COURT OF APPEALS DECISION DATED AND FILED

May 6, 2008

David R. Schanker
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. 2007AP1995-CR

Cir. Ct. No. 2006CF2642

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENYATTA KUYKENDOLL,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

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

¶1 FINE, J. Kenyatta Kuykendoll appeals a judgment entered on his guilty plea to burglary of a building or dwelling, *see* WIS. STAT. § 943.10(1m)(a), and an amended judgment modifying his pre-sentence credit. He also appeals an order denying his postconviction motion for sentence modification. Kuykendoll

claims that the circuit court: (1) erroneously exercised its sentencing discretion; (2) erroneously determined that he was ineligible for the Challenge Incarceration and Earned Release Programs; (3) sentenced him on the basis of allegedly inaccurate and incomplete information; (4) erred when it *sua sponte* reduced his pre-sentence credit; and (5) erroneously exercised its discretion in denying his sentence-modification motion. We affirm.

I.

¶2 Kuykendoll was arrested on May 21, 2006, for stealing property from a daycare center. According to the complaint, the arresting police officers saw Kuykendoll leave an office above the daycare center with two boxes. When they tried to talk to Kuykendoll, he dropped the boxes and ran. After the officers caught Kuykendoll, who fought with them, "kick[ing] his legs … and tr[ying] to hold his arms underneath his body to avoid being handcuffed," the owner of the daycare center came to the scene and told the police that he had let Kuykendoll stay in one of the apartments over the daycare center for free, but that Kuykendoll did not have permission to go into its offices. After his arrest, Kuykendoll told the police that he planned to sell the stolen property to buy crack cocaine.

¶3 Kuykendoll pled guilty to burglary, and on November 21, 2006, the circuit court sentenced him to ten years of imprisonment, with an initial confinement of five years, and five years of extended supervision, consecutive to any other sentence that Kuykendoll was serving. As we have seen, Kuykendoll challenges his sentence on several grounds. We address each one in turn.

II.

A. *Sentencing Discretion.*

¶4 Kuykendoll claims that the circuit court erroneously exercised its sentencing discretion because it did not: (1) explain why his sentence was the minimum necessary to promote the objectives of sentencing; or (2) adequately consider what he alleges are mitigating sentencing factors, including: the burglary was not "aggravated"; he claims to have cooperated with the police; he says he showed remorse and accepted responsibility; he asserts that he had a "positive attitude" and wanted to obey the law in the future; and he had been employed.

¶5 Sentencing is within the discretion of the circuit court, and our review is limited to determining whether the circuit court erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶68, 270 Wis. 2d 535, 569, 678 N.W.2d 197, 212 ("circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision"). There is a strong public policy against interfering with the circuit court's discretion, and the circuit 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 get relief on appeal, the 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).

¶6 The three primary factors a sentencing court must consider are the gravity of the offense, the character 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). The court may also consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639; *see also* ***Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d at 565–566, 678 N.W.2d at 211 (applying the main ***McCleary*** factors—the seriousness of the crime, the defendant's character, and the need to protect the public—to Gallion's sentencing). The weight given to each of these factors is also within the circuit court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶7 The circuit court considered the appropriate factors when it sentenced Kuykendoll. It described the burglary as a serious offense that affected not only the owner of the daycare, but the people who lived and worked in the neighborhood because "they know the burglary occurred, and they're fearful that their own businesses or homes would be burglarized."

¶8 The circuit court also considered Kuykendoll's character. It noted that Kuykendoll had a "long substantial prior criminal record that dates back to 1989." It also commented that Kuykendoll's parole or probation had been revoked many times, and that Kuykendoll had been given many chances:

> You were given opportunities at treatment. You refused to go to the Rescue Mission and wanted to participate in the Salvation Army. You were at the Genesis Residential Treatment Center in March of 2006. And when that was expiring, your agent arranged to have a transitional living placement, but you refused that.

