

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2014

Diane M. Fremgen
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. 2013AP1881-CR

Cir. Ct. No. 2011CF346

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN J. BURRILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Benjamin Burrill appeals a judgment of conviction for burglary and three counts of bail jumping, and an order denying his postconviction motion for resentencing or sentence modification. Burrill argues

the circuit court relied on an improper factor at sentencing. We hold the court did not actually rely on the purportedly improper factor. Accordingly, we affirm.

BACKGROUND

¶2 Burrill was convicted of one count of burglary and three counts of bail jumping. At sentencing, the State and the defense jointly recommended a withheld sentence and five years' probation. The presentence investigation report (PSI), however, recommended two to three years each of confinement and extended supervision on the burglary charge, and shorter sentences on the bail jumping charges. Attached to the PSI was an eight-page document referred to as "COMPAS AND ALTERNATIVE SCREENINGS" (COMPAS). The court sentenced Burrill to a combined total of ten years' imprisonment, consisting of four years' confinement and six years' extended supervision.

¶3 The court set forth a thorough analysis of the factors bearing on the sentence, including Burrill's character, pretrial behavior, danger to the public, and rehabilitative needs and the gravity of the offense. Additionally, the court mentioned the COMPAS report at sentencing.

¶4 Burrill filed a postconviction motion for resentencing or sentence modification, alleging the COMPAS risk assessment scores were an improper factor in the sentencing decision. Attached to the postconviction motion was an opinion of an expert psychologist who had studied the COMPAS risk assessment. Burrill requested a postconviction hearing, and arranged for the psychologist to testify by telephone. At the hearing, however, the court denied the request to call the psychologist as a witness, and refused to consider the expert's report.

¶5 The court did not decide whether it was appropriate to consider the COMPAS at sentencing because it held it had not actually relied on the COMPAS to determine the sentence. It explained, “I referred to the COMPAS, but I didn’t use it as proof of his recidivism rate.” The court therefore denied Burrill’s motion. Burrill now appeals.

DISCUSSION

¶6 Burrill argues the circuit court erroneously exercised its discretion because it relied on an improper factor when sentencing him. A circuit court properly exercises its discretion if, by reference to the relevant facts and factors, it explains how the sentence’s component parts promote the sentencing objectives. *State v. Gallion*, 2004 WI 42, ¶46, 270 Wis. 2d 535, 678 N.W.2d 197. Proper sentencing objectives include protection of the public, punishment, rehabilitation, and deterrence. *Id.*, ¶40. “Sentencing decisions are afforded a presumption of reasonability consistent with Wisconsin’s strong public policy against interference with a circuit court’s discretion.” *State v. Harris*, 2010 WI 79, ¶3, 326 Wis. 2d 685, 786 N.W.2d 409.

¶7 However, a court erroneously exercises its discretion when it “imposes its sentence *based on* or in *actual reliance upon* clearly irrelevant or improper factors.” *Id.*, ¶30. A defendant bears the burden to prove actual reliance by clear and convincing evidence. *Id.*, ¶34. This requires evidence indicating that it is highly probable or reasonably certain that the circuit court actually relied on an improper factor. *Id.*, ¶35.

¶8 Burrill explains, “Because the circuit court denied ... Burrill’s request to present evidence showing that COMPAS risk scores are an improper sentencing factor, this appeal focuses solely on the question whether the court

‘actually relied’ on the risk scores for its sentencing decision.” We therefore need not address whether, in the first instance, a COMPAS report constitutes an improper sentencing factor.

¶9 Burrill argues the court referenced an “improper factor in its sentencing statement ... [and] specifically linked that factor to its decision to imprison him.” His argument flows from the court’s statement, “We know from this presentence report the COMPAS evaluation that was performed on you said your recidivism rate is high. That’s the reason you are going to prison today, among others that I have already mentioned” Further, Burrill emphasizes the rule that a sentencing court’s after-the-fact assertion of nonreliance is not dispositive of the issue of actual reliance. *See State v. Travis*, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491.

¶10 At first blush, Burrill’s actual-reliance argument appears persuasive. However, “[o]ur obligation is to review the sentencing transcript as a whole, and to review potentially inappropriate comments in context.” *Harris*, 326 Wis. 2d 685, ¶45. Burrill’s proffered statement lacks critical context in two respects.

