COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2695-CR **Cir. Ct. No. 2001CF3351**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL M. LIPSEY,

DEFENDANT-APPELLANT.

Appeal from orders of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Samuel M. Lipsey appeals from an order for reconfinement entered after revocation of his extended supervision and from an order denying his subsequent motion for modification. Lipsey asserts that the circuit court's order imposing the maximum available time for reconfinement was

"unduly harsh." We conclude that the circuit court properly exercised its discretion by considering the relevant sentencing factors when determining the length of reconfinement. We therefore affirm the orders of the circuit court.

BACKGROUND

¶2 On February 11, 2002, Lipsey was convicted of second-degree sexual assault of a child. The circuit court imposed a twelve-year sentence, comprised of six years of initial confinement and six years of extended supervision.

¶3 After he was released to extended supervision, Lipsey was arrested for armed robbery with threat of force. At the time of his arrest, police officers discovered seventeen bags of marijuana in the dashboard of the car Lipsey was a passenger in. The police subsequently searched Lipsey's residence where they found a revolver containing his fingerprint.

¶4 The Department of Corrections proceeded with revocation of Lipsey's extended supervision. The Department alleged seven violations of the conditions of Lipsey's supervision. The alleged violations consisted of the following: failing to attend sex offender treatment on two occasions; failing to be present for a scheduled home visit; possessing a firearm; failing to abide by his curfew for the electronic monitoring program; riding in a vehicle where marijuana was present; and taking a jacket and its contents from another person without the owner's permission.

¶5 Based on Lipsey's admissions and the evidence presented, an administrative law judge concluded that Lipsey had committed all but two of the alleged violations. Because the owner of the jacket Lipsey allegedly stole did not

appear at the hearing, the administrative law judge found that the Department failed to establish that Lipsey committed armed robbery. The administrative law judge further concluded that the evidence was insufficient to establish that Lipsey knowingly missed a scheduled home visit.

¶6 The Department recommended reconfinement for the entire amount of time remaining on Lipsey's sentence. After ordering revocation, the administrative law judge recommended two years of incarceration.

¶7 Prior to the reconfinement hearing, the circuit court reviewed the Department's memoranda, the administrative law judge's decision, and the entire file, including the presentence report and sentencing transcript. The circuit court took into account the nature and seriousness of the underlying offense, sexual assault of a child, which it deemed "extremely serious"; Lipsey's institutional conduct record, which did not contain anything favorable or unfavorable to him, and accordingly was not considered further; and the amount of time necessary to protect the public and prevent undue depreciation of the seriousness of the offense. In looking at the totality of the circumstances, the circuit court detailed Lipsey's failure to attend two sex offender treatment sessions and the fact that he was ten minutes late for his curfew. The circuit court continued:

> [B]ut certainly the most serious part is this incident in the car. And as the administrative law judge found that you admitted that the marijuana was yours. And this is not just a little marijuana. It was 16 grams bundled into dime bags that was in that car.
>
> The administrative law judge found you possessed a firearm. You're a convicted felon. You can never possess a firearm, and there was evidence that your fingerprint was on the weapon.
>
> So we have extremely serious offenses, and I note that the armed robbery participation was not substantiated, and that is disregarded.

> But when I look at the nature of this offense, the extreme seriousness, and the risk that you present to the community, and here you are engaged in highly risky behavior, extremely risky, I think that the risk is extreme here. And I think that the department had it exactly right that this is a 100 percent case.

The circuit court ordered Lipsey reconfined for the maximum time available, five years, seven months, and twenty days.

¶8 Lipsey filed a postconviction motion asking the circuit court to modify its reconfinement order on grounds that the length of reconfinement was unduly harsh. The circuit court denied Lipsey's postconviction motion. He now appeals challenging his reconfinement sentence as unduly harsh, both as an erroneous exercise of sentencing discretion and as unconstitutional cruel and unusual punishment.

