contends that the court improperly ignored Gipson's alcoholism and "need for appropriate substance abuse treatment" in favor of "its armchair judgments about the disease model of alcoholism and its religious-based viewpoint that Mr. Gipson had given into 'sin' by excessively drinking." We do not consider the court's remarks to reflect an erroneous exercise of its discretion; the court could reasonably view the conduct which led to Gipson's conviction for battering his fiancée as the consequence of his conscious and voluntary decision to consume an excessive amount of alcohol. That the court's not-uncommon view of excessive drinking, particularly when it led to violence against women, as a moral choice was grounded in its religious upbringing as compared

to other bases for its determination that drinking is a choice, does not render that view inappropriate in the sentencing context.

As to the third sentencing factor, though the court did not specifically mention protection of the public, its consideration of the violent nature of the offense, Gipson's significant history of problematic drinking, and his prior convictions convinces us that the risk Gipson posed to his family and community was considered by the court in determining an appropriate sentence. In sum, the court's remarks show its examination of the facts, a statement of the reasons for the sentence imposed, and a rational application of the sentencing factors—in other words, a proper exercise of sentencing discretion. *See* ***State v. Vesper***, 2018 WI App 31, ¶9, 382 Wis. 2d 207, 912 N.W.2d 418.

Due Process Challenges

Lastly, Gipson contends that the court relied on inaccurate information at sentencing and was biased against him. Due process requires that a defendant be sentenced by an impartial judge and based on accurate information. *See* ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385 ("The right to an impartial judge is fundamental to our notion of due process."); ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 ("A defendant has a constitutionally protected due process right to be sentenced upon accurate information.").

Gipson's inaccurate information claim is premised on the same alleged misstatements of law discussed above. He argues that the court relied on an inaccurate statement of the burdens of proof at trial and in a revocation proceeding and wrongly concluded that it was bound by the ALJ's conclusions. We rejected this characterization of the court's comment regarding burden

of proof above, and for the same reasons, we conclude here that it does not constitute inaccurate information that would support a due process challenge to Gipson's sentence.

Gipson's bias argument is similarly without merit. At the outset, we presume that the circuit court "acted fairly, impartially, and without prejudice." *See* ***State v. Herrmann***, 2015 WI 84, ¶3, 364 Wis. 2d 336, 867 N.W.2d 772. Gipson has the burden to rebut that presumption and prove the court was biased "by a preponderance of the evidence." *See* ***id.***, ¶24. Here, he relies on our ***Goodson*** decision in which we concluded that a court's "unequivocal[] promise[] to sentence Goodson to the maximum period of time if he violated his supervision rules" would likely lead a reasonable person to conclude that the court "had made up [its] mind about Goodson's sentence before the reconfinement hearing." 320 Wis. 2d 166, ¶13. Gipson contends that the court's "it's going to be so ugly" comment at his initial sentencing hearing demonstrated similar prejudgment. We disagree; the "unequivocal[] promise[]" in ***Goodson*** bears no material resemblance to the vague and conditional remark at issue in this case. The court prefaced its remark about an "ugly" outcome with the words "[i]f I think you'd do it again and I have got reason to believe that." This conditional statement did not promise a specific sentence but gave fair warning that Gipson would receive a harsher sentence if he engaged in another act of domestic violence while on probation. Such a warning does not rebut the presumption of impartiality and demonstrate bias.

Now, therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals