COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2782-CR **Cir. Ct. No. 2006CF52**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE A. BAEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Judgment modified and, as modified, affirmed; order affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. The main issue in this case is whether an otherwise permissible sentence is unduly harsh because it is ordered consecutive to a

sentence being served in an unrelated case. We hold that in this case it is not. Part of the sentence is void, however, because one count erroneously was penalized as a Class E, rather than a Class F, offense. Accordingly, we modify Baez's sentence and, as modified, affirm the judgment and order.

¶2 The State charged Jose A. Baez with five criminal charges: Count 1, delivery of heroin; Count 2, third-degree sexual assault; Count 3, solicitation of delivery of heroin; Count 4, possession of heroin; and Count 5, possession of drug paraphernalia. The charges arose from allegations that Baez gave his seventeen-year-old stepdaughter alcohol and heroin, sexually assaulted her and tried to get her to sell heroin for him. A search of the house revealed heroin and a heroin injection kit secreted in some insulation in the basement. Pursuant to a plea agreement, Baez pled no contest to Counts 1 and 3, both felonies, and to Count 2, which was amended to sexual intercourse with a child age sixteen or older, a misdemeanor. Counts 4 and 5 were dismissed and read in.

¶3 The trial court sentenced Baez to eight years' initial confinement and five years' extended supervision[1] on Count 1 and three years' initial confinement and two years' extended supervision on Count 2, consecutive to each other.[2] The court ordered that those sentences also be served consecutive to the thirty-year sentence—fifteen years' initial confinement followed by fifteen years' extended supervision—he had just begun serving for his conviction on three counts of

[1] The extended supervision portion initially was six years, but the court modified it after the Offender Records Assistant at Dodge Correctional Institution notified the court that "the longest period of extended supervision is five years if there is eight years of initial confinement."

[2] The court also sentenced him to a concurrent nine months in jail on Count 3, the misdemeanor charge.

armed robbery in Milwaukee county. Baez moved for postconviction relief, arguing that making his sentences not only consecutive to each other but also to his Milwaukee county sentence is excessive and unduly harsh. The trial court reviewed its rationale for imposing consecutive sentences and denied the motion.

¶4 Baez appeals, again asserting that the consecutive structure renders the sentence unduly harsh. In support, he points out that he was forty-two years old at sentencing, and will be sixty-eight before just his initial confinement period ends. He also emphasizes that he showed true remorse, took responsibility, was cooperative, actively participated in AODA counseling and Bible study and took technical college courses during his year of predisposition incarceration. He urges that concurrent sentences would have accomplished the goals of protecting the community and deterring him from engaging in criminal behavior upon release. Consecutive sentences, therefore, represent an erroneous exercise of the trial court's discretion. We disagree.

¶5 A trial court is permitted wide discretion in determining whether to impose a concurrent or consecutive sentence. ***State v. Davis***, 2005 WI App 98, ¶27, 281 Wis. 2d 118, 698 N.W.2d 823; *see also* WIS. STAT. § 973.15(2)(a). We follow a strong policy against interference with the trial court's sentencing, and presume the court acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). When a sentence is alleged to be unduly harsh, we may 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." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). We must

affirm if the facts of record show the sentence is sustainable as a proper discretionary act. ***Wickstrom***, 118 Wis. 2d at 355.

¶6 When fashioning a sentence, the trial court must consider the gravity of the offense, the character and rehabilitative needs of the offender and the need to protect the public, and may consider other relevant, available information. ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). Here, the trial court found that consecutive sentences were warranted. It observed that heroin "has come pretty close to ruining [Baez's] life" yet he continued to put others, even family, at risk of traveling down that path. Noting that Baez's addiction tragically led him to commit other crimes, the court found it "extremely unfair" for Baez to provide the highly addictive drug to his teenage stepdaughter and to encourage her to begin selling it. The court noted that Baez's background was heavily influenced by crime, much of it related to heroin dealing and use. Indeed, besides these charges and the Milwaukee county case, additional armed robbery charges were pending in Ozaukee and Washington counties at the time of sentencing. The court conceded that Baez had not gotten "the same breaks" in life that many other people get, and took into consideration Baez's expression of remorse and a letter a chaplain wrote on Baez's behalf. The court nonetheless concluded that, given his criminal background and the "extremely serious" nature of the offense, the risk Baez posed to society was too great not to impose prison time beyond what he would serve on the Milwaukee county sentence. We see no erroneous exercise of discretion in the consecutive sentence structure.

¶7 The State concedes error in the length of the sentence on Count 1, however. The complaint, amended complaint and information charged Count 1, delivery of heroin, as a Class E felony under WIS. STAT. § 961.41(1)(a), which applies to narcotics generally. The plea questionnaire addendum repeated "Class

E felony." Section 961.41(1)(d) should have been used, however, because it specifically addresses heroin. *See* ***State v. Graf***, 72 Wis. 2d 179, 181, 240 N.W.2d 387 (1976) (stating that in penal legislation a specific statutory provision normally will prevail over a general one). Delivery of more than three but less than ten grams is a Class E felony, while delivery of three grams or less is a Class F felony. Sec. 961.41(1)(d)1., 2. None of the three documents specifies the amount of heroin Baez allegedly delivered to his stepdaughter. Count 1 therefore should be penalized as a Class F felony. *Cf.* ***State v. Baldwin***, 101 Wis. 2d 441, 447, 304 N.W.2d 742 (1981) (stating that the State must prove facts sufficient to constitute the statutory offense).

¶8 The trial court sentenced Baez on Count 1 to eight years' initial confinement. The maximum term of initial confinement for a Class F felony is seven years and six months. WIS. STAT. § 973.01(2)(b)6m. Baez's sentence, therefore, exceeded the permissible maximum for initial confinement by six months. The excess portion of the sentence is void. *See* WIS. STAT. § 973.13; *see also* ***State v. Flowers***, 221 Wis. 2d 20, 22, 586 N.W.2d 175 (Ct. App. 1998).

¶9 Accordingly, we modify the sentence to comport with the statutory ceiling. We reduce Baez's sentence on Count 1 to seven years' and six months' initial confinement. The remainder of his sentence, including its consecutive structure, shall remain the same.

By the Court.—Judgment modified and, as modified, affirmed; order affirmed.

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