

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2017

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 No. 2015AP2637-CR

Cir. Ct. No. 2011CF5442

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK CASTRO LELLIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Frank Lellie, pro se, appeals a judgment of conviction for one count of burglary and two counts of identity theft, all as party to a crime. He also appeals the denial of his motion for postconviction relief. We affirm.

¶2 Lellie was charged in Milwaukee County case No. 2011CF5442, with three counts of burglary as party to a crime, three counts of identity theft as party to a crime, and one count of receipt of stolen property. In a separate matter, Lellie was charged in Milwaukee County case No. 2012CF4883, with one count of second-degree recklessly endangering safety as party to a crime, and two counts of identity theft. Under a global plea agreement, Lellie pleaded guilty to one count of burglary as party to a crime, and two counts of identity theft as party to a crime. The remaining six counts were dismissed and read-in at sentencing.

¶3 After sentencing, Lellie filed an unopposed motion for a new sentencing hearing. The circuit court vacated the original sentence and a two-day resentencing hearing was held.

¶4 At the resentencing, the prosecutor noted the filing of a victim impact statement for the read-in offense of receiving stolen property. The prosecutor indicated the victim of that crime stated she was still recovering emotionally and she was afraid to leave her house. The prosecutor went on to describe the facts:

[T]he defendant was charged with receiving stolen property. That's because what arose out of this incident was that [the victim] was outside her vehicle. She was trying to take groceries into her house when somebody, some I believe male individual, got out of the vehicle, ran up to her, was pulling at her arms. She struggled with them, kind of a tug-of-war instance until the strap on her purse broke and this person was able to get away with her checkbook, wallet and glasses. Unfortunately, [the victim]

was not able to identify the actors who actually did the stealing of that purse, however, they did locate her belongings in this defendant's vehicle.

Police had responded to what they believed [was] a suspicious vehicle that had been idling in a high crime area. When they conducted that traffic stop, they observed people inside making movements towards the front passenger seat, and they ordered the defendant out of the vehicle because they were fearing for their safety.

It was then that officers discovered numerous amounts of Chore Boy as well as a checkbook with [the victim's] name on them. They also located her wallet and her eyeglasses in the defendant's vehicle's glove box.

He indicated that he had been smoking crack prior to being stopped but he insisted that the checkbook, wallet and glasses were items that he was holding for a friend, and he believed they belonged to his friend's aunt is the story that he told police.

¶5 In its sentencing decision, the circuit court referred to the victim impact statement. The court observed that, as of November 2011, the victim was "still recovering emotionally" and was "afraid to go out of the house." During the prosecutor's comments and the circuit court's decision, Lellie never objected to the use of the victim impact statement.

¶6 Lellie subsequently filed a postconviction motion seeking resentencing or sentence modification. Lellie raised three claims arising from the circuit court's consideration of the victim impact statement: (1) his due process rights were violated because his sentence was based on incorrect information; (2) the court violated the plea agreement because Lellie did not agree the robbery offense could be read in at his sentencing; and (3) the court relied on irrelevant and improper sentencing factors. The circuit court denied the motion, and Lellie now appeals.

¶7 At the outset, Lellie forfeited any right to complain on appeal that the circuit court violated his due process rights because he failed to object to any purported violation at the resentencing hearing. Failure to correct an error at the time of sentencing forfeits any right to complain later. *See State v. Benson*, 2012 WI App 101, ¶17, 344 Wis. 2d 126, 822 N.W.2d 484. Lellie offers no legitimate reason why this court should ignore his forfeiture, and we shall not do so here. *See Hegarty v. Beauchaine*, 2001 WI App 300, ¶¶11-12, 249 Wis. 2d 142, 638 N.W.2d 355. A defendant also forfeits the right to challenge an alleged breach of a plea agreement by failing to object at the time he or she is sentenced. *State v. Duckett*, 2010 WI App 44, ¶6, 324 Wis. 2d 244, 781 N.W.2d 522. Lellie also did not object on this basis at the sentencing hearing.

¶8 Regarding Lellie's remaining contention that the circuit court based its sentencing decision on irrelevant and improper factors, it appears Lellie takes the position that the court was obligated to ignore the victim impact statement. He seems to reason that the statement needed to be ignored because it addressed only the robbery's impact and not the impact of the dismissed and read-in count of Lellie's receipt of the victim's stolen property.

¶9 Review of a sentencing decision is limited to determining whether the court erroneously exercised its discretion. *See State v. Harris*, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. Strong public policy limits interference with the court's discretion, and the defendant bears a heavy burden of showing the court erroneously exercised its discretion. *Id.*

¶10 Lellie has not rebutted the presumption that the sentencing court properly exercised its discretion when it considered the victim impact statement. As the victim of a crime considered at sentencing, the court had the discretion to

allow her to submit a statement relevant to the sentence. *See* WIS. STAT. § 972.14(3)(a) (2015-16); *State v. Gallion*, 2004 WI 42, ¶43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197. Here, the statement was relevant to Lellie's sentence. The criminal complaint alleged that the victim was robbed outside her residence as she was unloading groceries from her vehicle. A car pulled up and the passenger ran up to the victim and forcibly took her purse containing her checkbook, wallet and glasses. These items were later found in Lellie's possession.

¶11 Lellie assumes incorrectly that the fear described in the victim's statement can be attributed only to a single source—the forceful taking of her purse. However, the victim did not attribute her fear to a single source, and it is not reasonable to construe her statement as relating to the impact of just the robbery itself. As the circuit court correctly observed, the robbery and Lellie's receipt of stolen property were both parts of a larger criminal episode.

¶12 The crime considered at sentencing was receiving stolen property, not the robbery, but the fact that Lellie was charged with one offense and not the other was a prosecutorial decision and did not alter how this entire criminal episode affected the victim. Even if Lellie was the person who received the stolen property rather than the person who took it from the victim by force, that distinction did nothing to mitigate the victim's fear about criminals interfering with her property rights. As the court observed, both crimes involved a violation of her property rights. The court was not prevented from considering the impact of the lesser offense of receiving stolen property when the crime was part of a larger criminal episode involving a robbery.

¶13 We reject Lellie's suggestion that unless the victim could articulate a statement directly and solely addressing the impact of the receipt of stolen

property, she had nothing relevant to say in this matter. The victim impact statement was relevant and proper for the court to consider, and Lellie is not entitled to a new sentencing hearing.

By the Court.—Judgment and order affirmed

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