> So throughout this entire period of time, you've had treatment opportunities. You've been supervised. You've been in prison. You've been at the House of Corrections. You've been involved in programming at Winnebago, at the [Drug Abuse Correctional Center], at the [Milwaukee Secure Detention Facility], at the Genesis Halfway House. You've been twice enrolled in the Nexus, N-e-x-u-s, [alcohol and other drug abuse] program. And none of that has convinced you to turn your life around.

The circuit court also observed that Kuykendoll stole from someone who was trying to help him; had a "strong substance abuse problem"; had many aliases, "reflecting somebody who's involved in substantial criminal conduct"; and fought with the arresting police officer.

¶9 Finally, the circuit court found that there was a "strong need" to protect the public. It concluded that a prison sentence was warranted under all of the factors and circumstances of Kuykendoll's case: "[U]nfortunately, … you can't be supervised in the community; that to not incarcerate you would unduly depreciate the seriousness of the offense[]; … you have rehabilitative needs that have to be addressed in a structured, confined setting." The circuit court fully explained Kuykendoll's sentence and the reasons for it. *See* ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 52, 710 N.W.2d 466, 476 (circuit court not required "to provide an explanation for the precise number of years chosen"). It did not erroneously exercise its sentencing discretion.

B. *Eligibility for Challenge Incarceration and Earned Release Programs.*

¶10 A circuit court's determination of whether a defendant is eligible for the Challenge Incarceration or Earned Release Program involves: (1) a threshold determination of whether the defendant is statutorily eligible under WIS. STAT. §§ 302.045(2) or 302.05(3)(a), and then, (2) an exercise of discretion showing the

circuit court's reasons for its decision on a defendant's ultimate eligibility. *See* WIS. STAT. § 973.01(3g), (3m); ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 749, 632 N.W.2d 112, 115.

¶11 Here, the circuit court determined that: "Considering all of the factors and circumstances, the Court's going to find the defendant is not eligible for the Challenge Incarceration [P]rogram, nor is he eligible for the Earned Release [P]rogram." Neither party disputes that Kuykendoll was statutorily eligible for the programs. Rather, the nub of Kuykendoll's argument is that the circuit court erroneously exercised its discretion because it did not explain its reasons for finding him ineligible. We disagree.

¶12 While a circuit court must state whether the defendant is eligible or ineligible for the Challenge Incarceration and Earned Release Programs, it is not required to make "completely separate findings" as long as "the overall sentencing rationale also justifies" its eligibility determination. ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 234, 713 N.W.2d 187, 189. As discussed above, the circuit court more than adequately explained the factors underlying its sentencing decision, including the seriousness of the crime, Kuykendoll's extensive criminal history and inability to follow through with treatment, and the need to protect the public. *See* ***id.***, 2006 WI App 75, ¶10, 291 Wis. 2d at 234–235, 713 N.W.2d at 190 (circuit court could infer from defendant's "past apathy" toward treatment that defendant was "neither sincere about wanting substance abuse treatment nor likely to succeed in the treatment program"). The circuit court did not erroneously exercise its discretion in determining that Kuykendoll was not eligible for the programs.

C. *Allegedly Inaccurate and Incomplete Information.*

¶13 A defendant claiming that a sentencing court relied on inaccurate information must show that: (1) the information was inaccurate; and (2) the sentencing court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 192–193, 717 N.W.2d 1, 7. We review *de novo* whether a defendant has been denied the right to be sentenced on accurate information. ***Id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

¶14 Kuykendoll contends that the circuit court erroneously concluded that he did not have a high school equivalency diploma when it ordered him to "obtain [his] G[eneral] E[ducational Development] D[iploma] or H[igh] S[chool] E[quivalency] D[iploma]" as a condition of extended supervision, even though the sentencing guidelines worksheet for Kuykendoll shows that he had a general educational development diploma or high school equivalency diploma. Significantly, the circuit court did not reference Kuykendoll's educational status as part of its sentencing rationale, and, although the circuit court evidently missed the worksheet's reference to Kuykendoll's equivalency educational attainments, Kuykendoll does not explain how or why this *de minimis* oversight negated the accuracy of the circuit court's actual sentencing analysis. *See* ***State v. Allen***, 2004 WI 106, ¶22, 274 Wis. 2d 568, 584, 682 N.W.2d 433, 441 ("A 'material fact' is: '[a] fact that is significant or essential to the issue or matter at hand.'") (quoted source omitted; brackets in original).

