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DISTRICT I

September 4, 2024

To:

Hon. J.D. Watts
Circuit Court Judge
Electronic Notice

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

2022AP1797-CR State of Wisconsin v. John Joseph Casper (L.C. # 2016CF743)
2022AP1798-CR State of Wisconsin v. John Joseph Casper (L.C. # 2016CF4483)

Before White, C.J., Donald, P.J., and Geenen, 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).

John Joseph Casper, *pro se*,[1] is pursuing his second appeal in these two consolidated cases. In his prior appeal, we remanded both cases for resentencing. ***State v. Casper*** (***Casper I***), Nos. 2019AP1662-CR, 2019AP1663-CR, unpublished slip op., ¶1 (WI App Mar. 30, 2021). Casper now challenges the judgments of conviction entered after remand and the order denying

[1] Casper discharged his appellate counsel after briefing was complete. We granted his subsequent motion for leave to file a supplemental reply brief on his own behalf.

his post-remand motion for sentence modification.[2] As grounds, he claims that the circuit court erred when resentencing him in both cases because it found him ineligible to participate in two prison programs. As a separate basis for relief, Casper claims that the circuit court erred during the pretrial proceedings when it denied his motion to suppress evidence in case No. 2016CF743. Based upon a review of the briefs and records, we conclude at conference that these matters are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

In case No. 2016CF743, the State alleged in a criminal complaint that in February 2016, police arrested Casper after a confidential informant arranged to purchase heroin from him. Police searched Casper at the scene of the arrest and found $1,421 and two cell phones. During a strip search at the police station, police found heroin tied to his testicles. The State charged him with possession with intent to deliver at least three grams but not more than ten grams of heroin as a second or subsequent offense. Casper then moved to suppress the physical evidence found during the strip search, arguing that the police lacked probable cause to arrest him. Following an evidentiary hearing, the circuit court denied the motion.

While proceedings were underway in case No. 2016CF743, the State filed a criminal complaint in case No. 2016CF4483. In that complaint, the State charged Casper with four

[2] The notice of appeal that Casper filed to initiate the instant appellate proceedings stated that he appealed under WIS. STAT. RULE 809.30(2)(j) (2021-22) not only from the final order of October 12, 2022, denying sentence modification after remand, but also from the original judgments of conviction entered on April 30, 2018. The notice acknowledged that Casper had previously appealed from the original judgments but stated that he "was requesting review of a different issue on that." A notice of appeal from a final judgment or final order does not bring before this court prior final judgments previously appealed. *See* WIS. STAT. RULE 809.10(4). We therefore construed the notice of appeal as commencing appeals from the applicable post-remand judgments, which were entered on July 30, 2021, as well as from the post-remand order denying sentence modification. *See* RULE 809.30(2)(j). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

felonies involving the possession and delivery of controlled substances over a period of several months during 2015 and 2016.

Casper resolved the two cases with a plea agreement. Pursuant to its terms, he pled guilty as charged in case No. 2016CF743. In case No. 2016CF4483, he pled guilty, as a party to a crime, to delivering more than fifteen grams but not more than forty grams of cocaine; and to delivering more than three grams but not more than ten grams of heroin. At sentencing, he faced an aggregate maximum penalty of fifty-nine years of imprisonment and $200,000 in fines.[3] The circuit court imposed three evenly bifurcated ten-year terms of imprisonment and ordered Casper to serve his sentences consecutively. The aggregate sentence imposed in the two matters was thus fifteen years of initial confinement and fifteen years of extended supervision.

Casper filed an unsuccessful postconviction motion for sentencing relief and then pursued consolidated appeals from the judgments of conviction and postconviction order, raising two challenges to his sentences. We rejected his claim that the State breached the plea agreement, but we concluded that he was entitled to resentencing because the circuit court did not advise him properly regarding the materials that it reviewed in conjunction with his

[3] In case No. 2016CF743, Casper faced a maximum penalty of $50,000 and nineteen years of imprisonment for possession with intent to deliver at least three grams but not more than ten grams of heroin as a repeat offender. *See* WIS. STAT. §§ 961.41(1m)(d)2., 939.50(3)(e), 961.48(1)(b) (2015-16). In case No. 2016CF4483, he faced a maximum penalty of $100,000 and twenty-five years of imprisonment for delivering more than fifteen grams but not more than forty grams of cocaine, and he faced a maximum penalty of $50,000 and fifteen years of imprisonment for delivering more than three grams but not more than ten grams of heroin. *See* WIS. STAT. §§ 961.41(1)(cm)3., 961.41(1)(d)2., 939.05, 939.50(d), (e) (2015-16).

sentencing.[4] ***Casper I***, Nos. 2019AP1662-CR, 2019AP1663-CR, ¶1. A successor circuit court presided over Casper's resentencing and imposed three concurrent, evenly bifurcated ten-year terms of imprisonment. The ultimate aggregate sentence imposed in these cases was thus five years of initial confinement and five years of extended supervision.

