

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2183-CR

Cir. Ct. No. 2006CF4729

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON J. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and DENNIS P. MORONEY,¹ Judges. *Affirmed.*

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

¹ The Honorable Charles F. Kahn, Jr., presided at the trial and entered the judgment of conviction. The Honorable Dennis P. Moroney heard the postconviction motion and entered the order denying postconviction relief.

¶1 PER CURIAM. Jason J. Evans appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the circuit court erroneously exercised its discretion when it sentenced him because: (1) the court did not consider mitigating factors, treatment and mental health issues, the parties' recommendations, and the recommendation in the presentence investigation report; (2) the court failed to explain the objectives and the reasons for the length of the sentence it imposed; (3) the court did not identify reasons for imposing consecutive sentences; and (4) the court did not find him eligible for the Earned Release Program, and unduly delayed his eligibility date for the Challenge Incarceration Program. He also argues that the circuit court erred when it denied his motion for postconviction relief. Because we conclude that the circuit court properly exercised its sentencing discretion, we affirm the judgment and order.

¶2 Evans was initially charged with one count of felony first-degree reckless injury while armed. He was charged for having shot a man in the chest and legs. While he was in custody on this case, he was involved in an incident at the House of Corrections. Evans broke a window in a door, damaging the door and injuring a corrections officer. He was eventually charged with one count of criminal damage to property and one count of battery, both misdemeanors.

¶3 He pled guilty to all three charges. The presentence investigation report recommended that he be sentenced to four and one-half years' initial confinement and four to five years' extended supervision. Evans asked for: "a substantial period of imposed and stayed time and eighteen months of extended supervision. The initial term should be three years with some probation and with nine months at the House of Corrections." The State recommended a lengthy period of confinement, "[d]efinitely in the double digits." The court sentenced

him to nine months each on the misdemeanor counts to be served concurrently to each other, and nine years' initial confinement and eight years' extended supervision on the felony count to be served consecutively to the misdemeanor charges.

¶4 Evans then brought a motion for postconviction relief, alleging that the sentence imposed was unduly harsh and excessive. The circuit court denied the motion.

¶5 Evans first argues that the circuit court erroneously exercised its sentencing discretion. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* “The primary considerations in imposing a sentence are the gravity and nature of the offense (including the effect on the victim), the character of the defendant and public safety.” *State v. Carter*, 208 Wis. 2d 142, 156, 560 N.W.2d 256 (1997). The discretion of the sentencing judge must be exercised on a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the trial court’s discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶6 *Gallion* requires that the sentencing court “by reference to the relevant facts and factors, explain how the sentence’s component parts promote the sentencing objectives.” *Id.*, 270 Wis. 2d 535, ¶46. The court went on to explain that: “[b]y stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion.” *Id.* A court

does not, however, need to explain its rationale for each separate aspect of the sentence imposed. *State v. Matke*, 2005 WI App 4, ¶19, 278 Wis. 2d 403, 692 N.W.2d 265. “[S]o long as a sentencing court has considered the proper factors, explained its rationale for the overall sentence it imposes, and the sentence is not unreasonable, the court does not erroneously exercise its discretion simply by failing to separately explain its rationale for each and every facet of the sentence imposed.” *Id.*

¶7 Our review of the sentencing transcript in this case establishes that the circuit court properly exercised its discretion, and appropriately explained its rationale for the overall sentence imposed. The court considered the severity of the crime, specifically that it was an intentional shooting and nearly caused the death of the victim, and Evans’s character, including his “background of repeated, continual, irresponsible, unrestrained violence against other people,” including his two-year-old son. The court considered his prior record, noted that he had failed on probation, and balanced that against his “awful childhood and upbringing.” The court also considered that, although Evans was initially reluctant to admit the truth, he eventually did come forward to admit what really happened. Further, the court considered his work history and his willingness to support his son. The court found that the community needed to be protected from Evans, and stated that it would not allow him the opportunity to hurt others just because he was upset.

