

RECEIVED

STATE OF WISCONSIN

06-06-2019

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Case No. 2018AP1476-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OCTAVIA W. DODSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING POSTCONVICTION RELIEF,
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONRABLE M. JOSEPH DONALD, AND THE
HONORABLE CAROLINA STARK, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

JOSHUA L. KAUL

Attorney General of Wisconsin

DONALD V. LATORRACA

Assistant Attorney General

State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice

Post Office Box 7857

Madison, Wisconsin 53707-7857

(608) 267-2797

(608) 266-9594 (Fax)

latorracadv@doj.state.wi.us

TABLE OF CONTENTS

	Page
ISSUE PRESENTED.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
INTRODUCTION	1
STATEMENT OF THE CASE	2
ARGUMENT	6
The circuit court’s observations about people who possess weapons and Dodson’s status as a concealed-carry licensee did not constitute an improper sentencing factor.....	6
A. Standards of review and legal principles	6
1. The exercise of sentencing discretion.....	6
2. Sentences based on improper factors.....	7
3. The right to carry weapons.....	8
B. Dodson did not prove that the sentencing court’s observations about people who arm themselves with weapons or Dodson’s status as a concealed-carry licensee constituted an improper factor.....	9
C. Even if the court’s observations about gun possession and Dodson’s decision to carry concealed were improper, Dodson has not proved that the court actually relied on these factors when it sentenced him.....	12

	Page
D. Any error in considering Dodson’s status as a licensee was harmless.	16
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	8, 11
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010)	8
<i>State v. Alexander</i> , 2015 WI 6, 360 Wis. 2d 292, 858 N.W.2d 662.....	7, 8, 12
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.....	6, 7, 17
<i>State v. Harris</i> , 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409.....	7, 8
<i>State v. Head</i> , 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413.....	11
<i>State v. Ogden</i> , 199 Wis. 2d 566, 544 N.W.2d 574 (1996)	10
<i>State v. Pocian</i> , 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894.....	8
<i>State v. Salas Gayton</i> , 2016 WI 58, 370 Wis. 2d 264, 882 N.W.2d 459.....	7
<i>State v. Stenzel</i> , 2004 WI App 181, 276 Wis. 2d 224, 688 N.W.2d 20.....	7
<i>State v. Thompson</i> , 172 Wis. 2d 257, 493 N.W.2d 729 (Ct. App. 1992).....	18
<i>State v. Travis</i> , 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491.....	8, 16
<i>Wisconsin Carry, Inc. v. City of Madison</i> , 2017 WI 19, 373 Wis. 2d 543, 892 N.W.2d 233.....	9, 11

Constitutional Provisions

U.S. Const. amend. II 8, 11, 12

Wis. Const. art. I, § 25 8, 11, 12

Statutes

Wis. Stat. § 175.60 9, 11

Wis. Stat. § 175.60(17) 12

Wis. Stat. § 939.50(3)(b) 4

Wis. Stat. § 939.63(1)(b) 2

Wis. Stat. § 940.01(2)(b) 11, 12, 14, 17

Wis. Stat. § 940.05(1) 2, 12

Wis. Stat. § 940.05(1)(a) 14

Other Authorities

Firearm Safety Course:

A Training Guide for Concealed Carry Licenses,

Wisconsin Department of Justice, January 2017,

<https://www.doj.state.wi.us/sites/default/files/dles>[/ccw/student-manual.pdf](https://www.doj.state.wi.us/sites/default/files/dles/ccw/student-manual.pdf) 15

ISSUE PRESENTED

Did the circuit court rely on an improper factor, i.e., Octavia W. Dodson's lawful possession of a firearm and his status as concealed-carry licensee, when it sentenced him for second-degree intentional homicide?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Dodson, a concealed-carry licensee, shot and killed Deshun T. Freeman. Dodson admitted that he used unnecessary defensive force and pleaded guilty to second-degree intentional homicide.

