COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP59-CR **Cir. Ct. No. 2006CF3870**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER ROSS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Christopher Ross appeals from a judgment of conviction for first-degree reckless injury and from a postconviction order denying his motion for sentence modification. The issue is whether the trial court erroneously exercised its discretion when it allegedly imposed an excessive

sentence by applying the sentencing factors in a mechanistic rather than an individualistic way. We conclude that the trial court properly exercised its discretion in applying the primary sentencing factors and explaining why it imposed the sentence it did. Therefore, we affirm.

¶2 Ross pled guilty to first-degree reckless injury, in violation of WIS. STAT. § 940.23(1)(a) (2005-06), for shooting at a vehicle and seriously injuring the driver.[1] The trial court imposed a ten-year sentence comprised of five-year periods of initial confinement and extended supervision. Ross moved for sentence modification. The trial court denied the motion and Ross appeals.

¶3 Ross contends that the trial court imposed an excessive sentence by employing a mechanistic rather than an individualistic approach. He contends that the trial court refused to impose probation simply because he committed an offense with a gun. Although the trial court expressed its concern with offenses involving guns, it extensively applied the primary sentencing factors to Ross's offense and his situation. The trial court's sentence was reasoned and reasonable.

¶4 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).

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶5 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).

¶6 The trial court considered the gravity of the offense. The trial court was troubled by Ross "tak[ing] a gun and fir[ing]" at the victim. It characterized gun offenses as "despicable" and "reckless." It considered both the positive and negative aspects of Ross's character. It believed that to his family, Ross was "a responsible, respectful person." It acknowledged that "the positives are considerable" with respect to Ross's character. However, it was aware of his past history and summarized some of Ross's past behavior as "not argu[ing] for leniency or mitigation. [Ross] w[as] on a track to be a very harmful person."

¶7 Ross's challenge is essentially to the trial court's rejection of the defense recommendation for probation. He claims that the trial court did not explain how the confinement term meets the minimum custody standard. *See* ***State v. Gallion***, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197. We disagree.

¶8 The trial court told Ross that it was "aware of the options," referring to probation. It rejected that option, however, because his offense was too serious for probation. The trial court did not impose the maximum sentence; in fact it imposed less than half of the twenty-five-year maximum sentence. *See* WIS. STAT. §§ 940.23(1)(a); 939.50(3)(d). Further, it explained its obligation to the

community and said that it could not justify "the shooting that happened there where you had all the kids pulling guns and shooting one another." The trial court explained that the people in the neighborhood would not think that probation was a good idea. People "deserve to know that if people are walking around armed and firing guns in a residential neighborhood," that there will be consequences. The trial court

> [could not] say probation is an adequate response, both to get it deep into your skull that the gun offense is something you have to pay a price for, if nothing else, to remind yourself never to do it again and secondly, to tell the community, you have a right to be safe from this behavior. We are going to do our best to protect you from that behavior.

¶9 Ross raised this same challenge in his motion for sentence modification. The trial court explained that it "considered the needs of the community and determined that the defendant needed to be confined for a significant, but reasonable, amount of time to protect the public given the nature of the offense."

¶10 The trial court properly exercised its sentencing discretion in addressing the violence that results from using guns. By firing a gun at a vehicle, Ross seriously injured the driver. Explaining the danger and violence begot from guns is not a mechanistic approach; it accounts for the facts of the offense Ross committed and explains why probation would unduly depreciate that offense.

¶11 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); *see* ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996). A ten-year sentence including a five-year period of initial confinement for shooting at a vehicle and seriously injuring the driver "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." *See* ***Daniels***, 117 Wis. 2d at 22. Ross acknowledges that his sentence is within the statutory maximum.

¶12 The trial court did not automatically impose a prison sentence because Ross used a gun. Shooting into a vehicle is a violent offense. Using a gun in that fashion does not warrant mitigation. The trial court applied the sentencing factors, addressed the individual factors involving the offense, Ross's character, and the trial court's obligation to protect the public. There was nothing mechanistic about the trial court's approach. Its comments were appropriate to the offense. Its comments were extensive; they were reasoned and the sentence imposed was reasonable.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).