COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP375-CR **Cir. Ct. No. 2005CF6531**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRELL MARQUIS BROWN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Darrell M. Brown appeals from a reconfinement order entered after the revocation of extended supervision and from an order denying his motion for postconviction relief. Brown argues that the circuit court erroneously exercised its discretion by failing to consider his background and

other mitigating circumstances, and by using a preconceived sentencing formula to determine the term of reconfinement. Further, he argues that the circuit court erred by not clarifying the basis of its ruling upon challenge by postconviction motion. We conclude that the circuit court properly exercised its discretion by considering the relevant sentencing factors when determining the length of reconfinement, and that it was not required to restate its reasoning in its order denying the motion for postconviction relief. Therefore, we affirm the orders of the circuit court.

¶2 On November 16, 2005, Brown entered a school and took a purse that belonged to a teacher. Upon finding two different car keys in the purse, Brown located the teacher's car in the school parking lot and took it without her consent. Brown subsequently picked up his friend, and they both went to the teacher's house. When they arrived at the teacher's house, they discovered someone was home, but they nevertheless took the teacher's minivan from the residence.

¶3 On January 13, 2006, Brown pled guilty to two counts of operating a vehicle without the owner's consent contrary to WIS. STAT. § 943.23(2) (2005-06).[1] The circuit court imposed a sentence on each count of one year of initial confinement and two years of extended supervision, to be served consecutively. In November 2007, Brown was released on extended supervision.

¶4 After Brown was released, a series of events occurred that led to his sentencing after revocation. Less than a month after being released, he allegedly

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

took bikes from a residential area. Less than a month after the bike incident, Brown was in custody again for being on the property of an elementary school without a chaperone, which was in violation of the rules of his release. He was given an alternative to revocation and was released back into the community in February 2008. Less than a month after being released, Brown went into a church and stole speakers and a microphone stand. The police caught him and placed him in a squad car. Brown got out of the squad car and fled. He was later found in a garage and taken into custody.

¶5 Brown waived the hearing on revocation and proceeded to a hearing on reconfinement. There were four years, two days available for reconfinement. The Department of Corrections (DOC) recommended fourteen months and twelve days; Brown concurred with this recommendation. The State recommended eighteen months. The circuit court ordered twenty-four months of reconfinement, which was the same length of time Brown had served on initial confinement.

¶6 Brown filed a motion for postconviction relief challenging the court's exercise of discretion in selecting the term of reconfinement. Specifically, Brown argued that the court did not properly consider his character, background and mitigating factors because it erroneously applied a preconceived sentencing formula that ignored the appropriate sentencing factors. The circuit court denied the motion, concluding that it had properly considered and applied the appropriate sentencing factors during the reconfinement hearing. This appeal follows.

DISCUSSION

¶7 This case is before us on a reconfinement order following revocation of Brown's extended supervision; the original judgment of conviction and the revocation decision are therefore not at issue. *See* ***State v. Drake***, 184 Wis. 2d

396, 399-400, 515 N.W.2d 923 (Ct. App. 1994); *see also* WIS. STAT. § 302.113(9)(g) (review of revocation only available through certiorari). Rather, we consider whether the circuit court erroneously exercised its discretion when it ordered Brown reconfined for twenty-four months. *See* ***State v. Brown***, 2006 WI 131, ¶20, 298 Wis. 2d 37, 725 N.W.2d 262 ("A reconfinement hearing is certainly akin to a sentencing hearing and, therefore, both are reviewed on appeal to determine if there has been an erroneous exercise of discretion.").

¶8 On appeal, we will not reverse the sentence as long as the reconfinement court considered the appropriate factors and imposed a sentence that was within the statutory limits, unless the sentence imposed "is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment."[2] ***Id.***, ¶22 (citation and two sets of quotation marks omitted). Appropriate sentencing factors to consider in making the reconfinement decision include the nature and severity of the original offense, the defendant's institutional conduct record, the amount of incarceration necessary to protect the public from the risk of further criminal activity and the nature of the violation of terms and conditions during extended supervision. ***Id.***, ¶34. The original sentencing transcript is also an important source of information that can be considered. *See* ***id.***, ¶38. When pronouncing sentence, "it is appropriate for a circuit court to identify the general objectives of greatest importance, and describe the factors and circumstances relevant to those objectives." ***Id.***, ¶39. The amount of explanation necessary will vary from case to case; not all factors need be discussed on the record. *See* ***id.***, ¶¶37, 39.

