COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP127-CR **Cir. Ct. No. 2007CF5241**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY LOGGINS, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY and M. JOSEPH DONALD, Judges. *Affirmed.*

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

¶1 KESSLER, J. Gregory Loggins, Sr., appeals from a judgment of conviction entered after he pled guilty to one count of armed robbery by threat of force, contrary to WIS. STAT. § 943.32(2) (2007-08).[1] He also appeals from an order denying his postconviction motion.[2] Loggins argues that the physical evidence seized at his home and his statement to police following his arrest should have been suppressed because the police illegally entered Loggins' home. He also claims that the trial court erroneously exercised its sentencing discretion. We conclude that the trial court did not err in denying the suppression motion and did not erroneously exercise its sentencing discretion. Therefore, we affirm.

BACKGROUND

¶2 City of Milwaukee police responded to the robbery of a George Webb restaurant that occurred in the early morning hours of October 22, 2007. The waitress working that night reported that a man entered the restaurant, threatened her with a hammer and demanded the money in the cash register. During their investigation of the robbery, police viewed a surveillance video from the restaurant and observed the perpetrator's appearance, clothing and the hammer used to threaten the waitress during the robbery. Police also interviewed a witness who identified Loggins as the perpetrator and provided Loggins' address.

¶3 Police went to Loggins' home at about 7:30 a.m., approximately five hours after the robbery had taken place. At the home, they interacted with his

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The Honorable William Sosnay accepted Loggins' plea and sentenced him. The Honorable M. Joseph Donald considered Loggins' postconviction motion.

live-in girlfriend, Cathy Ray, before Loggins was found and arrested at the home. The clothing and hammer observed in the surveillance video were also found at the home and recovered as evidence. After being read his ***Miranda***[3] rights, Loggins admitted that he had committed the robbery. In the course of the investigation, a witness told police that Loggins had robbed the same George Webb on August 19, 2007. As a result, Loggins was charged with one count of armed robbery by threat of force for robbing the George Webb on October 22, 2007, and one count of robbery by threat of force for robbing the same restaurant on August 19, 2007.

¶4 Following his arrest, Loggins filed a motion to suppress "all evidence derived from [his] unlawful arrest" including statements, clothing and weapons recovered by the police department. In his motion, Loggins asserted that the police entered and searched the house without a warrant and without consent from Ray, who answered the door the morning of the arrest. Loggins also asserted that the items recovered from his home were not in plain view and were not discovered inadvertently during the search that ensued. Loggins' motion to suppress was denied, for reasons detailed in the discussion section of this opinion.

¶5 Loggins entered a plea agreement with the State, pursuant to which he pled guilty to the October 22 robbery and the August 19 robbery was dismissed and read in. He was sentenced to four-and-a-half years of initial confinement and seven years of extended supervision. The trial court determined that Loggins was ineligible for the Challenge Incarceration Program because of his age and that Loggins was not eligible for the Earned Release Program because of the serious

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

nature of his offense, the read-in crime and the consideration the court had already given.

¶6 Loggins filed a motion for postconviction relief. He sought to overturn his conviction on grounds that his statements and the physical evidence should have been suppressed. In the alternative, he sought sentence modification. The postconviction motion was denied. This appeal follows.

DISCUSSION

I. The suppression motion.

¶7 Loggins argues that evidence found at his home and statements he made after his arrest should be suppressed because they resulted from an illegal entry into his home. Specifically, he argues that the trial court's factual findings concerning what happened at Loggins' home were clearly erroneous and that Ray did not adequately consent to allowing officers in the home. For reasons detailed below, we reject his arguments and affirm the trial court's denial of the suppression motion.

¶8 We begin our analysis with the applicable legal standards. Under the exclusionary rule, evidence obtained as a result of a violation of a constitutional right may be suppressed. ***State v. Knapp***, 2005 WI 127, ¶22, 285 Wis. 2d 86, 700 N.W.2d 899. "Searches conducted without a warrant are presumptively unreasonable." ***State v. Tomlinson***, 2002 WI 91, ¶20, 254 Wis. 2d 502, 648 N.W.2d 367. "However, the police may enter a home without a warrant to make an arrest if two circumstances are present. First, the police must have probable cause to make the arrest, and second, there must be an exception to the warrant requirement, such as exigent circumstances or consent to enter." ***Id.***

¶9 At issue in this case is whether the police had consent to enter the home.[4] "Consent must be voluntary, a 'free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied.'" ***State v. Hartwig***, 2007 WI App 160, ¶7, 302 Wis. 2d 678, 735 N.W.2d 597 (citation omitted).

