COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1968-CR **Cir. Ct. No. 2014CF887**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DION LASHAY BYRD,

DEFENDANT-APPELLANT.

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

Before Brennan, Brash and Dugan, JJ.

¶1 BRASH, J. Dion Lashay Byrd appeals from his judgment of conviction, entered on a jury's verdict, for making a bomb threat, contrary to WIS.

STAT. § 947.015 (2013-14).[1] He also appeals the trial court's order denying his postconviction motion for resentencing. Byrd asserts that the trial court based his sentence on improper factors: (1) a violation of Byrd's constitutional right against self-incrimination that occurred during an exchange between Byrd and the court when Byrd exercised his right of allocution; and (2) the trial court's disagreement with the statutory maximum penalty for this crime that was expressed during the sentencing hearings. We affirm.

BACKGROUND

¶2 Shortly after 7:00 a.m. on March 4, 2014, a bomb threat was called into Fox 6, a Milwaukee television station. The morning news show being broadcasted at that time was able to remain on the air, but most personnel were sent home and the guests for the show were cancelled. The Milwaukee County Sheriff's Department sent a bomb squad to search the premises. No bomb was found.

¶3 Fox 6 was able to trace the call to a land line located at a residence in the City of Milwaukee. Police interviewed a female at the residence, who was later identified as Byrd's mother. She confirmed that she and Byrd were the only two people at the residence, and further stated that Byrd had recently been "exhibiting unusual behaviors."

¶4 When police questioned Byrd, he admitted to using the phone that morning, but stated it was to call his grandmother. He denied making the bomb

[1] All references to the criminal code of the Wisconsin Statutes, chapters 939-951, are to the 2013-14 version; all other references are to the 2015-16 version of the statutes unless otherwise noted.

threat but suggested that maybe he had inadvertently dialed Fox 6, and that some background noise must have been mistaken for a bomb threat. Byrd was charged under the bomb scare statute for intentionally conveying a false bomb threat, a Class I felony. *See* WIS. STAT. § 947.015.

¶5 The matter went to trial in November 2015, and Byrd was convicted by a jury. Byrd was sentenced to the maximum penalty of three years and six months, consisting of one year and six months of initial confinement followed by two years of extended supervision. *See* WIS. STAT. § 939.50(3)(i).

¶6 During the sentencing hearing in December 2015, Byrd exercised his right of allocution and told the trial court that he was "not a terrorist" and that he was "not a threat to society." The court then proceeded to ask Byrd several questions, including "Why did you do this?" to which Byrd replied, "I really can't answer it, sir."[2] Additionally, Byrd apologized to the court, to which the trial court responded, "Why would you apologize? You didn't do anything wrong, according to you." Byrd informed the court that his apology was to his mother and to Fox 6, and for "just having people here, period." Byrd then stated that he would not have gone to trial, to which the court retorted that Byrd had gone to trial "and lost big time," and further noted that even the jury had asked the court why the case had gone to trial.

¶7 Following that exchange, the trial court discussed the factors upon which it was basing the sentence. The court described the effect of the bomb

[2] Prior to this exchange, Byrd's trial counsel had informed the trial court that Byrd had indicated he was going to appeal several issues in the case, and thus counsel had advised Byrd not to discuss the case. As a result, counsel stated on the record that "the why question is not going to be answered today for anyone … to preserve Mr. Byrd's appellate rights."

threat on Fox 6, the serious nature of the crime, and the need to protect the public. Additionally, in discussing Byrd's character, the court noted that Byrd's trial counsel had advised the court that Byrd suffered from mental illness, but that the court had not been provided with proof because counsel had just learned of it that day.

¶8 The trial court also stated that it was "shocked" that the penalty for this crime was "the lowest felony" when it is "one of the most serious felonies that [the court] know[s] of." The court then sentenced Byrd to the maximum penalty allowed in order to "get the message out that we, as a community, will not tolerate this stuff." The court also indicated that Byrd had shown no remorse.

¶9 Subsequently, Byrd filed a postconviction motion seeking resentencing or, in the alternative, sentence modification. Byrd argued that he was entitled to resentencing because the trial court had violated his constitutional right against self-incrimination during the exchange at the initial sentencing hearing when Byrd exercised his right to allocution. In the alternative, Byrd contended that his mental illness was a new factor that warranted sentence modification.

¶10 A hearing was held on Byrd's postconviction motion on December 1, 2016. The trial court denied Byrd's request for resentencing, finding that Byrd's right against self-incrimination was not violated because Byrd had "started making statements" and the court had then "responded by asking him appropriate questions, which I'm allowed to do." However, the court granted Byrd's request for sentence modification, concluding that Byrd's mental health records should have been reviewed prior to sentencing.

