

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2009

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. 2008AP1862-CR

Cir. Ct. No. 2007CF4684

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TONY WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tony Williams appeals from a corrected judgment of conviction for armed robbery and from a postconviction order summarily denying his sentence modification motion. The issues are whether the trial court erroneously exercised its sentencing discretion in failing to: (1) consider

Williams’s background and character as mitigating factors; (2) explain the length of the sentence; (3) explain the linkage between the component parts of the bifurcated sentence and the trial court’s sentencing objectives; (4) first determine Williams’s statutory eligibility for the Challenge Incarceration and Earned Release Programs¹ (“Programs”), and then determine his suitability for the Programs mindful of his substance abuse problems; and (5) “revisit its earlier rationale in a meaningful way” in denying his sentence modification motion. We conclude that the trial court properly exercised its discretion in imposing sentence, in determining Williams’s ineligibility 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 armed robbery, in violation of WIS. STAT. § 943.32(2), for a carjacking during which he threatened a woman at gunpoint and demanded her keys. The trial court declared Williams ineligible for the Programs, and imposed a ten-year sentence, comprised of four- and six-year respective periods of initial confinement and extended supervision. Williams moved for sentence modification, contending that the trial court misused its sentencing discretion in failing to explain the reasons for its sentence, for failing to consider mitigating aspects of his character, and for failing to declare him eligible for the Programs. The trial court denied the motion, explaining its exercise of discretion

¹ The Earned Release Program is also known as the Wisconsin Substance Abuse Program and serves as, among other things, a treatment program for eligible inmates. *See* WIS. STAT. § 302.05(1)(am) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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) in denying his sentence modification motion.

¶3 We first consider Williams's challenge to the sentence. He contends that the trial court erroneously exercised its sentencing discretion in failing to: (1) consider the mitigating aspects of his character and background; (2) specifically explain the reason for the length of the sentence; and (3) explain the linkage between the component parts of the bifurcated sentence and the court's 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 the trial court assessed the primary factors and the mitigating aspects of his character and background differently than he had hoped.

¶8 Williams criticizes the trial court for failing to consider what he characterizes as his "disturbing upbringing," his psychological issues, and his problems with alcohol and substance abuse. We disagree.

¶9 The trial court recognized that Williams had not:

led a Leave it to Beaver type life. But you know, you've been around, you've probably had a lot of tough knocks and you probably realized, realized more than most, even, that when you get burned putting your hand near a stove, you don't want to put it there again.

You've probably had ... every negative experience that a young guy could have; not saying that you haven't. But instead of learning from any of it, all you're doing is using it as an excuse for doing some more. That's what I'm hearing here. That's what the record reveals. It's not what I really want to believe or feel, but it's clear that you have disregarded any efforts that might have been made to rehabilitate you to a point where you could be a more effective guy. Now, why you've chosen that or why, you know, that you can't do it because of, you know, you have all these other issues.

Well, you know, there comes a point in time that you got to put those issues behind you, how difficult that is. And you know, but you just can't sit there and keep dwelling on the negatives and then go on out and perpetuate the negatives by proving up almost a – you're making a dream come true every time you hurt somebody else. You're doing it because you were hurt so badly? Maybe.

But number one, who cares? I mean that may sound cruel. But you know, I'm not here to tell you – I'm not going to mollycoddle you. Because you know, what you were doing is just pure wrong....

....

You know, I can order you to go to A.O.D.A. I can't have you stop necessarily smoking. I can tell you're going to have consequences if you do smoke or do whatever you're going to do. But reality is, there's only one person that's going to get you to do any of this stuff, and do you know who that is?

THE DEFENDANT: Me.

THE COURT: You. You got it.

So long as you're going to be going on a poor me program, you're never going to get anything done because you'll always rationalize or excuse monger to get you back into doing something to everyone else and just say, well, I did that because I was treated like dirt.

....

I have to consider that in terms of the need of your overall character, which seems to me you should be doing better in life based upon all the assistance that you did get [in the juvenile system] and hopefully learning from all the negative that you didn't get.

The trial court also ordered “a mental health evaluation and treatment if needed.” It ordered an A.O.D.A. assessment and treatment, and programs for cognitive intervention and anger management.

¶10 The trial court explicitly considered Williams’s background and character, including his “disturbing upbringing,” and his psychological and substance abuse problems. Rather than considering them as mitigating circumstances however, the trial court was frustrated with Williams’s squandering of his past rehabilitative opportunities, and declined to allow his background and character misfortunes to provide more excuses for his unlawful behavior. The trial court considered these factors, simply not as Williams had hoped. That is not an erroneous exercise of discretion. *See Hartung*, 102 Wis. 2d at 66.

