STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP2445-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARSHAWN TERELL JOHNSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE DOUGLAS COUNTY CIRCUIT COURT, THE HONORABLE KELLY J. THIMM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the circuit court rely on an improper factor and violate defendant-appellant Marshawn Johnson's rights under the Privileges and Immunities Clause when it based its sentence in part on the fact that Johnson brought heroin from Chicago to sell in Superior?

The circuit court denied Johnson's motion for resentencing.

This Court should affirm the circuit court's order.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication of this Court's decision.

INTRODUCTION

Johnson was convicted following a jury trial of possession of between ten and 50 grams of heroin with intent to deliver. The sole issue he raises on appeal concerns his sentence.

Johnson argues that the circuit court erroneously exercised its discretion because it considered the fact that he was from Chicago to be an aggravating factor. He contends that this violated his rights under the Privileges and Immunities Clause of Article IV, Section 2, of the United States Constitution. This Court should reject that claim because it is unsupported by any legal authority and because the aggravating factor at sentencing was not that Johnson resided in Chicago but the wholly proper consideration that he brought the heroin from Chicago to Superior.

STATEMENT OF THE CASE

Johnson was charged with possession of more than ten grams but not more than 50 grams of heroin with intent to deliver. (R. 1:1.) The complaint alleged that Johnson and Michael Jenkins came from Chicago to Superior with heroin, which they sold from a house in Superior with the assistance of several other individuals. (R. 1:1–9.) Johnson was convicted of that charge following a jury trial. (R. 72:1, 109:181.)[1]

Sentencing. At the sentencing hearing, the circuit court said that Johnson had committed a very serious offense because "heroin is killing people in our community" and because babies are being born addicted to heroin. (R. 107:17–18, A-App. 22–23.) The court also said that "[t]he other part of the offense that makes it serious is Mr. Johnson comes up from Chicago and brings this poison to our community." (R. 107:18, A-App. 23.)

The court noted that it had received letters on Johnson's behalf, but said that "the Mr. Johnson that's in these letters isn't the Mr. Johnson that came from Chicago, came to Superior and was slinging drugs out of a house in Superior." (*Id*.) The court said that it did not believe Johnson's explanation that "he came up here to meet girls" and said that it was "part of his bad character" that "he can sell this lie and continue to sell it and not accept responsibility for the serious offense." (R. 107:18–19, A-App. 24–25.)

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[1] Johnson also was charged with resisting an officer, but that charge was dismissed at trial. (R. 1:1, 109:116.)

The State's record citations are to the electronically filed record. The pagination in some of the electronically filed transcripts differs from the pagination in the original transcript.

The court observed that unlike heroin dealers who sell the drug to support their addiction, Johnson was a "serious dealer" because "the serious dealers don't use their own product." (R. 107:19, A-App. 24.) The "bad characters," it said, are the dealers like Johnson who sell heroin just to make money. (*Id.*)

On the positive side, the court noted that Johnson was a young man who had graduated high school and been accepted to college and who has a supportive family. (R. 107:19, A-App. 24.) The court said that it was taking those factors into consideration. (R. 107:20, A-App. 25.)

The court then addressed the need to protect the public. (*Id.*) The court said that it was concerned with both specific and general deterrence. (*Id.*) "Specifically," the court said, "Mr. Johnson needs to get the message he cannot go into our community and sell drugs and the community and those around the community need to get the message they're not going to bring heroin into Superior and sell it to our people." (*Id.*) "They cannot do it and that's the aggravating factor[,] bringing this drug from Chicago into the Superior community." (*Id.*) Heroin is "a horrible drug," the court said, and "[w]e are not going to tolerate drug dealers from Chicago coming up and selling it here." (*Id.*)

The court noted that Johnson's codefendants had received more lenient sentences, but said that "the difference between those people and Mr. Johnson is the offense level is obviously different." (R. 107:21, A-App. 26.) The court noted that the codefendants had been sentenced pursuant to a joint recommendation, had cooperated, and had "[a]ccepted responsibility which is something that Mr. Johnson continues not to do." (*Id.*)

The court said that probation was not an option because it would undermine deterrence as an objective.

(R. 107:22, A-App. 27.) The court said that when determining the appropriate length of prison time, "it comes down to a message needs to be sent to Mr. [Johnson] and the community" that "[t]his behavior is not going to be tolerated." (*Id.*) The court sentenced Johnson to eight years of initial confinement and ten years of extended supervision. (R. 107:23, A-App. 28.)

Postconviction motion. Johnson filed a postconviction motion in which he alleged that the circuit court improperly treated as an aggravating factor "the fact that Johnson came from Chicago to deliver heroin" to "justify[] a harsher sentence than he would receive if he had been a native of Superior, Wisconsin." (R. 84:2.) Johnson claimed that imposing a harsher sentence because he came from Chicago violated the Privileges and Immunities Clause of Article IV, Section 2, of the United States Constitution. (*Id.*)

The circuit court denied the motion following a nonevidentiary hearing. (R. 114:9, A-App. 38.) The court said that it had not considered that Johnson "needs to be punished because he's from Chicago." (R. 114:8, A-App 37.) Rather, the court said, "it's an aggravating factor" that Johnson was both a "wholesaler" who brought the drugs into the area and a "retailer" who sold the drugs there. (*Id.*)

STANDARD OF REVIEW

An appellate court reviews a circuit court's sentencing decision under the erroneous exercise of discretion standard. *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409.

