**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

November 22, 1995



**No. 94-2498-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**CHARLES A. BELL,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Rock County: J. R. LONG, Judge. *Affirmed*.

Before Eich, C.J., Sundby and Vergeront, JJ.

VERGERONT, J. Charles Bell was convicted of delivery of cocaine within one thousand feet of a school;[1] possession of cocaine with intent to deliver within one thousand feet of a school;[2] possession of

[1] Sections 161.41(1)(c)1 and 161.49(2)(a), STATS., 1991-92.

[2] Sections 161.41(1m)(c)1 and 161.49(2)(a), STATS., 1991-92.

tetrahydrocannabinols (THC) with intent to deliver within one thousand feet of a school;[3] and felony bailjumping.[4] The trial court sentenced Bell to five years on each of the cocaine convictions, to be served consecutively, and three years on the THC conviction, to be served concurrently with the first two sentences. The court withheld sentence on the bailjumping conviction and placed Bell on five years' probation consecutive to any other sentence.

Bell contends that he is entitled to a new trial because he was denied effective assistance of counsel and because the trial court impermissibly limited cross-examination of a witness in violation of his state and federal constitutional rights to confrontation. He also contends that punishment for the felony bailjumping charge constitutes double jeopardy. Finally, he challenges his sentence as excessive. We reject each of these arguments and affirm.

## BACKGROUND

The incident giving rise to the drug charges occurred while Bell was released on a recognizance bond after being charged with child abuse in violation of § 948.03(2)(b), STATS.[5] The drug charges and the bailjumping charge were tried together.

Valerie Herron was a witness for the State. She testified that she was a dancer at a tavern where Bell was a customer one afternoon. She did not remember having seen him before. Bell asked her if she did "cola" and she said she did not. Bell put a dollar in the front of her costume and then later put a rolled-up dollar in the back of her costume, telling her there was a surprise for her in it. That was the only dollar in the back of her costume. When she returned to her dressing room she found, in the dollar stuck in the back of her costume, a corner of a baggie with "white powdery stuff" in it. She gave the baggie to the manager, who gave it to the owner.

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[3] Sections 161.41(1m)(h)1 and 161.49(2)(b), STATS., 1991-92.

[4] Section 946.49, STATS., 1991-92.

[5] The child abuse charge, a felony, was subsequently amended to a charge of misdemeanor battery under § 940.19(1), STATS., and Bell pleaded no contest to that charge.

The owner gave the baggie to Greg Groves, a Town of Beloit fireman who was at the tavern. Groves telephoned Town of Beloit policeman Willis Abbeglen, who came to the tavern with another officer, James Driscoll.

Driscoll testified that after he and Abbeglen arrived at the tavern and Groves gave him the baggie, he and Abbeglen asked Bell to step outside with them. Both Driscoll and Abbeglen testified that Bell's right hand was clenched and they saw a plastic baggie sticking out from Bell's right hand fingertips. Driscoll testified that he asked what was in Bell's hand and Bell replied that it was money. Driscoll asked to see it and when Bell did not respond, a struggle ensued. Both Driscoll and Abbeglen testified that during the struggle Bell put his right hand under a table. Abbeglen testified that as he grabbed Bell's arm, Bell gave a forward jerking motion with his arm. When Abbeglen pulled Bell's arm out from under the table and examined his right hand, he did not see anything in his hand.

Driscoll testified that he and Abbeglen then handcuffed Bell. As they were doing so, they saw a patron pick up a baggie from the floor under the table and place it on the table. The baggie contained five smaller bags with white powder and five more bags with a green leafy substance. The owner testified that he also saw a patron retrieve a package of white powder and put it on the table.

Driscoll testified that later that evening jail personnel recovered a thumb scale and $605 from Bell.

Driscoll and Detective Orville Kreitzmann, Jr., with the Special Operations Bureau on Drug Trafficking in the City of Beloit, both testified that scales of the type retrieved from Bell are used to weigh amounts of drugs quickly.

Guang Zhang of the Wisconsin State Crime Lab testified that the package of white powder contained cocaine. Five of the baggies retrieved by the patron from under the table contained cocaine; and the five baggies of leafy green substance, similarly identified by Driscoll, contained THC, the substance in marijuana.

