COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1362-CR **Cir. Ct. No. 2015CF2785**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DESHANDRE DARNELL BRISTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 PER CURIAM. Deshandre Darnell Brister appeals from a judgment of conviction for two counts of failure to pay child support for more than 120 days, contrary to WIS. STAT. § 948.22(2) (2013-14).[1] Brister also appeals from an order denying his postconviction motion. At issue is whether Brister is entitled to resentencing on grounds that the trial court relied on an improper factor at sentencing: Brister's allegedly compelled and incriminating statement made in response to a question from the trial court. We conclude that even if Brister's statement was compelled and incriminating, he is not entitled to relief because he has not demonstrated that the trial court actually relied on the statement at sentencing. Accordingly, we affirm the judgment and the order.

BACKGROUND

¶2 Brister was charged with three counts of failing to pay child support for 120 days. He reached a plea agreement with the State pursuant to which he pled guilty to two counts and the third count was dismissed and read in. The State also agreed that it would read in an uncharged act of bail jumping for failing to appear for court in this case and "any uncharged counts of failure to support" occurring up until the date of the plea. The agreement further provided that the State would argue for a prison sentence of unspecified length and the defense would be free to argue for a different sentence. The maximum sentence Brister faced on each count was eighteen months of initial confinement and two years of extended supervision.

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

¶3 The trial court accepted Brister's pleas and found him guilty. At sentencing, the State noted that Brister owed over $32,000 in child support for two children.[2] The State said that its recommendation of a prison sentence was "based largely on the defendant's record and his very long history of noncompliance with a support order in this case." The State said that in 2005, Brister was ordered to pay child support for these two children. That same year, after Brister failed to make payments, a contempt motion was filed and a bench warrant was issued to insure Brister's appearance in court. At a 2006 hearing before a court commissioner, Brister indicated that he did not intend to pay child support through the state system. The State explained:

> The defendant at that time claimed he was self-employed doing auto repair work. He admitted that in 31 years he never held a job. The [court commissioner] inferred, based on the number of his felony drug convictions that … he was self-employed in that line of work. I think that was a fair assumption. He refused to acknowledge that he had to pay through the court system, even though his children were on public assistance. He had never, since 1997 when he first had an open order, made a payment through the court system. He went on to tell the [court commissioner] that he takes care of his children and he is not going to pay through [the] court [system] even though all information is to the contrary that he wasn't actually taking care of his children.

The State said that Brister failed to appear for the contempt hearing that the court commissioner scheduled before the trial court. In the years that followed, Brister was ordered confined for failure to pay child support on at least two occasions.

[2] Brister has ten other children for which he has child support obligations, but those obligations were not part of the criminal case before this court.

¶4 The State also addressed Brister's criminal history of ten prior convictions, including multiple convictions for drug offenses between 1996 and 2010. In addition, the State noted that while this criminal case was pending, Brister was arrested and charged with possession of a firearm, possession of THC with intent to deliver, and obstructing an officer. There were Fourth Amendment problems with that case that led to its resolution with a guilty plea to only the obstruction charge. The State argued: "It is clear from that [criminal history] that he has been actively engaged in the drug trade for I think two decades now, showing no apparent signs of stopping." The State noted that the only payments Brister made toward his child support obligation included about $4400 withheld from income he earned in prison and the payment of $3000 to purge a contempt order that would have led to his incarceration.

¶5 When Brister exercised his right of allocution, he told the trial court that he did, in fact, support his children, implying he had done so outside the state payment system. The trial court asked Brister why he had refused to make child support payments using the state system and why he had failed to appear for the contempt hearing in 2006. Brister said he did not recall telling the court commissioner he would not pay child support through the state system or failing to appear in court.

¶6 The trial court asked Brister questions about a recent offer of employment, an arrest in 2015, and his failure to support his children. In addition, the trial court asked Brister where he got the $2500 to post bond in this case; Brister replied that his mother posted it for him. The trial court also asked Brister about the source of $3000 he once paid to purge his contempt. The trial court asked: "Where did you get that? In a drug deal?" Brister replied: "Yeah."

¶7 Shortly thereafter, the trial court pronounced sentence. In doing so, it stated:

> I look at your record. It goes back to 1993. You have been engaged in dealing marijuana all of that time. There is no question about that. You have been a drug dealer. That is how you support. You have never had a job until just recently….
>
> You are going to prison. You are going to prison today.

The trial court imposed two consecutive sentences of eighteen months of initial confinement and two years of extended supervision, which was the maximum that could be imposed.

¶8 Brister filed a postconviction motion seeking resentencing on grounds that "he was forced to incriminate himself in open court" when the trial court asked whether drug sale proceeds were used to purge his contempt.[3] (Bolding omitted.) Brister argued that his "Yeah" answer to the trial court's question was both compelled and incriminating and that the trial court improperly relied on Brister's answer in imposing sentence. Brister also argued that his trial counsel provided ineffective assistance by failing to object to the trial court's question.[4] The trial court denied the motion in a written order.

[3] Brister's postconviction motion also sought sentence modification based on new factors, including new information about injuries he suffered as a crime victim and new information from letters submitted on his behalf by friends and family. Brister has not appealed the denial of his request for sentence modification and, therefore, we will not discuss those arguments.

[4] Brister explains in his reply brief that he raised ineffective assistance in order to preserve the issue concerning the trial court's question and "avoid any arguments about waiver."