¶11 Williams also contends that the trial court erroneously exercised its discretion because it failed to explain the length of his sentence and how its component parts met the court’s sentencing objectives. We disagree.

¶12 The maximum available penalty for armed robbery is forty years: twenty-five years of initial confinement and fifteen years of extended supervision. *See WIS. STAT. §§ 943.32(2); 939.50(3)(c); 973.01(2)(b)3. & (d)2.* The trial court imposed one-fourth of that sentence (ten years), and ordered only two-fifths of that

sentence (four years), to be served in initial confinement. The trial court explained that its “job is to protect society, that’s my primary function here.” It considered the sentencing guidelines, Williams’s “terrible record as a juvenile,” his age, his offense, and that he was “pointing that thing [a gun] at her [and she] had no clue [that the gun was a BB gun] and thought that was going to be the end of her life.” It assessed Williams as

an aggravated but medium risk [that it was] dropping ... down from aggravated high as almost a certainty that you’ll reoffend down to an aggravated medium. I hope you don’t. I’m giving you one shred of hope. But if you do, I’m just telling you that, you know, I’m not going to be the one surprised.

All those factors together then, I do think that 10 years in the Wisconsin State prison is appropriate.

¶13 The trial court explained the reasons for its sentence, and its explanation was reasonable. It was not obliged “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)).

¶14 Williams also contends that the trial court failed to explain the linkage between its sentencing objectives and the component parts of its bifurcated sentence. *See Gallion*, 270 Wis. 2d 535, ¶46. Again, we disagree.

¶15 The trial court imposed a ten-year sentence as appropriate, explaining that:

I’m going to give you four years of that [ten-year sentence] incarcerated and six years on extended supervision. I don’t want to lose you. I think you do have something to give

back but you're going to be under scrutiny and you're going to start learning that rules are laws and laws are rules and that society doesn't want a guy who's going to behave in the fashion you have about them. It's not acceptable, it's unreasonable, [and it] won't be tolerated.

The Court has to consider the need in this case here for what's going to happen to you during the extended supervision.

The trial court then listed the conditions of extended supervision including the need for mental health, alcohol and substance abuse assessments and treatments, and treatment for cognitive intervention and anger management. Although its primary purpose in structuring a sentence for Williams was protection of the public, it also recognized that it was involved “[t]angentially” with rehabilitation. It explained to Williams that the criminal justice system provides:

some assistance, we give you some supervision, we make you toe the line as best we can, but you've been through it before, you've been through probation, you've blown it off, you can play games with it, you can do whatever you want with it.

The trial court explained the linkage between its sentencing structure and its objectives; it was not required to explain “the precise number of years chosen.” *Taylor*, 289 Wis. 2d 34, ¶30 (citing *McCleary*, 49 Wis. 2d 263).

¶16 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). The trial court then exercises its discretion to determine whether the defendant is otherwise suited to participate 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 denied Williams eligibility for

each Program. Its failure to first declare Williams statutorily eligible before explaining why it was otherwise denying his right to participate in the Programs is inconsequential.

¶17 Williams also challenges the trial court's exercise of discretion in denying him the right to participate in the Programs, particularly the Earned Release Program because of his substance abuse problem. *See* WIS. STAT. § 302.05(1)(am). 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 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.

¶18 The trial court explained that the reason it denied Williams eligibility for the Programs was the assaultive nature of the offense for which he was convicted. Williams does not dispute that the armed robbery was "assaultive" in nature, only that he nevertheless remained statutorily eligible and has a substance abuse problem. It is the trial court's prerogative to ultimately determine whether a convicted defendant is entitled to the privilege of participating in a Program that, upon successful completion, will result in early release from initial confinement. The trial court considered protecting the public its primary sentencing function. It properly exercised its discretion in determining that Williams's assaultive conduct, in combination with the other primary sentencing factors, did not warrant that special privilege. The trial court imposed a shorter

period of initial confinement because of its perception that Williams “seem[s] to finally hopefully at least [be] ... opening [his] eyes a little bit.” By imposing a lesser period of initial confinement than perhaps it ordinarily would have, the trial court sought to give Williams “one shred of hope” because it “d[id]n’t want to lose [him].” The trial court told Williams that “what concerns me about you is that you’ve been through this wringer and you’ve gone through as extensive an operation as this system really has for you.”

¶19 Williams had previously been provided treatment and programming opportunities. Williams squandered those opportunities; as the trial court told him, “a person has to be receptive to help.” The trial court did not believe that Williams deserved an opportunity for early release. The trial court explained its reasoning in ultimately denying Williams eligibility for the Programs; its reasoning was reasonable, and thus, a proper exercise of discretion. *See id.*

¶20 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.

