COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP277-CR **Cir. Ct. No. 2003CF7164**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRICK DEWAYNE ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Larrick Dewayne Robinson appeals from a judgment of conviction for armed robbery, and from a postconviction order denying his motion for sentence modification. The issues are whether the trial court erroneously exercised its sentencing discretion by declining to consider

certain character factors, while making "groundless assumptions" about Robinson's employment, by failing to explain the reasons for the length of his sentence, and by denying his sentence modification motion. We conclude that the trial court did not erroneously exercise its sentencing discretion. Therefore, we affirm.

¶2 Robinson pled guilty to armed robbery as a party to the crime, in violation of WIS. STAT. §§ 943.32(2) (amended Feb. 1, 2003) and 939.05 (2003-04).[1] The maximum potential penalty for that offense is a forty-year sentence, comprised of twenty-five- and fifteen-year respective periods of confinement and extended supervision. *See* WIS. STAT. §§ 943.32(2) (amended Feb. 1, 2003); 939.50(1)(c) and (3)(c) (amended Feb. 1, 2003); 973.01(2)(b)3. (amended Feb. 1, 2003). The prosecutor recommended a six-year sentence, comprised of two three-year respective periods of confinement and extended supervision, which Robinson acknowledged was "reasonable"; the defense recommended a period of confinement in the range of two-to-three years and an unspecified but somewhat longer period of extended supervision.[2] The trial court imposed a fourteen-year sentence, consecutive to any other sentence, divided into two seven-year respective periods of confinement and extended supervision. Robinson sought sentence modification for an allegedly erroneous exercise of sentencing discretion including a failure to appropriately consider mitigating factors, which the trial court denied.

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

[2] There was no presentence investigation report.

¶3 Robinson contends that the trial court erroneously exercised its sentencing discretion by: (1) disregarding mitigating factors relating to his character including its skepticism about his positive employment record; (2) failing to explain the reasons for the length of his sentence, contrary to the spirit of ***State v. Gallion***, 2004 WI 42, ¶46, 270 Wis. 2d 535, 678 N.W.2d 197; (3) failing to explain how the confinement term was the minimum amount of custody necessary to achieve the sentencing considerations ("minimum custody standard"); (4) imposing an excessive sentence; (5) penalizing him for his treatment needs; and (6) denying his sentence modification motion.

> When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶4 The primary sentencing factors are the gravity of the offense, the need for public protection, and the character of the offender. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The trial court's obligation is to consider the primary sentencing factors, and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***id.*** at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶5 Initially, we address the trial court's consideration of the primary sentencing factors to demonstrate its proper exercise of sentencing discretion. The trial court considered the gravity of the offense: it characterized the armed robbery as "an extremely serious felony offense committed while [Robinson was] on probation for an extremely serious felony offense." It was mindful that

> [t]his is a[n] armed robbery with a weapon, a handgun. The difference between this offense and one where something goes wrong and the gun goes off, even if that is not the plan, can be just a matter of moments. It can be a matter of a quick trigger finger, it can be a matter of some unexpected development, but then somebody is shot. Sometimes they die, and then we have a homicide case.

¶6 The trial court also considered the need to protect the public from Robinson. It commented that the armed robbery and the felony, for which Robinson was on probation, were "extremely damaging to the community." It continued, emphasizing that the armed robbery is "the kind of offense that makes everyone who lives anywhere near this kind of event afraid to – to do anything, afraid to go to a Citgo Station, afraid to go out-of-doors, afraid to let their children go to the Citgo Station."[3]

¶7 Robinson's lead claim is that the trial court disregarded positive aspects of his character, such as his admirable employment record, his progress in completing his graduate equivalency degree, and his role as the principal caretaker for his disabled grandmother and his child, at the expense of unduly emphasizing the seriousness of the offense; we disagree. Incident to its consideration of Robinson's character, the trial court recognized that Robinson committed this offense while on probation for another "extremely serious felony offense," which

[3] This armed robbery occurred in the parking lot of a Citgo gasoline station.

is reflective of Robinson's character. It also was mindful that Robinson had recently been charged with his tenth operating after revocation offense. The trial court gave Robinson "some credit" for accepting responsibility for this offense, and recognized that there was evidence "of some meaningful employment at least some of the time."

¶8 Robinson criticizes the trial court's skepticism of his employment record and claims that it minimized his educational progress. The trial court commented:

> [i]t's hard to know what to make of this claim that [Robinson has] got this great employment record working for [his] uncle, may or may not have been full time, long-term stable employment, but there is at least some claim or evidence here of some meaningful employment at least some of the time. There is an eventual achievement of a high school-level education, but there is nothing in that that engenders a lot of confidence that [Robinson] ha[s] some stake in the community that is going to reduce the risks of a reoffense here. Maybe it was peer pressure, but [Robinson is] 22 years old. Someone tells [him], "[h]ere, hold the gun while we do this armed robbery," say, "[n]o." It seems pretty obvious, pretty clear. At age 22, [he] just can't come in and say, "[f]riends made [m]e do it. The devil made [m]e do it." [He] did it.

