COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2064-CR **Cir. Ct. No. 02CF003024**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TREMELL JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Tremell Jackson appeals from a judgment convicting him of one count of armed robbery by threat of use of a dangerous weapon, as a party to the crime, and one count of bail jumping, in violation of

WIS. STAT. §§ 943.32(2), 939.05, and 946.49(1)(a) (2001-02).[1] He also appeals from an order denying his motion for postconviction relief. Jackson contends that the trial court: (1) erred in not permitting him to withdraw his guilty plea prior to sentencing; and (2) erroneously exercised its sentencing discretion. Because the trial court properly denied Jackson's motion to withdraw his guilty plea and properly exercised its sentencing discretion, we affirm.

I. BACKGROUND.

¶2 On June 1, 2002, Milwaukee police were dispatched to investigate a carjacking. The victim told police that two unknown males approached his car while he was stopped at an intersection. One pointed a gun at him, through the open driver's side window, and ordered him out of the car. The victim complied, and after a physical scuffle during which the victim managed to stab one of the assailants, the two males fled the scene in the stolen car.

¶3 The next day, a Milwaukee police officer saw three males in the stolen car. The officer attempted to apprehend them after the three fled the car, but was only able to stop one. The apprehended individual told the officer that Jackson was one of the men that fled. After Jackson was apprehended, the officer identified him as one of the individuals he observed in the stolen car. The victim

[1] The bail jumping charge, according to the transcripts of the plea hearing, should be listed as a violation of WIS. STAT. § 946.49(1)(a). As the judgment roll erroneously lists a WIS. STAT. § 946.49(1)(b) felony bail jumping charge, on remittitur we direct the clerk to amend the judgment to reflect the appropriate convictions.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

also subsequently picked Jackson out of a line-up as the man who pointed the gun at him and ordered him out of the car.

¶4 On the date of the final pretrial, Jackson decided that he did not want to accept the reduced recommendation and the case remained set for trial. As defense counsel was leaving the courtroom, he was summoned by the bailiff who informed him that Jackson wanted to speak with him. Jackson indicated that he did want to plead guilty, and defense counsel attempted to contact the assistant district attorney, who had already left. The prosecutor subsequently returned to the courtroom and the plea hearing took place.

¶5 As a result of the plea negotiations, Jackson pled guilty to one count of armed robbery and one count of bail jumping,[2] with the count of operating a motor vehicle without the owner's consent being dismissed and read in for sentencing purposes. The State recommended eight years of initial confinement, followed by ten years of extended supervision on the first count. The State also recommended several conditions for the extended supervision. After conducting a plea colloquy with the defendant, the trial court accepted the guilty pleas.

¶6 After receiving the presentence investigation report, which indicated that Jackson felt that he was coerced into pleading guilty, defense counsel visited Jackson at the House of Correction and discussed the PSI with him. As a result, on October 1, 2002, the date set for sentencing, defense counsel informed the court that Jackson wished to withdraw his guilty plea. The State objected, and the trial court adjourned the sentencing in order to review the transcripts of the plea

[2] Jackson was charged with bail jumping because he was out on bail on another charge when he committed the crime.

hearing. The trial court allowed defense counsel to withdraw, and Jackson was appointed new counsel to allow him to file a written motion for plea withdrawal.

¶7 At the motion hearing, Jackson testified that he decided to plead guilty "[b]ecause [defense counsel] got mad at me because I wanted to go to trial and told me." He said that defense counsel swore at him and "convinced" him to plead guilty. He also essentially testified that he pled guilty because he did not know that he could have asked the court to appoint another lawyer, and defense counsel did not think he could win. On cross-examination, Jackson was asked to list all of the things that he thought defense counsel should have done for him. He said that there were "[a] lot of them," but only specifically discussed some photographs he claimed that defense counsel should have provided to him. He admitted that he never gave the trial court any indication during the plea hearing that he did not want to plead guilty.