Dodson claims that the sentencing court improperly relied on his status as a concealed-carry licensee and its general observations about people who possess guns when it sentenced him. Dodson should not prevail on his claim because he has not prove by clear and convincing evidence that the court's consideration of Dodson's decision to lawfully carry a firearm constituted an improper sentencing factor or that the court actually relied on this factor when it sentenced him. But even if the sentencing court improperly relied on information about Dodson's possession of a handgun, the error was harmless because it would have imposed the same sentence anyway.

STATEMENT OF THE CASE

The charge. The State charged Dodson with second-degree intentional homicide while using a dangerous weapon, alleging that he caused Freeman's death with intent to kill, under circumstances that "mitigated the offense of first intentional homicide, to wit: unnecessary defensive force under [Wis. Stat. § 940.01(2)(b)]," contrary to Wis. Stat. §§ 940.05(1) and 939.63(1)(b). (R. 1:1.)

According to the complaint, on March 25, 2016, several people called 911, reporting that they heard gun shots and saw the victim lying near the intersection of 10th Street and Concordia. (R. 1:1.) The Milwaukee Police Department's ShotSpotter detected six gunshots near the intersection of 10th and Concordia at approximately 10:48 p.m. (R. 1:2.)

Officers responded and found Freeman lying face down in the middle of the street. (R. 1:2.) Officers did not recover a firearm, ammunition, or holster from Freeman's person. (R. 1:2.) Officers located several spent shell casings grouped near the street curb. (R. 1:2.) Officers noted that Freeman's Buick did not have tinted windows and that a registration plate was affixed to the front bumper. (R. 1:2.)

A forensic pathologist determined that Freeman died as a result of the three gunshot wounds he sustained, including one to his right temple. (R. 1:2.)

An individual who identified himself as "Octavia Dodson" called 911 and said that the other man "pulled a gun" on him. (R. 1:1.) The caller said that he would turn himself into the police. (R. 1:1.) Officers met Dodson at his father's house, where they recovered a Glock 9mm semi-automatic handgun, an extended magazine with a 17-round capacity loaded with eleven unspent cartridges, and a holster. (R. 1:2.)

Dodson told detectives that a blue Buick without a front license plate and with bluish-purplish window tint rear-ended him at Teutonia Avenue and Center Street. (R. 1:3.) Dodson exited his car to see if it had sustained damage. (R. 1:3.) As the Buick backed away and sped off, Dodson unholstered his gun, holding it in his left hand. (R. 1:3.)¹ Dodson attempted to follow the Buick but lost sight of it. (R. 1:3.) As he drove around, Dodson replaced a 10-round magazine in the gun with an extended 17-round magazine. (R. 1:3.)

Dodson told detectives that he later saw the Buick that previously struck him come up from behind at a high rate of speed and stop. (R. 1:3.) Dodson stopped his car as well. (R. 1:3.) Dodson stated that a man exited the car and ran toward him with his hands in his pocket or underneath his shirt. (R. 1:3.) Dodson believed that the man was pulling something out and he responded by shooting his gun three times. (R. 1:3.) Initially, Dodson said that he never exited his car, but he later said that he shot the victim while standing outside his car. (R. 1:3.) Dodson drove to his girlfriend's house and then called 911 as he drove to his father's house. (R. 1:4.)

Dodson's plea hearing. Under a plea agreement's terms, the State move to dismiss the "while armed" penalty enhancer, and Dodson agreed to plead guilty to second-degree intentional homicide. (R. 70:2.) The State agreed to recommend that Dodson receive a "substantial prison term" without specifying the amount of confinement time or

¹ Surveillance video from a nearby gas station confirms Dodson's account of the accident that occurred at approximately 10:43 p.m. on March 25, 2016. (R. CD-Defendant's Postconviction Motion Exhibit F, 10:43:00 p.m.) The surveillance video is on a CD that Dodson filed in circuit court with his postconviction motion and subsequently transmitted to this Court. (R. 63:1.)

extended supervision time. (R. 13:2; 70:3.) The circuit court accepted Dodson’s plea, granted the State’s motion to strike the while armed enhancer, and ordered a presentence investigation. (R. 70:10–13.)

