COURT OF APPEALS DECISION DATED AND FILED

August 5, 2008

David R. Schanker
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. 2007AP452-CR

Cir. Ct. No. 2006CF2293

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN LEE BRACEY, III,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Wedemeyer[1] and Fine, JJ.

[1] This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. John Lee Bracey, III, appeals from a judgment of conviction for burglary, and from a postconviction order denying his motion for modification of his consecutive reconfinement and burglary sentences. The issue is whether the trial court erroneously exercised its discretion by unfairly emphasizing certain factors over other more mitigating circumstances, and for imposing a "needlessly harsh" consecutive sentence. We conclude that the trial court properly exercised its sentencing discretion when it explained why it imposed a nine-year burglary sentence to run consecutive to the reconfinement period it also imposed. The fact that the trial court could have exercised its discretion differently, specifically by imposing a lesser sentence, or by imposing that sentence concurrently does not constitute an erroneous exercise of discretion. Therefore, we affirm.

¶2 Bracey pled guilty to burglary as a party to the crime, in violation of WIS. STAT. §§ 943.10(1m)(a) and 939.05 (2005-06).[2] Bracey had committed that burglary while on extended supervision for armed robbery. The trial court revoked his extended supervision and imposed the remaining term available for reconfinement, four years and seven days, and imposed a nine-year consecutive sentence for the burglary, comprised of four- and five-year respective periods of initial confinement and extended supervision. Bracey moved to modify both the reconfinement and burglary sentences, and to modify the consecutive sentence structure to concurrent. The trial court denied the motion. Bracey appeals to challenge the consecutive burglary sentence.

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[2] All references to the Wisconsin Statutes are to the 2005-06 version.

¶3 Bracey contends that the trial court erroneously exercised its sentencing discretion; he challenges the length and consecutive nature of the burglary sentence. He specifically contends that the trial court erroneously exercised its sentencing discretion because it: (1) overly emphasized certain factors rather than considering mitigating circumstances; and (2) imposed a sentence and structure that were "needlessly harsh" and excessive. Essentially, Bracey contends that the trial court should have imposed a lesser sentence, or a more lenient sentencing structure. That the trial court could have imposed sentence differently does not constitute an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶4 Our principal focus is whether the trial court erroneously exercised its sentencing discretion.

> When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶5 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court assigns to each factor is a discretionary determination. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). "A trial judge has discretion to determine whether sentences imposed in cases of multiple convictions are to run

concurrently or consecutively, using the same factors that apply in determining the length of a single sentence." ***Larsen***, 141 Wis. 2d at 427; *see* WIS. STAT. § 973.15(2)(a).

¶6 A sentence is unduly harsh when 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." ***Ocanas***, 70 Wis. 2d at 185. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶7 The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***Larsen***, 141 Wis. 2d at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶8 Bracey contends that the trial court overemphasized certain factors at the expense of several mitigating circumstances. Bracey contends that the trial court viewed, more harshly than necessary, the gravity of the offense as aggravated by his prior criminal record, and the need to protect the community. In other words, he does not quarrel with the seriousness of the crime of burglary or the previous armed robbery, the factual record of his criminal history, or the need to protect the community from a burglar who he claims was otherwise "doing well on [extended] supervision by working and making his appointments"; his claim is that concurrent sentences would have appropriately addressed his needs as well as

those of the community, without depreciating the seriousness of this burglary. In justifying a more lenient sentence or sentence structure, Bracey criticizes the trial court for failing to focus more on mitigating circumstances, such as his claimed minor role in the offense, his cooperation with the police, his acceptance of responsibility by confessing, his agreement to pay restitution, his claimed "long stable periods of living and working in the community," and his obligation to care for his convalescent mother.

¶9 The trial court is not obliged to consider every possible positive detail of Bracey's character, although the trial court considered most of these factors, it simply did not elevate their importance over the significance of Bracey's participating in a burglary while he was on extended supervision for an armed robbery that he committed six years earlier. In fact, the trial court considered Bracey's role in this offense; it simply considered his role to be more significant than Bracey did. Bracey acted as a lookout, helped carry the stolen property to the truck he provided for transportation, and expected to be paid for his "services" performed in furtherance of the burglary. As the trial court explained to him,

> [t]his was not the first time, as you indicate, because you at least acknowledge that on one prior occasion the same individual called you, and certainly when you get a call at two in the morning to go over to somebody's home to remove items from it, as you said, you know that it's not legal.

¶10 The trial court also explained that it was crediting Bracey with cooperating with the authorities and pleading guilty. It expressly noted that during his period of extended supervision he "did report, and there don't appear to be any major violations other than some missed visits throughout the period of time [he was] on supervision up until … this offense." It was more concerned, however, that while serving a period of extended supervision for an armed robbery, Bracey

chose to participate in an activity he knew was illegal "to make a quick buck, and certainly [he] had no regard for the victim whose property [he was] taking."

¶11 The trial court explained why it imposed a consecutive sentence:

> [T]his is a separate offense. It was committed while [Bracey was] on supervision, and given [his] past prior record including the past burglary and armed robbery, the court again believes that if [it] were to give [him] concurrent time for this, [it] would depreciate the seriousness of this in the eyes of the community.
>
> [The trial court] believe[s] the community needs to be protected from someone who exercises the poor judgment that [Bracey] did, particularly in view of [his] past history and certainly [his being] someone that should have known better.

The trial court determined that a consecutive sentence was necessary to address Bracey's character and his poor judgment, and the obvious inappropriateness of reoffending while on extended supervision. It also sought to avoid depreciating Bracey's "extremely serious" conduct resulting in his revocation, as well as depreciating the subsequent offense itself, which were both crimes that "seem to go hand in hand." In its postconviction order, the trial court further explained why it also decided not to impose the maximum sentence for the burglary, namely because Bracey had acknowledged his culpability.

¶12 The trial court did not unfairly or unreasonably overemphasize certain factors over other mitigating circumstances. It extensively considered the primary sentencing factors and applied the relevant facts to those factors and provided a reasonable explanation for the consecutive sentence it imposed. The trial court exercised its discretion differently than Bracey had hoped it would. That difference, however, does not constitute an erroneous exercise of sentencing

discretion. *See* ***Hartung***, 102 Wis. 2d at 66 (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

¶13 Bracey also contends that the sentence and sentence structure were "needlessly harsh." The trial court has explained why the consecutive sentencing structure was justified and thus, not "needlessly harsh." Insofar as Bracey is raising an unduly harsh claim, we do not consider imposition of the four-year maximum available reconfinement period consecutive to a four-year period of initial confinement of a nine-year sentence for a crime that carries a twelve-year, six-month maximum potential sentence (and a seven-year, six-month maximum potential period of initial confinement) for a burglary committed while on supervision for an armed robbery to "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."[3] ***Ocanas***, 70 Wis. 2d at 185. A burglary sentence that is less than seventy-five percent of the maximum potential sentence (and the initial confinement period that is slightly over half of the correlative maximum potential period of initial confinement) is not unduly harsh. *See* ***Daniels***, 117 Wis. 2d at 22.

¶14 We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). We reject Bracey's contention that his sentence and sentence structure were "needlessly harsh." There was no erroneous exercise of sentencing discretion.

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[3] The applicable maximum potential sentence and initial period of confinement are set forth in WIS. STAT. §§ 943.10(1m)(a), 939.50(3)(f) and 973.01(2)(b)6m.

By the Court.—Judgment and order affirmed.

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