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DISTRICT I

September 6, 2023

To:

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

2022AP839-CR

State of Wisconsin v. Robert Andre Nash (L.C. # 2020CF3463)

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

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).

Robert Andre Nash appeals from his judgment of conviction entered after he pled guilty to hit and run resulting in death. He also appeals from the order denying his postconviction motion. He seeks resentencing for what he argues is an excessive sentence based on the consideration of improper factors. 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 summarily affirm.

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

The charge against Nash stemmed from a car crash that occurred in September 2020 in Milwaukee. Police officers had observed a tan Jeep Liberty driving at a high rate of speed on surface streets, and attempted to pull it over. The Jeep increased its speed and disregarded several stop signs. Officers briefly lost sight of the Jeep, but came upon it on North 35th Street after it had crashed into a Honda Civic, which was flipped over. The driver of the Jeep had fled. The driver of the Honda, M.B., died of his injuries.²

Nash, the owner of the Jeep, reported to police that his vehicle had been carjacked. However, he later admitted that he had been driving the vehicle when police attempted to pull it over, and did not want to be caught driving when his license was suspended. He further admitted to crashing into another vehicle on North 35th Street and fleeing the scene, and then making a fake report about the carjacking.

Nash was charged with hit and run resulting in death, fleeing an officer, and knowingly operating a motor vehicle while suspended and causing death. Nash opted to resolve the matter with a plea. Pursuant to the plea agreement, he pled guilty to the charge of hit and run causing death, with the other two charges dismissed and read in at sentencing. The State recommended substantial prison time, with the length to be determined by the trial court.

The trial court imposed the maximum sentence of fifteen years of initial confinement followed by ten years of extended supervision. *See* WIS. STAT. §§ 346.67(1), 346.74(5)(d), 939.50(3)(d) (2019-20). The court considered the severity of the offense, observing that getting

² Although WIS. STAT. RULE 809.86(3) permits the use of the name of a homicide victim to be used in an opinion, the State opted to use a pseudonym out of respect for the privacy of the victim's family; we follow suit.

“hit at fifty (50) miles an hour by a car” is a significant crash that is a “big deal.” It also discussed Nash’s conduct after the crash—running away, instead of seeking medical help for M.B., and then lying to police about being carjacked. The court characterized this as Nash considering only “his own self interest,” noting that he was fifty-two years old at the time, as opposed to being a teenager. The court also observed that the dismissal of the other charges in the matter, which were read in for sentencing purposes, was a “substantial benefit” to Nash. The court stated that it considered the facts of this case to be “among the most aggravated circumstances [it] has seen in a hit and run causing death.”

Nash filed a postconviction motion seeking resentencing. He argued that several comments made by the trial court at sentencing demonstrated that the court was “presumptively vindictive” in imposing the sentence, leading to a sentence that was excessive, and therefore, in violation of Nash’s due process rights. Specifically, Nash pointed to comments the court made referencing the State’s charging decision and uncharged offenses, as well as a discussion regarding social justice movements as they relate to law enforcement and the criminal justice system.

The trial court rejected Nash’s arguments. It maintained that it had considered proper sentencing factors, noting that its social justice comments were “in direct response to the statements made by [M.B.]’s mother” to the investigator who prepared the presentence investigation report (PSI). The court stated that those comments, “in context, serve[d] as no more than an aside.” The court therefore denied Nash’s postconviction motion. Nash appeals.

“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. On appeal, this court’s

review “is limited to determining if discretion was erroneously exercised,” such as if the trial court considers “clearly irrelevant or improper factors.” *Id.*

In its respondent’s brief, the State provides an in-depth synopsis of the trial court’s discussion of the primary sentencing factors, which are the gravity of the offense, the character of the defendant, 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. The State argues that the court’s comments relating to the charges brought against Nash were discussed by the court in the context of these factors—in particular, the gravity of the offense, with the court stating that the circumstances here were among the “most aggravated” it had encountered in a hit and run case. The State also contends that the court’s comments regarding social justice movements were in the context of discussing the factor relating to the protection of the public, where it also again referenced the gravity of the offense.

In sum, the State asserts—and the record reflects—that the trial court gave a “very thorough explanation of how it evaluated and weighed” the proper sentencing factors. The State maintains that the sentence imposed by the trial court simply reflects its disagreement with the PSI—which recommended an evenly bifurcated six-year sentence—regarding the severity of the offense and Nash’s degree of culpability. Therefore, the State contends that Nash has failed to demonstrate that the trial court erroneously exercised its discretion at sentencing.

Nash did not file a reply brief. As such, he has not refuted these specific points made by the State. Therefore, we conclude Nash has conceded these arguments. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (explaining that unrefuted arguments are deemed conceded).

As a result, Nash has not established that the trial court erroneously exercised its discretion at sentencing. *See Gallion*, 270 Wis. 2d 535, ¶17. Accordingly, we affirm Nash's judgment of conviction and the order denying his postconviction motion.

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals