COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP2561-CR
2004AP2562-CR

Cir. Ct. Nos. 2002CF3623
2003CF4933

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES E. MELTON,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed*.

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

¶1 PER CURIAM. Charles E. Melton appeals from judgments entered after he pled guilty to one count of delivery of a controlled substance (cocaine) as party to a crime, one count of theft, and one count of felony bail jumping, contrary to WIS. STAT. §§ 961.41(1)(cm)1., 939.05, 946.49(1)(b) and 943.20(1)(a) (2003-

04).[1] He also appeals from orders denying his postconviction motion seeking resentencing. Melton claims the trial court erroneously exercised its sentencing discretion when it refused to allow him to be considered for the earned release program. Because the trial court did not erroneously exercise its sentencing discretion, we affirm.

BACKGROUND

¶2 On July 9, 2002, Melton was involved in a drug transaction, whereby he provided an undercover officer with .16 grams of crack cocaine in exchange for $30. On August 26, 2003, while out on bail from the drug case, Melton smashed a car window, reached into the car and stole a purse. The victim of the purse snatching informed the court that the crime had a significant impact on her as it occurred while she was obtaining medical treatment in connection with an impending liver transplant.

¶3 Melton pled guilty after being charged in two separate cases. He was sentenced to a total of nine years, consisting of five years and six months of initial confinement and three years and six months of extended supervision. The court imposed a time-served disposition on one count. In imposing sentence, the trial court found that Melton was not eligible for either the challenge incarceration program provided for in WIS. STAT. §§ 302.045 and 973.01(3m), or the earned release program (ERP) provided for in WIS. STAT. §§ 302.05 and 973.01(3g).

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Melton filed a postconviction motion seeking sentence modification. He claimed that the trial court failed to adequately explain why it found him ineligible for the ERP program and that the reason the trial court did provide was erroneous. The trial court denied the motion. Melton now appeals.

DISCUSSION

¶5 Melton claims the trial court erroneously exercised its discretion when it ruled "as a matter of policy" that he would not be eligible for ERP, and failed to adequately explain its reasoning for that decision. We cannot conclude that the trial court erroneously exercised its discretion when it decided that Melton would not be eligible for ERP.

¶6 Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86, 493 N.W.2d 367 (1992). There is a strong policy against an appellate court interfering with a trial court's sentencing determination and, indeed, an appellate court must presume that the trial court acted reasonably. ***State v. Thompson***, 146 Wis. 2d 554, 565, 431 N.W.2d 716 (Ct. App. 1988). When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "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).

¶7 The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The

trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; 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, repentenance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495-96, 444 N.W.2d 760 (Ct. App. 1989).

¶8 The weight to be given to each of the factors is within the trial court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). After consideration of all of the relevant factors, the sentence may be based on any one of the primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). Because the trial court is in the best position to determine the relevant factors in each case, we shall allow the trial court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing it to be unreasonable or unjustifiable. ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶9 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, gave too much weight to one factor in the face of other contravening considerations, or relied on irrelevant or immaterial factors." ***Krueger***, 119 Wis. 2d at 337-38.

¶10 The exercise of a sentencing court's discretion requires a demonstrated process of reasoning based on the facts of the record and a

conclusion based on a logical rationale. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The trial court must explain its judicial reasoning process and the reasons for its actions. However, even if the trial court fails to adequately set forth its reasons for imposing a particular sentence, the reviewing court will not set aside the sentence for that reason. The reviewing court is "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***Id.*** at 282.

¶11 Melton does not argue that the trial court failed to consider the proper sentencing factors or that the sentence imposed was excessive. Rather, he argues *only* that the trial court erred with respect to its decision on whether he was eligible for ERP.

¶12 ERP, under WIS. STAT. § 302.05, is also known as the Wisconsin Substance Abuse Program. Eligibility for ERP for persons convicted and sentenced under truth-in-sentencing, WIS. STAT. § 973.01, is determined in two phases. The sentencing court is required to determine, within its discretion, whether a defendant is eligible for the program. ***State v. White***, 2004 WI App 237, ¶¶2, 9-11, 277 Wis. 2d 580, 690 N.W.2d 880. If the trial court finds the person eligible for ERP, it may also determine when the eligibility begins. ***Id.*** The Department of Corrections then determines whether the person participates in the program. WIS. STAT. § 302.05(3)(c).

¶13 A person who successfully completes ERP is granted early release from prison, as his or her original sentence is modified so that the defendant is released to extended supervision within thirty days. WIS. STAT. § 302.05(3)(c)2. Thus, the term of initial confinement is shortened and the length of extended supervision is increased. Thus, technically, the length of the total sentence "does

not change," § 302.05(3)(c)2.b.; however, the defendant is released early from prison.