¶9 The trial court concluded that Brister's answer to the trial court's question was not compelled or incriminating and that in any event, the trial court did not rely on it at sentencing. The order explained:

> [T]he court did not expressly rely on his statement at sentencing and considered only his *overall* history of drug dealing as it related to his character and rehabilitative needs. The defendant's statement did not materially impact upon the court's perception that the defendant was a drug dealer given everything the court knew about his prior record of committing drug crimes. In fact, it was that record which prompted the court's question about the purge money, and the defendant's response only confirmed that he had not curbed that behavior.
>
> The court did not punish the defendant more severely because of his statement about the purge money. Even without it, there were numerous factors the court considered which called for a maximum prison sentence in this case. The court finds that it properly acted within the exercise of its duty to acquire full knowledge of the character and behavior of the defendant and that resentencing is not warranted. Consequently, the court finds that trial counsel was not ineffective for failing to raise an objection.

This appeal follows.

DISCUSSION

¶10 At issue is whether Brister is entitled to resentencing based on the trial court's alleged reliance on Brister's answer to the trial court's question about the source of the money Brister used to purge his contempt. The parties generally agree on the legal standards to be applied, which the Wisconsin Supreme Court outlined in ***State v. Alexander***, 2015 WI 6, 360 Wis. 2d 292, 858 N.W.2d 662. ***Alexander*** recognized that a trial court "erroneously exercises its sentencing discretion when it 'actually relies on clearly irrelevant or improper factors'" and that "[a] defendant bears the burden of proving, by clear and convincing evidence,

that the sentencing court actually relied on irrelevant or improper factors." ***Id.***, ¶17 (citation omitted). ***Alexander*** explained that "[c]ompelled, incriminating statements are an improper factor in determining a defendant's sentence because their use would violate the defendant's Fifth Amendment right against self-incrimination." *See* ***id.***, ¶30.

¶11 In order for Brister's statement to constitute a Fifth Amendment violation—and therefore be an improper factor to use in determining his sentence—Brister's statement must have been "testimonial, compelled and incriminating." *See* ***State v. Mark***, 2006 WI 78, ¶42, 292 Wis. 2d 1, 718 N.W.2d 90. The parties agree that the statement was testimonial but debate whether it was compelled and incriminating. Even if we assume *arguendo* that Brister's statement was testimonial, compelled, and incriminating, we conclude that Brister is nonetheless not entitled to resentencing because he has not demonstrated that the trial court "actually relied" on Brister's statement when it imposed sentence. *See* ***Alexander***, 360 Wis. 2d 292, ¶17.

¶12 ***Alexander*** instructs that to determine whether the trial court "actually relied" on the statement, we must "review the [trial] court's articulation of its basis for sentencing in the context of the entire sentencing transcript to determine whether the court gave 'explicit attention' to an improper factor, and whether the improper factor 'formed part of the basis for the sentence.'" *See* ***id.***, ¶¶17, 25 (citations omitted). Brister argues that when the trial court imposed his sentences, it made "an explicit reference" to Brister's statement acknowledging that he used drug sale proceeds to purge his contempt order. Brister asserts:

> [The trial court] stated that Mr. Brister was a drug dealer—a conclusion proven beyond all doubt by Mr. Brister's in-court confession—and "That is how you support." As the court was told, the only sizeable lump sum child support

> payment Mr. Brister made—the $3,000 purge order—was from a drug deal. This is a plain reference to Mr. Brister's compelled and incriminating statement.

(Record citations omitted.)

¶13 Brister further contends that the trial court's comments demonstrate that Brister's compelled statement "'formed part of the basis for the sentence[s].'" *See* ***id.***, ¶25 (citation omitted). He argues:

> [T]he court made its comment about Mr. Brister being a person who used his occupation as a drug dealer "to support" almost immediately prior to stating[,] "You are going to prison. You are going to prison today." The clear inference is that Mr. Brister's drug-dealing, which he admitted to in the compelled and incriminating statement, was one justification for a prison sentence in this case. At the same time, the fact that Mr. Brister had only ever "supported" by selling drugs appears to suggest a clear call-back to the earlier comment about using drug proceeds to make a substantial court ordered support payment.

(Record citations omitted.)

¶14 We have reviewed the sentencing transcript and the postconviction order that contains the trial court's own assessment of its sentencing comments. We are not persuaded that when the trial court imposed the sentences it gave "'explicit attention'" to Brister's admission that he used drug proceeds to purge his contempt or that Brister's admission "'formed part of the basis for the sentence.'" *See* ***id.***, ¶25 (citations omitted). Instead, the trial court's sentence was based on the fact that Brister refused to pay child support through the child support system. As the trial court observed, Brister had paid into the system only "when it has been taken out of [his] prison account or when [he was] forced to do so to stay out of jail." The trial court's comments reflected its concern that Brister had to be forced to make payments, not that he used drug sale proceeds to make one purge

payment. The trial court also faulted Brister for choosing to continue to sell drugs, but its comments were based on Brister's long history of selling drugs—documented by his numerous criminal convictions for drug offenses—not on his admission that he once used drug money to pay a purge condition.

¶15 In summary, we conclude that the transcript, viewed in its entirety, demonstrates that Brister's single statement concerning the source of funds used to purge his contempt on a single occasion did not "'form[] part of the basis for the sentence.'" *See* ***id.***, ¶29 (citation omitted). Because Brister has not "prov[en], by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors," *see* ***id.***, ¶17, he is not entitled to resentencing. It follows that Brister's ineffective assistance of counsel claim fails because he has not demonstrated that he was prejudiced by his trial counsel's failure to object to the trial court's question about satisfaction of the purge condition. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense.).

By the Court.—Judgment and order affirmed.

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