ARGUMENT

I. Applicable legal principles.

Circuit courts must consider three primary factors in determining an appropriate sentence: the gravity of the offense, the character of the defendant, and the need to protect the public. *See Harris*, 326 Wis. 2d 685, ¶ 28. Courts also may consider a variety of secondary factors. *See id.*

"Sentencing courts have considerable discretion as to the weight to be assigned to each factor." *Id.* "In exercising discretion, sentencing courts must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives." *Id.* ¶ 29.

A circuit court erroneously exercises its discretion when it imposes its sentence based upon "clearly irrelevant or improper factors." *Id.* ¶ 30. "Sentencing decisions are afforded a presumption of reasonability consistent with [the] strong public policy against interference with the circuit court's discretion." *Id.* "Accordingly, the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion." *Id.* A defendant must show by clear and convincing evidence that the sentencing court relied on an improper factor. *Id.* ¶¶ 34, 42.

II. The circuit court properly considered the fact that Johnson brought heroin from Chicago to Superior to be an aggravating factor.

Johnson argues that the circuit court erroneously exercised its sentencing discretion when it consider the fact that Johnson "was not a resident of Superior, Wisconsin, but rather was a resident of Chicago, Illinois, as an aggravating factor" when it sentenced him. (Johnson's Br. 14.) Johnson argues that the court's consideration of his Chicago

residence violates the Privileges and Immunities Clause, of Article IV, Section 2, of the United States Constitution. (*Id*. at 13.)[2]

There are three problems with that argument.

First, Johnson does not cite any case that holds that consideration of the fact that a defendant came from a different state violates the Privileges and Immunities Clause. He says that in two Wisconsin cases, the appellate court "did not find violations of the Privileges and Immunities Clause, because the trial court did not actually rely upon the fact that the defendants were from a particular place." (Johnson's Br. 16 (citing *Buckner v. State*, 56 Wis. 2d 539, 202 N.W.2d 406 (1972), and *State v. Duarte*, nos. 2013AP1706–CR, 2013AP1707–CR, 2013AP1708–CR, 2013AP1709–CR, 2014 WL 2050846 (Wis. Ct. App. May 20, 2014) (unpublished).) But, he argues, "implicit in both decisions was the assumption that had the trial courts actually relied upon the fact that the defendant was from a particular place as a factor in its sentence, the sentences would have been erroneous exercises of discretion." (*Id*. at 16–17.)

Johnson misreads both cases. In *Buckner*, the defendant, who was from Chicago, argued that the sentencing court violated the Equal Protection and Privileges and Immunities Clauses when it referred to the fact that he and his codefendants were from Chicago. *Buckner*, 56 Wis. 2d at 551. The supreme court rejected that argument, stating that "[a]lthough defendant asserts violations of his constitutional rights, he cites no authority

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[2] Both Article IV and the Fourteenth Amendment include a Privileges and Immunities Clause. *See State v. Ruesch*, 214 Wis. 2d 548, 557, 571 N.W.2d 898 (Ct. App. 1997).

and attempts no showing that the trial court relied, in its determination of the proper sentence, upon the fact that defendant was from Chicago." *Id.* at 552.

In *Duarte*, the defendant argued that the circuit court's sentencing remarks demonstrated that it imposed a harsher sentence because he was not a Brown County native, having moved there from California. *Duarte*, 2014 WL 2050846, ¶ 3 (A-App. 41.) This Court rejected that claim because Duarte made "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." *Id.* ¶ 5.

Johnson's reading of *Buckner* and *Duarte* is mistaken because in both cases, the courts rejected the defendants' arguments not only because "the trial court did not actually rely upon the fact that the defendants were from a particular place" (Johnson's Br. 16), but also because there was no legal basis for their argument. In *Buckner*, the supreme court noted that the defendant "cite[d] no authority" to support his argument. *Buckner*, 56 Wis. 2d at 552. In *Duarte*, this Court noted that the defendant made "no cognizable argument about *how* the court's reference to the move from California was an improper factor." *Duarte*, 2014 WL 2050846, ¶ 5. Moreover, even if the *Buckner* and *Duarte* courts had based their decisions only upon the fact that the sentencing courts had not actually relied upon the defendant's out-of-state residence, that would have meant nothing more than that the *Buckner* and *Duarte* courts had assumed without deciding that it would have been an improper factor.