¶8 Jackson's former defense counsel testified that he did, in fact, show Jackson the photographs prior to the final pretrial. He also testified that he filed a suppression motion on the basis of the line-up photos and felt that the photos of Jackson's stab wounds were "extremely damaging" to Jackson's defense, because the victim said that he stabbed his assailant during the carjacking and Jackson "had stab wounds consistent with what the witness described[.]" Defense counsel testified that he reviewed the details of the case with Jackson, and told him that the evidence against him was strong. He also "remember[ed] specifically telling him that when he was asking if he should take a deal or not was that if he did the crime, he should enter a plea[, but] if he didn't do it that he should go to trial." He testified that he was willing and prepared to go either way, and had given Jackson on honest assessment of his odds at trial. He also did not recall being angry or using foul language.

¶9 After hearing argument from both the State and Jackson's new defense counsel, the trial court denied his motion to withdraw. The trial court indicated that, according to the PSI, Jackson agreed to plead guilty "because he was facing so much time[,]" and decided to take the eight years recommended by the State. The trial court found that defense counsel "was in fact prepared for trial[,]" as evidenced by the motions filed in preparation for trial and the work he had done on the case. The trial court also found Jackson's explanation that he was coerced incredible:

> In terms of Mr. Jackson's rationale that he's stating that somehow that he was coerced, I just don't find it credible because he testified on the stand today that in essence he was not provided photos or that [defense counsel] failed to provide him with photos with respect to the stabbing. And [defense counsel] testified that – which I do find credible and consistent – that once he was made aware that these items did not exist, he wrote to the State indicating that the discovery was missing, that [defense counsel] in fact was provided these documents prior to the plea, because consistent with his motion, attached to that is at least the photo with respect to the line-up. So I know that the line-up photo was present prior to the taking of the plea.
>
> I just don't find that this defendant has articulated any fair and just reason other than a change of heart, and that in my mind, as well as in the case law, is not necessarily a basis to grant the defendant's motion to withdraw the plea.

The trial court also noted that, at the plea hearing, Jackson never indicated that he was coerced by or unsatisfied with his representation even after being specifically asked.

¶10 At sentencing, the trial court considered the PSI and argument from both the State and defense counsel. The trial court addressed the serious and violent nature of the offense and its impact on the victim; Jackson's extensive

criminal history, both as a juvenile and an adult; his drug and education issues; his "complete lack of concern for the rights and safeties of others"; and the public's need for protection. Jackson was sentenced to twenty years for the armed robbery, with ten years of initial confinement and ten years of extended supervision. The trial court recognized that the sentence exceeded the State's recommendation, but explained: "the court is not bound by that recommendation, and given the aggravated and aggressive nature in which this offense occurred, given your extensive record, this court finds that the term that I have imposed will address your treatment needs, and protection, and essentially retribution, that there needs to be punishment." Jackson was additionally sentenced to nine months of incarceration for the bail jumping count, to be served concurrently. The court also imposed several terms on Jackson's extended supervision.

¶11 Jackson filed a motion for postconviction relief asserting that the trial court erred in not permitting him to withdraw his guilty plea prior to sentencing; requesting sentence modification because the trial court failed to adequately explain the basis for its sentence; and arguing that the trial court erroneously exercised its discretion when it exceeded the recommendations of both the State and the PSI without adequate justification. The motion was denied, and Jackson now appeals.

II. ANALYSIS.

A. The trial court did not erroneously exercise its discretion in denying Jackson's motion to withdraw his guilty plea.

¶12 Jackson contends that the trial court applied the wrong legal standard when it denied his motion to withdraw his guilty plea prior to sentencing, and that he had a fair and just reason for the withdrawal of his plea. He insists that he

maintained his innocence, had no faith in his attorney, and was coerced into pleading guilty. He asserts that his change in answer, from "yes" to "yeah," when questioned regarding his guilt "reflects [his] ambivalence and reluctance to enter those pleas."[3] Jackson argues that his "quick turnabout" when he had been "insistent of his innocence" supports his "version" that he felt coerced into pleading guilty, and thus, his plea should be vacated. We are unpersuaded.