¶8 Evans argues that the court did not consider mitigating factors, and drew erroneous conclusions from the factors it did consider. Specifically, he argues that the court erred when it found that he had failed on probation, and did not properly consider his education. He also argues that the court mischaracterized his criminal record, and did not consider his past treatment history or rehabilitative efforts. He further argues that the court did not explain its

rationale for departing from the parties' recommendations, and did not consider his mental health issues.

¶9 Our review of the sentencing transcripts does not support Evans's arguments. The court appropriately considered his criminal record, his education, and his mental health issues. Further, the transcript shows that the court engaged in a detailed and clearly individualized sentencing analysis. The court identified and considered both the positive and negative aspects of Evans's character and background. The court considered all of the appropriate factors, and to the extent it may have placed more emphasis on one factor, this also was an appropriate exercise of discretion. The circuit court did not erroneously exercise its sentencing discretion.

¶10 Evans makes a separate argument that the circuit court did not consider his mental health issues. We have already concluded that the circuit court properly considered his mental health issues. In this section of his argument, Evans also suggests that the circuit court erred because it did not consider treatment as part of the sentencing process. Evans's trial counsel, however, did not ask the court to consider a treatment program as part of his sentence. Further, the court explained in detail why it was necessary that Evans be confined. Once the court imposed a sentence of confinement, it did not have any jurisdiction to order specific treatment. *See State v. Lynch*, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981).

¶11 Evans also argues that the circuit court did not explain its reasons for departing from the sentencing recommendation made by him and by the presentence investigation report writer. We again disagree. The court acknowledged the recommendations made by all of the parties, and stated that the

State's recommendation was too long. Further, "a sentencing court is not required to give any particular level of deference to ... sentencing recommendations ... included in presentence investigation reports." *State v. Brown*, 2006 WI 131, ¶24, 298 Wis. 2d 37, 725 N.W.2d 262. As we have already stated, the court thoroughly explained its reasons for imposing the sentence it did.

¶12 Evans also argues that the court did not explain its reasons for the length of the sentence, or why the sentencing objectives could not be obtained by imposing a jail sentence with work-release privileges. Again, we disagree. The court explained why it imposed the length of sentence that it did, and why it believed that confinement was necessary. The court explained that Evans had caused "a near death experience" for the victim, and had done so by conduct that Evans knew to be reckless. The court stated that his conduct created "unreasonable risks" and showed "utter disregard for human life." The court considered his history of violent behavior, and stated that the community needed to be protected by taking him away so that he could not hurt anyone else over the next few years, and also to send a message to others "that if you shoot a gun, you're going to prison, and it's going to be a long time."

¶13 Evans next argues that the circuit court did not adequately explain its reasons for imposing consecutive sentences. In this case, the court imposed concurrent sentences on the two misdemeanor charges, and made those run consecutively to the sentence for the felony charge. Further, the total time for the consecutive sentences was less than the potential maximum Evans faced on the felony charge alone. Evans argues that under *State v. Hall*, 2002 WI App 108,

255 Wis. 2d 662, 648 N.W.2d 41, the sentencing court must provide sufficient reasons for imposing consecutive sentences. We conclude here that, for the reasons we have already discussed, the totality of the sentencing court's remarks provide a sufficient explanation for imposing consecutive sentences.

¶14 Evans next argues that the court improperly refused to recommend him for the Earned Release Program, and unduly delayed his eligibility for the Challenge Incarceration Program. First, neither Evans nor his counsel mentioned the Earned Release Program in their sentencing remarks. Second, because Evans was convicted of violating WIS. STAT. § 940.23(1)(a) (2005-06),² a crime within WIS. STAT. ch. 940, he is statutorily ineligible for the program. *See* WIS. STAT. § 302.05(3)(a)1. For the same reason, Evans is statutorily ineligible for the Challenge Incarceration Program. *See* WIS. STAT. § 302.045(2)(c). The circuit court did not err for this reason either.

¶15 Finally, Evans argues that the circuit court erred when it denied his motion for postconviction relief. Because we have concluded that all of the issues Evans raised were either waived or lacked merit, we conclude that the circuit court

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

properly denied his motion for postconviction relief. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

