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DISTRICT II

January 13, 2016

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

2015AP409-CR

State of Wisconsin v. Kevin F. McGuire (L.C. #2004CF17)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Kevin McGuire appeals from a judgment sentencing him after revocation of his probation and from an order denying his motion to vacate his sentence. On appeal, McGuire argues that he was sentenced based on inaccurate information and that the circuit court misused its discretion when it failed to state adequate reasons for the length of the confinement portion of the sentence.

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ We affirm.

In 2005, the circuit court withheld sentence and placed McGuire on seven years of probation for making false statements in relation to a securities sale, a felony. At the original sentencing, the court imposed \$112,750 in restitution to the victim McGuire defrauded. The court described McGuire as “a con artist” with multiple prior victims. The court placed McGuire on probation in part so that he could make restitution. In 2011, after making little progress in paying restitution, the court extended McGuire’s probation for another seven years.

In 2013, McGuire’s probation was revoked for various rule violations including several failures to notify his agent of employment and residence changes, several instances of providing false information to the agent about employment and residence changes, using a false identity in business dealings, and forging another’s name on a financial document.

At sentencing after revocation, the circuit court considered McGuire’s prior offenses and his character, his conduct as a con artist, and the severe impact of his conduct on his victims. The court considered the extension of McGuire’s probation and his eventual failure on probation, including his failure to make any meaningful restitution payments. The court determined that McGuire would not have another opportunity to avoid incarceration. The court also considered the deterrent effect of sentencing a defendant to confinement and found that “a stern sentence” was required.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Early in its sentencing remarks, the circuit court correctly noted that the presentence investigation report created for the 2005 sentencing recommended two to three years of initial confinement.² However, later in its remarks, the court described the presentence investigation report as recommending “two to five years.” The court sentenced McGuire to seven years, five years of initial confinement and two years of extended supervision.

McGuire filed a postconviction motion alleging that he was sentenced based upon inaccurate information because the circuit court mistakenly believed that the presentence investigation report recommended two to five years instead of the actual recommendation of two to three years. As evidence that the circuit court actually relied upon its inaccurate description of the presentence investigation report’s recommendation, McGuire cited the proximity of the court’s misstatement to the court’s imposition of an initial confinement term of five years.

At the postconviction motion hearing, the circuit court found that the facts before the court on sentencing after revocation had changed since the presentence investigation report recommended two to three years. The court found that it merely misspoke when it described the presentence investigation report’s recommendation as “two to five” rather than “two to three.” The court had read the presentence investigation report and knew its contents. The court determined that it did not sentence McGuire based upon an erroneous understanding of the presentence investigation report’s recommendation.

² The presentence investigation report also recommended three to four years of extended supervision.

On appeal, McGuire argues that he should be resentenced because the circuit court relied upon an inaccurate view of the confinement term recommended in the original presentence investigation report.

A defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To obtain resentencing, a defendant must establish that the information was inaccurate and the court actually relied upon it. *Id.*, ¶28. Whether the circuit court relied upon inaccurate information at sentencing presents a question of law we decide independently of the circuit court. *Id.*, ¶9.

McGuire has not established that he was sentenced based on inaccurate information. The circuit court correctly stated the recommendation of the presentence investigation report but later misspoke when it referred to the recommendation. The proximity of the court's misstatement to the imposition of sentence is not persuasive on the question of actual reliance. As we hold below, the circuit court properly exercised its discretion in sentencing McGuire.

Postconviction, McGuire also argued that the circuit court misused its discretion because it did not explain why it imposed a five-year period of confinement. With regard to the alleged misuse of discretion, the circuit court determined that its sentencing rationale was clear and sufficient.

A sentencing court's discretionary decision must have a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various sentencing factors is within the circuit court's discretion. *State v. Fisher*, 2005 WI App 175, ¶20, 285 Wis. 2d 433, 702 N.W.2d 56. As long as 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.” *State v. Owen*, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996). A defendant is not entitled to a mathematical breakdown of how each sentencing factor translates into a specific number of years in the sentence. *Fisher*, 285 Wis. 2d 433, ¶¶21-22.

We are unpersuaded by McGuire’s argument that the circuit court failed to state a rational and explainable basis for imposing five years of confinement. In fashioning the sentence, the court considered the seriousness of the offense, McGuire’s character and history, 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 court considered McGuire’s failure on probation, his continued engagement in dishonest and fraudulent conduct to the detriment of others, his failure to pay any meaningful amount of restitution, and his failure to comply with his probation rules. This conduct post-dated the original sentencing, and the court was entitled to consider this conduct and the light it shed on McGuire for purposes of sentencing after probation revocation. *State v. Reynolds*, 2002 WI App 15, ¶13, 249 Wis. 2d 798, 643 N.W.2d 165.³ The court had a rational basis for imposing a lengthy period of confinement and did not misuse its discretion.

Upon the foregoing reasons,

³ McGuire places inordinate weight on the original presentence investigation report’s confinement recommendation. As the circuit court correctly noted, the facts relevant to McGuire’s sentencing had changed significantly since the presentence investigation report was authored in 2004. Since the original sentencing, McGuire had appeared before the circuit court in 2006 and 2007 to answer for his failure to make progress on restitution. McGuire’s probation was extended and then revoked for conduct related to the crime of conviction, a crime of dishonesty, and various rule violations. This was the sentencing after revocation environment. McGuire’s reliance upon an outdated presentence investigation report recommendation is misplaced.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals