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DISTRICT IV

February 20, 2019

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

2017AP2256-CR	State of Wisconsin v. Brenda Lee McConochie (L.C. # 2015CF626)
2017AP2257-CR	State of Wisconsin v. Brenda Lee McConochie (L.C. # 2015CF1260)

Before Lundsten, P.J., Blanchard, and Kloppenburg, 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).

Brenda Lee McConochie appeals judgments of conviction entered upon her guilty pleas to homicide by intoxicated use of a motor vehicle and felony bail jumping, and an order denying her postconviction motion for sentencing relief. Based upon our review of the briefs and record,

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

McConochie was the driver in a single-car rollover crash that caused the death of her husband, the sole passenger. McConochie's blood-alcohol concentration was .233 grams per 100 milliliters. She was charged with homicide by intoxicated use of a vehicle and homicide by use of a vehicle with a prohibited blood-alcohol concentration, and she was released on bond with conditions of "No driving at all" and "Absolute sobriety." Three days later, police received a report that McConochie drove to a gas station and purchased alcohol. An officer made contact with McConochie at her house and smelled intoxicants. She was charged with two counts of felony bail jumping.

Pursuant to a plea agreement, McConochie pled guilty to homicide by intoxicated use of a vehicle and one count of felony bail jumping. The presentence investigation report set forth statements made by the victim's family members concerning the gravity of their loss, and expressing their beliefs that McConochie had failed to show remorse or compassion. The PSI writer concluded that McConochie "failed to show any remorse for her actions," and set forth the reasons for this conclusion, including that McConochie now claimed she had not been driving at the time of the crash. The PSI writer stated that McConochie "may also benefit from a cognitive-based treatment program to help her understand the severity of the offense and accept responsibility for her actions."

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

At sentencing, the court addressed the gravity of the offense, the character of the offender, and the need to protect the public. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. As to gravity, the court stated, “I think everybody agrees that this is a very serious crime. It involves a death” The court also considered McConochie’s high level of intoxication, which was “over twice the legal limit,” and the significant harm to the victim’s family, which was exacerbated by McConochie’s post-crash behavior. The circuit court found it “significant” and “troubling” that McConochie did not understand the “depth of the loss that they have experienced,” or “the negative effect her decisions and her actions have had on others.” In looking at character, the circuit court stated that McConochie had “a lot of positives,” was remorseful, and had “suffered a loss,” but again expressed concern that she did not understand the full impact of her actions on other people. It remarked that she “was more focused on her own desire to be released from custody so that she could get back to the things and the activities that she enjoyed doing.” The court was troubled by the fact that McConochie saw this as “just one - - one mistake,” and it agreed with the PSI writer’s recommendation that McConochie “would benefit from a cognitive based treatment program to help her understand the severity of the offense and for her to accept her responsibilities for her actions.”² With regard to protecting the public, the court stated that “this is one of the crimes where general deterrence may have an effect on the general public,” and that it wanted “a message sent to others that if you get in a car and you drive while you’re intoxicated, there can be some serious consequences, and that this is a serious offense that the Court is concerned about.” The court

² The sentencing court ascertained from both trial counsel and McConochie that they had reviewed the PSI. The defense did not request any modifications to the PSI.

also cited punishment and rehabilitation as “important component[s].” The court indicated that cognitive and alcohol treatment programs would lessen McConochie’s risk and were available in prison. On the homicide count, the court imposed an eleven-year bifurcated sentence with four years of initial confinement followed by seven years of extended supervision. The court imposed a shorter, two-year concurrent sentence on the bail jumping conviction.

McConochie filed a postconviction motion requesting sentence modification on the ground that the circuit court erroneously exercised its sentencing discretion as follows:

[T]he court mischaracterized the defendant’s focus on her fate and the consequences that her actions would have on her as an absolute inability to understand the harm her actions had caused that, in itself, constituted a “cognitive impairment” that required a period of imprisonment to address.

At a postconviction hearing, the court acknowledged McConochie’s belief that it had mischaracterized her at sentencing, but concluded that it was entitled to infer from the information presented that McConochie did not fully understand or appreciate the consequences of her actions. The court rejected McConochie’s assertion that it imposed a prison sentence in order to address her distorted thinking. The court explained that while it considered McConochie’s failure to fully understand the consequences of her actions as one sentencing factor, “it was not the sole factor, it was not the primary factor.”

On appeal, McConochie maintains that the circuit court erroneously exercised its sentencing discretion by (1) determining that she needed cognitive-based treatment based on an inference that she did not fully appreciate the consequences of her actions, and (2) relying on this faulty inference to send her to prison. Review of a sentencing decision is limited to determining whether there was an erroneous exercise of discretion. *State v. Harris*, 2010 WI 79, ¶30, 326

Wis. 2d 685, 786 N.W.2d 409. “Discretion is erroneously exercised when a sentencing court imposes its sentence based on or in actual reliance upon clearly irrelevant or improper factors.” *Id.* (emphasis omitted). Given the strong public policy against interfering with the sentencing discretion of the circuit court, sentences are afforded a presumption of reasonableness. *Id.* “Accordingly, the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion.” *Id.*

The circuit court properly exercised its discretion when it determined that McConochie needed cognitive-based treatment. Though McConochie asserts that the court should have viewed her post-crash behavior as situational selfishness attributable to this being her “first experience with the court system,” the information presented at sentencing supports the inference drawn by the court, namely, that McConochie did not fully appreciate the gravity of her actions and would benefit from therapy. The court’s determination was supported by the following: facts and recommendations presented in the PSI; McConochie’s attempt to retract her admission that she was the driver when she realized she might be penalized; her minimizing the crash by referring to it as a mistake; and trial counsel’s statements at sentencing confirming the propriety of “cognitive intervention treatment,” given McConochie’s need “to fully accept responsibility for her actions in this case. She needs to understand her role in the outcome of the offense to make sure it doesn’t happen again.” The State makes this argument in its respondent’s brief and McConochie has not filed a reply brief. Though we do not go so far as to deem this a concession, *see United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant’s failure to respond in reply brief to an argument made in response brief may be taken as a concession), it signifies the fragility of McConochie’s claim. We agree with the State’s argument that McConochie’s core complaint concerns how the circuit court

weighed the sentencing factors, a determination left to its sound discretion. *See Ziegler*, 289 Wis. 2d 594, ¶23.

To the extent that McConochie's claim rests on the contention that the circuit court imposed a prison sentence in order to ensure that she received cognitive-based therapy, we disagree. As the circuit court explained at the postconviction hearing, its sentencing decision was not based solely or primarily on McConochie's need for a cognitive-based treatment program. *See State v. Taylor*, 2006 WI 22, ¶21, 289 Wis. 2d 34, 710 N.W.2d 466 (in determining the propriety of a sentencing court's exercise of discretion, the reviewing court may consider the circuit court's articulated reasoning at sentencing and postconviction). Indeed, the sentencing court acknowledged that certain treatment programs were available in the community but determined that probation would unduly depreciate the seriousness of the offense.

Upon the foregoing reasons,

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

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

Sheila T. Reiff
Clerk of Court of Appeals