The presentence recommendation. As a result of his guilty plea to second-degree intentional homicide, Dodson faced a maximum term of imprisonment of not more than 60 years. (R. 70:3.) Wis. Stat. § 939.50(3)(b). The presentence writer recommended that Dodson serve a five-to-nine-year term of initial confinement followed by five-to-six-year term of extended supervision. (R. 17:20.)

Dodson’s sentencing hearing. After Dodson exercised his right of allocution, the court identified the information that it considered when it fashioned its sentence, including: the arguments of counsel, the presentence investigation report, the victim impact statement, Freeman’s mother’s statement, and letters and a statement provided on behalf of Dodson. (R. 73:29–30.)

The court identified relevant sentencing factors, including the serious nature of the offense, Dodson’s character, and the need to protect the public. (R. 73:30.) It characterized Dodson’s crime as a “serious offense.” (R. 73:32.) The court explained, “I am completely baffled as to why this happened. And I don’t think that there is any rational way of trying to explain it.” (R. 73:30.) The court observed,

[I]n my experience as a judge, I have seen over time how individuals when they are possessing a firearm, how that in some way changes them. It changes how they view the world. It changes how they react and respond to people. I know that this is only speculation on my part, but I do strongly feel that the day that you applied for that concealed carry permit and went out and purchased that firearm, and that extended magazine, whether your rational beliefs [sic] for

possessing it, whether you felt the need to somehow arm yourself and protect yourself from essentially the crime that is going on in this community I think on that day set in motion this circumstance.

(R. 73:30–31.)

Focusing on the crime itself, the court told Dodson, “[I]t is a distorted, misguided belief of the world that somehow Mr. Freeman was a threat that required you, in essence, to terminate his life.” (R. 73:31.) The court characterized Freeman’s death as “totally unnecessary and tragic loss of life.” (R. 73:31.) It told Dodson, “[Y]ou were operating under some misguided belief, some distorted view of the world that somehow Deshun Freeman was a threat to you when in reality it was nothing further from the truth.” (R. 73:32.) Based on its own review of the record as well as the prosecutor’s argument, the court observed that Dodson made several statements that were not factually supported in the record. (R.73:32.)

The court noted Dodson’s positive character traits, including the absence of a prior record, his work history, and efforts to provide for his family. (R. 73:32.) It also characterized Dodson’s acceptance of responsibility as a mitigating factor. (R. 73:32.)

Dodson’s sentence. The circuit court imposed a 20-year term of imprisonment, consisting of a 14-year term of initial confinement followed by a 6-year term of extended supervision. (R. 73:34.)

Dodson’s postconviction motion. Dodson moved for postconviction relief. (R. 38.) Relevant to this appeal, Dodson claimed that the sentencing court considered an improper factor, i.e., his possession of a handgun and status as a

concealed-carry licensee, when it sentenced him. (R. 38:12–17.)²

Based on its review of the sentencing transcript, the postconviction court determined that the sentencing court’s comments about gun owners did not constitute an improper sentencing factor. (R. 72:25–26.) The postconviction court determined that when it looked at the sentencing court’s statements “in the context” and as “a whole,” its statements did “not rise to the level of improper sentencing factors.” (R. 72:27.) The postconviction court denied Dodson’s postconviction motion. (R. 72:27.)

Dodson appeals.

ARGUMENT

The circuit court’s observations about people who possess weapons and Dodson’s status as a concealed-carry licensee did not constitute an improper sentencing factor.