¶10 In reviewing whether evidence should be suppressed, we apply a two-step standard of review. ***State v. Pallone***, 2000 WI 77, ¶27, 236 Wis. 2d 162, 613 N.W.2d 568. First, we review the trial court's factual findings and uphold them unless they are clearly erroneous. ***Id.*** Second, we review the application of constitutional principles to those facts *de novo*. ***Id.***

¶11 At the motion hearing, Detective Shannon Lewandowski, Officer Steven J. Van Erden and Ray testified concerning the events that took place at Ray and Loggins' home the morning of Loggins' arrest.

¶12 Lewandowski testified that she, another detective and two police officers went to Loggins' home at about 7:30 a.m. A detective and an officer were stationed at the back door and Lewandowski and Van Erden went to the front door. Lewandowski and Van Erden knocked on the front door. Lewandowski said Ray opened the door and Lewandowski asked if Loggins was in the home. Lewandowski testified that she asked Ray if they could step into the hallway and Ray said: "yes."

¶13 Lewandowski said that Ray appeared to move slowly (due to health problems). Lewandowski continued:

[4] The State does not contend that exigent circumstances existed, so we do not address Loggins' argument that exigent circumstances were lacking.

> [W]e stood behind her walking, and she slowly walked through the small hallway and we followed her and that's when I asked her again if he was home, she said no, and I said are you opposed to us looking to see if he is or is not [here] and she said no, go ahead.

Lewandowski testified that while she was talking to Ray, she and Van Erden had their guns holstered and they were not yelling at Ray. Lewandowski said she told Van Erden to tell the other officer and detective to come in. Shortly thereafter, Loggins was located and he was immediately arrested because "he fit the exact description as I saw on the surveillance video at the George Webb." Loggins was taken out of the house.

¶14 Lewandowski said she continued speaking with Ray and told her why Loggins was being arrested. Lewandowski said Ray was "very" responsive to Lewandowski's questions and was "actually thanking" Lewandowski for arresting and taking Loggins out of the house. Ray told Lewandowski that Loggins had a severe drug problem and that Ray feared for the safety of herself and her sixteen-year-old daughter.

¶15 Lewandowski said that after Loggins was arrested and taken outside, the daughter, who was present, wanted to know what was going on. Ray did not want her daughter to hear Lewandowski talking, so the two women moved into a small hallway area that was out of earshot and eyesight of the daughter. Lewandowski testified that while the women were in the hallway talking, she observed "clothes and shoes matching the ones on the [robbery] video which were in a front hallway." Lewandowski said she told Ray she recognized the clothing and mentioned that Loggins had used a hammer. Lewandowski said Ray became upset, said she could not believe what Loggins had done, told the detective to

"take what you want" and then moved aside a curtain covering a closet. At that time, Lewandowski saw a hammer in the closet, which was recovered.

¶16 Van Erden testified that when Ray let them enter the home he "took up a blocking position" between the two women and the rest of the house, for safety reasons. He said he did not do any searching right away. He explained: "I wait until I hear consent, the consent is confirmed from the detective, and then I begin the consent search." He said after consent was given, he located Loggins.

¶17 Ray's testimony varied in some respects from that of Lewandowski and Van Erden. She testified that on October 22, 2007, she was living with Loggins and their daughter. Ray said she has numerous health problems and as a result, she takes a lot of medication. She said that she was still sleeping when the police woke her by pounding on the door and that she did not have a good mental condition that morning.

¶18 Ray said she did not know exactly when the officers arrived, but she estimated it was "around 5 or 6." She said:

> They were basically bamming like they was coming through the door, kicking through the door, and when they knocked on the door, I asked who it was and they say the police, and I ask them who they looking for…. [T]hey said we want you. I said you don't even know who I am when I'm on the other side of the door, who are you looking for, and they mentioned that I could either open the door or they would get their way through or they gonna get a search warrant.

