**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 10, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2011AP595-CR** **Cir. Ct. No. 2008CF6067**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DANNIE EDWARD MOORE,**

**DEFENDANT-APPELLANT.**

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

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

¶1 PER CURIAM. Dannie Edward Moore appeals from a judgment of conviction, entered upon his guilty pleas, on one count of possession with the intent to deliver less than three grams of heroin and one count of possession of a

firearm by a felon. Moore also appeals from that portion of an order denying his motion for resentencing.[1] Moore contends that the circuit court should have granted a suppression motion, and that his "lengthy and consecutive prison sentences" are an erroneous exercise of the circuit court's sentencing discretion. We reject Moore's arguments and affirm.

## BACKGROUND

¶2 Police were working with a confidential informant. The informant described his heroin supplier and where the supplier lived, and provided police with the supplier's cell phone number. After the informant arranged a transaction, he and officers went to the arranged location, an apartment building.

¶3 As the informant was on the phone making a call to the supplier, Moore exited the building while talking on his cell phone. The informant identified Moore as the supplier. An officer in plain clothes approached Moore and identified himself as a police officer. Moore fled.

¶4 Moore ran around the building and entered the rear door, then entered apartment number 1. The pursuing officer forced entry into the building and entered the unlocked apartment, where Moore was exiting the bathroom. Seven bundles of heroin were later found in the toilet. Moore was arrested and charged with possession with intent to deliver between three and ten grams of cocaine, possession of a firearm by a felon, and maintaining a drug trafficking place as a second or subsequent drug offense.

[1] The Honorable Daniel L. Konkol was responsible for the original judgment of conviction and imposed Moore's sentence. The Honorable Rebecca F. Dallet entered the order denying the postconviction motion.

¶5 Moore filed a motion to suppress evidence obtained as a result of the warrantless entry into his home. The circuit court denied the motion, ruling there was probable cause to arrest Moore and exigent circumstances existed.[2] Moore then agreed to plead guilty to an amended possession-with-intent charge and the felon-in-possession charge. In exchange, the State would dismiss the drug-trafficking-place charge and would agree to recommend a global thirty-six month sentence concurrent to a thirty-month revocation sentence Moore was then serving in another case.

¶6 The circuit court sentenced Moore to twenty-four months' initial confinement and ten months' extended supervision on each count, to be served consecutive to each other and consecutive to the revocation sentence. The circuit court also deemed Moore ineligible for a risk reduction sentence or for the challenge incarceration and earned release programs.

¶7 Moore filed a postconviction motion seeking resentencing.[3] He alleged his sentences were "unduly harsh" and that the circuit court should reconsider his eligibility for the challenge incarceration and earned release programs. The circuit court denied the motion, finding that discretion had been properly exercised at sentencing. Moore appeals.

[2] The motion was denied orally by the Honorable Kevin E. Martens.

[3] The motion also sought to vacate the $250 DNA surcharge on the grounds that while it appeared on the judgment of conviction, it had not been ordered by the circuit court. That portion of the motion was granted and is not challenged on appeal.

## DISCUSSION

### I. Suppression motion.

¶8 Ordinarily, a guilty plea waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). A narrowly crafted exception to this rule exists in WIS. STAT. § 971.31(10) (2009-10),[4] which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. We review the denial of a motion to suppress under a two-part standard of review, upholding the circuit court's factual findings unless clearly erroneous but reviewing *de novo* whether those facts warrant suppression. *See* ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404.

¶9 Moore's fundamental argument for suppression is that the police entry into his home was unlawful, which made the subsequent search and recovery of evidence also unlawful. A police officer's warrantless entry into a home is presumptively prohibited by the Fourth Amendment. ***State v. Sanders***, 2007 WI 174, ¶10, 304 Wis. 2d 159, 737 N.W.2d 44.

¶10 However, a warrantless entry is lawful if exigent circumstances exist. ***State v. Ferguson***, 2009 WI 50, ¶19, 317 Wis. 2d 586, 767 N.W.2d 187. "Exigent circumstances exist when 'it would be unreasonable and contrary to public policy to bar law enforcement officers at the door.'" ***Id.*** (citation omitted). There are four well-recognized categories of exigent circumstances previously

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

identified by our courts: (1) hot pursuit of a suspect; (2) a threat to the safety of the suspect or others; (3) risk that evidence will be destroyed; and (4) likelihood that the suspect will flee. ***Id.***, ¶20. In reviewing whether exigent circumstances justified entry here, we must also review whether police had probable cause to arrest Moore. *See* ***id.***, ¶19; *see also* ***State v. Tomlinson***, 2002 WI 91, ¶20, 254 Wis. 2d 502, 648 N.W.2d 367.

¶11 On appeal, Moore contends that the police had, at best, reasonable suspicion, insufficient even if an exigency exists. Moore also argues that there were no exigent circumstances because there was no reason to believe he was a drug dealer who was about to destroy evidence.