A. Standards of review and legal principles

1. The exercise of sentencing discretion.

Sentencing is committed to the circuit court’s discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. In exercising its sentencing discretion, the circuit court must identify the objectives of its sentence,

² Dodson also moved to withdraw his plea because he claimed that his counsel was ineffective for misadvising him about the unanimity requirement at a jury trial. (R. 38:6–12.) The court denied this claim following an evidentiary hearing. (R. 71; 72:17–22.) Dodson does not challenge the postconviction court’s denial of his plea withdrawal motion on appeal.

including protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Id.* ¶ 40. Circuit courts consider several factors in making this assessment, deciding which factors are relevant and how much weight to give to a particular factor. *Id.* ¶ 43 n.11; and *State v. Stenzel*, 2004 WI App 181, ¶ 16, 276 Wis. 2d 224, 688 N.W.2d 20.

This Court reviews a circuit court’s sentencing decision under the erroneous exercise of discretion standard. *Gallion*, 270 Wis. 2d 535, ¶ 17. This Court “follows a consistent and strong policy against interference with the discretion of the trial court in passing sentence.” *Id.* ¶ 18 (citations omitted). “Accordingly, the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion.” *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409.

2. Sentences based on improper factors.

A circuit court erroneously exercises its sentencing discretion when it relies on inaccurate information or an improper factor. *State v. Salas Gayton*, 2016 WI 58, ¶ 19, 370 Wis. 2d 264, 882 N.W.2d 459. This Court uses a two-step framework to determine whether the circuit court erroneously exercised its discretion based on inaccurate information or an improper factor. *State v. Alexander*, 2015 WI 6, ¶¶ 17–18, 360 Wis. 2d 292, 858 N.W.2d 662. First, it must decide whether the information was inaccurate or an improper factor. *Id.* Second, it must decide whether the circuit court actually relied on inaccurate information or the improper factor. *Id.*

Actual reliance occurs only when the circuit court paid “explicit attention” to an improper factor, and when the improper factor formed “part of the basis for the sentence.” *Alexander*, 360 Wis. 2d 292, ¶ 25. In determining whether a

circuit court actually relied on an improper sentencing factor, an appellate court reviews the sentencing transcript as a whole and considers the allegedly improper comments in context. *Harris*, 326 Wis. 2d 685, ¶ 45. Notably, actual reliance does not occur when improper factors “bear a reasonable nexus to proper sentencing factors.” *Id.* ¶ 4.

“A defendant bears the burden of proving, by clear and convincing evidence, that the [circuit] court actually relied on irrelevant or improper factors.” *Alexander*, 360 Wis. 2d 292, ¶ 17.

If the defendant meets this burden, then the burden shifts to the State to prove that the error was harmless. *Alexander*, 360 Wis. 2d 292, ¶ 18. “The State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error.” *State v. Travis*, 2013 WI 38, ¶ 73, 347 Wis. 2d 142, 832 N.W.2d 491 (error not harmless in context of inaccurate information at sentencing claim).

3. The right to carry weapons.

The Second Amendment of the U.S. Constitution confers an individual with the right to keep and bear arms for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008)(holding Second Amendment does not permit “the absolute prohibition of handguns held and used for self-defense in the home.”). The Second Amendment is applicable to the States under the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010).

Article I, section 25 of the Wisconsin Constitution also recognizes a right to keep and bear arms. *State v. Pocian*, 2012 WI App 58, ¶ 7, 341 Wis. 2d 380, 814 N.W.2d 894. The supreme court has interpreted the right conferred under the state constitution more broadly than the right under the

Second Amendment: “It is, instead, a straightforward declaration of an individual right to keep and bear arms for *any lawful purpose*.” *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 10, 373 Wis. 2d 543, 892 N.W.2d 233 (emphasis added). Individuals may exercise this right by obtaining a license to carry concealed under Wis. Stat. § 175.60. *Id.* ¶ 11.

B. Dodson did not prove that the sentencing court’s observations about people who arm themselves with weapons or Dodson’s status as a concealed-carry licensee constituted an improper factor.

Neither the circuit court’s comments about gun possession nor Dodson’s decision to obtain a conceal-carry license constituted an improper sentencing factor.