Casper next moved for sentence modification. He argued that the circuit court erroneously exercised its discretion during the resentencing proceeding by finding him ineligible to participate in the challenge incarceration program (CIP) and the Wisconsin substance abuse program (SAP). The circuit court denied the motion, and these appeals followed.

We begin with the claim that the circuit court erroneously denied Casper eligibility for CIP and SAP. Both are prison treatment programs and, upon successful completion of either program, an inmate's remaining initial confinement time is normally converted to time on extended supervision. *See* WIS. STAT. §§ 302.045(3m)(b), 302.05(3)(c)2.; ***State v. Gramza***, 2020 WI App 81, ¶17, 395 Wis. 2d 215, 952 N.W.2d 836. Subject to some exceptions for crimes that are not at issue here, a circuit court imposing a bifurcated sentence exercises its sentencing discretion to decide whether a person is eligible to participate in either or both programs while confined. WIS. STAT. § 973.01(3g)-(3m).[5] We will sustain the circuit court's discretionary decisions regarding program eligibility if they are supported by the record and the overall

[4] While ***Casper I*** was pending in the court of appeals, the circuit court modified Casper's sentences, resulting in an aggregate, evenly bifurcated twenty-year term of imprisonment. That sentence modification was superseded by the subsequent resentencing required by our decision in ***Casper I***.

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

sentencing rationale. ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112.

The records show that the circuit court properly exercised its sentencing discretion in denying Casper eligibility for CIP and SAP. The circuit court determined that Casper must serve an aggregate term of five years of initial confinement and five years of extended supervision to ensure sufficient punishment for his "extensive" history of "criminal thinking and acting." *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197 (requiring the circuit court to identify the sentencing goals). In making that determination, the circuit court considered 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. Specifically, the circuit court found that Casper's crimes were of "intermediate gravity" based on the types and amounts of the controlled substances at issue, and the circuit court found that the public required protection from drug traffickers. In assessing Casper's character, the circuit court discussed the steps that Casper had taken towards rehabilitating himself while in prison, acknowledging his "completion of programming" and praising his contributions to the well-being of his community, including his volunteer work tutoring other inmates. The circuit court then explained that it was denying Casper eligibility for CIP and SAP because, notwithstanding the progress that he had made since his arrest, eligibility for those programs "would reduce by too [much] the amount of punishment that [the court had] determined is appropriate" for his crimes.

Casper asserts that the circuit court "failed to take into account the 'accomplishment documents'" and evidence of good character that he presented at the resentencing hearing. To the contrary, the records show that the circuit court explicitly considered that evidence but found

that it did not warrant a potential reduction in the five years of initial confinement imposed. As this court long ago observed, "each sentence must navigate the fine line between what is clearly too much time behind bars and what may not be enough." ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. Although the sentence here did not navigate that line as Casper would have preferred, the choice rested with the circuit court. ***Id.***

Casper next claims that the circuit court erred in the pre-plea proceedings when it denied his motion to suppress evidence in case No. 2016CF763. That claim is not before us. Casper's challenge to the suppression order relates to the original judgment of conviction in case No. 2016CF763. His current appeals, however, are taken from the final dispositions entered after resentencing and do not bring the original final judgments of conviction before this court. *See* ***State v. Scaccio***, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449. Rather, "[a]n appeal from a final judgment or final order brings before the court all prior *nonfinal* judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." WIS. STAT. RULE 809.10(4) (emphasis added).

In ***Casper I***, Casper appealed from the original final judgments of conviction. ***Id.***, Nos. 2019AP1662-CR, 2019AP1663-CR, unpublished slip op., ¶1 n.1. In that appeal, he could have challenged the order denying his motion to suppress evidence in case No. 2016CF763. WIS. STAT. § 971.31(10). He did not do so. He cannot use the instant appeals to revive the issues that he abandoned. *Cf.* ***Scaccio***, 240 Wis. 2d 95, ¶¶8-10.

Casper seeks to avoid the foregoing rules and obtain review of the suppression order by invoking "the plain error doctrine." That doctrine is inapplicable. The plain error doctrine

permits appellate review of errors that were otherwise waived by a party's failure to object to them in the circuit court. ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77; *see also* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. Casper, however, did not fail to object to admission of the evidence that police found during the search following his arrest. He proactively moved the circuit court to suppress that evidence, and the circuit court denied the suppression motion on its merits. Casper thus preserved the claim for appellate review under WIS. STAT. § 971.31(10), and he could have raised the issue when he appealed in ***Casper I***. He elected not to do so then, and the issue is not before us now.[6] WIS. STAT. RULE 809.10(4); ***Scaccio***, 240 Wis. 2d 95, ¶¶8-10.

