

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2011

A. John Voelker
Acting 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. 2010AP2576-CR

Cir. Ct. No. 2009CF3281

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HANSEL F. MERRIWEATHER,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Milwaukee County:
PATRICIA D. McMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Hansel F. Merriweather appeals from a judgment of conviction for one count of possession of a firearm by a felon, contrary to WIS.

STAT. § 941.29(2)(a) (2009-10),¹ and from an order denying his motion for postconviction relief.² He argues that the trial court erroneously exercised its sentencing discretion by imposing an “excessive sentence” after mischaracterizing certain factors as aggravating. We reject his arguments and affirm.

BACKGROUND

¶2 Pursuant to a plea agreement, Merriweather pled guilty to being a felon in possession of a firearm. The State agreed to recommend a sentence of eighteen months of initial confinement and twenty-four months of extended supervision, and the defense was free to make its own recommendation. The parties stipulated that the facts in the criminal complaint provided a factual basis for the conviction. The criminal complaint indicated that a police officer observed Merriweather driving a vehicle with stolen license plates and pulled him over. While Merriweather was standing outside of the car, he appeared nervous and “was reaching with his right hand towards his right rear shorts pocket.” The officer conducted a pat-down search and discovered a gun in Merriweather’s pocket that contained six unfired bullets.

¶3 At sentencing, Merriweather’s trial counsel told the trial court that the reason Merriweather had the gun was that he had just taken it from a friend who was threatening suicide. Trial counsel said that Merriweather was taking the gun to the friend’s brother’s house for safekeeping when he was pulled over by the

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² The Honorable Patricia D. McMahon accepted Merriweather’s plea and imposed the sentence. The Honorable Rebecca F. Dallet denied the motion for postconviction relief.

officer. Merriweather personally told the trial court that he “probably should have called the police right away” when his friend threatened suicide, but he did not want to get his friend involved with the police. Merriweather also said that he was driving someone else’s car and did not know that the license plates were stolen.

¶4 Trial counsel asked the trial court to place Merriweather on probation, with six months of jail time imposed as a condition of probation. He argued that a prison sentence was not warranted because Merriweather immediately stopped the car, did not resist the officer and “had no prior involvement with gun offenses.” He also noted that Merriweather had not been convicted of a felony in eight years, was working up to forty hours a week and was “doing fairly well in the community.”

¶5 The trial court sentenced Merriweather to eighteen months of initial confinement and eighteen months of extended supervision. In doing so, the trial court identified several “aggravated factors,” including: the gun was loaded, it was in Merriweather’s pocket, he was on the street with a gun and he had a prior criminal history (including both felonies and misdemeanors). It also identified mitigating factors, including Merriweather’s acceptance of responsibility and his cooperation at the scene.

¶6 Represented by new counsel, Merriweather filed a motion for postconviction relief challenging the severity of his sentence. He argued that the sentence was excessive “where, as here, the allegedly aggravating factors identified by the trial court judge at sentencing constituted nothing more than the bare elements of the crime itself.” (Bolding omitted.) The trial court denied the postconviction motion in a written order, concluding that the sentencing court had not erroneously exercised its sentencing discretion. This appeal follows.

LEGAL STANDARDS

¶7 Sentencing lies within the sound discretion of the trial court. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At a minimum, a trial court “must consider three primary factors in determining an appropriate sentence: the gravity of the offense, the character of the defendant, and the need to protect the public.” *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. Other factors that may be considered include:

- (1) Past record of criminal offenses;
- (2) history of undesirable behavior pattern;
- (3) the defendant’s personality, character and social traits;
- (4) result of presentence investigation;
- (5) vicious or aggravated nature of the crime;
- (6) degree of the defendant’s culpability;
- (7) defendant’s demeanor at trial;
- (8) defendant’s age, educational background and employment record;
- (9) defendant’s remorse, repentance and cooperativeness;
- (10) defendant’s need for close rehabilitative control;
- (11) the rights of the public; and
- (12) the length of pretrial detention.

