COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1206-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE ANTON JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Lee Anton Jackson appeals from a judgment of conviction and a postconviction order denying his motion to vacate a portion of his sentence. The issue is whether the trial court's explanation for the length of the sentence it imposed impermissibly enhanced Jackson's sentence, or demonstrated a proper exercise of discretion. We conclude that the trial court's

explanation of how it attributed certain portions of the sentence to certain legal factors demonstrates a proper exercise of discretion. Therefore, we affirm.

Jackson entered a no contest plea to burglary, as a habitual criminal, contrary to §§ 943.10(1)(a) and 939.62, STATS. The trial court withheld sentence and imposed a ten-year term of probation. Subsequently, the State revoked Jackson's probation and he returned to court for sentencing. At sentencing, the judge said:

> I am going to structure a sentence which is a total of four years; three years on the burglary charge and an additional year as a repeater. Those are not separate sentences. That is one sentence, but I want [Jackson] to know what is factored into this in terms of [the court's] thinking.

However, the judgment of conviction did not reflect that the trial court had imposed a unitary sentence. Instead, the judgment of conviction described the sentence as "3 years + one year consecutive for repeater."

By postconviction motion, Jackson challenged the fourth year of his sentence. Because the trial court did not impose the maximum sentence for the underlying crime,[1] it is impermissible for the court to add a one-year enhancer for habitual criminality. *See* § 939.62(1), STATS.; ***State v. Harris***, 119 Wis.2d 612, 619, 350 N.W.2d 633, 637 (1984). The trial court denied the motion and explained that "[i]t never mentioned the repeater statute. It [considered Jackson's] criminal history and referred to it in a shorthand sense in terms of repeater." Jackson appeals and urges this court to vacate one year of his four-year sentence.

[1] Ten years is the maximum sentence for a burglary conviction. *See* §§ 943.10(1)(a) and 939.50(3)(c), STATS.

The trial court is obliged to exercise its discretion when it imposes sentence. *See, e.g.,* ***State v. Krueger,*** 119 Wis.2d 327, 336, 351 N.W.2d 738, 743 (Ct. App. 1984). "A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***LaRocque v. LaRocque,*** 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987) (citations omitted). "There should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth." *See* ***Krueger,*** 119 Wis.2d at 336, 351 N.W.2d at 743 (citation omitted). "An [erroneous exercise] of discretion might be found if the trial court failed to state on the record the material factors which influenced its decision." *See* ***id.*** at 337, 351 N.W.2d at 744.

At sentencing, the trial court considered the primary sentencing factors—the seriousness of the offense, the character of the offender, and the need for public protection.[2] *See* ***State v. Larsen,*** 141 Wis.2d 412, 427, 415 N.W.2d 535, 541 (Ct. App. 1987). It addressed Jackson's character and emphasized that "Mr. Jackson hasn't learned."

> [H]e has not distanced himself from criminal activity, and it seems to [this court] that with respect to his character, both his previous convictions, the violations of his probation, and the pending charges, suggest that he does present a high degree of dangerousness, and that reflects poorly on his character."

[2] The trial court's discussion of the seriousness of the offense is not relevant to the issue raised on appeal.

The trial court also addressed the public's need for protection and explained "that [Jackson] was deserving of punishment and substantial punishment because he was a repeat offender and he hadn't learned...."

The appellate court also may consider the trial court's postconviction remarks as an amplification of how it exercised its sentencing discretion. *See* ***State v. Wuensch***, 69 Wis.2d 467, 480, 230 N.W.2d 665, 672-73 (1975). At the postconviction hearing, the trial court elaborated that its reference to Jackson as a repeater was merely "a shorthand sense" of referring to his criminal history and the need for public protection. The court explained that it considered his past criminal history and his "bad character" to "deter him personally in continuing a criminal course of conduct." The court then "suggested ... that his penalty was being increased because of his criminal history." Although the trial court explained that it thought that at sentencing it had "ma[d]e [its] intent perfectly clear ... it was translated out of context in the judgment of conviction."

We conclude that the trial court's explanation of why it decided to impose a four-year sentence was a proper exercise of discretion, not an attempt to enhance the sentence under the repeater statute. *Accord* ***State v. Vinson,*** 183 Wis.2d 297, 315, 515 N.W.2d 314, 321-22 (Ct. App. 1994) (we will not reverse under § 939.62, STATS., (the repeater statute) or ***Harris*** when the trial court "clarifie[s] its intention" that it was not imposing a repeater enhancement). The trial court considered Jackson's history as a habitual offender as a reason to impose a lengthier sentence, without doing so under the repeater statute. Although the clerk's notations on the judgment of conviction arguably denote the imposition of an illegal sentence, the trial court's remarks at the postconviction hearing clarified any doubt as to why it imposed a four-year sentence. It explained that three years were imposed for the burglary, but that imposition of a lengthier

sentence was warranted by Jackson's criminal history and the attendant need for public protection. We conclude that the trial court's explanation demonstrates a proper exercise of discretion. *See* ***Vinson,*** 183 Wis.2d at 315, 515 N.W.2d at 321-22.

By the Court.—Judgment and order affirmed.

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