COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1038-CR
2016AP1039-CR

Cir. Ct. Nos. 2011CF176
2011CF311

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. WORZALLA,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Portage County: JON M. COUNSELL, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Daniel Worzalla appeals judgments of conviction and orders denying postconviction relief. Worzalla contends that the circuit court's imposition of consecutive sentences on Worzalla's bail jumping

convictions impermissibly punished Worzalla twice for the same conduct, was based on inaccurate information, and was excessive.[1] We conclude that the circuit court properly exercised its sentencing discretion. We affirm.

¶2 In July 2011, Worzalla was charged with stalking, defamation, and violating a restraining order based on his conduct related to S.R., a county social worker who had worked with Worzalla and his children. Worzalla signed a signature bond that contained a condition that Worzalla have no contact with S.R.'s place of employment unless Worzalla had an appointment in the building.

¶3 In October 2011, Worzalla was charged with multiple criminal counts after he arrived at S.R.'s place of employment without an appointment. The charges included violating a restraining order, felony bail jumping for violating his July 2011 bond, and felony bail jumping for violating a July 2009 bond in a separate case.

¶4 After a jury trial, Worzalla was convicted of stalking, defamation, and two counts of felony bail jumping. The court sentenced Worzalla to two years of initial confinement and two and a half years of extended supervision on each bail jumping count; one and a half years of initial confinement and two years of extended supervision on the stalking count; and nine months of jail time on the

[1] Worzalla also asserts in his brief-in-chief that the Department of Corrections (DOC) has failed to properly adjust Worzalla's mandatory release date following resentencing, and requests that this court "enter an order that adjusts his sentence and mandatory release date" to reflect the resentencing. The State responds that, to correct the problem with the calculation of Worzalla's mandatory release date, this court should "direct the circuit court to issue an order stating that the original sentences were vacated to provide DOC the documentation it requested to implement the [new] sentences." In reply, Worzalla states that the circuit court has now entered an order vacating the original sentences in this case, but that DOC has not adjusted Worzalla's release date. Worzalla does not seek any further relief on this issue.

defamation count, all consecutive. Worzalla appealed, and this court vacated the defamation count and remanded for resentencing on the remaining charges. On resentencing, the circuit court sentenced Worzalla to two years of initial confinement and two and a half years of extended supervision on each bail jumping count, and one and a half years of initial confinement and two years of extended supervision on the stalking count, all consecutive.

¶5 Worzalla contends that he was punished twice for the same conduct when the circuit court imposed consecutive sentences for the two bail jumping counts that arose from Worzalla's single act of entering S.R.'s place of business without an appointment. Worzalla argues that the consecutive sentences for the two bail jumping counts is analogous to a court applying a sentencing enhancement based on the same conduct that underlies the offense, which the Seventh Circuit held impermissible in ***United States v. Bell***, 598 F.3d 366, 372 (7th Cir. 2010). We are not persuaded.

¶6 The ***Bell*** court held that "[i]mpermissible double counting occurs when … the same underlying facts that establish an element of the base offense are used to justify an upward enhancement" under the federal sentencing guidelines. ***Id.*** At the outset, as the State correctly asserts, ***Bell*** was overruled by ***United States v. Vizcarra***, 668 F.3d 516, 519 (7th Cir. 2012), which held that "double counting is generally permissible unless the text of the guidelines expressly prohibits it." Moreover, Worzalla was not subject to a sentencing enhancement for a single bail jumping conviction. Rather, Worzalla was sentenced for two separate bail jumping convictions based on a single act that violated two separate bonds. We have already determined that the State may

charge multiple counts of bail jumping for a single act that violates multiple bonds.[2] *See* ***State v. Richter***, 189 Wis. 2d 105, 108-11, 525 N.W.2d 168 (Ct. App. 1994) (holding that three charges of bail jumping resulting from a single act that violated three separate bonds were not multiplicitous; "[e]ach count would require proof of facts for conviction which the other two counts would not require because each bond would give rise to an individual factual inquiry").

