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July 18, 2017

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

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| 2016AP1261-CR | State of Wisconsin v. Darnell Scott (L.C. #2014CF3900) |
| 2016AP1262-CR | State of Wisconsin v. Darnell Scott (L.C. #2014CF4902) |

Before Brennan, P.J., and Kessler and Brash, 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).

In these consolidated appeals, Darnell Scott appeals his convictions for one count of third-degree sexual assault, one count of strangulation and suffocation, and one count of intimidating a witness as a repeater. *See* WIS. STAT. §§ 940.225(3), 940.235(1), 940.43(7), and 939.62(1)(b) (2013-14).¹ He also appeals the denial of his postconviction motion to modify his

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

sentences.² We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We reject Scott's challenges to his sentences and summarily affirm.

In 2014, fifty-year-old Scott was charged with one count of second-degree sexual assault and one count of strangulation and suffocation after an incident involving a woman with whom he once had a romantic relationship. At the time of the incident, Scott was on extended supervision for third-degree sexual assault. Scott was subsequently charged with one count of felony intimidation of a witness, as a repeater, for arranging for his brother to tell the victim to change her statement.

Facing sixty years of imprisonment, Scott entered a plea agreement that reduced his exposure to thirty years by amending the second-degree sexual assault charge to third-degree sexual assault. In exchange for Scott's guilty pleas in both cases, the State agreed to recommend a prison sentence with the length left to the trial court's discretion and to take no position on whether the sentences should be consecutive to or concurrent with any other sentence.

At sentencing, the parties recognized that Scott's extended supervision had been revoked and that he would be serving six years of reconfinement time. The defense recommended sentences totaling sixteen years, including eight years of initial confinement and eight years of extended supervision. Trial counsel said he would "defer to [the c]ourt in terms of whether that should be consecutive or concurrent to any sentence he's currently serving." The trial court

² Scott filed a single motion addressing both cases, and the trial court issued a single decision addressing both cases.

imposed three consecutive sentences totaling eleven years of initial confinement and eleven years of extended supervision. It ordered that the sentences be served consecutive to Scott's reconfinement sentence.

Scott filed a postconviction motion seeking sentence modification. Scott asked that his sentences remain consecutive to each other but be modified to run concurrent to his reconfinement sentence. He cited three reasons. First, he said the trial court had not given due consideration to his "substantial acceptance of responsibility." Second, Scott complained that the sentencing hearing included only "limited mention of Scott's AODA issues," which he believes was a disservice to him because his "drug addiction was directly connected to the sexual assault and strangulation and suffocation convictions." Third, he alleged that the trial court "did not adequately consider the massive collateral consequence" of his reconfinement sentence.

The trial court denied the motion in a written decision, concluding that Scott had not identified a "new factor" that would justify sentence modification and that it had not erroneously exercised its discretion at sentencing. This appeal follows.

On appeal, Scott argues that the trial court erroneously exercised its discretion when it denied his sentence modification motion, although he does not continue to assert that there is a "new factor" justifying sentence modification.³ See *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Instead, as the State explains, "[t]he sole issue Scott advances ... is that the [trial] court erroneously exercised its sentencing discretion when it ordered his three

sentences to run consecutive to each other and to the reconfinement sentence.” (Hyphen omitted.)

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, *State v. Gallion*, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court’s discretion. *See Gallion*, 270 Wis. 2d 535, ¶41. On appeal, our “review is limited to determining if discretion was erroneously exercised.” *Id.*, ¶17.

Scott’s brief advances the same three challenges to the trial court’s exercise of discretion that he raised in his postconviction motion. First, he asserts that “[t]here was a considerable level of acceptance of responsibility which is a mitigating factor that the court neglected to weigh in fashioning its sentence.” We disagree. Trial counsel explicitly asked the trial court to give Scott favorable consideration for having “accepted responsibility.” When the trial court imposed sentence, it said that trial counsel “has made some very good arguments” and that as a

³ Because Scott has not pursued his argument that there is a new factor justifying sentence modification, it is deemed abandoned and we will not discuss it. *See Reiman Assoc., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (Issues not briefed are deemed abandoned.).

result, the trial court had decided to “adopt his sentencing requests with some modification” instead of following the PSI writer’s recommendation as it “had originally anticipated.”⁴ The trial court was not required to explicitly comment on Scott’s acceptance of responsibility. *See id.*, ¶43 n.11 (The trial court “need discuss only the relevant factors in each case.”).

Scott’s second challenge is to what he calls the “limited mention” of his “AODA issues” at the sentencing hearing. He asserts that his “drug addiction was directly connected to the sexual assault and strangulation convictions” and that “[t]his was really not mentioned at all during the court’s sentencing comments.” We are not persuaded that Scott is entitled to relief. The PSI, the State, and Scott’s trial counsel all acknowledged that Scott has AODA issues. For instance, his trial counsel stated: “He does have rehabilitative needs. He does have a history of substance abuse. He does have AODA issues.” Scott also personally told the trial court that he “had struggled with heroin addiction for most of [his] life” and that his addiction played a role in his offenses. The trial court clearly heard about Scott’s AODA issues, and it referenced them in the course of considering Scott’s eligibility for the Challenge Incarceration and Earned Release Programs, stating: “I understand there are AODA issues but given the level of dangerousness that I think you present,” the programs are not appropriate in this case. We discern no erroneous exercise of discretion with respect to the trial court’s consideration of Scott’s AODA issues.

Finally, Scott asserts that the trial court “did not adequately consider the massive collateral consequence” of his reconfinement sentence, which he claims “justified” making his

⁴ The trial court decided to make the sentence for suffocation and strangulation consecutive to the sentence for sexual assault, which will result in Scott serving three years longer in initial confinement and three years longer on extended supervision than trial counsel recommended. However, the total period of initial confinement is less than that recommended by the PSI writer.

new sentences concurrent to his reconfinement sentence. Once again, the record belies his assertion. The trial court explicitly addressed whether the new sentences should be concurrent with the reconfinement sentence, stating: “These are grave offenses. I do recognize that you’ve had that collateral consequence but these are serious enough that they need to stand on their own and I think concurrent time would unduly depreciate the gravity of the offense and frankly the danger that you present to the community.” The trial court’s weighing of the sentencing factors, including the appropriateness of imposing concurrent sentences, was within its discretion, *see Gallion*, 270 Wis. 2d 535, ¶41, and we discern no erroneous exercise of that discretion.

For the foregoing reasons, we reject Scott’s arguments. The trial court’s analysis of those issues, as well as the sentencing factors generally, was consistent with the framework set forth in *Gallion* and its progeny. We are not persuaded the trial court erroneously exercised its discretion at sentencing or when it denied Scott’s motion to modify his sentence. Therefore, we summarily affirm.

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

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

Diane M. Fremgen
Clerk of Court of Appeals