Ray said she opened the door and then Lewandowski asked to speak with her. Lewandowski said Loggins had been involved in a robbery. Ray said that when Lewandowski saw Ray's daughter in the dining area, Lewandowski moved toward

the living room area so she could talk to Ray "on the side," away from the daughter.

¶19 Ray said she did not tell the officers they could look around, but acknowledged that she did not ask them to leave, explaining that she "wanted to hear what they had to say." Ray also said she did not give the officers permission to take Loggins' clothing and his hammer.

¶20 The trial court found the testimony of Lewandowski and Van Erden to be credible. It also accepted some of Ray's testimony, but observed that Ray was "somewhat sketchy over the details numerous times throughout her testimony." The court explained: "She indicated that she doesn't remember detail to detail and doesn't recall exactly what was said or what did happen. That is apparent throughout her testimony."[5]

¶21 The trial court explicitly found as follows. The officers knocked loudly enough that Ray and her daughter heard them. Ray opened the door and allowed police to enter the front hall, then led them to a dining and living room area. Lewandowski "inquire[d] specifically of Ms. Ray as to whether or not she objected to them looking for [Loggins] and she consented." Van Erden then quickly located Loggins.

¶22 The trial court commented that it had the opportunity to observe Ray's demeanor during her testimony and specifically found that although Ray "may have been upset, even concerned" after she was awakened by the police, the

[5] In her testimony, Ray acknowledged that she was "still kind of confused on what went on … [be]cause I could see everything was going on so quick and fast."

officers "did not appear threatening in nature to Ms. Ray" and did not act that way toward Ray.

¶23 The trial court further found that while Lewandowski was talking with Ray, she observed the clothing and shoes "in plain view" and recognized them from the video. The court found that when Lewandowski and Ray went into another room, Ray "did in fact expose the closet area to Detective Lewandowski who then observed … the hammer … [which] was recovered as potential evidence in a crime."

¶24 Based on these findings, the trial court concluded that there had been no constitutional violations because Ray let the officers into the home and gave them consent to search. The court concluded that the arrest was lawful and that the clothing and hammer were lawfully obtained.

¶25 On appeal, Loggins challenges the trial court's factual findings. He argues that it "was clearly erroneous for the court to state that Cathy Ray was inconsistent in her testimony and from that conclude she was less than credible than police in whose favor the motion was decided." We disagree. The court's credibility determinations and findings of fact were precisely within its discretion. *See* ***Pallone***, 236 Wis. 2d 162, ¶45 ("[I]t is the role of the fact finder listening to live testimony, not an appellate court relying on a written transcript, to gauge the credibility of witnesses."); *see also* ***State v. Sloan***, 2007 WI App 146, ¶21, 303 Wis. 2d 438, 736 N.W.2d 189 ("'When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.'") (citations and one set of quotation marks omitted). The trial court explicitly found the officers to be more credible than Ray, and it made detailed findings that are supported by the testimony of Van Erden and

Lewandowski. Because there is credible evidence to support the court's findings, including that Ray consented to the police coming in the home[6] and was not intimidated by them, we will not disturb them. *See* ***id.***

¶26 Further, we agree with the trial court's legal conclusions, which are supported by its factual findings.[7] Specifically, Ray gave the officers consent to enter the home and to look for Loggins, and the officers had probable cause to arrest him based on the evidence provided by the videotape of the robbery. *See* ***Tomlinson***, 254 Wis. 2d 502, ¶20.

¶27 Next, the clothing and hammer were properly seized. It is well established that the police may seize evidence without a warrant when the evidence is in plain view. *See* ***State v. Johnston***, 184 Wis. 2d 794, 809, 518 N.W.2d 759 (1994). The plain-view exception for warrantless seizures applies when: (1) the evidence was within plain view of the discovering officer; (2) the officer had a prior justification for being in the position from which the plain view discovery was made; and (3) the item seized, by itself or in combination with facts known to the officer at that time, provided probable cause to believe that there was a connection between the evidence and the criminal activity. ***State v. Edgeberg***, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994). Here, the officers had

[6] Loggins takes specific issue with the trial court's finding that Ray "opened the door and allowed" the officers to enter. He asserts that Ray "gave no verbal consent and her action in opening the door to a police presence, unaccompanied by verbal consent, is not tantamount to the consent needed to confer authority on police." We reject this challenge to the trial court's findings. Lewandowski testified that she "asked [Ray] if we could step in and she said yes." This testimony supports the trial court's finding that Ray "allowed" the officers to enter.