¶13 "Wisconsin precedent teaches that the criterion for withdrawal of a guilty plea prior to sentencing is whether [the] defendant has shown a fair and just reason for withdrawal." ***State v. Shanks***, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). The supreme court "has held that withdrawal of a guilty plea before sentencing is not an absolute right and that a 'fair and just reason' contemplates 'the mere showing of some adequate reason for defendant's change of heart.'" ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991) (citation omitted). The burden is on the defendant to show a fair and just reason, ***id.*** at 583-84, and "[w]hether a defendant's reason adequately explains his or her change of heart is up to the discretion of the [trial] court[,]" ***State v. Kivioja***, 225

[3] Curiously, a review of the record indicates that Jackson only responded "yeah" when questioned about his guilt in regard to the bail jumping charge, and not when questioned in regard to the armed robbery charge:

> THE COURT: Then at this time, Mr. Jackson, what is your plea to Count 1, armed robbery, threat of force, party to a crime?
>
> [JACKSON]: Guilty.
>
> THE COURT: And are you pleading guilty to that offense, Mr. Jackson, because you are guilty of that offense?
>
> [JACKSON]: Yes.

Wis. 2d 271, 284, 592 N.W.2d 220 (1999). That determination will not be upset absent an erroneous exercise of discretion. ***Kivioja***, 225 Wis. 2d at 284.

¶14 A trial court is to apply this test liberally, ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999), but "the defendant is not entitled to an automatic withdrawal[,]" ***Kivioja***, 225 Wis. 2d at 284. Reasons that have been considered fair and just in prior cases include: "genuine misunderstanding of the plea's consequences; haste and confusion in entering the plea; and coercion on the part of trial counsel." ***Shimek***, 230 Wis. 2d at 739. Furthermore, "the assertion of innocence and the promptness with which the motion is brought [are] factors relevant to the court's consideration." ***Id.*** at 740. However, "[t]he reason must be something other than the desire to have a trial[,]" ***Canedy***, 161 Wis. 2d at 583, and "even where the reasons are fair and just, they must be supported by the evidence of record[,]" ***Shanks***, 152 Wis. 2d at 290.

¶15 Jackson's allegation that the trial court applied the wrong legal standard is wholly unsupported by the record. Jackson selectively quotes language from the transcripts of the October 1 hearing, which was the original sentencing date and not the motion hearing. When read in full, the trial court's statements set forth the proper standard:

> With respect to the motion to withdraw the plea, essentially the motions are at the discretion of the Court. The evidentiary hearing aspect is to be granted liberally. However, withdrawal of guilty pleas before sentencing should be freely allowed absent compelling reasons for denial.
>
> Freely does not mean automatically. It requires a showing of some adequate reason for the defendant's change of heart other than a desire to have a trial, and the burden of proof is on the defendant by a preponderance of the evidence.

Furthermore, at the motion hearing, the trial court used the relevant standard in ruling on the motion:

> I just don't find that this defendant has articulated any fair and just reason other than a change of heart, and that in my mind, as well as the case law, is not necessarily a basis to grant the defendant's motion to withdraw the plea.
>
> So at this time the Court is going to deny the motion to withdraw the plea because the defendant has failed to establish that there was a fair and just reason to withdraw the plea.

¶16 In ruling on the motion, the trial court found Jackson's contention that he was "coerced" into pleading guilty by his attorney incredible. As noted above, the trial court specifically found former defense counsel's testimony credible, which ultimately undermined Jackson's version of the events surrounding his plea. The trial court also found that defense counsel was in fact willing, able, and prepared to go to trial. In sum, the trial court did not find Jackson's "reason" for the withdrawal of his guilty plea to be fair and just, and Jackson has pointed to nothing in the record, other than his alleged subjective beliefs, suggesting that the trial court's findings were erroneous.