These comments demonstrate the trial court's consideration of Robinson's character including his employment history and his educational progress.

¶9 The trial court considered Robinson's character, and most of the specific character information Robinson claims it ignored. The trial court was mindful that Robinson was employed by his uncle and that his employment history may have been portrayed somewhat more positively than it actually was. That was a reasonable inference from Robinson's sentencing presentation. Although the facts and other reasonable inferences could have supported a different exercise

of discretion, Robinson has not shown that his sentence was predicated on some unreasonable or unjustifiable basis, only that the trial court exercised its discretion differently than he had hoped it would. That, however, is not an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

¶10 The trial court considered each of the three primary sentencing factors including Robinson's character. The weight the trial court assigns to each factor is a discretionary determination. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Strongly considering the nature of the offense along with the other primary sentencing factors is hardly a legitimate basis for criticism.

¶11 Robinson also criticizes the trial court for failing to explain the duration of the sentence as mandated by ***Gallion***. First, ***Gallion*** does not apply because it was decided after Robinson's sentence was imposed.[4] Second, Robinson seeks a specificity in sentencing that the law does not require. The trial court is not obliged to explain the reason it imposed the precise amount of confinement it did, as long as it explains its reasons for the total sentence. *See* ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971); ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483 ("no appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion"). We conclude that the trial court amply exercised its

[4] *See* ***State v. Trigueros***, 2005 WI App 112, ¶4 n.1, 282 Wis. 2d 445, 701 N.W.2d 54 (citing ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197).

sentencing discretion, by considering the primary sentencing factors and providing the reasons for its sentence.

¶12 Robinson claims that the trial court did not explain how the seven-year confinement period satisfied the minimum custody standard. The trial court explained that

> [t]his was an extremely serious felony offense committed while [Robinson was] on probation for an extremely serious felony offense. Different offenses, perhaps, but ones that are extremely damaging to the community. [Robinson was] apparently given a chance on probation with a lot of jail time on the cocaine charge. House of Correction apparently didn't impress [Robinson]. [Robinson has] been violating the laws in less[e]r ways a lot here, apparently not caring about laws relating to being a licensed driver, and [the trial court] do[es]n't see how [Robinson] can be entitled to another chance for quite awhile here.
>
> ….
>
> [The trial court] think[s] there needs to be a long period of initial confinement before [Robinson is] given a chance. Now, [Robinson is] going to get some chance back in the community. In light of the State's recommendation, what [the trial court] will do is find [Robinson] eligible for the Challenge Incarceration Program.

The trial court's explanation of why it imposed a lengthier confinement period than recommended was reasonable.

¶13 Robinson raises several criticisms, including that the fourteen-year sentence is excessive, as demonstrated by its being over twice the six-year total sentence recommended by the prosecutor. A sentence is unduly harsh when it 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***, 70 Wis. 2d at 185.

"A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶14 Robinson contends that the ***Daniels*** standard essentially eliminates the excessive argument for most defendants. Modification for an excessive sentence is rarely warranted. A fourteen-year sentence for an armed robbery, which carries a forty-year maximum potential sentence, does not "shock public sentiment and violate the judgment of reasonable people," and is not excessive. *See* ***Ocanas***, 70 Wis. 2d at 185.

¶15 Robinson contends that the trial court imposed a harsher sentence because of his treatment needs. Preliminarily, Robinson's past substance abuse and treatment needs are relevant character information, which may be properly considered at sentencing. *See* ***State v. Damaske***, 212 Wis. 2d 169, 195-96, 567 N.W.2d 905 (Ct. App. 1997) (a "trial court in imposing sentence for one crime can consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing.") (citations omitted). Furthermore, we disagree with Robinson's contention that the trial court imposed a harsher sentence; we interpret its remarks on Robinson's past substance abuse as a method to facilitate a more lenient sentence.

¶16 The trial court commented that

> [i]n light of the [S]tate's recommendation [of a three-year period of confinement]… [it] f[ou]nd [Robinson] eligible for the Challenge Incarceration Program. There hasn't been any assertion of a great drug problem here, but we've got two prior drug offenses, so [the trial court] think[s] that's enough of a predicate.

The trial court offered Robinson the opportunity to substantially reduce the confinement part of his sentence if he successfully completed the Challenge Incarceration Program.[5] A substance abuse problem was a requisite to eligibility for that program. Consequently, it was Robinson's two prior drug offenses (which the trial court characterized as "[no] assertion of a great drug problem") that permitted the trial court to offer the Challenge Incarceration Program as an option to reduce his sentence. *See* WIS. STAT. § 302.045(3m).

¶17 Robinson contends that the trial court erroneously exercised its discretion in denying his postconviction motion for sentence modification. Our conclusion that the trial court did not erroneously exercise its discretion when it imposed sentence necessarily disposes of his challenge to the trial court's postconviction exercise of discretion.

By the Court.—Judgment and order affirmed.

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

[5] The trial court declared Robinson eligible for that program after he served a minimum of four years of his seven-year confinement period.