Dodson claims that the “sentencing court actually relied on an improper and erroneous conclusion: that obtaining a CCW permit and possessing a firearm are wrong, in and of themselves.” (Dodson’s Br. 10.) Dodson misinterprets the court’s statements. The court made no judgment about whether obtaining a permit or lawfully possessing a firearm is “wrong.” Rather, it simply drew on its “experience as a judge” when it made its observations about gun possession and Dodson’s decision to obtain a conceal carry permit. (R. 73:30.)

The record reflects that the court made the two challenged comments as it attempted to understand why this homicide occurred. “I am completely baffled as to why this happened.” (R. 73:30.) After stating that there was no “rational way of trying to explain it,” the court made the two challenged observations. First, it noted from “its experience as a judge” how people change when they possess a weapon: “It changes how they view the world. It changes how they react and respond to people.” (R. 73:30.) Second, with respect to Dodson, the court expressed its belief that Dodson’s

decision to apply for a conceal carry license and purchase a firearm and extended magazine “set in motion this circumstance” that resulted in Freeman’s death. (R. 73:30–31.)

The court’s observation from its experience—that people who possess weapons react and respond differently—was not improper. Sentencing courts are not prohibited from “entertaining general predispositions, based upon [their] criminal sentencing experience,” when they exercise sentencing discretion. *See State v. Ogden*, 199 Wis. 2d 566, 573, 544 N.W.2d 574 (1996) (deeming improper sentencing court’s pronouncement that it “never granted Huber release for child care unless it was ‘absolutely necessary.’”). What a sentencing court may not do is allow its predispositions to override “the particular circumstances of the individual offender.” *Id.*

Unlike the consideration deemed improper in *Ogden*, the court here did not articulate a hard and fast rule for fashioning a sentence that it applies in all similar cases before it. *See, e.g., Ogden*, 199 Wis. 2d at 569. Rather, the court linked its observations as a judge about gun possession to Dodson, noting that his decision to obtain a conceal-carry license and arm himself with a firearm “set in motion” the tragic circumstances that led to Freeman’s death.

Dodson attempts to connect the court’s comments about Dodson’s gun possession to two other statements in the record. First, the court stated, “[I]t appears that it is a distorted, misguided belief of the world that somehow Mr. Freeman was a threat that required you . . . to terminate his life.” (Dodson’s Br. 10; R. 73:31.) Second, the court stated, “[Y]ou were operating under a misguided belief, some distorted view of the world that somehow Deshun Freeman was a threat to you when in reality it was nothing further from the truth.” (Dodson’s Br. 11; R. 73:32.)

The court's comments about Dodson's "distorted, misguided belief" and "distorted view" focused on Dodson's perception that Freeman posed a threat to him. Neither statement had anything to do with the court's previous observations as a judge about gun ownership or Dodson's status as a conceal-carry licensee. Indeed, the court's comments went to the very nature of the second-degree intentional homicide charge: Dodson acted with unnecessary defensive force when he intentionally killed Freeman. That is, Dodson believed Freeman posed an imminent danger of death or great bodily harm to him and that deadly force was necessary to defend himself, but his beliefs were not objectively reasonable. Wis. Stat. § 940.01(2)(b); *see also State v. Head*, 2002 WI 99, ¶ 69, 255 Wis. 2d 194, 648 N.W.2d 413 (discussing imperfect self-defense).

Dodson also contends that the court's remarks "demonstrate" that the court was punishing him "for choosing to become a lawful gun owner in the first instance," violating his Second Amendment rights. (Dodson's Br. 13.) Dodson is wrong for two reasons. First, the court neither expressly stated nor implicitly suggested that it sentenced Dodson based on his exercise of his right to carry a concealed weapon.