Bell testified in his defense. He disputed the accounts of Herron, the owner, Driscoll and Abbeglen. According to Bell, he did not put any cocaine in the dollar bill that he put in Herron's costume and did not bring any cocaine or marijuana to the tavern that evening. He testified that he knew Herron and was having a sexual relationship with her, and she might have set him up because her boyfriend was upset over Bell's relationship with her. He explained the thumb scale as follows:

> This thing--this thing right here is something that I have a mailman that--I have a friend that's a mailman, and this right here was broke. He gave it to me, and Officer Kreitzmann, I believe that's his name, he fixed it up to some kind of deal for it to be a scale or some sort--I had this originally on my key ring you know.

Defense counsel, in cross-examination and argument, focused on the number of persons who had handled the baggie that Herron testified she found, other chain-of-evidence issues, the lack of fingerprints tying Bell to any of the baggies, the circumstantial nature of the evidence against him, and the sufficiency of the evidence of intent to deliver rather than simply possession.

The jury found Bell guilty on all four counts. Bell was sentenced to five years in prison on each of the two cocaine convictions to be served consecutively. On the THC charge, he was sentenced to three years to be served concurrently with count two but consecutively to count one. Sentence was withheld on the felony bailjumping conviction and Bell was placed on probation for five years, consecutive to counts one and two.

Bell moved for a new trial on the grounds that trial counsel was deficient for failing to move to sever the felony bailjumping charge and failing to request a cautionary instruction that the evidence on the bailjumping charge should not be used to determine guilt on the drug charges. He also asserted that his Sixth Amendment right to confrontation of witnesses was violated by the trial court's limitation of his counsel's cross-examination of Driscoll. Bell's motion also requested that the judgment of conviction on the bailjumping charge be vacated on double jeopardy grounds.

After an evidentiary hearing, the trial court denied Bell's motion. It concluded that no prejudice resulted from trial counsel's failure to seek a severance and request a cautionary instruction. It also concluded that trial counsel had ample opportunity to cross-examine Driscoll, and that Bell was not subject to double jeopardy.

Bell also moved to modify his sentence. That motion was denied.

## INEFFECTIVE ASSISTANCE OF COUNSEL

In order to prevail on a claim for ineffective assistance of counsel, Bell has the burden of proving that trial counsel's performance was deficient and that the deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). Prejudice occurs when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***Strickland***, 466 U.S. at 694. We reject an ineffective assistance claim if the defendant fails to satisfy either element. ***Johnson***, 153 Wis.2d at 128, 449 N.W.2d at 848.

The trial court's determinations of what the attorney did and did not do, and the basis for the challenged conduct, are factual and will be upheld unless clearly erroneous. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. The ultimate determinations of whether counsel's performance was deficient and prejudicial to the defense are questions of law that this court reviews independently. ***Id.*** at 128, 449 N.W.2d at 848.

Bell asserts that his trial counsel was deficient because he failed to move the court to sever the felony bailjumping charge from the drug charges and try that charge separately. Alternatively, Bell contends his trial counsel should have moved to strike the reference in the information to child abuse[6] as

[6] While defense counsel did not file a motion to modify the wording of the information, he did ask the court to omit reference to child abuse when it read the information because the reference to child abuse was prejudicial to Bell. This occurred after the court had read the information the first time, at the beginning of *voir dire*. The prosecutor argued against the request and the court decided it would read the information without any changes.

the predicate felony for the bailjumping charge, or requested the court to give WIS J I—CRIMINAL 275, the cautionary instruction relating to evidence of other acts. Reference to the charge of child abuse, Bell contends, prejudiced his defense on the drug charges. We do not decide whether there was deficient performance because we conclude that there is no reasonable probability that the outcome on the drug charges would have been different had trial counsel taken the steps Bell claims he should have taken.

There was no evidence presented at trial concerning the child abuse charge except the stipulation of facts agreed to by counsel and read to the jury by the court. The stipulation avoided referring to child abuse and instead described the charge simply as a felony:

> That on October 28th, 1991, the defendant, Charles A. Bell, had a personal recognizance bond that remained in full force and effect, which bond had previously been set in a criminal case on October 8, 1991, in the circuit court of Rock county. It is further stipulated that said bond contained as a condition the condition that the defendant was not to commit any crime. It is further stipulated that the defendant was charged with a felony at the time of his release on bond on October 8, 1991, and that felony charge was still pending on October 28, 1991.

