

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2013AP1706-CR
2013AP1707-CR
2013AP1708-CR
2013AP1709-CR**

**Cir. Ct. Nos. 2011CM1928
2012CM121
2012CF34
2012CF692**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FABIAN J. DUARTE,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Brown County:
MARC A. HAMMER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Fabian Duarte appeals orders denying his post-conviction motion for resentencing. He contends the circuit court relied on an

improper factor when imposing the sentence. We reject that argument and affirm the orders.

¶2 In four separate complaints, Duarte was charged with numerous felonies and misdemeanors that arose from multiple incidents in 2011 and 2012. Pursuant to a plea agreement, Duarte agreed to plead no contest to two counts of first-degree reckless endangerment by use of a dangerous weapon, and a single count of possession of THC, criminal damage to property by use of a dangerous weapon, resisting an officer and misdemeanor bail jumping. He faced a total of thirty-eight years' imprisonment for these offenses. The parties made a joint sentence recommendation of twenty-one months' initial confinement and seven years' extended supervision and probation. The court sentenced Duarte to twelve years and three months' initial confinement and five years' extended supervision.

¶3 Duarte contends the court relied on an improper factor when imposing the sentences based on the court's comments at the sentencing hearing:

Your folks moved to Green Bay when you were a teenager because they wanted you to get away from the dangers of California. They wanted to provide a better life for you, and you indicate in your statement that you lived a normal childhood, you were happy all the time, you were going to school, you were playing with friends, and that your relationship with your family was very close.

These behaviors in Brown County are the behaviors I'm most concerned about. They're inconsistent with the family objective to get away from problems and troubles in California, whatever those may be. Because the problems and the troubles you caused in Green Bay, Wisconsin are unacceptable, and it sounds to me like they're the exact type of problems that you and your family wanted to get away from, and I'm not going to let you bring those here, Mr. Duarte. That's not going to happen. That's not going to happen here, Mr. Duarte. That may be the average course of affairs in California, but that isn't going to fly here in Green Bay.

Duarte characterizes these comments as evidence that the court imposed the sentence in excess of the joint recommendation because Duarte is not a Brown County native.

¶4 A defendant challenging a sentencing court’s discretion, he bears the heavy burden of showing an erroneous exercise of discretion by clear and convincing evidence. *State v. Harris*, 2010 WI 79, ¶¶30, 34, 326 Wis. 2d 685, 786 N.W.2d 409. The defendant must put forth evidence indicating it is highly probable or reasonably certain that the circuit court actually relied on an improper factor when imposing sentence. *Id.*, ¶35.

¶5 Duarte makes no cognizable argument about *how* the court’s reference to the move from California was an improper factor or how that reference lacked a reasonable nexus to the court’s discussion of Duarte’s character. The court’s comments show frustration with Duarte’s crime spree after his family moved from California to escape the type of crimes Duarte committed in Brown County. That discussion bears a reasonable nexus with Duarte’s character, a valid sentencing consideration. *See id.*, ¶¶4, 59.

¶6 Duarte has also failed to demonstrate that the sentence was actually based on Duarte not being a Brown County native. At the postconviction hearing, the court found the sentence was not based on Duarte’s residency:

[B]ut I heard you say, Judge, we’re concerned there’s the possibility that you sentenced him more harshly because he wasn’t from Green Bay. I have to be honest. That was not my thought. I would never sentence someone lighter or harsher because he is or is not a member of the community that I live in.

In light of the court's finding, Duarte has not carried his burden of showing high probability or reasonable certainty that the court actually relied on his previous California residency when it imposed these sentences.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