¶11 After the trial court's review of Byrd's mental health records, a new sentencing hearing was held on December 14, 2016.[3] The trial court again concluded that the maximum sentence was warranted. The court acknowledged that it had not been aware of the severity of Byrd's mental illness and had been "pretty harsh" in its remarks at the sentencing hearing in December 2015. Nevertheless, the court stated that its consideration of the serious nature of the crime and the need to protect the public "still goes," and thus those factors remained as its basis for imposing the maximum sentence allowed.

¶12 Byrd again filed a motion for postconviction relief from that sentence, but it was denied. In its written decision, the trial court reiterated that the resentencing was to allow the court to consider information relating to Byrd's mental illness and was not intended to remedy any alleged violation of Byrd's right against self-incrimination, as the court had already rejected that argument.

¶13 The trial court also rejected Byrd's argument that the sentence improperly reflected the court's view regarding the maximum penalty available for this crime. It found that the transcript demonstrated that the sentence was based on proper sentencing factors, and that the court's comments about the penalty classification were not relied upon in imposing the sentence but instead were just a "side dish." This appeal follows.

[3] Although the trial court had stated at the postconviction hearing that it was granting Byrd's motion for a sentence modification in order to take Byrd's mental illness into consideration, at the subsequent sentencing hearing, the court stated that rather than a modification, it was vacating Byrd's sentence and would instead be resentencing him.

DISCUSSION

¶14 "It is a well-settled principle of law that a [trial] court exercises discretion at sentencing." ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Our review on appeal is limited to determining whether that discretion was erroneously exercised. *See* ***id.***

¶15 In making a sentencing determination, the trial court must identify the objectives of the sentence, which generally include "the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. It is also within the court's discretion to consider other relevant factors and determine the weight given to those factors. ***Harris v. State***, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977).

¶16 If the trial court "actually relies on clearly irrelevant or improper factors," it has erroneously exercised its discretion. ***State v. Alexander***, 2015 WI 6, ¶17, 360 Wis. 2d 292, 858 N.W.2d 662 (citation omitted). The defendant "bears the burden of proving, by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors." ***Id.*** In our review of a sentencing challenge based on the alleged use of improper factors, we examine the entire sentencing transcript, and "look to the [trial] court's articulation of its basis for imposing the sentence." ***Id.***, ¶29.

¶17 In this case, Byrd argues that the trial court considered improper factors during sentencing in two instances. First, Byrd asserts that the trial court violated his constitutional right against self-incrimination and then improperly relied on Byrd's compelled statement, which the court had described as demonstrating a lack of remorse. Additionally, Byrd contends that the trial court's declaration of its disapproval of the maximum penalty for this crime—which the

legislature determines—was an improper factor upon which the court relied in imposing the maximum sentence.

1. The trial court did not rely on improper factors relating to a violation of Byrd's right against self-incrimination at the resentencing.

¶18 "Among the rights granted a defendant in a criminal proceeding is the Fifth Amendment privilege against self-incrimination." ***State v. Mark***, 2006 WI 78, ¶16, 292 Wis. 2d 1, 718 N.W.2d 90. This right, set forth in the United States Constitution as well as article I, section 8 of the Wisconsin Constitution, provides that a person cannot be compelled to be a witness against himself or herself in a criminal case. *See* U.S. CONST. amend. V.

¶19 This constitutional protection against self-incrimination continues through sentencing. ***Alexander***, 360 Wis. 2d 292, ¶24. Indeed, a compelled self-incriminating statement is an improper factor that should not be considered at sentencing. ***Id.*** However, in Wisconsin there is a statutory right of allocution, under which a defendant is afforded the opportunity at sentencing "to make a statement with respect to any matter relevant to the sentence." WIS. STAT. § 972.14(2); *see also* ***State v. Greve***, 2004 WI 69, ¶¶34-35, 272 Wis. 2d 444, 681 N.W.2d 479. In fact, in exercising this right of allocution, a defendant may, in the hope of obtaining a more lenient sentence, waive the right against self-incrimination "and acknowledge his guilt and express his contrition and remorse." ***Scales v. State***, 64 Wis. 2d 485, 496, 219 N.W.2d 286 (1974).

¶20 The right against self-incrimination will be deemed waived "only if it is voluntary, knowing, and intelligent with an understanding of the consequences of such waiver." ***Harvey v. Shillinger***, 76 F.3d 1528, 1536 (10th Cir. 1996). In other words, the right is waived if it is shown that, under the totality

of the circumstances, the waiver was "uncoerced," and there was "requisite level of comprehension" surrounding the waiver. ***Colorado v. Spring***, 479 U.S. 564, 573 (1987) (citations and one set of quotation marks omitted).

