COURT OF APPEALS DECISION DATED AND FILED

March 29, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2016AP1052-CR

Cir. Ct. No. 2014CF1007

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AVOREY CELESTIAN BURNS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: MICHAEL J. PIONTEK, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Avorey Celestian Burns pled no contest to possession of a firearm by a felon. Burns argues that he merits resentencing on grounds that the sentencing court relied on inaccurate information and erroneously

exercised its discretion when it expressed concern, without foundation, that he might "shoot it out with someone." We disagree with Burns and affirm the judgment of conviction and the order denying his motion for postconviction relief.

¶2 Around noon one summer day, police responded to a report that two men were arguing in a McDonald's parking lot and that one of them had a pistol. They found Burns sitting in the driver's seat of a van; the other man had left. Burns consented to a search of the van. Police found a semi-automatic handgun under the driver's seat with a live round of ammunition in the chamber. Burns later admitted the gun was his and that he had purchased it "off the streets" a few weeks earlier for protection as he lived in a dangerous area.

¶3 Burns faced up to ten years' imprisonment and a $25,000 fine. Focusing on the protection of the public due to the "great risk" Burns posed with the gun, the circuit court sentenced him to five years' initial confinement and five years' extended supervision consecutive to the revocation sentence he was serving. The court denied his postconviction motion requesting resentencing.

¶4 Burns first argues on appeal that the circuit court relied on inaccurate information at sentencing when it said that this case was the third time he "aggressively" used a gun. A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. ***Id.***

¶5 To be entitled to resentencing, Burns must show by clear and convincing evidence both that the information was inaccurate and that the circuit court actually relied on it at sentencing. ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. To determine actual reliance, we consider

whether in the context of the entire sentencing transcript "the court gave 'explicit attention' to an improper factor, and whether the improper factor 'formed part of the basis for the sentence.'" ***State v. Alexander***, 2015 WI 6, ¶25, 360 Wis. 2d 292, 858 N.W.2d 662 (citation omitted).

¶6 Burns has not made the proper showing that the statement that he used guns aggressively three times was inaccurate. In September 2003, in charges that arose from the same incident, Burns was convicted of possession of cocaine with intent to deliver and possession of a firearm as a felon. In a 2005 home invasion, Burns struck the homeowner in the head with a gun. In this case, the court observed that, while in a non-high-crime area at a McDonald's where "people take their kids," Burns has no lawful right to possess any gun, yet he got into an argument while in possession of a loaded one.

¶7 The court concluded that all three occasions involved a gun and a level of aggression. Our supreme court has noted the link between dangerous weapons and the drug trade, *see* ***State v. Johnson***, 2007 WI 32, ¶29, 299 Wis. 2d 675, 729 N.W.2d 182, and that those involved in drug trafficking rely on weapons for "self-help" and "self-protection", ***State v. Wedgeworth***, 100 Wis. 2d 514, 533, 302 N.W.2d 810 (1981). Aggression in the assault on the homeowner is plain. An argument in the McDonald's parking lot with a loaded gun at the ready is troublesome, at best. The court's inference that Burns used guns aggressively three time is not "clearly unreasonable"; we thus must accept it *See* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989). Burns has not shown by clear and convincing evidence that the statement is inaccurate.

¶8 Were we to assume for argument's sake that Burns did not act aggressively in all three incidents, he has not shown clearly and convincingly that

the court "actually relied" on any inaccuracy in sentencing him. The primary sentencing factors a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Davis***, 2005 WI App 98, ¶13, 281 Wis. 2d 118, 698 N.W.2d 823. The weight to be given each factor is within the sentencing court's discretion. ***Id.***

¶9 Although the court gave "explicit attention" to Burns using a gun aggressively on three occasions, we are satisfied that the reference did not form part of the basis for the sentence. *See* ***Alexander***, 360 Wis. 2d 292, ¶¶25-26. The court discussed Burns' poor attitude toward rules; his lack of remorse; his twenty-five-year history of prior offenses; that this was his third offense of possessing a firearm as a felon; that despite his above-average intelligence, he is a "thug with a gun" who helps perpetuate the violence and crime in the city; and that, as he ignores societal rules, protection of the public was of greatest importance.

¶10 The court clarified when it denied Burns' postconviction motion that in fashioning the sentence it "afforded little weight" to the exact number of times Burns acted aggressively with a weapon. Rather, "a major factor" was that Burns continued to possess firearms despite the fact that he lawfully could not do so. When a defendant challenges a sentence, the postconviction proceedings afford the circuit court an additional opportunity to explain the sentencing rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶11 Burns similarly complains that the court unreasonably inferred that he would "shoot it out with someone," necessitating the maximum sentence, and thus erroneously exercised its discretion. The court explained in its postconviction motion decision:

> [I]t is a reasonable inference that a convicted felon who has a previous conviction for Possession of a Firearm as a Felon does so with the intent to use it. [Burns'] [c]ounsel's inference that it is reasonable to assume that the Defendant would not use the weapon aggressively is no more reasonable than the Court's.
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> ….
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> One can assume, or infer, that the .38 Caliber Smith and Wesson Semi-Automatic Handgun with a live round of ammunition in the chamber that was located under the vehicle seat that the [D]efendant occupied in a McDonald's parking lot could be aggressively used by the Defendant. The Defendant admitted the weapon was his.

¶12 It is well established that the circuit court may draw reasonable inferences from the record in the exercise of its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶19, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). This is Burns' third conviction for possessing a firearm as a felon. His record of flouting the law; arrests for strong-armed robbery, battery, and intimidating a victim with threat of force; "pistol-whipping" a homeowner he robbed; having a loaded handgun in his van; and a COMPAS evaluation that revealed both a high history of violence and a high risk of violent recidivism all undercut the notion that a "shoot … out with someone" is far-fetched.

¶13 The inference the court drew reflected its opinion that Burns posed a future risk to the public, an opinion grounded in the facts of record and the court's observations of Burns' demeanor and history. From that reasonable deduction, the court concluded that protecting the public demanded the sentence it imposed.

By the Court.—Judgment and order affirmed.

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