Moreover, were we to conclude that Casper could pursue the suppression issue, his claim would fail because Casper does not demonstrate any error—"plain" or otherwise—in the circuit court's order denying his suppression motion. Casper alleged in that motion that he was arrested without probable cause, and therefore the subsequent searches of his vehicle and person were unlawful. "Probable cause to arrest is the sum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***State v. Nieves***, 2007 WI App 189, ¶11, 304 Wis. 2d 182, 738 N.W.2d 125. The standard of proof requires only "probabilities,

[6] The State argues that Casper's challenge to the suppression order is barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). ***Escalona-Naranjo*** holds that when a defendant has pursued a postconviction motion or direct appeal, the defendant is prohibited from collaterally attacking his or her conviction in a motion under WIS. STAT. § 974.06, unless the defendant has a "sufficient reason" for failing to raise the claim in the earlier postconviction motion or appeal. ***Escalona-Naranjo***, 185 Wis. 2d at 185. ***Escalona-Naranjo*** is not implicated here. Casper is not pursuing a collateral attack on his convictions under § 974.06. He is pursuing direct appeals under WIS. STAT. RULE 809.30, following entry of final dispositions. The suppression order, however, underlies an earlier final judgment and is therefore not before us. *See* WIS. STAT. RULE 809.10(4); ***Scaccio***, 240 Wis. 2d 95, ¶10.

not hard certainties." ***Id.***, ¶14. When we review a probable cause determination, we uphold findings of fact unless they are clearly erroneous, but we independently decide whether probable cause exists. ***State v. Phillips***, 2009 WI App 179, ¶6, 322 Wis. 2d 576, 778 N.W.2d 157.

According to Casper, police lacked probable cause to arrest him because they relied on information from an admitted heroin addict, Michael Boyanz, who had made some untrue statements following his own earlier arrest. Casper asserts—both in the briefs filed by his former appellate counsel and in the supplemental reply brief that he filed *pro se*—that Boyanz was an unreliable informant, and the police therefore could not act on information that he provided. However, police may act on information from a person whose reliability is limited when the information includes "significant details or future predictions along with police corroboration." ***State v. Miller***, 2012 WI 61, ¶32, 341 Wis. 2d 307, 815 N.W.2d 349. The evidence presented at the suppression hearing in this case demonstrated that police had information amply satisfying this standard and providing probable cause for Casper's arrest.

Officer Todd Kurtz testified for the State at the suppression hearing. His testimony established that on February 12, 2016, police were investigating the death of E.O. from an apparent drug overdose.[7] The officers discovered that E.O. had purchased drugs from Boyanz. Police arrested Boyanz, and he agreed to arrange a heroin transaction with his alleged supplier, Casper. Police monitored Boyanz as he arranged the deal, and they conducted surveillance of the transaction location. Boyanz told police that Casper drove a black Cadillac Escalade, and at the time and place for the transaction, police saw a black Cadillac Escalade approaching the site.

[7] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use initials to refer to the deceased victim so as to protect his family's privacy. *See* WIS. STAT. § 950.02(4)(a)4.a.

Police conducted a check of the Escalade's license plates and confirmed that Casper owned the vehicle. After the vehicle stopped, Kurtz saw Boyanz receiving a text message saying "here, come out." The message came from the number that Boyanz had previously reported as Casper's.

Police in unmarked cars moved in to stop the Escalade but, as the squad cars approached, it drove away and turned into a dead-end alley. Police blocked the Escalade in the alley and arrested its driver, who the officers identified as Casper.

As the circuit court correctly determined, police reasonably concluded that Casper had arrived on the scene to execute the drug deal that the police heard Boyanz arrange. Even if other reasonable inferences exist—and it is not readily apparent what those inferences would be—the police were entitled to rely on the reasonable inference justifying arrest. ***Nieves***, 304 Wis. 2d 182, ¶14.

Casper insists that even if his initial detention was lawful, probable cause dissipated when police did not find contraband during the on-scene search. However, Kurtz testified that drug dealers typically carry cash and more than one cell phone, so the discovery of a substantial amount of cash and two cell phones during the initial search added support to an inference of drug trafficking. *See* ***Maryland v. Pringle***, 540 U.S. 366, 372 n.2 (2003) (reflecting that discovery of hundreds of dollars in cash is a factor in the totality of circumstances when assessing probable cause to arrest for a suspected drug offense). Moreover, failure to find drugs during a warrantless arrest for a suspected drug trafficking offense does not erase the probable cause that other facts established. ***United States v. Freeman***, 691 F.3d 893, 896 (7th Cir. 2012) (holding that police had probable cause to arrest the defendant for attempted cocaine distribution

where the defendant's "activities just prior to his arrest coincided perfectly with the details of the undercover operation, thus supplying probable cause to arrest despite the fact that no drugs were found in the search during the stop").[8] For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgments and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals

[8] In ***United States v. Freeman***, 691 F.3d 893, 897 (7th Cir. 2012), as in the instant case, police ultimately found drugs hidden in the defendant's genital area during a strip search following the defendant's arrest.