¶17 Although Jackson now attempts to bolster his "coercion" argument by insisting that he maintained his innocence, had no subjective faith in his attorney, and had a "quick turnabout," we cannot conclude that the trial court erroneously exercised its discretion when it denied his withdrawal motion. First, there is no real indication in the record that he was "insistent of his innocence" throughout the duration of the proceedings. Indeed, the first mention of his claim of innocence appears to be in the PSI. He never asserted that his innocence was

the motivation for his desire to withdraw his plea during the hearing.[4] Second, his explanation that he had no faith in his attorney's abilities was undermined by his own testimony, when he could list only one thing that his attorney failed to do, and it was later established that that was in fact false. Third, his "quick turnabout" argument is unpersuasive in terms of his coercion theory, given the fact that defense counsel had already filed pretrial motions, informed that court that there would be a trial, and was on his way out of the courtroom when Jackson had the bailiff summon defense counsel in order for him to plead guilty. Conclusory allegations of subjective beliefs are not enough; reasons must be supported by the evidence of record.

¶18 Thus, we conclude that the trial court applied the proper standard, made reasonable findings, and drew reasonable conclusions; as such, the trial court properly exercised its discretion when it denied Jackson's motion for the withdrawal of his guilty plea.

B. The trial court did not erroneously exercise its sentencing discretion.

¶19 Jackson essentially argues that the trial court erroneously exercised its sentencing discretion in that: (1) it "sanctioned" him "for being uneducated, unemployed and having drug issues" and failed to consider any mitigating factors

[4] Interestingly, in his discussion of the hearing, Jackson contends that he "wanted to exercise his right to a jury trial because he maintained he was innocent of the charges[,]" citing a page of the hearing transcript that contains no mention of Jackson's innocence. At the hearing he simply stated: "I wanted to – I didn't want to plead guilty; I told you that before. I just told you like six minutes ago I didn't want to plead guilty, I wanted to go to trial from day one." The questioning then turned to the guilty plea hearing, and Jackson admitted that he never indicated to the trial court that he did not want to plead guilty. He never asserted his innocence as a reason for withdrawing the guilty plea, he only said that he wanted to go to trial. Indeed, as noted above, "[t]he reason must be something other than the desire to have a trial." ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991).

without adequate explanation; (2) it erroneously concluded that "he had no employment"; and (3) the sentence departed from the recommendations of the State and the PSI without adequate explanation. Jackson also insists that the trial court failed to exercise the appropriate discretion in denying his motion for postconviction relief. For the reasons that follow, we disagree.

¶20 Sentencing is well within the discretion of the trial court, ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987), and "[t]he trial court has great latitude in passing sentence[,]" ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). Our review "is limited to determining whether there was an [erroneous exercise] of discretion." ***Larsen***, 141 Wis. 2d at 426. Further, there is a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). "An [erroneous exercise] of discretion will be found only where 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶21 The trial court is to consider three primary factors in passing sentence: (1) the gravity of the offense; (2) the defendant's character; and (3) the need for the protection of the public. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The trial court *may* also consider:

> the vicious or aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational

> background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Borrell, 167 Wis. 2d 749, 773-74, 482 N.W.2d 883 (1992). The weight to be attributed to each factor "is a determination which appears to be particularly within the wide discretion of the sentencing judge." ***Ocanas***, 70 Wis. 2d at 185. Thus, "[i]f the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed." ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971). Finally, "[a]s long as '[t]he trial judge [exercises] discretion [and] sentence[s] within the permissible range set by statute,' the court need not explain why its sentence differs from any particular recommendation." ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990) (citation omitted).

¶22 Here, the trial court considered all three primary factors, as required. Although Jackson argues that the trial court "sanctioned" him for his minimal education and employment history and his drug problems, these were proper factors for the trial court to consider. The trial court properly considered these factors as they relate to, among other things, Jackson's "history of undesirable behavior patterns; [his] personality, character and social traits; … [and his] age, educational background and employment record." ***Borrell***, 167 Wis. 2d at 774. The trial court explained its consideration of these factors:

> When I take into account the drug issues that you have as well, the educational issues that you are confronted with in terms of your lack of employment and lack of education, seriousness of this offense, the impact that it had on the community as a whole, it's obvious to this court that confinement is necessary not only to address the extensive treatment needs that you have, but also to protect the public.

Thus, Jackson's argument that the trial court erred by not treating his education and drug issues as limitations, or mitigating factors, and instead as reasons to penalize or imprison him without explanation is unsupported by the record. Furthermore, the trial court had already recounted Jackson's long history of probation and parole revocations, which would lead any reasonable person to conclude that community-based treatment and supervision were unwarranted.