In short, Johnson has not identified any legal authority to support his claim that a sentencing court violates the Privileges and Immunities Clause if it considers a defendant's out-of-state residence as an aggravating factor

at sentencing. This Court does not consider arguments unsupported by references to relevant legal authority. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992)

Second, even if it were improper to consider at sentencing the fact that a defendant lives in another state, the circuit court's concern here was not with where Johnson lived but what he did. The circuit court's remarks addressed the problem of individuals bringing heroin from Chicago to Superior to sell. The court said that the "aggravating factor" was Johnson's "bringing this drug from Chicago into the Superior community." (R. 107:20, A-App. 25.) Whether Johnson lived in southeast Wisconsin or in Illinois was not the aggravating factor; it was the fact that he brought heroin from Chicago to Superior.

Case law involving claims that a sentencing court improperly relied on a defendant's nationality illustrate the importance of this distinction. In *United States v. Munoz*, 974 F.2d 493 (4th Cir. 1992), for example, the defendant came to the United States from Colombia at the behest of a co-conspirator and became involved in a drug distribution organization in Miami supplied with drugs from Colombia. *Id.* at 494. At the sentencing hearing, the district judge stated that it was "revolting to see you people come up here from South America, take advantage of our system, take advantage of the wealth, the work and good people of this country and bring in these drugs literally by the ton." *Id.* at 495. The sentencing court said that it "was not charging Mr. Munoz with tons of cocaine or tons of marijuana or anything else" but that it was "talking about the people who deal in these drugs down in Florida from these South American States." *Id.*

Munoz argued on appeal that the sentencing judge's remarks displayed an improper bias against him based on

his Colombian nationality. *See id.* The Fourth Circuit rejected that claim. It said that while "[b]road discretion is given to sentencing courts to consider a wide range of information concerning the background, character, and conduct of defendants," "there is no proper place for a comment or observation by a sentencing judge during sentencing that alludes to the national origin of the defendant as a basis of sentencing." *Id.* "[S]uch extraneous observations run counter to fundamental constitutional principles against basing punishment on a defendant's national origin." *Id.*

But, the Fourth Circuit held, "[w]hile a defendant's nationality cannot form the basis of punishment, a sentencing court may indicate the community's outrage at the defendant's conduct as well as at its larger context, for instance by decrying the source of the drugs involved in a defendant's offense and the distributing organizations at locations in other countries." *Id.* A sentencing court "may also impose a sentence to deter similar criminal conduct by others, and so may refer to those, as a group, whom the court seeks to deter" and "may appropriately take judicial notice of the fact that South America, in general, and Colombia, in particular, are major sources of the cocaine sold and used in the United States." *Id.* (citation omitted). The district court's sentencing remarks were proper, the court of appeals concluded, because "the court's comments were directed at *drug traffickers* from Colombia and Florida, and not Colombians or South Americans, generally." *Id.* at 496.

That principle applies with equal force here. Johnson does not take issue with the circuit court's observations that heroin use is a significant problem in the Superior community and that Chicago is a significant source of the heroin plaguing the community. The circuit court properly determined that the fact that Johnson brought heroin from

Chicago to sell in Superior to be an aggravating factor at sentencing.

Third, Johnson argues that the circuit court's consideration of the fact that he brought the heroin from Chicago violates his constitutional right to travel under the Privileges and Immunities Clause. (Johnson's Br. 19.) But "[w]hile the right to travel is well-established, no federal court has ever held that an individual has a fundamental right to travel for an illicit purpose." *United States v. Bredimus*, 352 F.3d 200, 210 (5th Cir. 2003).

Finally, the State notes that Johnson's brief hints at a possible claim that his sentence was improperly based on race. He states in his brief that he and codefendant Michael Jenkins are black and that two other codefendants, Matthew Thompson and Lydia Higgins, are "Caucasians from Superior, Wisconsin." (Johnson's Br. 6.) He further states that he and Jenkins "both received lengthy prisons sentences" while "Thompson and Higgins both had their sentences withheld and were placed on probation." (*id*.) He asserts that "[t]he considerable disparities between the sentences received by the two African-American defendants from Chicago, Illinois, and the two Caucasian defendants of Superior, Wisconsin, cannot be waived away simply by arguing that the Caucasian defendants testified at trial and the African-American defendants did not" (*id*. at 18).

If Johnson is attempting to argue that the circuit court improperly relied on race as a factor, this Court should reject that argument as inadequately developed. *See Pettit*, 171 Wis. 2d at 646. Moreover, as Johnson acknowledges, Thompson and Higgins were convicted of much less serious offenses than Johnson's Class D felony (R. 72:1)—according to Johnson, Thompson was convicted of two misdemeanors and Higgins was convicted of a Class I felony. (Johnson's Br. 6.) Indeed, the circuit court stated at Johnson's

sentencing that "the difference between those people and Mr. Johnson is the offense level is obviously different" and that the other defendants cooperated and "[a]ccepted responsibility which is something that Mr. Johnson continues not to do." (R. 107:21, A-App. 26.) This Court should reject Johnson's insinuation that the circuit court based its sentence on his race.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 1st day of May, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,765 words.

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JEFFREY J. KASSEL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of May, 2018.

_____
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