[2] On appeal, Brown presents no argument that the period of reconfinement imposed shocks the public sentiment.

¶9 Brown argues that the circuit court did not properly exercise its discretion during the sentencing after revocation because it failed to consider Brown's background and mitigating factors, such as the circumstances of his upbringing and the current support of his family, and because it applied a preconceived sentencing formula when determining the term of reconfinement. We are not persuaded.

¶10 As Brown acknowledges, the circuit court "spoke on the record at some length concerning the documents it had received and the arguments it had heard, the legal standards for its decision, the facts as it understood them, and some of the inferences it drew from those facts." We reject Brown's assertion that the circuit court failed to consider mitigating factors and his background; the record indicates the circuit court considered all the relevant information provided, including the court memo prepared by the DOC, the court file and the transcript of the original sentencing hearing. The circuit court was not obligated to examine each factor on the record, including the circumstances of Brown's upbringing and the current support of his family. *See* ***id.***, ¶37 (The circuit court must apply relevant factors and "provide, on the record, a reasoned basis for a reconfinement decision. These factors are not a mandatory checklist, and we do not hold that a circuit court must examine each factor on the record in every case.").

¶11 Next, we consider Brown's assertion that the circuit court employed a preconceived sentencing formula and failed to take into account the specific circumstances of his case. *See* ***State v. Ogden***, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996) ("[O]ne 'unreasonable and unjustifiable basis' for a sentence is a trial judge's employment of a preconceived policy of sentencing that is 'closed to

individual mitigating factors.'") (citation omitted). Specifically, Brown asserts that after the circuit court considered the appropriate sentencing factors,[3] the circuit court "reverted to a simple formula to determine the length of reconfinement." Brown takes issue with the following statement by the circuit court:

> [Brown is] going to need to change [his ways]. The first two years of initial confinement didn't do the trick. I think at this point[,] although I have heard the recommendation[s] for less than that, I think he has to do that all over again so he understands this is something serious, he's got to stop the criminal conduct. That still will leave him even more opportunity for extended supervision but knowing over time if he's going to do this [criminal activity] he's going to go back for [the] same amount of time.

¶12 We are unconvinced that this statement is evidence that the circuit court was applying a preconceived policy of making all defendants repeat the time already served if their extended supervision was revoked. The circuit court did not say it had a policy of always imposing the same amount of time on reconfinement that was served on initial confinement, and it did not ignore Brown's particular circumstances in order to entertain general predispositions. Rather, the circuit court carefully considered the appropriate sentencing factors and gave a reasoned

[3] For instance, the circuit court noted the nature and severity of the original offense by stating that this offense was "far more serious than most of the take and drive offenses, particularly the kind where someone just comes across a car on the street." It also examined Brown's violations of the terms and conditions of extended supervision. The circuit court referred to Brown's conduct as "kind of the ultimate failure on extended supervision" because he continually failed to comply with what was required of him and committed new offenses. It also noted that Brown did not have any employment, but acknowledged that Brown had tested negative for drug use. Lastly, the circuit court considered the original sentencing transcript and noted the original sentencing court's concern for the protection of the public. Subsequently, the circuit court stated that Brown had only been out a short period of time and had shown he was not going to comply with supervision, so the community needed to be protected from him.

and reasonable explanation for the reconfinement sentence. *See* ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). We conclude the circuit court did not erroneously exercise its discretion.

¶13 Brown also takes issue with the fact that the circuit court did not explain its deviation from the recommendations made by the DOC (with which Brown concurred). We disagree that such an explanation was necessary. The circuit court owes no deference to the DOC when determining the term for reconfinement. *See* ***Brown***, 298 Wis. 2d 37, ¶¶24-25 ("[T]he DOC's recommendation may be helpful and should be considered by a circuit court, but the court is not required to follow the DOC's sentencing recommendation in making a reconfinement decision" and the circuit court is not required to explain its reasons for not following the recommendation "as long as proper sentencing discretion is exercised.").

¶14 Finally, Brown argues that the circuit court's two-sentence written order denying his postconviction motion was insufficient. He argues that the trial court "should have taken the additional opportunity to explain its sentence upon postconviction challenge." While it is true that a circuit 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), it is not required to do so. Here, the circuit court concluded that its original sentencing on revocation was a proper exercise of discretion; it was not required to restate its reasons for imposing the sentence.

By the Court.—Orders affirmed.

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