COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP1178-CR
2013AP1179-CR

Cir. Ct. Nos. 2010CF1135
2011CF23

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMEIL A. GARRETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: JASON A. ROSSELL, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 GUNDRUM, J. Jameil A. Garrett appeals his judgment of conviction and the circuit court's denial of his postconviction motion, contending that the court sentenced him on inaccurate information, namely "the unwarranted

assumption Mr. Garrett acted with an intent to kill" the victim. Garrett has failed to convince us that the court's "assumption" was inaccurate. We affirm.

BACKGROUND

¶2 Garrett pled guilty to four misdemeanor counts—three as domestic abuse related incidents and two as repeaters—and three felony bail jumping counts. As part of his plea agreement, an additional thirteen felony bail jumping counts, felony substantial battery and false imprisonment (domestic abuse related) counts, and four misdemeanor counts were dismissed. The circuit court sentenced Garrett to concurrent one-year jail sentences on each of the two misdemeanor repeater convictions, but withheld sentence on the remaining convictions and instead ordered three years of probation on those counts to be served consecutively to the one-year jail term.

¶3 Garrett's probation was subsequently revoked. At the sentencing-after-revocation hearing, the circuit court[1] sentenced Garrett on each of the counts on which he had been serving probation. As to the third felony bail jumping count, the count at issue in this appeal,[2] Garrett was sentenced to two years of initial confinement and two years of extended supervision, consecutive to sentences issued on other counts.

[1] Garrett was originally sentenced by the Honorable Barbara A. Kluka. The Honorable Jason A. Rossell presided over the sentencing-after-revocation hearing and the postconviction motion hearing.

[2] Garrett was sentenced to jail terms on his misdemeanor counts, to two years of initial confinement and two years of extended supervision on the first bail jumping count, and to three years of initial confinement and three years of extended supervision on the second bail jumping count. He is not contesting these sentences on appeal.

¶4 In discussing the gravity of the offenses at the sentencing-after-revocation hearing, the circuit court noted that the bail jumping count at issue was premised on Garrett "committing an additional crime [while free on bail] … strangulation." That "additional crime" had been separately charged as substantial battery and dismissed as part of the earlier plea agreement. Among other reasons the court provided for its sentence on the third bail jumping count, it stated:

> It's a felony bail jumping for committing an additional crime. When I read what that crime was it was a strangulation; strangulating Ms. [] to be specific. In this Court's eyes it was very aggravating. When you strangle someone, there is only one thing you have in your mind, that is to kill the person because the only thing strangulation can do is kill the person. You are choking off their breath…. Essentially, it's attempted homicide, because what the end goal has—you may be angry provocation [sic], but really what you are trying to do is end their life.

¶5 Garrett filed a postconviction motion for resentencing on this count. The circuit court denied the motion after a hearing in all respects relevant to Garrett's appeal now before us.[3] Additional facts are set forth as necessary.

DISCUSSION

¶6 It is well-settled in Wisconsin that sentencing is left to the discretion of the circuit court and appellate review is limited to determining if the court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "Discretion is not synonymous with decision-

[3] The circuit court did agree with Garrett's postconviction contention that it had erred at sentencing in denying Garrett eligibility for the Challenge Incarceration and Substance Abuse programs. The court amended the judgment of conviction to correct this error. This issue is not before us on appeal.

making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." ***State v. Taylor***, 2006 WI 22, ¶17, 289 Wis. 2d 34, 710 N.W.2d 466 (citation omitted). We review sentencing after revocation under this same standard. ***State v. Reynolds***, 2002 WI App 15, ¶8, 249 Wis. 2d 798, 643 N.W.2d 165 (2001).

¶7 Garrett contends the circuit court based its sentencing-after-revocation decision upon inaccurate information, specifically that the court sentenced him based upon an erroneous belief that Garrett was attempting to kill the victim when he strangled her. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (citations omitted). Whether a defendant has been denied this right is an issue we review de novo. ***Id.*** In reviewing a sentence on this ground, we apply a two-part test: (1) whether the information at issue was in fact inaccurate and (2) whether the sentencing court actually relied on it. ***Id.***, ¶¶2, 26. The defendant must prove both prongs by clear and convincing evidence. *See* ***State v. Harris***, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409; *see also* ***State v. Littrup***, 164 Wis. 2d 120, 131-32, 473 N.W.2d 164 (Ct. App. 1991). Here, we need not address the second prong because Garrett has not met his burden on the first.

¶8 In determining the proper sentence, a court must consider the gravity of the offense, the character of the defendant, and the need to protect the public. ***Gallion***, 270 Wis. 2d 535, ¶44. Here, in discussing the gravity of the offense at the sentencing-after-revocation hearing, the circuit court observed that the acts

underlying Garrett's bail jumping charge were "very aggravating" and involved the strangulation of the victim, and noted that with strangulation "[y]ou are choking off their breath." The court inferred that such an act is "[e]ssentially" an attempt to "end their life." At the postconviction hearing, the court explained that it had reviewed the criminal complaint prior to sentencing Garrett and that the complaint indicated that, related to the incident underlying the bail jumping conviction, the victim had reported that Garrett "choked her until she had popped blood vessels in both eyes" and further reported that she "had bruises on [her] shoulders, face and chest."

¶9 While generalized statements like some of those made by the circuit court here (for example, "[w]hen you strangle someone, there is only one thing you have in your mind, that is to kill the person because the only thing strangulation can do is kill the person") should be avoided, we are satisfied from the totality of the court's statements at the sentencing-after-revocation and postconviction hearings that the court was properly considering *Garrett's* actions underlying this bail jumping charge based on the record before the court. Further, the court was entitled to draw reasonable inferences from the record, *see* ***Taylor***, 289 Wis. 2d 34, ¶17, and based on the statement in the complaint that the victim reported that Garrett choked her until blood vessels popped in both her eyes, the court's inference that Garrett was choking off the victim's breath and essentially attempting to kill her was a reasonable inference. As a result, Garrett has not shown by clear and convincing evidence that the sentencing-after-revocation

court's "assumption" that Garrett was attempting to kill the victim was inaccurate, and thus cannot show he was sentenced based upon inaccurate information.[4]

By the Court.—Judgment and ordered affirmed.

Not recommended for publication in the official reports.

[4] Although not developed as a separate ground for relief, Garrett appears to suggest that Judge Rossell erroneously exercised his discretion at sentencing-after-revocation by viewing the bail jumping count at issue as a more serious offense than Judge Kluka did at the original sentencing, contrary to ***State v. Reynolds***, 2002 WI App 15, ¶8, 249 Wis. 2d 798, 643 N.W.2d 165 (2001) (citation omitted). Judge Kluka, however, never discussed her view of the specific acts underlying the bail jumping offense at the original sentencing hearing. Thus, unlike the situation in ***Reynolds***, we have no basis to conclude as Garrett suggests, and we decline to assume Judge Kluka viewed the underlying acts as being less serious simply because she placed Garrett on probation and withheld sentence on the bail jumping count.