¶11 First, the single reference to COMPAS did not occur until *after* the court had already pronounced the sentence on all four counts. Prior to pronouncing the sentence, the court engaged in a thorough, reasoned discussion of the factors it relied upon. The overarching theme of the court’s sentencing rationale was that Burrill had repeatedly demonstrated he was unable to control his behavior. Immediately before pronouncing the sentence, after recounting specific behaviors, the court summarized its rationale as follows:

These are other things that tell me you are totally out of control and that the only way that your behavior will be

controlled is by getting your rehabilitation in a confined setting.

I do find that the criteria for confinement are met here. Your character is one of a repeat criminal, continued thievery and operating [an] auto without owner's consent; and you are a danger to the public to commit these offenses if put back in the community soon. Rehabilitation has been tried in the community. You have not yet availed yourself of that. Finally, to impose probation in this case would seriously depreciate the gravity of your offense and the harm that you have caused.

Thus, the court demonstrated a proper exercise of discretion by explaining the relevant facts and factors it relied upon and then pronouncing the sentence. It was only after this occurred that the court mentioned the COMPAS report one time in passing. As the court observed at the postconviction motion hearing, "So I went ahead and I sentenced [Burrill] and then and only then, ... when I was speaking about the Challenge Incarceration Program" was the COMPAS mentioned.

¶12 This brings us to the second component of context that is lacking from Burrill's proffered statement. Specifically, Burrill ignores the context in which the COMPAS report was mentioned. After pronouncing the sentence, the court found Burrill eligible for both the Challenge Incarceration Program (CIP) and the Substance Abuse Program. It then told Burrill, "That's very important, Mr. Burrill, because of this. Those are both very good programs. You will be able to earn your way out of prison sooner than you might get out" The court then engaged in a brief discussion about sentence credit, and awarded credit. The court then returned to its earlier focus on the prison programs and counseled Burrill as follows:

You should pay very close attention to your ability to get into one of those programs I have just mentioned. The [CIP] is the Boot Camp Program, which has ... rehabilitation components being drug and alcohol treatment and coping mechanisms, cognitive thinking. In either one

of these programs you have to, No. 1, admit you've got a drug problem. You have to certainly admit that and admit you want help. Those are not easy programs. You wash out from them and you spend the entire time in prison.

The recidivism rate—We know from this presentence report the COMPAS evaluation that was performed on you said your recidivism rate is high. That's the reason you are going to prison today, among others that I have already mentioned; but you can cut that down, Mr. Burrill, by successfully completing one of these programs. The statistics prove that out, but you have to want that and you have to want to change your life and you have to want to work hard at it, Mr. Burrill.

I hope you do because I have seen people that have come out of both of these programs. I have performed wedding ceremonies for graduates of these programs that I sent to prison because they, in fact, appreciated that they needed help and they needed to change their life and they did. They were very successful. You can do that, Mr. Burrill. I hope that you want to.

¶13 It is apparent that the sole reference to COMPAS was part of the court's attempt to motivate Burrill to better himself by engaging in the programs made available to him.¹ Further, the statement, "That's the reason you are going to prison today," could reasonably be interpreted as referring back only to Burrill's high risk of recidivism, as opposed to the implication that the COMPAS report was what informed the court of such a risk.

¶14 Indeed, at the postconviction hearing, when addressing the second quoted paragraph, the court explained, "The point that I was attempting to make there was that the recidivism rate for people who succeed in one of these programs

¹ Burrill participated in and successfully completed the Challenge Incarceration Program. At the postconviction hearing, the court told Burrill it hoped he would be released to extended supervision within a few days.

is less. The recidivism rate is lower than those people coming out of the general population” Further, the court explained:

I referred to the COMPAS, but I didn’t use it as proof of his recidivism rate. That proof was already spelled out in detail in this sentence before I ever got to page 25.

I found on this record long before that that Mr. Burrill was a grave danger to reoffend in this present state and, therefore, that’s why it is totally irrelevant, because I did not use the COMPAS for that purpose[,] but it certainly showed something that I had already found, that his recidivism rate was high.

¶15 Considering the circuit court’s statement in context, we conclude Burrill failed to demonstrate it was highly probable or reasonably certain that the court actually relied on the COMPAS report when imposing sentence.² *See Harris*, 326 Wis. 2d 685, ¶¶34-35.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

² Our analysis of whether the court actually relied on the COMPAS report should not be interpreted as an acknowledgement or suggestion that it would be improper to consider COMPAS reports when imposing a sentence. We simply do not reach that issue.