¶15 Kuykendoll also claims that the circuit court had an inaccurate impression of his character and rehabilitative needs because it did not have his medical records or full treatment history. He also contends that the presentence investigation report was incomplete because it did not contain "a health history

drawn from [his] medical records." In support, Kuykendoll points to: (1) medical records primarily from 2005 and 2006 submitted with his postconviction motion showing that he suffered from, among other things, depression, polysubstance abuse, anxiety, a hernia, and kidney stones; and (2) a letter from the director of the Milwaukee Rescue Mission, also submitted with his postconviction motion, stating that while Kuykendoll was dismissed from its discipleship/recovery program in 2005 because he had legal and medical issues, he could return to the program if he wanted to. Kuykendoll argues that, had the circuit court been aware of these issues, "it would not have thought that he rejected programs or needed to be confined to participate." We disagree.

¶16 First, a defendant claiming that a sentencing court erred in not considering matters material to a fair and just sentence must either show that the matters are new, or, if not new, that his or her trial lawyer gave him ineffective assistance of counsel by not bringing those matters to the sentencing court's attention.

> Whether facts constitute a new factor is a question of law we review de novo. A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial court at the time of original sentencing, either because it was not then in existence or because it was unknowingly overlooked by the parties. The new factor not only must be previously unknown, but it must also strike at the very purpose of the original sentence.

State v. Slagoski, 2001 WI App 112, ¶10, 244 Wis. 2d 49, 59, 629 N.W.2d 50, 54 (citations omitted). Kuykendoll does not show that the matters he now complains should have been considered by the circuit court at sentencing were not either known to him or knowable by him upon reasonable inquiry. Thus, he has not satisfied the first element of what constitutes a new factor ("not then in existence or because it was unknowingly overlooked"). *See* ***ibid.*** Further, he does not even

contend that his lawyer's failure to bring what he now contends was his medical history to the circuit court's attention deprived him of effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (Defendant must demonstrate that his or her lawyer's performance was deficient and that the deficient performance was prejudicial.).

¶17 Second, Kuykendoll does not show how his medical history would have affected the circuit court's sentencing analysis given what the circuit court noted was his substantial history of unsuccessful treatment. As the circuit court succinctly explained in its written decision and order denying Kuykendoll's postconviction motion, "the fact that [Kuykendoll] had medical problems in 2005 and 2006 does not sufficiently address his inability to conform his conduct … over the course of more than ten years." Moreover, the circuit court's decision to confine Kuykendoll was not based solely on Kuykendoll's treatment needs. As noted, the circuit court explained that confinement was necessary due to the seriousness of the crime, Kuykendoll's extensive criminal history, and the need to protect the public.

¶18 Finally, Kuykendoll argues that the presentence report was incomplete because it did not have a statement from the victim. Although the presentence report indicates that its writer was unable to contact the owner of the daycare center, the owner submitted to the sentencing court a letter on behalf of Kuykendoll asking for leniency. Kuykendoll does not show how an additional statement from the owner of the daycare center would have added anything to the

circuit court's sentencing analysis. The circuit court did not erroneously exercise its discretion in denying Kuykendoll's sentence-modification motion.[1]

D. *Sentence Credit.*

¶19 At the sentencing hearing, the circuit court awarded 185 days of sentence credit to Kuykendoll. In its decision and order denying Kuykendoll's postconviction motion, the circuit court *sua sponte* reduced Kuykendoll's sentence credit from 185 days to 130 days, and amended the judgment of conviction:

> [Kuykendoll] was sentenced by the court on November 21, 2006 to ten years in prison for burglary (five years initial confinement, five years extended supervision) with 185 days of credit. Because the sentence is consecutive and the defendant was serving a revocation sentence for a period of time for which credit was awarded, the award of credit is erroneous. Accordingly, the judgment of conviction shall be amended to reflect 130 days of sentence credit rather than 185 days of credit.