The prosecutor did not mention to the jury that the prior felony charge was for child abuse. The trial court did refer to the child abuse charge when it read the information, which it did at the beginning of *voir dire*, at the beginning of the trial and before instructing the jury. The trial court described count four as follows:

> And a fourth charge that on the 28th day of October, 1991, at the Town of Beloit in Rock County, the defendant, Charles A. Bell, having been charged with the commission of a felony, to wit: child abuse, and having been released from custody pursuant to Chapter 969, to wit: having signed a $5,000 recognizance bond on October 8, 1991, with the

> condition he not commit any new crimes, did intentionally and feloniously fail to comply with the terms of his bond, contrary to Section 946.49, subsection (1), subsection (b) of the Wisconsin Statutes.

After reading the information to the jury at the beginning of the trial, the court instructed the jury that it could only consider evidence in reaching its verdict, and that there are only two kinds of evidence: witness testimony and exhibits received into evidence. After reading the information to the jury when charging the jury, the court instructed that the information was not evidence and did not raise any inference of guilt. Neither the jury instructions nor the special verdict question on the felony bailjumping count referred to child abuse.

Bell contends that prejudice resulted from the reading of the information three times to the jury, as demonstrated by the comments of one juror in *voir dire*. The court asked whether any juror felt he or she could not be impartial. Juror Noll answered that because she is a registered nurse, she is very uncomfortable with drugs. Moreover, because she was abused as a child, it would be difficult for her to listen to evidence of child abuse. The court stated that it would leave it up to her whether she could be impartial. Juror Noll then said that if child abuse was not dealt with in detail, she could be impartial, but if there were any specific detail, she "would have a real problem." After the prosecutor stated that, "We aren't going into that [child abuse] at all, Judge, in this case," Noll stated that she could be unbiased.

Juror Noll's comments are insufficient to persuade us that, had the information not contained the words "child abuse," the outcome on the drug charges would have been different. We reach this conclusion in light of the prosecutor's response to Noll's statement, the court's instructions to the jury, the lack of any evidence on child abuse presented during the trial, and the strength of the evidence against Bell on the drug charges. We have reviewed the record carefully and, like the trial court, we are convinced that the jury convicted Bell on the drug charges because it found his testimony incredible and found the testimony of the State's witnesses credible.

## RIGHT TO CROSS-EXAMINATION

Bell contends that his state and federal constitutional rights of confrontation were violated because the trial court sustained an objection to a question asked on cross-examination of Officer Driscoll.[7] To resolve this argument, it is necessary to consider Driscoll's testimony in more detail.

On direct examination, Driscoll testified that jail personnel had recovered a thumb scale from Bell and that he (Driscoll) had seen scales like that before. When the prosecutor asked whether, based on his training and experience, he knew whether such scales are used in drug transactions, Driscoll answered that they are used to weigh drug material. At that point defense counsel objected, "unless [the prosecutor] is prepared to stipulate that he has expertise for drug transactions or drug trafficking." The trial court overruled the objection and permitted the answer to stand, saying that defense counsel could cross-examine on this point.

On cross-examination, defense counsel questioned Driscoll at length about his training and experience in drug enforcement. With respect to the scale, this was the cross-examination:

Q Now, you're saying that this scale is sometimes used in drug transactions?

A Yes, sir.

Q Now, is that scale an operable scale? Does it work?

A It appears to be a spring or a pointer missing. Something's not here. I don't know what it is.

Q Can you indicate to the jury how that scale operates?

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[7] The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." By virtue of the Fourteenth Amendment, that right is applicable in criminal prosecutions by the State. Article I, section 7 of the Wisconsin Constitution essentially provides the same right. *See* ***State v. Lindh***, 161 Wis.2d 324, 346, 468 N.W.2d 168, 175 (1991).

A There should be a piece of metal here that you hold this thumb scale with and a pointer that points to how much material that's clipped here would weigh.

Q So that scale was retrieved from Mr. Bell; is that correct?

A Yes, sir.

Q So whatever was retrieved from him, when it was retrieved it's not even working, is it?

A No, sir.

Q Now, is it your testimony here today that drug dealers normally have scales not working?

A Norm -- No.

Q Now, do you -- Are you testifying here today that there is a connection between that scale and the possession by Mr. Bell to indicate that he's in drug dealing?

[PROSECUTOR]: Objection, Judge. Again, that is for the jury to decide, not the officer or the witnesses, that determination.

[DEFENSE COUNSEL]: This is cross-examination.

THE COURT: Just a minute.

