

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 2010

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. 2009AP1148-CR

Cir. Ct. No. 2008CF1100

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE V. BEARD,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Antoine V. Beard appeals from a corrected judgment of conviction for possessing a firearm as a felon and for possessing heroin with intent to deliver, and from a postconviction order denying his sentence modification motion. The issue is whether the trial court erroneously exercised its

sentencing discretion when it allegedly ignored mitigating circumstances that Beard claims would have supported a lesser period of initial confinement. We conclude that the trial court properly exercised its sentencing discretion by considering the primary sentencing factors, by providing a reasoned and reasonable sentence well within the statutory maximums, and by expressly considering some of the mitigating circumstances Beard contends it ignored. Therefore, we affirm.

¶2 Beard pled guilty to possessing a firearm as a felon, in violation of WIS. STAT. § 941.29(2) (2007-08),¹ and to possessing no more than three grams of heroin with intent to deliver as a subsequent drug offense, in violation of WIS. STAT. §§ 961.41(1m)(d)1. (2007-08) and 961.48 (2007-08). For the firearm conviction, the trial court imposed a three-year sentence, comprised of two- and one-year respective periods of initial confinement and extended supervision. For the heroin conviction, the trial court imposed a six-year sentence, comprised of four- and two-year respective periods of initial confinement and extended supervision. Both sentences were imposed to run consecutive to each other and to any other sentence.

¶3 Beard sought sentence modification, contending that the trial court ignored mitigating factors and imposed a sentence that exceeded the minimum amount of custody required to meet the sentencing objectives (“minimum custody requirements”). The trial court denied the motion, explaining the specific mitigating factors it considered, most particularly Beard’s health problems, and

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

further explained that it “was not obliged to comment on each and every mitigating factor that was offered by the defense.” Beard appeals.

¶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 should also 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. 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. 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). 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).

¶5 Beard’s complaint is not the trial court’s failure to consider the primary sentencing factors; he complains that it emphasized the gravity of the offenses and the protection of the community at the expense of the mitigating aspects of his character. Preliminarily, the emphasis the trial court places on each of the primary sentencing factors is discretionary. *See Ocanas*, 70 Wis. 2d at 185.

¶6 The trial court considered the seriousness of each of these offenses, and characterized them collectively as “aggravated because there are two matters

here.” It was concerned about the dangerousness of the particular drug involved—heroin—and the involvement of a gun: a “very lethal combination” because “[g]uns and drugs in combination are a cancer in this community, and they are causing tremendous problems throughout the community, and that has to be stopped.”

¶7 The trial court expressly considered the mitigating aspects of Beard’s character, crediting him for being “cooperative with the police investigation [and] ... accept[ing] responsibility in his statement to the police [and] for his conduct in coming forward and pleading on these matters.” The trial court was also mindful of Beard’s criminal history that includes convictions for drug-dealing in serious substances, including cocaine and heroin. It was particularly troubled that Beard committed these offenses while on probation for a prior offense, explaining “[t]hat doesn’t bode well for [Beard’s] rehabilitative abilities.”

¶8 The trial court not only considered Beard’s significant medical problems, but explicitly stated that it imposed a more lenient sentence because of Beard’s health. The trial court said at sentencing, and reiterated its remarks in its postconviction order:

[The trial court] think[s] that it’s important to note [Beard] has significant health problems. He’s had a knee replacement. He has cardiac problems including congestive heart failure. He has kidney problems. He has severe asthma.

....

And [the trial court] consider[s] Beard’s multiple health problems]. And because of that, [the trial court is] going to reduce the sentence that [it] otherwise would have issued. [The trial court is] going to take that into account.

[Beard's] health is going to make it more difficult for him to serve than if he didn't have those health problems.

¶9 The trial court considered several of Beard's mitigating factors, and expressly imposed a lesser sentence because of Beard's combination of significant health problems. We reject Beard's challenge that the trial court erroneously exercised its discretion and ignored various mitigating circumstances.

¶10 Beard also contends that the sentence failed to meet the minimum custody standards. We disagree. The trial court expressly rejected probation as "wholly inappropriate" because Beard "was already on a drug probation" when he committed these offenses. The trial court reasoned that Beard should understand that his continued involvement with drugs and guns will result in "more serious penalties" and "more ... time behind bars." The trial court properly explained why its sentence met the minimum custody requirements. See *Gallion*, 270 Wis. 2d 535, ¶23.

¶11 Beard's remaining challenge was that the sentence imposed, particularly the period of initial confinement, was unduly harsh. A sentence is unduly harsh, excessive and violative of the Eighth Amendment 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; see *State v. Pratt*, 36 Wis. 2d 312, 322, 153 N.W.2d 18 (1967). "A sentence well within the limits of the maximum sentence is not ... disproportionate to the offense committed..." *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).

¶12 Beard implicitly realizes that he cannot meet this challenge. Possessing a firearm as a felon carries a maximum potential penalty of ten years. *See* WIS. STAT. §§ 941.29(2); 939.50(3)(g). Possessing no more than three grams of heroin carries a maximum potential penalty of twelve years and six months. *See* WIS. STAT. §§ 961.41(1m)(d)1.; 939.50(3)(f). Beard was convicted of the heroin offense as a subsequent drug offense, carrying an additional maximum potential penalty of four years. *See* WIS. STAT. § 961.48(1)(b). Imposing a nine-year sentence for offenses carrying a maximum potential penalty of twenty-six years and six months is not excessive. *See Daniels*, 117 Wis. 2d at 22. Imposing slightly more than one-third of the maximum sentence on a defendant for his fourth and fifth convictions, committed while on probation for his third conviction, does not “shock public sentiment.” *See Ocanas*, 170 Wis. 2d at 185. Imposing a nine-year sentence with a six-year period of initial confinement is not disproportionate to Beard’s gun and drug-dealing offenses committed while he was on probation for a prior heroin offense. *See id.* We reject Beard’s challenge that his sentence is unduly harsh and excessive.

¶13 The trial court properly exercised its sentencing discretion. It considered many of the mitigating factors and expressly imposed a lesser sentence because of one of those mitigating factors, Beard’s health problems. Beard’s sentence was not an erroneous exercise of discretion, nor was it unduly harsh or excessive.

By the Court.—Judgment and order affirmed.

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