ANALYSIS

¶9 This case is before us on a reconfinement order following revocation of Lipsey's extended supervision; the original judgment of conviction and the revocation decision are therefore not at issue. *See* ***State v. Drake***, 184 Wis. 2d 396, 399–400, 515 N.W.2d 923, 925 (Ct. App. 1994); *see also* WIS. STAT. § 302.113(9)(g) (review of revocation only available through certiorari). Rather, we consider whether the circuit court erroneously exercised its discretion when it ordered Lipsey reconfined for the maximum available time. *See* ***State v. Brown***, 2006 WI 131, ¶20, 298 Wis. 2d at 49, 725 N.W.2d at 268 ("A reconfinement hearing is certainly akin to a sentencing hearing and, therefore, both are reviewed on appeal to determine if there has been an erroneous exercise of discretion.").

¶10 On appeal, as long as the reconfinement court considered the appropriate factors and imposed a sentence that was within the statutory limits, we

will not reverse unless the sentence imposed "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." *See* ***id.***, 2006 WI 131, ¶22, 298 Wis. 2d at 51, 725 N.W.2d at 268 (citation and two sets of quotation marks omitted). Appropriate sentencing factors to consider in making the reconfinement decision include the nature and severity of the original offense, the defendant's institutional conduct record, the amount of incarceration necessary to protect the public from the risk of further criminal activity, and the nature of the violation of terms and conditions during extended supervision. ***Id.***, 2006 WI 131, ¶34, 298 Wis. 2d at 56–57, 725 N.W.2d at 271. The original sentencing transcript is also an important source of information that can be considered. ***Id.***, 2006 WI 131, ¶38, 298 Wis. 2d at 58, 725 N.W.2d at 272. When pronouncing a reconfinement decision, "it is appropriate for a circuit court to identify the general objectives of greatest importance, and describe the factors and circumstances relevant to those objectives." ***Id.***, 2006 WI 131, ¶39, 298 Wis. 2d at 58, 725 N.W.2d at 272. The amount of explanation necessary will vary from case to case; not all factors need be discussed on the record. *See* ***id.***, 2006 WI 131, ¶¶37, 39, 298 Wis. 2d at 58, 725 N.W.2d at 272.

¶11 The circuit court's statement at the reconfinement hearing demonstrated a process of reasoning. After examining the record and the information before it, the circuit court articulated sufficient reasons for imposing the maximum available time for reconfinement. The circuit court noted the severity of Lipsey's underlying offense of sexual assault of a child and statements Lipsey made at the time of his original sentencing. While disregarding the unsubstantiated armed robbery allegation, the circuit court considered Lipsey's missed sex offender treatment sessions and the relatively minor curfew violation

in the context of the "extremely serious offenses"—Lipsey's possession of sixteen grams of marijuana bundled into dime bags and a firearm. Based on the "extreme" risk that Lipsey presented to the community, the circuit court concluded that reconfining Lipsey for five years, seven months, and twenty days was warranted.

¶12 The circuit court carefully considered the appropriate sentencing factors and gave a reasoned and reasonable explanation for the reconfinement sentence. *See* ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971). The circuit court properly exercised its discretion; the fact that it did so differently than Lipsey had hoped does not constitute a misuse of that discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20–21 (1981).

¶13 Lipsey argues, for the first time on appeal, that the reconfinement sentence is unconstitutional because it constitutes cruel and unusual punishment. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730. Notwithstanding, we address this issue because "[t]he test for whether a sentence violates the Eighth Amendment and whether a sentence was excessive are virtually identical in Wisconsin." ***State v. Davis***, 2005 WI App 98, ¶21, 281 Wis. 2d 118, 130, 698 N.W.2d 823, 829. "In addressing the Eighth Amendment claim, we look to whether the sentence was 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." ***Id.***, 2005 WI App 98, ¶21, 281 Wis. 2d at 130–131, 698 N.W.2d at 829 (citation and internal quotation marks omitted). Likewise, as we have seen, where the

reconfinement court considered the appropriate factors and imposed a sentence that was within the statutory limits, we will not reverse unless the sentence imposed "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." *See* ***Brown***, 2006 WI 131, ¶22, 298 Wis. 2d at 51, 725 N.W.2d at 268 (citation and two sets of quotation marks omitted).

¶14 Lipsey does not prove either standard. The facts and circumstances of this case support imposition of the maximum period of reconfinement. There was nothing shocking about the circuit court's decision.

By the Court.—Orders affirmed.

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