COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1826-CR **Cir. Ct. No. 2007CF4522**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE T. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Antoine T. Williams appeals from a corrected judgment of conviction for burglary to a dwelling, and from a postconviction order summarily denying his sentence modification motion. The issues are whether the trial court erroneously exercised its discretion in imposing sentence, in declaring

Williams ineligible for the Challenge Incarceration and Earned Release Programs ("Programs") before determining his statutory eligibility, and for denying his sentence modification motion.[1] We conclude that the trial court properly exercised its discretion in imposing sentence, in declaring Williams ineligible for the Programs, and in denying his postconviction motion for sentence modification; its doing so differently than Williams had hoped does not constitute a misuse of discretion. Therefore, we affirm.

¶2 Williams pled guilty to burglarizing a dwelling, in violation of WIS. STAT. § 943.10(1m)(a) (2007-08).[2] The trial court declared Williams ineligible for the Programs, and imposed a twelve-year, six-month sentence, comprised of a seven-year, six-month period of initial confinement and a five-year period of extended supervision to run concurrent to reconfinement time he was also serving. Williams moved for sentence modification, contending that the trial court misused its discretion in imposing sentence, and in declaring him ineligible for the Programs without addressing his statutory eligibility. The trial court denied the motion, explaining its exercise of discretion in imposing sentence and in declaring Williams ineligible for the Programs, specifying why any error in failing to address his statutory eligibility was harmless. Williams appeals, challenging the trial court's exercises of discretion in: (1) imposing sentence; (2) declaring him ineligible for the Programs; and (3) denying his sentence modification motion.

[1] Williams raises the same challenges against each Program. On the rare occasion that we address one of the Programs specifically, we refer to that Program by name. Otherwise we refer to them both as the Programs.

[2] All references to the Wisconsin Statutes are to the 2007-08 version.

¶3 We first consider Williams's challenges to the sentence imposed. He contends that the trial court erroneously exercised its sentencing discretion in: (1) failing to evaluate various mitigating factors at all, or differently than he had hoped; and (2) failing to specifically explain the linkage between the component parts of the bifurcated sentence and its sentencing objectives. Williams's challenges fail because he does not properly distinguish between his disappointment in how the trial court exercised its discretion, and an erroneous exercise of discretion.

¶4 "[T]he term [discretion] contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." ***State v. Gallion***, 2004 WI 42, ¶19, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). "It is a well-settled principle of law that a [trial] court exercises discretion at sentencing." ***Id.***, ¶17 (citation omitted).

> On review, in any instance where the exercise of discretion has been demonstrated, [the appellate court] follows a consistent and strong policy against interference with the discretion of the trial court in passing sentence. [S]entencing decisions of the [trial] court are generally afforded a strong presumption of reasonability because the [trial] court is best suited to consider the relevant factors and demeanor of the convicted defendant. Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence.

Id., ¶18 (citations and quotation marks omitted).

¶5 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court

accords each factor is a discretionary determination. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). 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).

¶6 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* ***Larsen***, 141 Wis. 2d at 426-28. That the trial court could have exercised its discretion differently does not constitute 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). Williams fails to recognize this distinction.

¶7 Williams does not dispute that the trial court addressed each of the primary sentencing factors. His complaint is that he does not agree with the trial court's assessment of the primary factors, and faults it for not considering every possible factor that could arguably be considered a mitigating circumstance.

¶8 Williams criticizes the trial court for failing to consider or weigh more heavily the following mitigating factors: (1) his disadvantaged childhood; (2) his seven years in custody as a juvenile; (3) his age; (4) that he was not involved with a gang; (5) the motive underlying his prior burglary conviction, which he claims was to avoid starvation as opposed to obtaining a financial benefit; and (6) that he was not the instigator of the current burglary, but encouraged to participate by his uncle. Williams also contends that the trial court blamed him unfairly for not working.

¶9 The trial court considered Williams's terrible childhood, his juvenile record, his age, and his secondary role in the current burglary. The trial court

interpreted Williams's employment history, or lack thereof, differently than Williams had hoped, but nothing the trial court said was untrue.[3] The trial court did not mention that Williams was not involved with a gang. This conviction did not relate to gang involvement and no gang involvement was mentioned. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 n.11 (citing ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993)) ("The [trial] court need discuss only the relevant factors in each case."). The trial court was troubled by Williams's prior burglary conviction, but did not address the motive underlying that conviction while imposing sentence for this subsequent burglary.

¶10 The trial court reasoned that this was a "mid-level" felony, aggravated because it was a residential burglary. "[Williams] initially was simply going to be the lookout, but then did go inside with his uncle to help carry things out. He got the laptop computer and $50.00 as his cut." The trial court was mindful that Williams now "has developed this history of burglaries." The trial court considered as aggravating factors that "[Williams] has already had an opportunity for community supervision. He was actually on extended supervision when this offense was committed. He was only three months out of confinement when this occurred."

