COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3431-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM R. SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and ROBERT CRAWFORD, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. William R. Scott appeals from a judgment of conviction and sentence after he pled guilty to operating a vehicle without the

owner's consent, contrary to WIS. STAT. § 943.23(3) (1999-2000).[1] He also appeals from an order denying his postconviction motion to modify his sentence. Scott claims: (1) the trial court erred when it determined that the Criminal Penalties Study Committee's proposal to reclassify the crime of operating a vehicle without the owner's consent was not a new factor; (2) the trial court erroneously exercised its discretion when it imposed what he claims was an unduly harsh and disproportionate sentence; and (3) the sentence imposed by the trial court violates the Eighth Amendment of the United States Constitution because it is disproportionate to the gravity of the offense. We affirm.

I. BACKGROUND

¶2 Scott was charged with one count of operating a vehicle without the owner's consent. In exchange for a guilty plea, the State recommended a sentence of eighteen months confinement and five months of extended supervision. The trial court sentenced Scott to fifteen months of initial prison confinement and forty–five months of extended supervision pursuant to the Truth–in–Sentencing law. *See* WIS. STAT. § 973.01.

¶3 Scott filed a postconviction motion to modify his sentence, claiming that there was a new factor. Specifically, he asserted that the sentencing court and the parties were unaware of the Criminal Penalties Study Committee's recommendation to reclassify operating a motor vehicle without the owner's

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

consent from a Class E felony to a Class I felony.[2] He alleged that this information was a new factor because it was relevant to the gravity of the offense. Scott also alleged that the trial court erroneously exercised its discretion when it imposed an unduly harsh and disproportionate sentence. Finally, Scott claimed that the sentence imposed by the trial court violated the Eighth Amendment of the United States Constitution because it was disproportionate to the gravity of the offense.

¶4 The trial court denied the motion without a hearing, concluding that legislative changes in sentence ranges are not new factors. The court also rejected Scott's Eighth Amendment argument, concluding that decisions regarding the appropriate length of a sentence are properly decided by the legislature, not the courts.

II. DISCUSSION

A. New Factor

¶5 Scott claims that the Criminal Penalties Study Committee's proposal to reclassify the crime of operating a motor vehicle without the owner's consent is a new factor that warrants sentence modification. He argues that the proposed reclassification is relevant to the length of his sentence because it is persuasive evidence regarding the gravity of the offense.[3] We disagree.

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[2] The Committee recommended a change from the current five-year maximum sentence to a maximum sentence of three and one-half years, which would consist of a maximum of eighteen months of initial confinement and a maximum two-year term of extended supervision.

[3] The three primary factors a sentencing judge must consider are the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984).

¶6 The trial court has the discretion to modify a sentence if the defendant presents a new factor. ***State v. Macemon***, 113 Wis. 2d 662, 668, 335 N.W.2d 402, 406 (1983). A new factor is a:

> fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975). A new factor must be an event or development that frustrates the purpose of the original sentence. ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191, 195 (Ct. App. 1997). The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. ***State v. Michels,*** 150 Wis. 2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989). Whether a set of facts constitutes a new factor is a question of law that we review *de novo*. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609, 611 (1989).

¶7 The Committee's recommendation is not a new factor — it is simply a proposal to change existing legislation. The Wisconsin Supreme Court has repeatedly refused to accept sentencing guidelines or limitations that have not been enacted into law. *See* ***State v. Paske,*** 163 Wis. 2d 52, 66–67, 471 N.W.2d 55, 61 (1991) (declining to adopt American Bar Association commentary limiting consecutive sentencing); ***Macemon***, 113 Wis. 2d at 669, 335 N.W.2d at 406–407 (holding that sentencing guidelines from other counties were not a new factor because the guidelines were voluntary and experimental in the counties in which they were used); ***Drinkwater v. State***, 73 Wis. 2d 674, 684, 245 N.W.2d 664, 669 (1976) (refusing to adopt an American Bar Association recommendation on consecutive sentencing). For instance, ***Drinkwater***, which refused to adopt

commentary to an American Bar Association Standard on consecutive sentencing, stated "[t]he legislature of this state has not seen fit to adopt the recommendation of the ABA. Rather it has provided that the imposition of multiple consecutive sentences is within the discretion of the trial court." ***Drinkwater***, 73 Wis. 2d at 684, 245 N.W.2d at 664.