¶7 Next, Worzalla contends that the circuit court relied on inaccurate information as to the bail jumping charges in imposing consecutive sentences. Worzalla cites the circuit court's statements at resentencing that it was imposing consecutive sentences because "these were all distinct actions," and "separate events with separate consequences." Worzalla argues that those statements showed that the court relied on its mistaken belief that the two bail jumping charges were based on two separate acts by Worzalla with separate measurable consequences on S.R. and the public. Worzalla also contends that the circuit court relied on inaccurate information when it stated that "there is yet to be any conclusion that this court is aware of by any agency that would have a direct bearing on someone involved not doing their job the way it should be done." Worzalla argues that that statement showed that the court relied on inaccurate information because, following the original sentencing, Worzalla filed a postconviction motion with an exhibit showing that S.R. had been subject to professional discipline in an unrelated matter.

[2] In Worzalla's reply brief, Worzalla distinguishes the case cited by the State in its respondent's brief, ***State v. Anderson***, 219 Wis. 2d 739, 580 N.W.2d 329 (1998), on grounds that ***Anderson*** involved two bail jumping counts based on two acts violating separate conditions of a single bond. Worzalla contends that ***Anderson*** does not support the State's argument. For the reasons set forth above, we remain unpersuaded by Worzalla's argument that he was impermissibly punished twice for a single act.

¶8 The State responds that Worzalla did not argue in the circuit court that the court relied on inaccurate information at resentencing, and that Worzalla has thus forfeited those arguments for appeal. *See* ***State Farm Mut. Auto. Ins. Co. v. Hunt***, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 ("'Arguments raised for the first time on appeal are generally deemed forfeited….'" (quoted source omitted)). Worzalla replies that the forfeit rule is one of administration, and that this court may reach issues even if they were not preserved in the circuit court. *See* ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702. However, Worzalla does not assert any reason for this court to disregard the general rule of forfeiture in this case. We see no basis to reach arguments raised for the first time in this appeal. *See* ***id.***, ¶¶7-9 (declining to address issues raised for the first time on appeal because we saw "no compelling reason to ignore forfeiture here").

¶9 Worzalla concedes that he did not argue in the circuit court that the resentencing court relied on inaccurate information. Worzalla asserts, however, that his postconviction motion did argue that a court must provide sufficient justification for imposing consecutive sentences and that the two bail jumping counts were based on a single act.

¶10 To the extent that Worzalla is arguing that he preserved his argument that the circuit court relied on inaccurate information at resentencing by arguing in his postconviction motion that the sentences were excessive and multiplicitous, on the basis that the issues are related, we disagree. "[T]he forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." *See* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155. Worzalla did not argue, in the circuit

court, that the court relied on inaccurate information at resentencing.[3] That argument is therefore forfeited on appeal.

¶11 Were we to reach Worzalla's argument that the circuit court relied on inaccurate information at resentencing, we would conclude it lacks merit.[4] A defendant claiming that the sentencing court relied on inaccurate information must establish that there was information before the court that was inaccurate, and that the court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. We independently review whether a defendant was denied his or her due process right to be sentenced on accurate information. ***Id.***, ¶9.

¶12 As to Worzalla's claim that the circuit court relied on inaccurate information that the two bail jumping charges were based on two separate "actions" or "events," we note that the court clarified those statements by then stating that the bail jumping sentences were imposed consecutively based on "the separate nature of each event … not event, but charge, the separate consequences of each charge, and the impact that they have had." That statement makes clear that the circuit court understood that the bail jumping charges were based on a single event, but determined that consecutive sentences were appropriate. *See*

[3] Worzalla does not argue that any of his postconviction arguments raised the issue of the court's reliance on inaccurate information as to S.R.'s professional conduct.