¶11 We conclude that the trial court properly exercised its sentencing discretion. The fact that it assessed certain factors differently than Williams had

[3] The trial court mentioned Williams's lack of employment as follows:

> The times that [Williams] has been out of prison he hasn't had any employment, and that's an aggravating factor. [The trial court] think[s] when he wants something, he just takes it. He hasn't experienced really having to go to work day in and day out to labor for things that he needs or wants.

hoped, or neglected to mention every conceivable circumstance, is not a misuse of discretion. *See* ***id.***; ***Hartung***, 102 Wis. 2d at 66.

¶12 Williams also contends that the trial court failed to explain the linkage between the sentencing objectives and the components of the bifurcated sentence. *See* ***Gallion***, 270 Wis. 2d 535, ¶46. We disagree. The trial court does not need "to provide an explanation for the precise number of years chosen." ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466 (citing ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971)).

¶13 The trial court considered this burglary a serious felony, rendered more serious by Williams's prior record that included other "similar" offenses. The trial court was principally concerned with protecting the public because "his risk factor is high…. [h]e's out of control despite all of the resources that he has had available to him." It was troubled that Williams had been on extended supervision for only three months before he participated in this burglary. As the trial court explained, "[Williams] needs to know the consequences will be worse and worse as he continues to participate in this conduct." The trial court sought to "protect the community for an extensive period of time" because

> the public needs absolutely to be protected from his conduct. [The trial court] think[s he] need[s] a lengthy period of extended supervision as well to ensure that into this next decade that he will be someone who's not going to be infecting the community and making more victims, because he's created enough victims in the community already.

The trial court imposed this sentence concurrently to a previously imposed sentence to give Williams hope, as Williams's counsel contended that was important. Ultimately, the trial court "think[s] if [Williams] continues to persist in this conduct after this, even after having that hope, then he just is indicating to the

community that he can't be outside of any type of confinement in the future." The trial court properly exercised its sentencing discretion in explaining the linkage between the component parts of the bifurcated sentence and its objectives. *See* ***Gallion***, 270 Wis. 2d 535, ¶46.

¶14 Williams's next challenge is that the trial court declared him ineligible for the Programs without even mentioning his statutory eligibility. Technically, the trial court should first determine if the defendant meets the statutory eligibility requirements to participate in the Programs, pursuant to WIS. STAT. §§ 302.045(2) and 302.05(3).[4] The trial court then exercises its discretion to determine whether the defendant is suited to participation in the Program. *See* WIS. STAT. § 973.01(3g) and (3m); ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112. Here, the trial court decided that Williams was ineligible for both Programs. Its failure to first declare Williams statutorily eligible before explaining why it was otherwise denying his right to participate in the Programs is inconsequential.

¶15 Williams also challenges the trial court's exercise of discretion in denying him the right to participate in the Programs. Both Programs allow an eligible inmate, who successfully completes either Program, to be released early from prison to extended supervision. *See* WIS. STAT. §§ 302.045(1) and (3m); 302.05(3)(c)2. The time remaining on the confinement portion of the inmate's sentence is then converted to extended supervision so only the confinement

[4] For purposes of addressing Williams's challenges, there is no consequential difference between the Programs in the methodology for determining eligibility. The Challenge Incarceration Program is addressed in WIS. STAT. §§ 302.045(2) and 973.01(3m); the Earned Release Program is addressed in WIS. STAT. §§ 302.05(3) and 973.01(3g).

portion is reduced, not the total sentence. *See* §§ 302.045(3m) and 973.01(3m) (Challenge Incarceration Program); 302.05(3)(c)2. and 973.01(3g) (Earned Release Program). Eligibility for these programs is discretionary, applying the same criteria as those considered when imposing sentence. *See* ***Steele***, 246 Wis. 2d 744, ¶¶8-11.

¶16 The trial court explained why it denied Williams eligibility for the Programs. Williams

> had the resources of the Earned Release Program and that hasn't proven effective in keeping [him] out of difficulties. [The trial court] think[s] those resources should be used for other people and the community should be protected from [his] conduct for each and every day of the initial confinement that [the trial court is] ordering.

The trial court properly exercised its discretion in denying Williams a second chance at early release. It preferred to use the Program's resources to give another inmate the opportunity that Williams squandered.

¶17 Williams's remaining challenge is that the trial court erroneously exercised its discretion in denying his sentence modification motion. Our rejection of his other challenges necessarily deprives him of this challenge.

By the Court.—Judgment and order affirmed.

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