

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 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. 2007AP2028-CR

Cir. Ct. No. 2006CF3669

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSE A. BAEZ,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Jose A. Baez appeals from a judgment of conviction and from an order denying his postconviction motion. The only issue is whether the circuit court erroneously exercised its sentencing discretion. We affirm.

Background

¶2 On multiple occasions in January 2006, Baez, sometimes alone, sometimes with an accomplice, robbed employees of a check-cashing service. In each incident, he either brandished a gun or indicated that his gun was concealed. The victims identified Baez in a line-up. The State subsequently filed an information charging Baez with two counts of armed robbery by threat of force, and one count of armed robbery by threat of force as party to a crime. *See* WIS. STAT. §§ 943.32(2), 939.05 (2005-06).¹

¶3 Baez entered guilty pleas, and the State recommended an aggregate thirty-year term of imprisonment, bifurcated as fifteen years of initial confinement and fifteen years of extended supervision. Baez was free to argue for a different disposition, and he recommended an aggregate twenty-five-year sentence, with ten years of initial confinement. The circuit court followed the State's recommendation and imposed three consecutive ten-year sentences, each bifurcated as five years of initial confinement and five years of extended supervision. The court additionally imposed a \$1000 fine on one count.

¶4 Baez filed a postconviction motion for sentence modification. The circuit court denied the motion, and this appeal followed.

Discussion

¶5 On appeal, this court will uphold a sentence unless the circuit court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Wis. 2d 535, 678 N.W.2d 197. “When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence” *State v. Stenzel*, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

¶6 Baez contends that the court imposed an unduly harsh term of confinement.

When a defendant argues that his or her sentence is excessive or unduly harsh, a court may find an erroneous exercise of sentencing 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.”

State v. Grindemann, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

¶7 The offenses in this case carried an aggregate prison term of 120 years. The court imposed an eighth of the available prison time as initial confinement. “A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.” *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. To prevail, Baez must show “an unreasonable or unjustifiable basis in the record for the sentence imposed.” *Id.*, ¶17 (citation omitted). He has not done so.

¶8 The circuit court’s obligations at sentencing are familiar. The court must consider the primary sentencing factors of the gravity of the offense, the character of the defendant, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may also consider a wide range of other factors concerning the defendant, the offense, and

the community. *See id.* The court has discretion to determine the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. *Stenzel*, 276 Wis.2d 224, ¶16. “[T]he sentence imposed ... should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.” *Gallion*, 270 Wis.2d 535, ¶23 (citation omitted).

¶9 The court must specify the objectives of the sentence. *Id.*, ¶40. These objectives may include “the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Id.* The court must identify the factors it considered, “and indicate how those factors fit the [chosen] objectives and influence the sentencing decision.” *Stenzel*, 276 Wis. 2d 224, ¶8. The court is not required, however, to utter any “magic words” in order to properly exercise sentencing discretion. *See Gallion*, 270 Wis. 2d 535, ¶49.

¶10 Here, the circuit court assigned significant weight to Baez’s character. It observed that Baez was dangerously selfish, not only by failing to take the steps necessary to curb his heroin addiction but also by engaging in irresponsible sexual activity after testing positive for Hepatitis C. The court considered Baez’s pending charges, including two felonies and one misdemeanor, as additional troubling indicators of character. *See Elias v. State*, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980) (complaints in other cases are an index of character).

¶11 The court addressed the gravity of the offense, properly noting that armed robbery is governed by applicable sentencing guidelines.² See *State v. Grady*, 2007 WI 81, ¶2, 302 Wis. 2d 80, 734 N.W.2d 364 (sentencing court has a mandatory obligation under WIS. STAT. § 973.017(2)(a) to consider sentencing guidelines). The court viewed the offenses as “aggravated high” under the guidelines, in part because they reflected an escalating pattern of criminal behavior. In its postconviction order, the court further explained that the offenses had a substantial impact on the victims, all of whom were frightened and two of whom left their jobs as a result of their encounters with Baez. See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (court has an additional opportunity to explain its sentence when challenged by postconviction motion).

¶12 Baez asserts that the circuit court overstated the seriousness of the offenses because no one was physically harmed. Absence of physical injury does not necessarily reflect diminished seriousness. See *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 435, 351 N.W.2d 758 (Ct. App. 1984). Psychological impact is an equally relevant consideration. See *id.* Moreover, the circuit court has discretion to determine whether and to what extent a particular factor is an aggravating one. See *State v. Thompson*, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992). The court’s assessment here regarding the seriousness of the armed robberies was reasonably drawn from the facts, and, accordingly, we will not disturb it.

² The sentencing guidelines worksheet for armed robbery is available on the Internet. See Wisconsin Sentencing Commission, <http://wsc.wi.gov/docview.asp?docid=3303>.

¶13 The court considered protection of the public. It observed that Baez’s crimes had indirect effects that rippled through the community, raising concerns about “peril” in the workplace. The court further considered the risk Baez posed in light of his repetitive criminal conduct.

¶14 The court also discussed a variety of other factors. It was disturbed that Baez considered himself a minister, and it was concerned that Baez’s intelligence and abilities allowed him to manipulate others in harmful ways. *See Ziegler*, 289 Wis.2d 594, ¶23 (court may consider defendant’s educational background and employment). The court further took note that Baez was not a “foolish young man” but a middle-aged adult, whose behavior was worsening over time. *See id.* (defendant’s age an appropriate consideration at sentencing). The court gave extensive consideration to the aggravating factor of Baez’s heroin addiction. *See id.* (undesirable behavior pattern relevant at sentencing). The court’s discussion reflected its view that Baez was not fully accepting responsibility for his actions but was using his addiction as an excuse.

¶15 The court identified protection of the community as the primary objective of its sentence. It recognized that Baez had rehabilitative needs, but concluded that his history of relapse required subordinating treatment to deterrence and to the community’s need for protection. Accordingly, the court imposed a meaningful period of initial confinement.

¶16 Baez complains that the circuit court failed to justify rejecting ten years of confinement in favor of fifteen. The sentencing court is not required to articulate its rationale for the amount of confinement imposed with any greater specificity than was done here. *See Gallion*, 270 Wis.2d 535, ¶¶54-55. “[T]he exercise of discretion does not lend itself to mathematical precision As a

result, we do not expect circuit courts to explain, for instance, the difference between sentences of 15 and 17 years.” *Id.*, ¶49. What is required is that the court provide an explanation for the general range of sentence. *See id.* The court satisfied that obligation here. Moreover, we observe that the court imposed an aggregate period of initial confinement at the low end of the range suggested by the applicable sentencing guidelines.

¶17 In sum, the circuit court considered relevant factors. It gave particular weight to the aspects of Baez’s character suggesting that Baez would not conform his behavior to law, and concomitantly stressed the need to protect the community. In light of the totality of the factors and the applicable sentencing guidelines, the court fashioned a reasonable sentence calculated to meet appropriate goals. Consequently, we conclude that the court properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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