[7] Because we conclude there were no constitutional violations, we do not consider Loggins' argument that his confession was insufficiently attenuated from the search at Loggins' home.

consent to be in the home and the clothing and the hammer were in plain view when Lewandowski saw them. There was probable cause to believe they were connected to the robbery, as they were seen in the videotape. Thus, their seizure was constitutional. *See* ***id.***

II. Sentencing discretion.

¶28 Loggins argues that the trial court erroneously exercised its discretion when it sentenced him. Specifically, he argues: the trial court did not adequately explain the reason for the sentence; Loggins should have been given a shorter sentence; Loggins should have been given credit "for his cooperation or minimal record or compliance while on probation" in the past; and the trial court should have made him eligible to participate in the Earned Release Program. We reject his arguments and affirm the sentence.

A. Legal standards.

¶29 Appellate review of sentencing "is limited to determining if discretion was erroneously exercised." ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. This court follows a strong, consistent policy against interfering in the trial court's sentencing discretion. ***Id.***, ¶18. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.***, ¶17. When the exercise of discretion has been demonstrated, we follow "'a consistent and strong policy against interference with the discretion of the trial court in passing sentence.'" ***Id.***, ¶18 (citation omitted). "'Sentencing 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.'" ***Id.*** (citation and one set of brackets omitted). The "'sentence imposed in each

case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" ***Id.***, ¶23 (citation omitted).

¶30 A sentencing court is "required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. Also, under truth-in-sentencing, the legislature has mandated that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant and other aggravating or mitigating factors. ***Id.***, ¶40 n.10. Justification for the length of the sentence should be provided, along with the reasons for not imposing a shorter sentence. ***Id.***, ¶24. However, the trial court is not required to specify the weight it assigned each sentencing factor and how each factor translated to a certain number of years. ***State v. Fisher***, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56.

B. The sentencing.

¶31 Loggins argues that the trial court's sentencing rationale, "distilled to its core, bear little resemblance to the ideal sentencing rationale required under ***Gallion***." We disagree.

¶32 The trial court considered appropriate sentencing factors. It commented on Loggins' longstanding addiction to drugs and Loggins' need for drug treatment, noting that at the time of sentencing, Loggins was doing well in treatment because he was "[i]n a confined setting where he faces extensive exposure where he could go to prison … up to a total of 40 years." The court considered the nature and severity of the offense, noting that Loggins committed

two robberies, which were serious because his purpose was getting money to fuel his drug addiction and because he was armed or gave the impression he was armed.

¶33 The trial court discussed the sentencing guidelines and even thanked trial counsel for providing his written analysis of the application of the guidelines. The court considered the trauma to the victims. It discussed Loggins' age, character, background, employment, relationships and drug use. The court also considered the protection of the community, noting the effect of robberies on the community.

¶34 With respect to the imposition of sentence, the trial court explicitly said it was giving Loggins credit because he had pled guilty, accepted responsibility and shown remorse. The court further indicated it had given Loggins credit for additional mitigating factors that trial counsel had identified in the sentencing guideline worksheet. The court found that although Loggins was sincere in his desire to give up drugs, rehabilitation would require a confined setting. The court said it considered probation, but rejected it as inappropriate because "[i]t would diminish the seriousness of the defendant's conduct." It also said that punishment was a component of the sentence.

¶35 The trial court concluded that "[a] period of confinement is warranted … to protect the community particularly and to make sure that the defendant continues to abstain from the use of drugs and continues to get treatment." The court added that the period of extended supervision would provide monitoring to address Loggins' drug treatment.

¶36 In this court's opinion, the sentencing transcript refutes Loggins' claims that the sentence was not adequately explained and that he was not given

credit for his cooperation, record and compliance on probation. With respect to the length of the sentence, we conclude that a total sentence of eleven-and-one-half years out of a possible forty years is not "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." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶37 Loggins' final argument concerning his sentence concerns the Earned Release Program (ERP). At sentencing, the trial court told Loggins: "I do not find you eligible for the [Challenge Incarceration Program] boot camp. You are outside the age requirement, and I do not find you eligible for the Earned Release Program because of the serious nature of the offense, the read[-]in and the consideration I have already given you." Loggins takes issue with the trial court's decision that he was ineligible for the ERP.