[4] In reply, Worzalla also contends that the State made inaccurate statements at resentencing. Worzalla cites the State's comments that it believed that defense counsel had referenced facts related to a different bail jumping case of Worzalla's rather than this case. Worzalla argues that this is his only bail jumping case, and that the State's comments were inaccurate. However, we fail to see how the State's possibly inaccurate statement that Worzalla had a separate bail jumping case would have caused the court to have inaccurate information as to the facts underlying the two bail jumping charges in this case.

State v. Larsen, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987) (explaining that the circuit court "has discretion to determine whether sentences imposed in cases of multiple convictions are to run concurrently or consecutively"). Moreover, we are not persuaded by Worzalla's argument that the circuit court relied on a mistaken belief that the two bail jumping offenses had separate measurable consequences on S.R. or other individuals at her workplace. In imposing consecutive sentences for the two bail jumping convictions, based on an act that violated Worzalla's bonds in two separate cases, the circuit court considered Worzalla's ongoing pattern of undesirable behaviors and criminal activity and the impact Worzalla's conduct had on S.R. and the people with whom she worked. *See* ***id.*** at 426-27 (explaining that circuit courts use the same factors that apply in determining the length of a single sentence—including the defendant's character and the need to protect the public—to determine whether to impose consecutive sentences).

¶13 As to Worzalla's claim that the circuit court relied on a mistaken belief that there was no evidence S.R. had not performed her job properly, we are not persuaded. The circuit court stated that the court was not aware of any conclusion by an agency "that would have a direct bearing on someone involved not doing their job the way it should be done." In the context of the court's sentencing remarks, it is clear that the court meant that there was no evidence that S.R. had not done her job properly in relation to Worzalla. The court made that statement in connection with references to Worzalla's ongoing negative behaviors aimed at S.R. in her capacity as a social worker assigned to work with Worzalla and his children. The circuit court was presumably aware of the evidence as to the unrelated disciplinary proceeding against S.R., but determined that it did not have

a "direct bearing" on whether S.R. failed to perform her job properly as Worzalla's social worker.

¶14 Finally, Worzalla argues that his bail jumping sentences were excessive because, Worzalla asserts, the court essentially imposed a nine-year sentence for Worzalla's single act of entering a social services building without an appointment. Worzalla contends that the imposition of consecutive sentences for a single action was contrary to the ABA standards for sentencing, which indicate that a court should not change the severity of the sentence for a single episode based on the number of charges. We are not persuaded that the court erroneously exercised its sentencing discretion.

¶15 We begin "with the presumption that the [circuit] court acted reasonably," and to overcome that presumption, Worzalla "must show some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). At the outset, we reject Worzalla's argument that the court erred by imposing consecutive sentences contrary to ABA standards. Wisconsin has not adopted the ABA sentencing standards. *See* ***State v. Johnson***, 178 Wis. 2d 42, 52, 503 N.W.2d 575 (Ct. App. 1993). Rather, whether to impose consecutive sentences remains within the circuit court's discretion. ***Id.***

¶16 The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Worzalla's character as demonstrated by his pattern of manipulative behaviors, the seriousness of the offenses as demonstrated by their impact on the social services office, Worzalla's need for rehabilitation, and the need to protect the public from future similar behavior. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197.

The court explained that Worzalla's behavior indicated that he continued to refuse to follow legal processes and that he was intent on manipulative and criminal behavior. The court also noted the impact on S.R., others in her workplace, and society as a whole based on Worzalla's ongoing pattern of conduct. We conclude that, based on the court's reasoning, the consecutive sentences totaling four years of initial confinement and five years of extended supervision for the two bail jumping convictions were not excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'only where the sentence 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'" (quoted source omitted)).

¶17 Ultimately, Worzalla argues that the facts would have supported a lesser sentence. Worzalla points out that there was no violence or use of a dangerous weapon in this case and that Worzalla had a minimal criminal history. However, we will not disturb a circuit court's exercise of its sentencing discretion if it was not unduly harsh or excessive, even if we would have imposed a different sentence in the first instance. *See* ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971). Because the circuit court's sentence was not excessive, we will not disturb it.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).