COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2210-CR **Cir. Ct. No. 2003CF5061**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSIE LEE STOKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Jessie Stokes appeals from a judgment convicting him of first-degree sexual assault by use of a dangerous weapon and armed burglary, and also from an order denying his motion for sentence modification.

He claims the trial court erroneously exercised its discretion at sentencing by considering several contacts Stokes had with the justice system in which charges were never filed or had been dismissed, and that his sentences were unduly harsh. We affirm for the reasons discussed below.

BACKGROUND

¶2 The complaint alleged that Stokes entered the duplex of a fifty-nine-year-old woman for whom he had been doing some remodeling work, armed himself with a box cutter, demanded money from her, tied her up and sexually assaulted her. Stokes admitted his conduct to the police, explaining that he was drunk and high, and eventually entered guilty pleas to both charges.

¶3 The presentence investigation report (PSI) listed nine prior convictions, which were mostly operating while intoxicated and misdemeanor or civil forfeiture traffic offenses. The PSI also mentioned that there were another twelve offenses for which Stokes had been arrested but charges were either never filed or later dismissed. The agent recommended that Stokes receive eight years of initial confinement and ten years of extended supervision on the sexual assault count and a concurrent term of fours years' initial confinement and four years' extended supervision on the burglary count, plus structured alcohol and drug abuse (AODA) treatment and treatment addressing his educational and mental health problems.

¶4 The State asked for fifteen years' initial confinement and fifteen years of extended supervision on the sexual assault count, and a concurrent term of five years of initial confinement and five years' extended supervision on the burglary count. Stokes asked for eight years of initial confinement and four years of extended supervision on the sexual assault count and a concurrent term of four

years' initial incarceration and four years of extended supervision on the burglary count, in line with the initial incarceration times recommended by the PSI.

¶5 The trial court imposed thirteen years of initial confinement and twelve years of extended supervision on the sexual assault count and a concurrent term of five years' initial incarceration and five years of extended supervision on the burglary count. In the course of its discussion, the trial court stated:

> The court takes a look at—considers your record as to the number of possession charges or driving offenses, not all too serious, but just the fact that there are contacts with the justice system and the several cases in which there were dismissals and no process.
>
> The court takes a look at those as contacts such as the armed robbery, the first degree recklessly endangering safety, the arson, the disorderly contacts, the criminal trespasses, the child abuse intentional causing harm, battery. Those individual contacts the Court takes into consideration also.
>
> ….
>
> Unless you have the necessary treatment that you need according to the presentence report it would appear that based upon your prior history that you are certainly a moderate risk in re-offending or high risk to re-offend based upon your prior contacts.

¶6 In a postconviction motion challenging his sentences, Stokes presented as a "new factor" the fact that prosecutors had determined within two days after his arrests for the arson, attempted armed robbery, reckless endangerment and child abuse that those charges were not provable against him. Stokes also claimed the sentences were unduly harsh because the court failed to adequately take into account Stokes' remorse, limited mental capacity, and lack of prior opportunities to benefit from supervision. The trial court denied the motion, and Stokes appeals.

STANDARDS OF REVIEW

¶7 Sentence determinations are accorded a presumption of reasonableness and will not be set aside unless the trial court has erroneously exercised its discretion. ***State v. Schreiber***, 2002 WI App 75, ¶7, 251 Wis. 2d 690, 642 N.W.2d 621. In order to properly exercise its discretion, the trial court should discuss relevant factors such as the severity of the offense and character of the offender and relate them to sentencing objectives such as the need for punishment, protection of the public, general deterrence, rehabilitation, restitution, or restorative justice. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

¶8 A trial court has discretion to set aside a sentence based upon a new factor. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242 (citations omitted). A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to parties and trial judge at the time of sentencing, which operates to frustrate the purpose of the original sentence. ***Id.*** Whether a particular set of facts constitutes a new factor is a question of law which we review de novo. ***Id.***

¶9 A sentence may also be set aside if it was unduly harsh or unconscionable. ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. A sentence may be considered unduly harsh or unconscionable only 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." ***Id.*** There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶¶31-32.