Second, and more importantly, Dodson holds an overly broad view of his right to keep and bear arms. Neither the Second Amendment nor Art. I, § 25 authorize anyone, including a concealed-carry licensee, to use a firearm for an unlawful purpose. *Heller* recognized an individual's Second Amendment right to "keep and bear arms . . . for self-defense in the home." *Heller*, 554 U.S. at 635–36. And Art. I, § 25 of the Wisconsin Constitution confers a broader right to "keep and bear arms for *any lawful purpose*[" which includes the right to carry concealed as authorized under section 175.60. *Wisconsin Carry, Inc.*, 373 Wis. 2d 543 at ¶¶ 8–11 (emphasis added).

By his own admission, Dodson acted unlawfully when he shot and killed Freeman with unnecessary defensive force. *See* Wis. Stat. §§ 940.01(2)(b) and 940.05(1). Dodson may have acted lawfully when he carried a concealed weapon, but neither the Second Amendment nor Article I, § 25 of the Wisconsin Constitution, however, shield Dodson from liability for his unlawful act of using unnecessary force.

Dodson contends that Wis. Stat. § 175.60(17) statutorily protects his constitutional right to bear arms. (Dodson’s Br. 14.) Section 175.60(17) imposes criminal liability on an “officer who uses excessive force based *solely* on an individual’s status as a licensee.” *Id.* (emphasis added). Putting aside the relevance of this subsection to his case, the court did not sentence Dodson “based solely on [Dodson]’s status as a licensee.” *Id.* It sentenced him primarily because he unnecessarily and tragically took Freeman’s life. (R. 73:32–33.)

Neither the court’s observations about gun possession from its experience as a judge nor its comment that Dodson’s concealed-carry license status set in motion a chain of events that ultimately resulted in Freeman’s tragic death constituted improper sentencing factors.

C. Even if the court’s observations about gun possession and Dodson’s decision to carry concealed were improper, Dodson has not proved that the court actually relied on these factors when it sentenced him.

Neither the court’s comments about gun possession generally nor Dodson’s concealed-carry license status constitute improper factors. But even if they do, Dodson cannot prove actual reliance because he has not demonstrated that they formed “part of the basis for [his] sentence.” *Alexander*, 360 Wis. 2d 292, ¶ 25.

The court's observations about gun possession generally or Dodson's concealed-carry license status occurred at a single moment during the sentencing proceeding. (R. 73:30–31.) Nothing within the court's sentencing comments suggest that people who commit crimes with guns that they otherwise lawfully possessed should receive longer sentences.

Contrary to Dodson's assertion, the court's statements about Dodson's "distorted, misguided belief" and "distorted view" had nothing to do with its observations about people who possess guns or Dodson's conceal-carry status. (R. 73:30–31; Dodson's Br. 17.) As argued in Section B, *supra*, the court's comments about "distorted" beliefs focused on Dodson's perception that Freeman posed a threat to him. And here, where liability attached because Dodson's subjective belief was not objectively reasonable, the court's consideration of the unreasonableness of his beliefs related directly to the seriousness of his crime.

The court's comment that some of Dodson's statements did not "make any sense" also do not demonstrate that the court actually relied on its observations about gun possession or his concealed-carry license status when it sentenced him. (Dodson's Br. 17.) Viewed in its entire context, the court stated: "I, too, like the State, look at certain factors that are surrounding the night that this occurred, certain statements that are attributed to you that in my opinion really don't make any sense, because factually it's not supported." (R. 73:32.)

The record supports the court's observations. After providing a detailed summary of Dodson's crime (R. 73:9–14), the prosecutor identified several "demonstrably false statements" that Dodson made:

- "That the defendant, or that the victim rather, pulled a gun. That wasn't true." (R. 73:16);

- “That he shot from inside the safety of his car. False.” (R. 73:16);
- “He shot [at] him six times not three.” (R. 73:16);
- According to the presentence report, Dodson told his father that he was the victim of a bump-and-rob scheme. (R. 73:16.) “That’s totally false. The video of the car accident shows that that’s not even close to anything that had happened there. And there is not a shred of evidence to indicate that Mr. Freeman was up to anything of the sort.” (R. 73:16.)

