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DISTRICT I

Amended April 5, 2023

April 4, 2023

To:

Hon. David L. Borowski
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County
Electronic Notice

Matt Borkovec
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John D. Flynn
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Kieran M. O'Day
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1271-CR

State of Wisconsin v. Pierre Lee Roberson (L.C. # 2019CF4352)

Before Donald, P.J., Dugan and White, 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).

Pierre Lee Roberson appeals from a judgment convicting him of second-degree reckless homicide with use of a dangerous weapon as a party to the crime. He also appeals an order denying his postconviction motion for sentence modification. Roberson contends that the circuit court's sentence was unduly harsh, the circuit court was objectively biased, and he was entitled to judicial substitution for purposes of resolving his postconviction motion. 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(1) (2021-22).¹ We affirm.

While driving with her sister, her son, and her niece, J.B. was tragically killed in the crossfire of a gun fight. Roberson was one of the participants in that gun fight, shooting across a Milwaukee street. The State charged Roberson with first-degree reckless homicide with the use of a dangerous weapon as a party to the crime. Roberson subsequently agreed to plead guilty and testify against, Romance Gunn, who was one of the other individuals alleged to have been involved in the shooting. In exchange for his plea and his testimony, the State reduced Roberson's charge to second-degree reckless homicide with the use of a dangerous weapon as a party to the crime.

At sentencing, the State recommended that Roberson serve five years of initial confinement and five years of extended supervision. The defense agreed with that recommendation. Focusing heavily on the gravity of the offense, the circuit court sentenced Roberson to ten years of initial confinement and eight years of extended supervision.

Postconviction, Roberson sought sentence modification, arguing that the circuit court was objectively biased against him during sentencing and imposed an unduly harsh sentence. Roberson additionally requested judicial substitution pursuant to WIS. STAT. § 971.20. The circuit court denied Roberson's motion concluding that there is no right to substitution during postconviction proceedings and that there was no evidence of bias or prejudice in the record.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Roberson appeals and continues to claim that the sentence he received, which doubled the initial confinement time recommended by the State, was unduly harsh. He contends that the circuit court’s objective bias is apparent and claims the court made up its mind about his sentence before the hearing occurred; interrupted and fought with the State before listening to its full statement; and did not consider anything presented by the defense.

When a circuit court concludes that its imposed sentence was not unduly harsh, this court reviews that decision for an erroneous exercise of discretion. *State v. Grindemann*, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507. A sentencing court properly exercises its discretion when it considers the primary sentencing factors of the gravity of the offense, the character of the offender, and the protection of the public. *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. A defendant bears a “heavy burden” to show that the court erroneously exercised its sentencing discretion. *Id.*, ¶30.

“A sentence is unduly harsh or unconscionable ‘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.’” *State v. Cummings*, 2014 WI 88, ¶72, 357 Wis. 2d 1, 850 N.W.2d 915 (citation omitted). However, “[w]hat constitutes adequate punishment is ordinarily left to the discretion of the trial judge.” *Id.*, ¶75 (citation omitted). If a sentence falls well within the statutory limits, it is unlikely to be deemed unduly harsh. *Id.*, ¶74.

We begin by noting that Roberson’s sentence fell within the statutory maximum for second-degree reckless homicide with use of a dangerous weapon, which resulted in a maximum

exposure of thirty years. WIS. STAT. §§ 940.06(1), 939.50(3)(d), 939.63(1)(b). Consequently, it is presumed that the sentence was not unduly harsh.

The sentencing transcript reflects that the State, while recognizing the tragic nature of the case and gravity of the offense, advocated for a shorter sentence based on mitigating factors such as Roberson's willingness to cooperate, his testimony against Gunn (whom the State believed instigated the incident), and Roberson's criminal record, which was "not the most aggravated." The defense made similar arguments in favor of the State's recommended sentence. In contrast, the victim impact statement from J.B.'s mother advocated for the maximum sentence.

The circuit court, in its sentencing remarks, emphasized the gravity of Roberson's crime. The circuit court highlighted the increasing homicide rate in Milwaukee and the recklessness of engaging in a gun fight in broad daylight on a busy street. As mitigating factors, the circuit court explicitly credited Roberson for testifying against Gunn and pleading guilty. The circuit court also acknowledged the mitigating circumstances discussed in the presentence investigation report.

Weighing everything presented to it, the circuit court imposed a sentence longer than what the State recommended but still within the statutory maximum. The circuit court said that its sentence was the "absolute minimum that I think can deal with these circumstances." Based on the applicable standards, the circuit court concluded that "anything less than this would make an absolute mockery of what occurred here." The circuit court focused on the gravity of the offense, along with the need for punishment, deterrence, and community protection from people like Roberson "who are willing to have a gunfight in broad daylight to kill an innocent 23[]year old." The court's sentence was not unduly harsh.

Roberson's claim that the circuit court was objectively biased also fails. Objective bias can exist in two situations: when the facts give rise to an appearance of bias or when the record objectively demonstrates that the circuit court in fact treated a litigant unfairly. *State v. Herrmann*, 2015 WI 84, ¶¶27, 30, 46, 364 Wis. 2d 336, 867 N.W.2d 772. We have reviewed the entirety of the circuit court's remarks, and we are satisfied that nothing in them suggests judicial bias. *Id.*, ¶23 (providing that whether the circuit court was objectively biased presents a question of law that this court reviews *de novo*).

Lastly, Roberson argues that he was entitled to judicial substitution during the postconviction proceedings pursuant to WIS. STAT. § 971.20. In his reply brief, Roberson acknowledges that the State correctly asserted that § 971.20 does not provide for a right to judicial substitution during postconviction proceedings. Consequently, he changes tack and asserts that the main basis for his request "is that once the postconviction matter is complete, upon bias being found, substitution of judge occur [sic] for any resentencing/sentence modification[.]" Because there was no objective bias, we need not address this argument further. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (holding that only dispositive issues need be addressed).

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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