¶12 "Probable cause to arrest exists when, at the time of the arrest, an officer has within his or her knowledge reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person's belief that the suspect has committed or is committing a crime." ***Sanders***, 304 Wis. 2d 159, ¶11.

¶13 At the suppression hearing, several officers testified. The circuit court found them credible and truthful. It explained the background of the confidential informant's citation, which had brought him to police attention, and his cooperation with police. It noted that police took steps to corroborate the informant's information. The circuit court did consider that this was the first time police had worked with that particular informant, but the circuit court explained

that it was reasonable for police to believe the confidential informant was being truthful.[5]

¶14 The circuit court then noted that the cell phone number provided by the informant belonged to Moore and that "on the second phone call the CI dials the number and that the defendant then answers his [phone] essentially, so they're observing a conversation that it would appear to them I think again quite reasonably to be between those two individuals." The circuit court noted that one officer testified about overhearing a third phone call between the informant and his supplier discussing drugs and a sale, corroborating some additional information from the informant's first call. The informant specifically identified Moore as he exited the apartment building. Police approached Moore and identified themselves, causing Moore to flee. Police then followed in pursuit, observing Moore exiting a bathroom.

¶15 Based on those facts, the circuit court ruled:

> As to the entry into the apartment, that I think requires probable cause to arrest the defendant…. In this case I would find that to exist. I think it's a close call, but I'm persuaded by all the things that I've already stated and the fact that he fled, quite frankly….
>
> ….
>
> All the things that I've already described are consistent with drug sale and a drug transaction as I think are commonly understood and the officer testified to this as well.

[5] Moore had also moved for disclosure of the informant's identity. If information from a confidential informant "is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed." WIS. STAT. § 905.10(3)(c).

> ….
>
> So taking all those factors into account, I would find that there was probable cause to arrest the defendant … [for] possession within intent to deliver controlled substance, that the controlled substance was heroin, that that could be indeed dissipated or destroyed quickly upon entry of the home, the home that the officers based upon their information and consistent with what they observed is that of the defendant, and therefore that created an exigent circumstance for the officers to conduct and immediate entry, and to do quickly to make sure there is no destruction of evidence.

¶16 We discern no erroneous exercise of discretion, we agree with the determination of probable cause, and we agree that an exigency existed based on the possible destruction of drug evidence. The warrantless entry was lawful, and it was proper for the circuit court to deny the suppression motion.

**II. Sentencing Discretion.**

¶17 Moore complains that his forty-eight months of initial confinement, consecutive to fifteen months' initial confinement on his revocation sentence, is "too long and unduly harsh." He complains that the circuit court put too much focus on punishment and not enough on his rehabilitative needs. He complains that he should have received more credit for accepting responsibility, his remorsefulness, and his desire to change his ways. He also complains that the circuit court should have deemed him eligible for the two early release programs because he "is an outstanding candidate for these programs and is the very type of offender that the legislature intended for participation in these programs: young, identifiable substance abuse program [sic], and a desire to change behavior."

¶18 Sentencing is committed to the circuit court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has the burden to show an unreasonable or unjustifiable

basis in the record for the sentence at issue. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with a presumption that the circuit court acted reasonably, and we do not interfere with a sentence if discretion was properly exercised. ***Id.*** at 418-19.

¶19 In its exercise of discretion, the circuit court is to identify the objectives of its sentence, including but not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. ***Gallion***, 270 Wis. 2d 535, ¶40. In determining the sentencing objectives, we expect the circuit court to consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the circuit court's discretion. ***Id.*** The amount of necessary explanation of a sentence varies from case to case. ***Gallion***, 270 Wis. 2d 535, ¶39.

¶20 The circuit court explained that Moore's mid-level felonies were serious. It commented on several aggravating factors: the cumulative seriousness of a drug and gun felony together; Moore's escalating drug possession, from marijuana to cocaine to heroin; the seriousness of heroin and the fact that individuals in search of it may victimize others, such as through a bank robbery to fund the purchase; and the fact that Moore was on probation at the time.

¶21 The circuit court also considered several mitigating factors. It noted that Moore had completed five of seven tests necessary to earn his high school equivalency diploma; he was interested in barbering and welding, which the circuit court thought would be productive career options once Moore was released; Moore had a supportive family; and Moore seemed genuinely remorseful.

¶22 Nevertheless, the circuit court explained that it was imposing the minimum sentences it thought were necessary for rehabilitation, and it explained why the sentences would be consecutive. It explained that because it was imposing the absolute minimum necessary, it would not grant him early release opportunities, lest the seriousness of the crimes be diminished.

¶23 The maximum possible sentence Moore could have received was twenty-two years and six months' imprisonment. The sentence totaling five years and eight months' imprisonment is well within the range authorized by law and therefore presumptively neither harsh nor unconscionable. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. That Moore believes the weight should have been allocated differently or the objective prioritized differently does not mean the circuit court erroneously excised its discretion.

*By the Court.*—Judgment and order affirmed.

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