DISCUSSION

¶10 Stokes challenges the trial court's consideration of his past arrests that did not lead to criminal convictions on several different theories.[1] Stokes first claims that the court's consideration of the possibility that he had committed some of the twelve dismissed or uncharged offenses listed in the PSI—knowing that he had not been convicted of them—amounted to being sentenced based on inaccurate information in violation of his due process rights. However, there are numerous reasons why a charge might be dismissed or not prosecuted, even if the defendant did have some actual involvement in the offense. A trial court is therefore permitted to consider uncharged and unproven conduct for the purpose of evaluating a defendant's character and patterns of behavior. ***State v. Damaske***, 212 Wis. 2d 169, 194-97, 567 N.W.2d 905 (Ct. App. 1997). Here, Stokes does not dispute that he was in fact arrested on each of the charges listed in the PSI. In the absence of any additional explanation at the sentencing hearing for why a series of twelve charges were dismissed or never prosecuted, it was permissible for the trial court to draw the inference that there was misconduct underlying at least some of those charges.

¶11 Stokes next argues that the trial court erroneously exercised its discretion by placing too much weight on the dismissed and non-prosecuted charges. He points to the court's comment that he was at "high risk to re-offend based upon [his] prior contacts" as evidence that the trial court placed great weight

[1] In the trial court, Stokes also argued that information about dismissed and non-prosecuted offenses should not have been included in the PSI in the first place, without some sort of acknowledgement or confirmation from him. *See* WIS. ADMIN. CODE § DOC 328.29(3). We conclude that Stokes has waived any objection to the inclusion of the information in the PSI, however, because he raised no objection to the PSI when asked by the trial court.

on his arrests. We do not read the trial court's comments the same way Stokes does. In context, we believe the court's reference to Stokes' "prior contacts" with the justice system was meant to include both his prior convictions and the other offenses for which he was arrested. That the court prefaced the prior contacts remark with, "Unless you have the necessary treatment that you need according to the presentence report," further suggests that the court was focusing on the multiple drunk-driving offenses for which Stokes had been convicted and the AODA treatment recommended by the PSI. In any event, it was within the trial court's discretion to determine how much weight to give to Stokes' past contacts with the justice system, including the permissible inferences it made from those contacts that did not lead to prosecution or conviction. *See generally* ***Schreiber***, 251 Wis. 2d 690, ¶8.

¶12 Assuming that the trial court could properly infer, based on the record before it, that there may have been some degree of misconduct underlying his arrests on charges that did not lead to convictions, Stokes asserts that he should now be entitled to resentencing based on a new factor—namely, evidence that he was, in fact, completely innocent of the non-prosecuted offenses.[2] Stokes' assertion of innocence does not qualify as a new factor, however, because it was information that was known to him at the time of sentencing. Having seen the PSI prior to sentencing and been given an opportunity to speak at the hearing, Stokes could have chosen to give the trial court additional information about his arrests to clarify which charges had subsequently been dismissed pursuant to plea bargains and which had been dropped almost immediately for lack of evidence. Therefore,

[2] Stokes does not appear to be claiming innocence on the dismissed charges.

the trial court did not err in denying Stokes' motion for sentence modification on this ground.

¶13 Stokes also claims that his sentence was unduly harsh and inadequately explained. We disagree. Stokes was facing combined maximum terms of fifty years' initial incarceration and twenty-five years' extended supervision. *See* WIS. STAT. §§ 940.225(1)(b) (2003-04)[3] (classifying first-degree sexual assault by use of a dangerous weapon as a Class B felony); 939.50(3)(b) (providing maximum imprisonment term of sixty years for Class B felonies); 943.10(2)(a) (classifying armed burglary as a Class E felony); 939.50(3)(e) (providing maximum imprisonment term of fifteen years for Class E felonies); and 973.01 (explaining bifurcated sentence structure). The combined thirteen years' initial incarceration and twelve years' extended supervision imposed by the court amounted to about a quarter of the maximum initial incarceration time and a third of the total imprisonment time available. This was well under the maximum and not so excessive or disproportionate as to shock the conscience.

¶14 With regard to the trial court's explanation for the duration of the sentences, it stated that the most egregious factor was the nature of the offense itself—namely, a home invasion in which the victim had been threatened with a box cutter, tied up, and sexually assaulted. The court also adopted the PSI agent's view that Stokes needed structured AODA treatment and treatment addressing his educational and mental health problems. We are satisfied that the trial court's citation of these factors adequately explain why it imposed the moderate prison

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

sentence that it did, particularly when the recommendations of both the defense and the State were in the same general range of concurrent prison terms well under the maximum. *See* ***Gallion***, 270 Wis. 2d 535, ¶49 (concluding court must provide an explanation for the general range of the sentence imposed, not for the precise number of years chosen, and need not say why it did not impose a lesser sentence).

By the Court.—Judgment and order affirmed.

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