¶14 In specifically addressing whether Melton was eligible for ERP, the trial court stated:

> And the court finds that you are not eligible for the earned release program either because you went through the DACC, that was the previous drug program in prison, from May of 1995 to August of 1995. So you would not be eligible to go through it again in my view or should not as a matter of policy be allowed to go through a second time in my view.

¶15 Melton claims that the trial court's finding was based on a "matter of policy," demonstrating that the court failed to individualize the portion of the sentence denying ERP eligibility. He argues that this "policy" is not found anywhere in the statutes, and therefore is unlawful, and that it was "irrational" for the trial court to find Melton ineligible on the ground that Melton went through the prior drug program many years ago.

¶16 Although Melton is correct in stating that a trial court must individualize a sentence and may not base a sentence on a preconceived policy that does not take into account the specific circumstances of the case, *see* ***State v. Martin***, 100 Wis. 2d 326, 327, 302 N.W.2d 58 (Ct. App. 1981), our review demonstrates that that was not what happened in this case.

¶17 The trial court based its finding on the information presented to it. That information included the prosecutor's statements to the trial court, including Melton's lengthy criminal history, which started with a theft in 1983, and continued to five convictions through 1992. The 1992 conviction was for armed robbery and Melton was sentenced to seventy-two months in prison. Then, in

1999 and 2000, he had two additional drug offenses. In 2002, the drug crime in this case occurred. The prosecutor advised the court:

> When I consider all of the probationary needs, all of the prison jail time, everything else wasted on this defendant, and he continues to commit crimes. On the prison sentence for instance, as I indicated, he was released in 1995, absconded from supervision, continued to use drugs. He failed to report to his agent. They tried an alternative to revocation. And I think at least two occasions, which to me is mind boggling, on an armed robbery.

¶18 The prosecutor also pointed out that the purse snatching crime here occurred in broad daylight, in front of witnesses, demonstrating that Melton had reached a point of bald defiance for the law.

¶19 Defense counsel then acknowledged that Melton had an extensive criminal history, had been a "scourge on the community," and has had great "difficulty controlling" his drug addiction. Defense counsel advised the court that Melton was interested in the challenge incarceration program, but made no mention of ERP.

¶20 Melton then addressed the court, acknowledging that he had received treatment in the past, that he had successfully completed the treatment program, but then "was right back doing the same thing." He told the court he needed treatment and asked for probation so he could receive treatment.

¶21 Against this backdrop, the court began its sentencing remarks. The court addressed the need to protect the public from Melton, whose actions demonstrated a history of violence toward people. The trial court discussed the various offenses contained in the presentence investigation report. The court then proceeded to impose the sentence and make the comments about Melton's ineligibility for ERP.

¶22 Taken in isolation, the trial court's comments could be viewed as problematic. However, when viewed in the context of what transpired at the sentencing hearing, it is clear that the court's finding of ineligibility for ERP was based on the court's consideration of the circumstances of Melton's crimes, his poor character, his significant criminal history, and his recidivism after receiving and completing treatment. Thus, the trial court did not simply "as a matter of policy" find Melton ineligible for ERP. Rather, the trial court considered a variety of factors in making that finding. The trial court's decision, therefore, did not constitute an erroneous exercise of discretion.

¶23 Likewise, taken in context, the trial court's decision was not irrational. Standing alone, the fact that Melton successfully completed a prior drug treatment program a decade ago, should not prevent him from participating now. However, that fact was not the sole reason for the denial here. Since completion of the program in 1993, Melton had been in near constant trouble with the law. His criminal acts escalated in severity, and he continued his criminal, drug-addicted ways.

¶24 The trial court explained that confinement was necessary. It based its decision in part on Melton's personal failures to refrain from criminal activities, and his failure to change after receiving drug treatment and probation. Based on this, the trial court found that the public needed protection from Melton. As the State points out, ERP is not *simply* a drug treatment program. Rather, it is an earned *release* program, whereby an offender who completes it is released.

¶25 The trial court found, based on all the information before it, that Melton would not be eligible for this program. It did so for a variety of factors, including the need to keep Melton confined for a significant period of time, his

prior criminal record, his failure to take advantage of past substance abuse treatment, and the need to protect the public. The trial court's decision was reasonable and it was based on a consideration of appropriate sentencing factors. Accordingly, we reject Melton's arguments and affirm.

By the Court.—Judgments and orders affirmed.

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