Id. (quotation marks and citations omitted).

¶8 The trial court must “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.” *Gallion*, 270 Wis. 2d 535, ¶40. “[S]entencing courts must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives.” *Harris*, 326 Wis. 2d 685, ¶29. Basing a sentence upon clearly irrelevant or improper factors constitutes an erroneous exercise of discretion. *Gallion*, 270 Wis. 2d 535, ¶17.

¶9 On appeal, we review sentencing decisions under the erroneous exercise of discretion standard. *Id.* Where 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). “[T]he defendant bears the heavy burden of showing that the [trial] court erroneously exercised its discretion.” *Harris*, 326 Wis. 2d 685, ¶30.

DISCUSSION

¶10 Merriweather argues that the trial court erroneously exercised its discretion by imposing an “excessive sentence” after mischaracterizing certain factors as aggravating. He explains:

[T]he reasons that the court gave at the time of [Merriweather’s] sentencing were not so clearly explained, not linked to relevant facts, and do not appear to be the product of a process of reasoning that was either clearly stated on the record or could reasonably be derived by inference from facts stated on the record so as to allow meaningful appellate review.

The reason for this claim is very simple: all of the factors that the court identified as “aggravating” during the course of its statement at the time of sentencing are not only part and parcel of the nature of the crime itself but are, in fact, the bare elements of the crime.

....

There was, quite simply, nothing about [Merriweather’s] conduct in this case that was in any sense aggravated or went beyond that of simply being a felon who was in possession of a firearm....

[Merriweather] has not been able to find any authority for the proposition that a court may find the existence of aggravating factors—may find that a defendant’s conduct in a case was more serious and therefore deserving of a longer sentence than might otherwise be imposed—based on the fact that the defendant’s conduct fulfills all of the required elements of

the crime *and nothing more*. For a court to do so, as was done in this case, is to violate fundamental principles of fairness and wreak havoc with the goal of individualized sentencing that is to guide a court's actions at the time of sentencing.

¶11 We are unconvinced that the trial court erroneously exercised its sentencing discretion. First, we disagree with Merriweather's suggestion that the aggravated factors considered by the trial court were "nothing more" than the required elements of the crime. There are two elements to this crime: "(1) the defendant has been convicted of a felony; and (2) the defendant possessed the firearm." *State v. Black*, 2001 WI 31, ¶18, 242 Wis. 2d 126, 624 N.W.2d 363. The trial court identified additional factors that it considered aggravated, including the fact that the gun was loaded (versus unloaded), on Merriweather's person (as opposed to in the car's trunk or other container), and Merriweather was on the street with the gun (instead of in a private residence, away from the public). These factors are all relevant to the gravity of the offense and were properly considered.

¶12 The trial court also considered Merriweather's criminal history to be an aggravating factor. Merriweather has at least six felony and misdemeanor convictions dating from 1985 through 2008, including convictions for operating a motor vehicle without the owner's consent, fleeing and theft. A defendant's criminal history is a proper factor for consideration at sentencing. *See Harris*, 326 Wis. 2d 685, ¶28.

¶13 Mitigating factors were also contemplated during sentencing. The trial court recognized that Merriweather was employed, had taken steps to further his education and was living with his fiancée and their child. It also noted that Merriweather had accepted responsibility for the crime and had been cooperative at the scene. In consideration of those mitigating factors, the trial court made

“some adjustments” and imposed a shorter term of extended supervision than the State requested.

¶14 Having reviewed the sentencing transcript, we conclude that the trial court considered appropriate sentencing factors and adequately explained its sentencing rationale. *See Gallion*, 270 Wis. 2d 535, ¶40. We conclude that the trial court complied with the dictates of *Gallion* and its progeny.

¶15 Further, we conclude that the sentence imposed is not excessive. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (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.”). “A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.” *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Here, Merriweather’s total sentence was three years—less than one-third of the maximum sentence of ten years. Given the facts of this case and Merriweather’s criminal record, the sentence was not excessive.

By the Court.—Judgment affirmed.

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