In a footnote, the circuit court explained:

> The defendant received 185 days of sentence credit for the period May 21, 2006 (date of arrest) to November 21, 2006 (date of sentencing). However, probation was revoked in case 05CM006777 [theft conviction] on September 1, 2006, and the sentence was deemed served by the House of Correction from December 20, 2005 (with the credit) to July 14, 2006. Consequently, he was only entitled to credit for the period July 14, 2006 to November 21, 2006, or 130 days.

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[1] Kuykendoll also claims that the circuit court had incorrect and incomplete information "concerning … his reaction to the police at the time of his arrest." This claim is conclusory and undeveloped. Kuykendoll does not explain what the allegedly incorrect or missing information was or how it would have affected the circuit court's sentencing analysis. Accordingly, we decline to address this issue. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (we will not review arguments that are "amorphous and insufficiently developed").

Kuykendoll does not challenge these factual findings. Accordingly, our review is *de novo*. *See* ***State v. Lange***, 2003 WI App 2, ¶41, 259 Wis. 2d 774, 794, 656 N.W.2d 480, 489 (Ct. App. 2002).

¶20 Kuykendoll contends that he is entitled to the fifty-five days of sentence credit from May 21, 2006, to July 14, 2006, under WIS. STAT. § 973.155(1)(a).[2] To receive sentence credit under § 973.155(1)(a), a defendant must establish that: (1) he or she was in custody; and (2) the custody was in connection with the course of conduct for which the sentence was imposed. ***Lange***, 2003 WI App 2, ¶41, 259 Wis. 2d at 794–795, 656 N.W.2d at 489.

¶21 It is undisputed that Kuykendoll was in custody from May 21, 2006, to July 14, 2006. Accordingly, the only issue is whether Kuykendoll was in

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[2] WISCONSIN STAT. § 973.155 provides, as material:

> **(1)** (a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
>
> 2. While the offender is being tried; and
>
> 3. While the offender is awaiting imposition of sentence after trial.
>
> (b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113 (8m), 302.114 (8m), 304.06 (3), or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

custody in connection with the course of conduct for which the burglary sentence was imposed. He was not. The 55 days Kuykendoll spent in custody from May 21, 2006, to July 14, 2006, were for the completely unrelated crime of theft. It is of no consequence that he completed the theft sentence before his probation for that crime was formally revoked. "'[D]ual credit is not permitted' where a defendant has already received credit against a sentence which has been, or will be, separately served." ***State v. Jackson***, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 239, 607 N.W.2d 338, 342 (quoted source omitted).

¶22 Kuykendoll also claims that the reduction in his sentence credit violated his double-jeopardy rights. *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 8. Double jeopardy prohibits an increase in punishment after the imposition of a sentence. ***State v. Amos***, 153 Wis. 2d 257, 281–282, 450 N.W.2d 503, 512 (Ct. App. 1989). In this case, the circuit court did not increase Kuykendoll's sentence. As we have seen, it modified the sentence to eliminate credit to which Kuykendoll was not entitled. Kuykendoll's overall sentence, ten years of imprisonment, with an initial confinement of five years, and five years of extended supervision, was the same before and after the modification. Accordingly, the circuit court did not violate Kuykendoll's double-jeopardy rights. *See* ***id.***, 153 Wis. 2d at 282, 450 N.W.2d at 512–513 (adjustment of sentence credit does not violate double jeopardy).

By the Court.—Judgment, amended judgment, and order affirmed.

Publication in the official reports is not recommended.