¶23 Moreover, Jackson's contention that the trial court erroneously concluded that "he had no employment" is unsupported by the record.[5] The trial court indicated that he had a "lack of employment," but did not find that Jackson had never been employed. In fact, the trial court only mentioned Jackson's employment history once, when it recognized the "educational issues that [he is] confronted with in terms of [his] lack of employment and lack of education[,]" in one sentence. Contrary to Jackson's contention, Jackson's employment does not appear to have been "a central issue for the court," as it was mentioned only once in the sentence noted above; rather, the trial court focused on the aggravated nature of the offense, Jackson's attitude, and his past criminal history.

¶24 Moreover, in regard to Jackson's argument that the trial court erroneously failed to consider, in the pronouncement of the sentence, mitigating factors such as his employment at a car wash for a couple of years and the several years during which he had no new criminal violations, it is important to note that the weight to be given to each of the sentencing factors lies within the discretion

[5] It appears that Jackson may also be attempting to raise a due process argument concerning his right to be sentenced on the basis of accurate information in regard to the allegedly erroneous conclusion of the trial court. However, as the constitutional issue is inadequately briefed as such, we will not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address issues inadequately briefed).

of the trial court. Jackson's period of employment and several crime-free years do not negate the other considerations the court found to be compelling.[6]

¶25 In regard to Jackson's argument that the trial court inexplicably departed from the recommendations of the State and the PSI without adequate explanation, the record again indicates otherwise. First, the court explained that it was departing from the State's recommendation because: "the court is not bound by that recommendation, and given the aggravated and aggressive nature in which this offense occurred, given your extensive record, this court finds that the term that I have imposed will address your treatment needs, and protection, and essentially retribution, that there needs to be punishment."[7] Second, the sentence did not exceed the recommendation of the PSI; the PSI recommended seven to ten years of initial confinement. And, insofar as Jackson appears to argue that the sentence defense counsel recommended was "consistent with what sentencing law requires," and that, presumably, the sentence imposed by the trial court was excessive because it exceeded his recommendation, we are unpersuaded. Moreover, the sentence was well within the sixty year maximum. The sentence is not so unusual or disproportionate so as to shock the public sentiment or violate

[6] Furthermore, Jackson appears to argue that the trial court failed to address the PSI; however, he fails to point to any law requiring the trial court to specifically refer to and address the PSI when pronouncing the sentence. Moreover, the record indicates that the trial court informed the State and Jackson that it read the PSI, and we presume that, accordingly, it was not unaware of its contents, as Jackson seems to insinuate.

[7] Jackson also argues that the trial court did not "explain what was aggravated or explain if the parties' recommendations failed to recognize the aggravated nature of the crime." He contends that in order for the trial court to deviate from the recommendations, "[i]t had to reach this conclusion based on factors that the parties did not consider in reaching." He provides no legal support for this proposition, and as such, we decline to address it. *See* ***Pettit***, 171 Wis. 2d at 646-47 (court of appeals may decline to address issues inadequately briefed).

the judgment of reasonable people under the circumstances. *See* ***Ocanas***, 70 Wis. 2d at 185.

¶26 Finally, Jackson's contention that the trial court failed to exercise appropriate discretion in denying postconviction relief is unclear and unpersuasive. First, Jackson concedes that "[h]e asked that the court vacate the plea for the reasons of his original motion"; the trial court denied the motion for the same reasons—by referring to the extensive hearing previously held on the motion. The trial court had already ruled on the matter and exercised its discretion on the record. Second, in regard to the resentencing issue, the trial court's written denial indicates that it reviewed the transcripts and concluded that all three primary factors were considered, noted which factors it considered to be of paramount importance, indicated that a "solid basis existed for the sentence imposed," and determined that it was not required to explain "why one sentence is more appropriate than another." The motion was considered and denied. While we are unclear of exactly what relief Jackson is requesting in this regard, it need not be resolved, as we have already concluded that the trial court properly denied the motion for plea withdrawal and properly exercised its sentencing discretion. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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