¶21 At the initial sentencing hearing in December 2015, Byrd exercised his statutory right of allocution. However, this was after Byrd's trial counsel informed the court that he had advised Byrd not to discuss the case at the sentencing hearing, specifically stating that any questions regarding why this crime was committed should not be answered. Nevertheless, the trial court entered into a verbal exchange with Byrd, which included asking him why he committed the crime: "I want to know, the people in authority of [Fox] 6 want[] to know, the district attorney wants to know why the hell would you do this?" Byrd did not answer the question. However, he later apologized to the court, to which the court responded by asking Byrd why he would apologize when, according to him, he had done nothing wrong.

¶22 This exchange could be construed as an attempt to goad Byrd into an admission; in other words, compelling a self-incriminating statement. Any such statement may not be taken into consideration at sentencing. *See* ***Alexander***, 360 Wis. 2d 292, ¶24. Yet, the trial court specifically noted Byrd's lack of remorse, based on his answers during that exchange, when it imposed the sentence.

¶23 Furthermore, given the status of Byrd's mental health—which had been questioned but was unknown at the time of the first sentencing hearing—it is certainly at least questionable whether Byrd had the "requisite level of comprehension" to waive his Fifth Amendment right against self-incrimination. *See* ***Spring***, 479 U.S. at 573 (citations and one set of quotation marks omitted).

¶24 However, at the resentencing hearing in December 2016, the record indicates that these issues were cured. By that time, the trial court had reviewed Byrd's medical records and acknowledged that Byrd suffered from severe mental illness. The court again asked Byrd about making the bomb threat phone call, and Byrd answered that he was suffering from hallucinations at the time and could not recall making the threat. The court did not question Byrd any further on that point.

¶25 The trial court then explained that Byrd's mental illness did not outweigh the sentencing goals and factors that it had considered at the first sentencing hearing. Thus, even after taking into account Byrd's mental illness, the court again imposed the maximum sentence.

¶26 The trial court may, at a postconviction hearing, clarify its earlier statements from the sentencing hearing, and explain the factors that it did or did not consider when it imposed the sentence. ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). That is precisely what the trial court did here: it acknowledged that it did not have all of the relevant information regarding Byrd's mental health at the first sentencing, and in fact characterized its remarks to Byrd as being "pretty harsh."

¶27 Moreover, the court articulated the factors that it did consider, which included proper factors pursuant to ***Gallion*** and, more importantly, did not include any of Byrd's statements from the first sentencing hearing or reference any perceived lack of remorse. Therefore, we conclude that any error relating to Byrd's right against self-incrimination was cured at the resentencing in December 2016 and, as a result, the trial court did not erroneously exercise its discretion

when it resentenced Byrd to the maximum penalty permitted. *See* ***Gallion***, 270 Wis. 2d 535, ¶40; ***Harris***, 75 Wis. 2d at 519-20.

2. Byrd fails to prove that the trial court relied on its disagreement with the statutory maximum penalty when it imposed his sentence.

¶28 The record clearly demonstrates that the trial court openly and unmistakably expressed its opinion that the statutory penalty relating to this crime was too lenient. In fact, the court shared its opinion not once but twice, at both the original sentencing hearing in December 2015 as well as the resentencing hearing in December 2016, when it noted that "a year later, I'm still shocked that this is only the minor felony that it is[.]" Byrd argues that this is an improper factor upon which the trial court relied in imposing the maximum sentence.

¶29 Even if frustration with the legislature is an improper factor for consideration at sentencing, Byrd fails to prove that the trial court actually relied on its opinion when it imposed the maximum penalty. The court shared its opinions while discussing the seriousness of the crime and the need to protect the community, which are proper factors for consideration. *See* ***id.***

¶30 Furthermore, in its decision denying Byrd's postconviction motion, the court stated that it had "recognized that the defendant has mental health issues, but the need for punishment and strong deterrence so far outweighed that factor that the court determined that only a maximum sentence was sufficient to achieve those sentencing goals." This indicates that the court took into consideration the specific facts of this case in exercising its discretion in imposing the sentence.

¶31 Where it has been demonstrated that the trial court exercised its discretion during sentencing, we "'follow[] a consistent and strong policy against

interference with the discretion of the trial court in passing sentence.'" ***Gallion***, 270 Wis. 2d 535, ¶18 (citation omitted). "[S]entencing decisions … are generally afforded a strong presumption of reasonability because the [trial] court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***Id.*** (citations omitted; first set of brackets in ***Gallion***). Thus, even if an appellate court disagrees with a sentence, it cannot "'substitute [its] preference for a sentence merely because, had [it] been in the trial judge's position, [it] would have meted out a different sentence.'" ***Id.*** (citation and footnote omitted).

¶32 The record reflects that the trial court exercised its sentencing discretion based on proper factors, and Byrd has failed to meet his burden of proving that the court actually relied on any improper factors. *See* ***Alexander***, 360 Wis. 2d 292, ¶17. We therefore affirm the judgment of conviction and the trial court's order denying Byrd's postconviction motion.

By the Court.—Judgment and order affirmed.

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