¶38 In ***State v. Owens***, 2006 WI App 75, 291 Wis. 2d 229, 713 N.W.2d 187, we explained the purpose and proper analysis of a defendant's eligibility for the ERP. We explained:

> The ERP is a substance abuse program administered by the Department of Corrections. WIS. STAT. § 302.05. An inmate serving the confinement portion of a bifurcated sentence who successfully completes the ERP will have his or her remaining confinement period converted to extended supervision, although the total length of the sentence will not change. WIS. STAT. § 302.05(3)(c)2.
>
> Subject to a few exceptions … when imposing a bifurcated sentence, "the court shall, *as part of the exercise of its sentencing discretion*, decide whether the person being sentenced is eligible or ineligible to participate in the earned release program…." WIS. STAT. § 973.01(3g) (emphasis added).

> ….
>
> … WIS[CONSIN] STAT. § 973.01(3g) explicitly states an ERP eligibility decision is part of the court's exercise of sentencing discretion. Thus, while the trial court must state whether the defendant is eligible or ineligible for the program, we do not read the statute to require completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the ERP determination.

Id., ¶¶5-6, 9 (footnotes omitted).

¶39 In this case, the trial court offered ample justification for its sentence as a whole, and also identified three specific factors that influenced its decision on Loggins' eligibility for the ERP: (1) the serious nature of the crime; (2) the read-in offense; and (3) the consideration Loggins had already been given. The court's discretionary determination is amply supported by the sentencing transcript and constitutes a proper exercise of sentencing discretion. *See* ***Owens***, 291 Wis. 2d 229, ¶9.

¶40 Loggins asserts that sentencing discretion was not properly exercised because the trial court did not consider whether Loggins was potentially eligible for the ERP. He argues that the court was required to "determine if he was statutorily eligible for the program before determining he was not eligible." Loggins asserts that if the trial court had "reviewed the criteria [for eligibility], it may have concluded the program was beneficial because Mr. Loggins met the requirements and therefore, there was no reason to preclude his involvement." Loggins relies on ***State v. Steele***, 2001 WI App 160, 246 Wis. 2d 744, 632 N.W.2d 112, a case involving eligibility for the Challenge Incarceration Program. In ***Steele***, we stated:

> The language of WIS. STAT. §§ 302.045(2) and 973.01(3m) is plain. The sentencing judge must first determine whether the offender meets the preliminary criteria of § 302.045(2)

> regarding voluntariness, age, nature of offense, substance abuse issues, and absence of psychological, physical or medical limitations. Then the court must determine, exercising its own sentencing discretion, whether an offender who already meets the § 302.045 specified criteria is eligible for boot camp. Sec. 973.01(3m). Even if the offender meets all of the department's eligibility requirements under § 302.045(2), the trial court has the discretion under § 973.01(3m) to declare an offender ineligible for boot camp.

Steele, 246 Wis. 2d 744, ¶8.

¶41 Loggins argues that the trial court in this case was required to determine whether he met the preliminary statutory criteria for the ERP and then exercise discretion. We agree. However, we disagree with Loggins' assertion that the court failed to do so. The only preliminary statutory requirement for the ERP is that the sentencing crime not be one of certain crimes from WIS. STAT. chs. 940 and 948. *See* WIS. STAT. § 302.05(3). It was undisputed that Loggins violated WIS. STAT. § 943.32(2). Thus, the court proceeded directly to its exercise of discretion concerning the program. We are unconvinced that the trial court was required to say "Loggins did not commit one of the crimes specified in. § 302.05(3) and, therefore, he is potentially eligible for the Earned Release Program." It is implicit in the court's statement that Loggins would have been eligible for the ERP[8] but for the fact that the court, in exercising its discretion, determined Loggins should not be eligible due to the seriousness of his actions and other considerations that had already been factored into the sentence. *See* ***Owens***, 291 Wis. 2d 229, ¶6 (determining eligibility for ERP is part of sentencing

[8] In contrast, the trial court indicated that Loggins was not eligible for the Challenge Incarceration Program due to his age.

discretion). For the foregoing reasons, we reject Loggins' challenges to his sentence.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.