[PROSECUTOR]: Your Honor, it may be cross-examination --

THE COURT: All right. Just a minute. I understand your position. The objection is sustained.

[DEFENSE COUNSEL]:

Q Is it your testimony here today that if one has $600 or $605 on him, then that means they're in -- involved in drug transactions?

A No, sir.

Q So there are a lot of people that may -- there are other people that may have $600 on them and also not in drug transactions; is that correct?

A Yes, sir.

Bell argues that because the trial court sustained the objection to his counsel's question on the connection of the thumb scale to Bell's alleged drug dealing, he was deprived of the opportunity to cross-examine a key witness on a key issue.

The essential purpose of the confrontation clause is to secure for the opponent the opportunity for cross-examination. ***Lindh***, 161 Wis.2d at 346, 468 N.W.2d at 175. The right to examine adverse witnesses is not absolute, however, because the confrontation clause "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish." ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original). As long as the defendant is guaranteed the opportunity for effective cross-examination, the trial court retains broad discretion in placing reasonable limits on cross-examination. ***United States v. Sasson***, 62 F.3d 874, 882 (7th Cir. 1995).

Ordinarily we review trial court rulings regarding the scope of cross-examination to determine if there was an erroneous exercise of discretion. ***Lindh***, 161 Wis.2d 348-49, 468 N.W.2d at 176. However, when limitations directly implicate the constitutional right to confrontation, our review is de novo. ***Sasson***, 62 F.3d at 882. In considering a constitutional challenge to a limitation on cross-examination, we must therefore "distinguish between the core values of the confrontation right and the more peripheral concerns that remain within the ambit of the trial judge's discretion." ***Sasson***, 62 F.3d at 882 (quoting ***United States v. Saunders***, 973 F.2d 1354, 1358 (7th Cir. 1992), *cert.*

*denied*, 113 S. Ct. 1026 (1993)).[8] We conclude the trial court's sustaining of the objection to the question asked of Driscoll did not implicate Bell's constitutionally-protected right of cross-examination.

Since Driscoll testified on direct examination that, based on his experience, scales of the type recovered from Bell were used to weigh drugs, Bell was entitled on cross-examination to question Driscoll about the basis for this observation. He was entitled to probe Driscoll's experience in drug enforcement and with drug transactions, and he was allowed to do so. He was also entitled to question Driscoll about the operability of the scale recovered from Bell in an effort to show that it could not function to weigh drugs. He was allowed to do so. But the question to which the prosecutor objected asked something different. It asked whether Driscoll thought there was a connection between Bell's possession of the thumb scale and Bell's alleged drug dealing. Apparently the prosecutor thought Driscoll should not be permitted to give his opinion as to whether Bell used the scale to weigh drugs because that was for the jury to decide. The trial court agreed. Apparently Bell's trial counsel understood the objection was to the question being phrased specifically in terms of Bell. His next question, with respect to the money recovered from Bell, asked about the connection of that amount of money to drug transactions in general, not to whether the money showed that Bell, in particular, sold drugs.

The objection sustained by the court did not prevent defense counsel from questioning Driscoll further about the connection between the scales and drug dealing in general, which defense counsel had already done. Bell does not explain why the single question objected to was significant to his defense or what other questions or areas of inquiry were foreclosed by the trial court's ruling. We fail to see how the ruling on this one question limited in any significant way his opportunity to show weaknesses in Driscoll's testimony that scales of this type are used to weigh drugs.[9]

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[8] We do not understand ***State v. Lindh***, 161 Wis.2d 324, 468 N.W.2d 168 (1991), to hold otherwise. The supreme court in ***Lindh*** held that the trial court's decision not to permit evidence of sexual misconduct allegations against the State's witness, a psychiatrist, was not an erroneous exercise of discretion. ***Lindh***, 161 Wis.2d at 362, 468 N.W.2d at 182. We understand the court's holding to imply that the trial court's decision did not implicate the core values of the confrontation right.

[9] Bell states in his brief that the trial court "conceded" at the postconviction hearing that

## DOUBLE JEOPARDY

Bell contends that the prosecution for bailjumping constitutes double jeopardy because he had already been prosecuted on the child abuse charge. Both the United States and Wisconsin Constitutions[10] protect against a second prosecution for the same offense after either acquittal or conviction, and against multiple punishments for the same offense. ***State v. Kurzawa***, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717, *cert. denied*, 114 S. Ct. 2712 (1994). Bell relies on ***United States v. Dixon***, 509 U.S. ___, 113 S. Ct. 2849 (1993), in arguing that the subsequent prosecution for felony bailjumping is barred because he has already been punished for the offense that occasioned the bond--felony child abuse (reduced to misdemeanor battery). We reject this argument and conclude that Bell was not subject to double jeopardy.

