COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2322-CR
2011AP2323-CR
2011AP2324-CR

Cir. Ct. Nos. 2009CF4300
2009CF4358
2009CF5415

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MACK SIMMONS,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mack Simmons, *pro se*, appeals from two judgments of conviction for burglary and one judgment of conviction for burglary as a party to a crime, contrary to WIS. STAT. §§ 943.10(1m)(a) and 939.05 (2009-

2010).[1] He also appeals from an order denying his motion for sentence modification. On appeal, he argues that the trial court erroneously exercised its discretion at sentencing and when it denied the motion for sentence modification. We affirm.

BACKGROUND

¶2 Simmons was charged with breaking into three homes while the owners were away; a second man accompanied Simmons on one of the burglaries. Simmons entered a plea bargain with the State pursuant to which he agreed to plead guilty to three burglaries and allow an additional uncharged burglary to be considered for restitution purposes. In exchange, the State agreed to recommend a global sentence of four years of initial confinement and six years of extended supervision. The trial court accepted Simmons's pleas and found him guilty. It ordered that an AIM report be generated.[2]

¶3 The AIM report concluded that the risk Simmons would reoffend was low/moderate. It concluded that a mental health and AODA assessment may be beneficial. It also noted that Simmons was unemployed and would be homeless upon release. It further stated that the assessor could not verify Simmons's reported GED completion or his past employment for a mortgage company.

[1] The three cases have been consolidated on appeal.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The Justice 2000 Assess, Inform and Measure (AIM) Program performs presentencing assessments of defendants.

¶4 At the sentencing hearing, trial counsel offered several corrections to the AIM report. She told the trial court that Simmons would be able to live with his girlfriend upon release and that Simmons believed he had passed his GED test.

¶5 Simmons stipulated to a total of $2664 in restitution to four homeowners. Four victims testified about the effect of the burglaries on their lives. One told of being fearful of future burglaries. Another explained how the theft of his social security number had already caused him problems.

¶6 Trial counsel urged the trial court to consider the fact that Simmons had accepted responsibility for the crimes, choosing "not to further victimize these victims here by taking these cases to trial." She also noted that the plea agreement had not provided a great reduction in charges: Simmons pled guilty to all three charged crimes and only a single uncharged burglary was read in. She argued that Simmons committed the crimes to support his drug habit and needs AODA treatment.

¶7 The trial court sentenced Simmons to three years of initial confinement and three years of extended supervision on each of the burglaries, to be served consecutively. Simmons filed a notice of intent to pursue postconviction relief and postconviction counsel was appointed.

¶8 After postconviction counsel reviewed the case and gave Simmons his assessment, Simmons directed postconviction counsel to seek to withdraw from the case so that he could proceed with another attorney or *pro se*. After the public defender indicated that it would not provide another attorney for Simmons, the trial court issued an order informing Simmons of the risks and responsibilities of proceeding *pro se*. As the order directed, Simmons responded with a letter

indicating his understanding of those risks and responsibilities. The trial court then granted postconviction counsel's motion to withdraw.

¶9 Simmons filed a *pro se* motion for sentence modification under WIS. STAT. § 973.19. Because more than ninety days had passed since sentencing, the trial court construed the motion under WIS. STAT. RULE 809.30. It concluded that Simmons had not shown a new factor justifying sentence modification and denied Simmons's motion. This appeal follows.

DISCUSSION

¶10 Simmons asserts that the trial court erroneously exercised its sentencing discretion and that his motion for sentence modification should have been granted. We begin by reviewing the applicable legal standards and applying them to Simmons's sentence, and then we address Simmons's challenges to his sentence and to the denial of his motion for sentence modification.

I. Sentencing.

¶11 At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294

Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

¶12 The sentencing court is generally afforded a strong presumption of reasonability, and if our review reveals that discretion was properly exercised, we follow "'a consistent and strong policy against interference with the discretion of the trial court in passing sentence.'" ***Id.***, ¶18 (citation omitted). Our analysis includes consideration of postconviction orders denying motions for sentence modification, because a 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).

¶13 In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court discussed the nature of the crimes, recognizing that although the victims were not hurt physically, they had suffered emotionally and financially from the invasion of their homes. It noted that one victim will forever worry about the potential misuse of his social security number and that another victim said she feels "frightened to come home after work." The trial court noted that Simmons had acted brazenly, such as by entering one home during the daytime despite a large barking dog.

¶14 The trial court considered Simmons's prior criminal record, which included misdemeanor convictions for disorderly conduct and obstruction. The trial court also recognized that older charges of carrying a concealed weapon and disorderly conduct had been dismissed for reasons unknown.

¶15 The trial court discussed the need to protect the public, noting that it was concerned that if it gave a sentence that was too low, Simmons would simply "do this again." It noted that but for the fact Simmons was caught in the act of committing the final burglary, he may not have been caught for the earlier burglaries. It also observed that Simmons had selected homes in various communities, rather than picking houses at random. It characterized Simmons as a "serial burglar" from whom the public needed protection.

¶16 The trial court declined to make Simmons eligible for a risk reduction sentence, the challenge incarceration program, or the earned release program because Simmons was at risk to reoffend and because of the number of burglaries. It said that it was giving Simmons a penalty on each of the crimes and ordered them to be served consecutively.