¶8 ***Drinkwater's*** reasoning applies here. The Committee's recommendation was merely a proposal. The legislature declined to enact it. Moreover, a subsequent statutory change in the maximum sentence for a crime to less than that imposed on the defendant is not a new factor that the trial court must consider for sentence modification. ***State v. Hegwood***, 113 Wis. 2d 544, 548, 335 N.W.2d 399, 402 (1983). Under WIS. STAT. § 990.04, the repeal of a statute does not "remit, defeat or impair any civil or criminal liability for offenses committed … under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal ... unless specially and expressly remitted." ***Hegwood*** found that the reduction in a maximum penalty for sexual assault was not relevant to the imposition of the sentence and, therefore, was not a new factor. ***Hegwood***, 113 Wis. 2d at 547, 335 N.W.2d at 401. Thus, even if the legislature had adopted the Committee's proposal to decrease the maximum sentence for operating a motor vehicle without the owner's consent, the reduction would not apply retroactively to Scott and the court would not be required to consider it as a new factor. Accordingly, we affirm.[4]

[4] The sentencing judge was a member of the Criminal Penalties Study Committee, Scott's argument that the court was unaware of the Committee's recommendation is without merit.

B. Sentence

1. Judicial Discretion

¶9 Scott also argues that his sentence of fifteen months initial prison confinement and forty–five months of extended supervision should be modified because the trial court erroneously exercised its sentencing discretion by imposing an unduly harsh and disproportionate sentence. He relies upon the Criminal Penalties Study Committee's recommendation to reduce the maximum sentence as evidence that his sentence is unduly harsh and disproportionate.

¶10 We will not disturb a sentence imposed by a trial court, however, unless the trial court erroneously exercised its discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975). We will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Id.***, 70 Wis. 2d at 185, 233 N.W.2d at 461. A strong public policy exists against interfering with the trial court's discretion in determining sentences, *see* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984), and "[t]he trial court is presumed to have acted reasonably." ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, a defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶11 The three primary factors which a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.[5] ***Sarabia***, 118 Wis. 2d at 673, 348 N.W.2d at 537; ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). An examination of the record shows that the trial court considered the appropriate factors: the rehabilitative needs of the victim, Scott's work history, his educational background, his past behaviors, his character and social traits, his inability to be rehabilitated, and his danger to the community as reflected by his prior convictions of two counts of armed robbery, one count of battery, one count of theft, and one count of retail theft. The trial court also considered the gravity of the offense, finding that Scott had "cost the victim a great deal of money" and that this was a crime involving "aggravation" to the victim.

¶12 Moreover, Scott's sentence is well within the maximum under both the present statute and the recommended maximum contained in the Committee's report. The trial court actually imposed less prison time than recommended in the plea bargain and in the presentence report. Accordingly, Scott has not pointed to anything in the record that indicates that the trial court erroneously exercised its discretion in sentencing him to fifteen–months initial prison confinement and forty–five months of extended supervision. We affirm.

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[5] The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495–496, 444 N.W.2d 760, 763–764 (Ct. App. 1989).

2. Eighth Amendment

¶13 Finally, Scott claims that the five-year sentence imposed by the trial court is cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution because it is disproportionate to the gravity of the offense. We disagree.

¶14 The standard for determining whether a particular sentence constitutes cruel and unusual punishment is whether it is "'so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Hanson v. State***, 48 Wis. 2d 203, 206, 179 N.W.2d 909, 911 (1970). "[T]he [E]ighth [A]mendment to the United States Constitution does not require strict proportionality between crime and sentence; rather, it forbids only extreme sentences that are grossly disproportionate to the crime." ***State v. Babler***, 170 Wis. 2d 210, 211, 487 N.W.2d 636, 636 (Ct. App. 1992). In determining whether the sentence is proportional, the trial court must consider: (1) the inherent gravity of the offense and the harshness of the penalty; (2) the sentences imposed for similarly grave offenses in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. ***Solem v. Helm***, 463 U.S. 277, 290–291 (1983). *See also* ***Babler***, 170 Wis. 2d at 214, 487 N.W.2d at 638 (finding that the proportionality analysis of whether a sentence violates the Eighth Amendment survives ***Harmelin v. Michigan***, 501 U.S. 957 (1991)).

¶15 In his brief, Scott relies exclusively on the proportionality standard from ***Hanson***, which is quoted above. Because Scott did not discuss the second and the third ***Solem*** factors, namely the sentences imposed for similarly grave offenses in this jurisdiction and the sentences imposed for the same crime in other

jurisdictions, this court will not address them. ***Barakat v. Wisconsin Dep't of Health & Social Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398–399 (Ct. App. 1995) (stating that a court of appeals may decline to review an issue that is "amorphous and insufficiently developed"). With regard to the proportionality of Scott's sentence, we hold, based on our analysis of the sentencing factors above, that Scott's sentence is not so excessive or unusual as to "shock the public sentiment" in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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