Whether a defendant's double jeopardy rights are violated is a question of law, which we review de novo. ***State v. Harris***, 190 Wis.2d 719, 723, 528 N.W.2d 7, 8 (Ct. App. 1994).

In ***Dixon***, one of the respondents had been tried and convicted of criminal contempt for violating a court order that he not commit any criminal offense while released on bond. When he was later prosecuted for possession of cocaine with intent to distribute, an offense committed while he had been released on bond, he challenged the second prosecution on double jeopardy grounds. The court decided that the court order had incorporated the entire criminal code and the drug offense that violated the court order was a "species of lesser-included offense." ***Dixon***, 509 U.S. at ___, 113 S. Ct. at 2857. Therefore,

(..continued)

the question was a proper one. We note that this is not an accurate account of what the trial court said. The court stated that the objection "might have been to a proper question." But the court did not decide whether the question was proper because it concluded that Bell had ample opportunity for cross-examination. Because we have decided that the trial court's ruling did not implicate Bell's right of cross-examination, we need not decide whether the ruling was an erroneous exercise of discretion. We do not understand Bell to be making the argument that, even if the ruling did not violate his right to cross-examination, it was an erroneous exercise of discretion that requires reversal.

[10] The Fifth Amendment to the United States Constitution provides that no person may "be subject for the same offense to be twice put in jeopardy of life or limb." Article I, section 8 of the Wisconsin Constitution provides that no person "for the same offense may be put twice in jeopardy of punishment."

prosecution on the drug charge, after prosecution on the criminal contempt charge, constituted double jeopardy. ***Id.***

In ***State v. Harris***, we held that prosecution for bailjumping and for possession of cocaine, where possession of cocaine is the offense committed while released on bond, does not constitute double jeopardy. ***Harris***, 190 Wis.2d at 724, 528 N.W.2d at 9. We applied the "elements only" test of ***Blockburger v. United States***, 284 U.S. 299 (1932), and concluded that the charge of bailjumping and the charge of possession of cocaine each contained at least one element that the other charge did not. ***Id.*** We decided that ***Dixon*** was not controlling for several reasons, including the distinction that ***Dixon*** involved successive prosecutions, whereas Harris faced a single prosecution with multiple counts. ***Id.*** at 725-26, 528 N.W.2d at 9.

Bell apparently recognizes that under ***Harris***, prosecutions on the bailjumping charge and the drug charges do not subject him to double jeopardy. However, he argues that because the prosecution on the child abuse charge and the prosecution on the bailjumping charge were successive prosecutions, ***Dixon*** applies to prohibit the later prosecution on the bailjumping charge.

***Dixon*** does not support Bell's position. The ***Dixon*** court concluded that the subsequent prosecution of a drug charge was barred by double jeopardy because of its determination that the drug charge was a lesser-included offense of the violation of the court order prohibiting commission of any crime. The bailjumping charge against Bell is not a lesser-included offense of the child abuse charge. Indeed, Bell does not even make this argument.

Since the bailjumping charge is not a lesser-included offense of the child abuse charge, we apply the ***Blockburger*** test to determine whether either offense contains an element that the other does not. ***Kurzawa***, 180 Wis.2d at 524, 509 N.W.2d at 721 (under ***Blockburger***, the State cannot successively prosecute a defendant for two offenses unless each offense necessarily requires proof of an element the other does not; under ***Dixon***, the State cannot prosecute an offense whose elements are "incorporated" into elements of an offense already prosecuted). The elements of bailjumping as applicable to this case are: (1) the defendant has been arrested for, or charged with, a felony; (2) the defendant has been released from custody on a bond under conditions

established by the trial court; and (3) the defendant has intentionally failed to comply with the conditions of the bond. *See* § 946.49(1)(b), STATS.; ***State v. Dawson***, 195 Wis.2d 161, 170-71, 536 N.W.2d 119, 122 (Ct. App. 1995). The elements of the child abuse charge are: (1) the defendant caused bodily harm; (2) to a person under the age of eighteen; and (3) the defendant intentionally caused such harm. Section 948.03(2)(b), STATS.; WIS J I—CRIMINAL 2109. Each of these offenses contains an element not contained in the other, satisfying the ***Blockburger*** "elements only" test.