¶17 In its order denying Simmons's motion for sentence modification, the trial court rejected Simmons's suggestion that concurrent sentences were warranted because he took responsibility, expressed remorse, had no history of violence or prior burglaries, cooperated with law enforcement, maintained a substantial crime-free period before the offenses, had no pattern of criminal behavior, had only a low or moderate risk to reoffend, had a supportive family, was ready to address his AODA issues, and was committed to maintaining employment upon release. The trial court explained that it had considered many of those factors at sentencing, but "gave greater weight to the sophisticated and brazen nature of these crimes, their impact on the victims, the defendant's prior dismissed charges, his risk for reoffending and the need for deterrence and community protection." It stated that it had "determined that separate punishment was warranted for each burglary conviction and therefore ordered these sentences

to run consecutively." It also noted that "[a]lthough the total sentence imposed is longer than the parties recommended, it is considerably less than the maximum sentence available at law *because of* the mitigating factors [that Simmons] relies upon in his motion."

¶18 Based on the trial court's remarks at sentencing and the explanation in its postconviction order, we conclude that the trial court's sentencing fit within the dictates of ***Gallion***. We further conclude that Simmons's sentence was not unduly harsh. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (A trial court will be found to have erroneously exercised its sentencing discretion by imposing an unduly harsh sentence only if "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."). Here, Simmons benefitted from the fact that one burglary was never charged. Even so, he still faced a total of twenty-two-and-one-half years of initial confinement and fifteen years of extended supervision. The nine years he will spend in initial confinement is only forty percent of the maximum period of initial confinement that could have been imposed and is not excessive. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

¶19 Simmons argues that the trial court erroneously exercised its sentencing discretion, for numerous reasons.[3] First, he contends that the trial court

[3] We have carefully reviewed Simmons's briefs and appendix. This opinion addresses many of Simmons's arguments directly or indirectly, but to the extent we do not address particular arguments, they are denied because we have determined that they lack merit.

should not have considered dismissed criminal cases from his past and "evidence of irrelevant uncharged conduct."[4] We reject Simmons's argument. It is well-settled that a trial court can consider unproven offenses and uncharged offenses at sentencing, as "those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing." *See* ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). Moreover, it is clear that the dismissed charges were not the primary focus at the sentencing hearing. Rather, the trial court focused on the nature of the crimes, the effect on the victims, and Simmons's need for rehabilitation.

¶20 Second, Simmons argues that the trial court "overemphasize[d]" primary sentencing factors over mitigating factors. We disagree. The trial court considered proper sentencing factors, including the gravity of the offenses, Simmons's character, and the public's need for protection, and the weight it chose to give each factor was within its discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41. In addition, the trial court explained in its postconviction order that it had considered mitigating factors and had imposed a sentence considerably less than the maximum sentence "*because of* the mitigating factors."

¶21 Third, Simmons contends that the sentence imposed was "significantly dis[pro]portiona[te] to the crime[s] committed given all relevant circumstances." We do not agree. The total sentence was less than half of what could have been imposed. Given the seriousness of the crimes, Simmons's self-admitted drug addiction that he claims "force[d]" him to commit the burglaries, and his past criminal convictions, the trial court acted well within its discretion.

[4] Simmons does not identify the uncharged conduct to which he is referring.

¶22 Finally, Simmons asserts that the trial court "was influenced by person[a]l bias." He cites several trial court comments as evidence of bias. For instance, he points to the fact that the trial court told one victim that it was familiar with the neighborhood where he lived because the court lived in that area in the past. We are unconvinced that any of the trial court's comments that Simmons cites demonstrate that the trial court was biased against Simmons.

II. Motion for sentence modification.

¶23 Simmons's motion for sentence modification included his assertion that a new factor justified sentence modification: his provision of written verification that he obtained his GED in 2004 and that he worked for a mortgage company from 2007-2010. He argued that if this information had been made available to the trial court at sentencing, it would have provided "a better outlook" of Simmons's character.

¶24 In ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, our supreme court summarized the law relating to motions for sentence modification:

> Deciding a motion for sentence modification based on a new factor is a two-step inquiry. The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor. Whether the fact or set of facts put forth by the defendant constitutes a "new factor" is a question of law. The requirement that the defendant demonstrate the existence of a new factor prevents a court from modifying a sentence based on second thoughts and reflection alone.
>
> The existence of a new factor does not automatically entitle the defendant to sentence modification. Rather, if a new factor is present, the [trial] court determines whether that new factor justifies modification of the sentence. In making that determination, the [trial] court exercises its discretion.

> Thus, to prevail, the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence.

Id., ¶¶36-38 (citations omitted). A new factor is defined as:

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

See ***id.***, ¶40 (citation omitted). Applying those standards here, we agree with the trial court that Simmons has not shown the existence of a new factor.

¶25 As the State points out, the trial court was aware that Simmons claimed he had earned his GED and that he had worked for a mortgage company. The trial court concluded that the new information Simmons provided about his GED and work history were not "'highly relevant to the imposition of sentence.'" *See* ***id.*** (citation omitted). It explained:

> The fact that [Simmons] has obtained a GED is commendable and important for his rehabilitation; however, it is not highly relevant to the sentence imposed. Too, the letter documenting [Simmons's] employment is not highly relevant to the court's sentencing goals in this case (i.e. punishment; deterrence; community protection), and, therefore, had this information been presented at the time of sentencing, it would not have changed the court's sentencing decision. In sum, the court finds that the defendant has not set forth a new factor for purposes of sentence modification.

We agree with this analysis. The trial court's explanation is consistent with the trial court's comments at sentencing, which focused primarily on the seriousness of the crimes, the need to punish Simmons, and the need to protect the community. While the trial court questioned why Simmons had not obtained a high school diploma and his claim that he had been an "assistant realtor," the majority of the

sentencing focused on the crimes rather than on Simmons's education and employment. The sentence modification motion was properly denied. *See* ***id.***

By the Court.—Judgments and order affirmed.

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