The prosecutor argued one reasonable explanation for Dodson’s lies was that “he was aware and he knew in his heart that what he did was completely out of bounds and over the top.” (R. 73:16.) Thus, the court’s observation that Dodson’s statements did not “make any sense” have everything to do with his unreasonable subjective belief that he needed to use deadly force against Freeman. Nothing about this comment suggests that the court relied on an improper factor when it sentenced him.

In arguing that the court actually relied on improper information, Dodson asserts that he “had a legitimate subjective fear.” (Dodson’s Br. 18.) There is nothing “legitimate” about a subjective fear that is not otherwise objectively reasonable. Wis. Stat. §§ 940.01(2)(b) and 940.05(1)(a). By pleading guilty to second-degree intentional homicide, Dodson acknowledged that his fears were not legitimate. In fact, his counsel agreed with the prosecutor’s assessment that Dodson had a “gross overreaction.” (R. 73:25.)

Dodson asserts that evidence at the scene corroborated important portions of his story. (Dodson’s Br. 18.) But nothing in the record supported Dodson’s initial claim that Freeman

pulled a gun on him or his subsequent statement that Freeman ran toward him with his hands in his pocket or underneath his shirt when he shot him. (R. 1:1, 3.) Indeed, the court noted that Dodson’s statements about Freeman were not factually supported. (R. 73:32.) Responding officers found Freeman lying face down in the middle of the street with his hands and arms in a position well away from his waistband and his pockets. (R. 1:2; 73:11.) Officers found no other evidence at the scene that suggested that Freeman was armed with a weapon. (R. 1:2; 73:11.)

Noting that he contacted the police “as instructed by the DOJ Training Guide” and turned himself and his weapon over to the police, Dodson argues that he conducted himself “responsibly *after* the incident.” (Dodson’s Br. 18) (emphasis added.)³ What Dodson did “after the incident” was simply too late to save Freeman from Dodson’s unnecessary defensive force. More importantly, Dodson failed to follow the DOJ Training Guide’s recommendations for avoiding and de-escalating confrontations in the first place.

If you become involved in a confrontation, attempt to de-escalate the situation. Avoid engaging in a power struggle . . . Maintain or increase your distance from the other person . . . If it is safe to leave, do so immediately. If you are unable to escape the situation, maximize your distance, attempt to reduce the other person’s anger over a period of time, and avoid reacting to inflammatory insults.

If you find yourself in a conflict. Do everything to de-escalate the situation.

DOJ Training Guide, p. 27–28.

³ “Firearm Safety Course: A Training Guide for Concealed Carry Licenses,” Wisconsin Department of Justice, January 2017, <https://www.doj.state.wi.us/sites/default/files/dles/ccw/student-manual.pdf> (last viewed May 29, 2019).

Dodson neither avoided nor de-escalated the situation. He did not call the police after the accident. Instead, he unholstered his gun, replaced its magazine with an extended magazine, and looked for the Buick. (R. 1:3.) When he saw what he believed was the Buick involved in the accident pass him and stop, Dodson also stopped his car. (R. 1:3.) When Freeman exited his car and approached him, Dodson exited his car as well and shot Freeman, striking him three times. (R. 1:2–3.)

Contrary to his assertion (Dodson’s Br. 16), Dodson did not behave responsibly after he shot Freeman. He left the scene and went to his girlfriend’s house, only calling the police as he drove to his father’s house. (R. 1:4.) Dodson’s action before, during, and immediately after his confrontation with Freeman were neither reasonable nor responsible. And the court could reasonably consider his irresponsible and unreasonable behavior when it sentenced him.

The record demonstrates that the court properly exercised its sentencing discretion when it sentenced Dodson. After identifying the information that it considered, the court appropriately assessed the seriousness of Dodson’s offense, Dodson’s character, and the need to protect the public when it fashioned his sentence. (R. 73:29–34.) Therefore, Dodson did not prove by clear and convincing evidence that the court relied on an improper factor and made inaccurate assumptions about firearm possession or his concealed-carry status when it sentenced him.