When the "elements only" test is satisfied, a presumption arises that multiple punishments are allowed. ***Harris***, 190 Wis.2d at 724, 528 N.W.2d at 8. The defendant must prove a contrary legislative intent to overcome that presumption. ***Id.*** at 724, 528 N.W.2d at 8-9. Bell has made no argument and submitted no evidence of a contrary legislative intent. We conclude that the prosecution for bailjumping after the prosecution for child abuse did not subject Bell to double jeopardy.

## SENTENCE MODIFICATION

Bell argues that his sentence is unreasonably excessive and disproportionate to the crime he committed. Bell characterizes the crime as giving a small amount of cocaine to a dancer and having a small amount of cocaine and THC on his person. He points out that this is one incident, no sale was involved, and although the offense occurred within 1,000 feet of a school, it did not occur in an area frequented by children. Bell also notes that the presentence report recommended five years on each of the cocaine charges, to be served concurrently rather than consecutively. The sentence imposed by the court, Bell asserts, will require him to serve at least six years in prison before he is eligible for parole.[11]

Sentencing is committed to the sound discretion of the trial court, and our review is limited to determining whether there has been an erroneous

[11] Section 161.41(1)(c)1, STATS., 1991-92, provides for a prison sentence not to exceed five years. Section 161.41(1m)(c)1, 1991-92, provides for a sentence not to exceed five years. Section 161.41(1m)(h)1, 1991-92, provides for a sentence not to exceed three years. Section 161.49, STATS., provides for enhanced penalties for violations that occur within 1,000 feet of a school.

exercise of that discretion. ***McCleary v. State***, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971). An erroneous exercise of discretion is demonstrated when the record shows that a decision was made without the underpinnings of explained judicial reasoning; the sentence was based on clearly improper factors; or when the record is so disproportionate as to shock the conscience. ***State v. Wickstrom***, 118 Wis.2d 339, 354-55, 348 N.W.2d 183, 191 (Ct. App. 1984).

The primary factors a court must consider in fashioning a sentence are the gravity of the offense, the character of the offender and the need for public protection. ***McCleary***, 49 Wis.2d at 276, 182 N.W.2d at 519. The court may also consider, among other things, the defendant's criminal record; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; degree of culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the need for close rehabilitative control; the rights of the public; and length of pretrial detention. ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178, *cert. denied*, 115 S. Ct. 641 (1994). The weight to be given each factor is within the discretion of the trial court. ***Wickstrom***, 118 Wis.2d at 355, 348 N.W.2d at 192.

Bell concedes that the trial court gave its reasoning for the sentence imposed. The record also shows that the court considered the three primary factors and other proper factors. It did not consider any improper factors.

Specifically, the court went over with Bell the information in the presentence report--including his past criminal record, his personal and social history, and his alcohol and drug abuse problem--to make sure it was accurate. In imposing the sentence, the court explained that it was considering the defendant's extensive prior criminal history beginning when he was a juvenile; his age of twenty-eight years; his limited education; his employment history, which the court said demonstrated that he could be a good worker and support his family; his undesirable behavior patterns, as demonstrated by his criminal record; his personalty, which the court considered anti-social as demonstrated by his record; his lack of character as demonstrated by his failure to change his conduct; the serious nature of his crime, in that drug trafficking, in the court's view, is the most serious problem our society faces; the fact that there was no doubt about his guilt; his need for rehabilitation and treatment in a closed environment; and the rights of the public to be protected from his criminal

conduct. The court rejected probation because confinement was necessary to protect the public from further criminal activity by him; because the treatment he needed could be more effectively provided if he were confined; and because of the serious nature of the crime.

We conclude the sentence imposed by the court is not unreasonably excessive or disproportionate to the crime committed. The trial court could reasonably consider drug trafficking as a serious crime. Bell was convicted of delivery on one count and possession with intent to deliver on two other counts. That is fairly characterized as drug trafficking, notwithstanding Bell's point that no sale, meaning drugs exchanged for money, took place. The trial court could also reasonably conclude that, given Bell's many prior convictions and the failure of prior supervision and prior probations to bring about a change in his behavior, a substantial prison term was needed both to protect the public from continued criminal acts and to change Bell's behavior.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.