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DISTRICT IV

March 6, 2013

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

2011AP2911-CR State of Wisconsin v. Dominique D. Gulley (L.C. # 2008CF793)

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

Dominique Gulley appeals pro se from the judgment imposing a sentence after revocation of probation and orders denying his motions for sentence modification. He argues that his sentence was an erroneous exercise of discretion, is unduly harsh, and new factors support sentence modification. 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 (2011-12).[1] We affirm the judgment and orders.

Gulley stole a vehicle and drove it into a police officer who was placing road spikes down to curtail Gulley's reckless driving.[2] Gulley was convicted of first-degree reckless injury and sentenced to probation. Gulley's probation was revoked when he committed a new stolen vehicle offense just days after being released from a juvenile facility.[3] Gulley was sentenced to ten years' initial confinement and ten years' extended supervision. Shortly over one month after sentencing, and while represented by appointed postconviction counsel, Gulley wrote the circuit court complaining that his sentence was unreasonable and asking that his confinement time be reduced to five years. Over the next year, Gulley wrote several more letters and filed two motions asserting new factors and requesting sentence modification or transfer to a different facility. The circuit court denied his requests in multiple orders and Gulley appeals.[4]

On appeal Gulley fails to present any developed arguments. However, two recurrent themes can be gleaned from his appellate briefs: (1) his twenty year sentence is unreasonable or

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Gulley was a juvenile at the time of the offense but waived into adult court on charges of hit and run and first-degree reckless injury. The hit and run charge was dismissed as a read-in at sentencing.

[3] Gulley misstates that this appeal provides a vehicle for challenging the revocation decision. An order revoking probation may be challenged only by a petition for a writ of certiorari. *Cf.* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation is independent from the underlying criminal action). The revocation of Gulley's probation is not subject to review in this appeal.

[4] Gulley's appointed postconviction counsel filed a no-merit notice of appeal. Gulley's motion to voluntarily dismiss the no-merit appeal and proceed pro se was granted. ***State v. Gulley***, No. 2011AP367-CRNM, unpublished op. and order (WI App Nov. 2, 2011).

unduly harsh given his mental health problems, his age, his remorsefulness, and his desire to see his two children grow up; (2) his diagnosed mental illness constitutes a new factor supporting sentence modification.

Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We begin with the presumption that the circuit court acted reasonably and the appellant must show some unreasonable or unjustifiable basis in the record for the sentence complained of. ***State v. Petrone***, 161 Wis. 2d 530, 563, 468 N.W.2d 676 (1991). Our review of the sentencing decision confirms that it was a proper exercise of discretion. The sentence was based on the facts of record, the seriousness of the offense, and the need to protect the public.

Gulley suggests that the circuit court's decision was inappropriately based on victim impact statements which include "racial letters, and discriminating letters." Consideration of the comments and even "wishes" of a victim is within a sentencing court's prerogative. ***State v. Johnson***, 158 Wis. 2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990). At the sentencing after revocation hearing the circuit court heard from the injured officer, his wife, and his daughter. None of their comments were racially charged. Their comments detailed the horrific pain and recovery period endured by the officer and his family. The circuit court properly heard and considered the impact statements.

Gulley faced a possible twenty-five year sentence. Where, as here, the sentencing court considered the proper factors and the sentence was within the statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience. *See* ***State v.***

Owen, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996). We conclude the sentence does not shock the public conscience and cannot be considered excessive.[5]

The circuit court repeatedly rejected Gulley's contention that his diagnosed mental health problems and treatment needs were new factors justifying sentence modification. A new factor "refers to 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The circuit court correctly observed that it was well-aware of Gulley's difficult childhood, behaviors, and mental health problems. That Gulley obtained a doctor's diagnosis of his disorders while in prison did not add to what the court already knew. No new factor was presented. *See* ***State v. Harbor***, 2011 WI 28, ¶58, 333 Wis. 2d 53, 797 N.W.2d 828.

Gulley also argues that because of his mental health problems and treatment needs, the circuit court should have sentenced him to a mental health treatment facility rather than prison. His argument lacks merit because the circuit court lacks authority to specify the type of facility in which a sentence is served. *See* ***State v. Gibbons***, 71 Wis. 2d 94, 99, 237 N.W.2d 33 (1976); WIS. STAT. § 973.02 ("if a statute authorizes imprisonment for its violation … a sentence of more than one year shall be to the Wisconsin state prisons").

[5] Gulley raises for the first time on appeal that the sentence was cruel and unusual punishment in violation of the Eighth Amendment. Even if the argument was developed, issues not presented to the circuit court will not be considered for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals