COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1183-CR **Cir. Ct. No. 2006CF612**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY WESTLUND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jeremy Westlund appeals from a judgment convicting him of kidnapping and an order denying his postconviction motion to modify his sentence. He argues that the trial court failed to consider relevant

factors at sentencing and then failed to correct the "unduly harsh" sentence it imposed. We disagree and affirm.

¶2 Wielding a wrench, Westlund forced his estranged wife, Jennifer, to accompany him to the grocery store where she worked, leaving her two-year-old alone at home. He made Jennifer use her manager's code to disable the security alarm and gain access to the store's money. Westlund later released Jennifer on a country road. Before driving off, Westlund warned Jennifer not to call the police because "I can get to [the child] before they can."

¶3 Westlund pled guilty to one count of kidnapping, as a repeater, by use of a dangerous weapon. Three other counts—armed robbery with threat of force, false imprisonment by use of a dangerous weapon and felony intimidation of a victim by use of a dangerous weapon, all as a repeater—were dismissed and read in for sentencing. With the penalty enhancers, Westlund faced fifty-one years' imprisonment (thirty-six years' initial confinement/twenty-five years' extended supervision).

¶4 The State recommended twenty-five years (ten/fifteen); the Department of Corrections (DOC) presentence investigation report (PSI) recommended sixteen to eighteen years (nine to ten/seven to eight); an independent PSI recommended eleven to thirteen years (four to five/seven to eight); and the defense recommended twelve years (four/eight). The defense argued that "character factors" listed in the private PSI[1] "weigh[ed] heavily" on

[1] The private PSI described a violent, largely absent father and a mother who abused drugs and alcohol and left Westlund home alone for lengthy stretches when he was still very young. It indicated that Westlund was a probable victim of childhood sexual abuse and that he had not received treatment for any of the abuse or neglect.

the court considering its recommendation rather than the DOC's. The court imposed an eighteen-year sentence, ten years' initial confinement followed by eight years' extended supervision.

¶5 Over ten months later, Westlund brought a motion to modify his sentence. He alleged that the sentence he received was unduly harsh because the court failed to appropriately consider his mental health issues and childhood abuse. The State objected that the motion was untimely. *See* WIS. STAT. § 973.19(1) (2007-08);[2] *see also* WIS. STAT. RULE 809.30(2)(h). Westlund countered that the power to modify a sentence is one of the judiciary's inherent powers. *See* ***State v. Crochiere***, 2004 WI 78, ¶11, 273 Wis. 2d 57, 681 N.W.2d 524. The trial court agreed with the State, but nonetheless addressed the motion on the merits. It concluded that Westlund had not identified a new factor or shown that the sentence was unduly harsh, beyond recommended terms, in excess of the maximum, or imposed without properly balancing aggravating and mitigating circumstances. The court denied the motion without a hearing. Westlund appeals.

¶6 Sentencing is committed to the trial court's discretion, and we limit our review to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A criminal defendant challenging a sentence has the burden to show an unreasonable or unjustifiable basis in the record. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We presume the trial court acted reasonably. ***Id.*** As long as the sentencing court considered the relevant factors and the decision was within the statutory maximum, we will not reverse the sentence unless it is so wholly

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

disproportionate to the offense as to shock public sentiment. ***State v. Brown***, 2006 WI 131, ¶22, 298 Wis. 2d 37, 725 N.W.2d 262.

¶7 The primary factors relevant to any sentencing include protection of the community, punishment and rehabilitation of the defendant and deterrence of others. ***Gallion***, 270 Wis. 2d 535, ¶40. Multiple secondary factors the court may also consider include the defendant's past criminal offenses, history of undesirable behavior and need for close rehabilitative control; his or her remorse, repentance and cooperativeness; the rights of the public; and the vicious or aggravated nature of the crime. ***Id.***, ¶43 n.11.

¶8 Westlund again asserts that his sentence should have been shorter.[3] He argues that the trial court erroneously exercised its sentencing discretion because it did not adequately consider such mitigating circumstances as his mental health issues and untreated childhood traumas. Determining which factors are most relevant, however, and the weight to assign to each factor ultimately are both within the trial court's exercise of discretion. ***Brown***, 298 Wis. 2d 37, ¶39.

¶9 Moreover, the court did consider mitigating evidence. It noted that Westlund came from a "very dysfunctional family" with little parental support, was diagnosed as bipolar and suffering from depression, had AODA issues and may have been sexually assaulted as a child. The court specifically stated that Westlund's lack of treatment for those matters was "a real concern" to it. The court concluded that despite such mitigating evidence, the serious nature of the

[3] The State again argues that Westlund's postconviction motion to modify his sentence is time-barred. We have the discretion to make exceptions to the waiver rule, *see* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999), and we do so here.

crime and the protection of the public warranted an eighteen-year sentence. To the extent the sentence indicates the court gave more weight to aggravating factors than to mitigating factors, it acted within its discretion when it did so. *See* ***id.***

¶10 Westlund next argues that the trial court erroneously exercised its discretion by failing to exercise its inherent authority to modify his "unduly harsh and unconscionable" sentence. *See* ***Cresci v. State***, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979). We may deem a sentence unduly harsh or unconscionable only if the sentence 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." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). The legislature determined that his crime, with penalty enhancers, merits up to fifty-one years' imprisonment. Westlund's sentence is well within the maximum. We thus may presume it is reasonable, *see* ***State v. Scaccio***, 2000 WI App 265, ¶¶17-18, 240 Wis. 2d 95, 622 N.W.2d 449, and not so harsh or excessive as to shock public sentiment, *see* ***State v. Stenzel***, 2004 WI App 181, ¶22, 276 Wis. 2d 224, 688 N.W.2d 20.

¶11 The trial court considered appropriate factors and imposed a sentence that is not unduly harsh or unconscionable. It committed no error here.

By the Court.—Judgment and order affirmed.

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