D. Any error in considering Dodson’s status as a licensee was harmless.

Even if this Court concludes that Dodson proved by clear and convincing evidence that the circuit court actually relied on an improper factor, the error was harmless because the circuit court would have imposed the same sentence absent the error. *Travis*, 347 Wis. 2d 142, ¶ 73.

The circuit court identified relevant sentencing factors including, the seriousness of Dodson’s offense, Dodson’s character, and the need to protect the public. (R. 73:30.) *See Gallion*, 270 Wis. 2d 535, ¶¶ 41–42. It assessed these factors based on a wide variety of information in the record, not just its observations about people who possess weapons. It considered the attorney’s arguments, the presentence investigation report, victim impact statements, and statements made on Dodson’s behalf. (R. 73:29–30.)

The court placed considerable weight on the seriousness of Dodson’s offense and appropriately determined that a sentence other than imprisonment would unduly depreciate the seriousness of the offense. (R. 73:33.) The record supports this assessment. Dodson intentionally killed Freeman under circumstances that constituted “unnecessary defensive force.” (R. 70:8.) In this case, “unnecessary defensive force” meant that Dodson unreasonably believed that Freeman posed an imminent danger of death or great bodily harm and that the force was necessary to defend himself. Wis. Stat. § 940.01(2)(b). By pleading guilty, Dodson acknowledged that his subjective belief was not objectively reasonable under the circumstances. (R. 70:8.) Indeed, at the sentencing hearing, Dodson’s counsel acknowledged that Dodson’s behavior constituted a “gross overreaction.” (R. 73:25.)

The record does not support Dodson’s initial assertion that Freeman pulled a gun on him or his subsequent assertion that Freeman ran toward him with his hands in his pocket or underneath his shirt when he shot him. (R. 1:1, 3.) The court noted that Dodson’s statements about Freeman were not factually supported. (R. 73:32.) Responding officers found Freeman lying face down in the middle of the street with his hands and arms in a position well away from his waistband and his pockets. (R. 1:2; 73:11.) Officers found no other evidence that suggested that Freeman was armed with a

weapon. (R. 1:2; 73:11.) The court reasonably concluded that Freeman did not pose a threat to Dodson and that his death was “a totally unnecessary and tragic loss of life.” (R. 73:31–32.)

The court appropriately acknowledged a number of positive attributes that weighed positively in Dodson’s favor, including his work history, responsibility toward family, absence of a criminal record, and acceptance of responsibility. (R. 73:32.) *But see State v. Thompson*, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992) (recognizing that a court may deem a defendant’s commission of a serious offense that results in the death of another “especially egregious” “when viewed in light of the defendant’s ‘laudable background.’”) Here, the court ultimately placed greater weight upon the seriousness of Dodson’s offense, observing that any sentence other than a prison sentence would unduly depreciate the seriousness of his offense. (R. 73:33.)

But despite the seriousness of Dodson offense, the court demonstrated restraint. Dodson faced a 60-year term of imprisonment for intentionally killing Freeman, but the court only sentenced him to a 20-year term, consisting of a 14-year term of initial confinement and 6-year term of extended supervision. (R. 73:34.)

The court observations about Dodson’s concealed-carry license or gun possession based on its experience did not drive its exercise of sentencing discretion. Rather, the court fashioned an individualized sentence grounded in the seriousness of Dodson’s offense, but tempered by his otherwise positive background. The court would have imposed the same sentence even if it had not commented on Dodson’s possession of a handgun or his concealed carry license status. The error was harmless. Dodson is not entitled to resentencing.

CONCLUSION

The Court should affirm Dodson's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 6th day of June, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

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 4,928 words.

DONALD V. LATORRACA
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 6th day of June, 2019.

DONALD V. LATORRACA
Assistant Attorney General