

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2012

Diane M. Fremgen
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 Nos. 2011AP1135-CR
2011AP1136-CR
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2009CF3405
2010CF1577**

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROCKY SHAWN KELLY,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Rocky Shawn Kelly appeals from judgments of conviction, entered upon his guilty pleas, on one count of possession with intent to deliver three grams or less of heroin and one count of possession with intent to deliver more than forty grams of cocaine as a second or subsequent offense. Kelly

also appeals from orders denying his postconviction motion for resentencing, contending that the circuit court erroneously exercised its sentencing discretion. We reject this argument and affirm the judgments and orders.

BACKGROUND

¶2 In 2009, Kelly was arrested on warrants and, during a search incident to arrest, officers found multiple drugs on him. Kelly was charged with possession with intent to deliver heroin as a result. According to Kelly, he was subsequently released from custody with the Department of Corrections' consent, despite the pending charge, so that he could aid law enforcement with certain cases.

¶3 In March 2010, Kelly was arrested again: someone reported he had stolen a gun, and there was an active warrant for his arrest. Officers again conducted a search incident to the arrest, discovering nearly half a pound of cocaine and \$1700 in mostly counterfeit currency. Kelly was charged with possession with intent to deliver cocaine as a second or subsequent offense and two counts of felony bail jumping.¹

¶4 Pursuant to a plea agreement, Kelly pled guilty to the two drug charges. The bail-jumping charges were dismissed and read in. A portion of the sentencing hearing was conducted under seal to protect the details of Kelly's cooperation with law enforcement. The circuit court in these matters sentenced Kelly to seven years' initial confinement and four years' extended supervision for

¹ Kelly was also charged with possession of a firearm by a felon. That charge was eventually dismissed outright on the State's motion, as the weapon was not recovered from Kelly and it could not conclusively be linked to him.

each count, to be served concurrently with each other and with a revocation sentence.² The circuit court further denied Kelly participation in the challenge incarceration and earned release programs, but did authorize a risk reduction sentence.

¶5 Kelly filed a postconviction motion for sentence modification. He asserted that the circuit court did not consider many mitigating factors that warranted a lighter sentence, especially his assistance to law enforcement; that his needs merited less punishment and more treatment; and that the circuit court denied challenge incarceration and earned release program eligibility without explanation. Kelly asked the circuit court for a “fairer” sentence. The circuit court denied the motion and Kelly appeals, effectively repeating the same arguments made in the postconviction motion.

DISCUSSION

¶6 Sentencing is committed to the circuit court’s discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has a burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. *See 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. *See id.* at 418-19.

² At the time of his convictions in this case, Kelly was on extended supervision for his first conviction of possession with intent to deliver more than forty grams of cocaine; that supervision was revoked.

¶7 In its exercise of discretion, the circuit court is to identify the objectives of its sentence, which include but are 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.

¶8 We reject outright any claim that mitigating factors were not properly considered. The circuit court expressly identified several mitigating factors: the fact that Kelly had a treatable mental disorder; its perception that Kelly was extremely intelligent; Kelly’s apparent remorsefulness; evidence that Kelly was maturing from “a place where [he was] before”; and the information that was under seal with the court—that is, the details relating to Kelly’s cooperation with law enforcement. The circuit court expressly noted that it was crafting a sentence based on both aggravating and mitigating circumstances. While Kelly proffers multiple additional facts he believes were relevant, we expect the circuit court to discuss only the factors *it* deems relevant, not every item of minutiae counsel can identify. *See State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993).

¶9 Kelly contends that his “mental health should have figured prominently in the sentencing scheme with emphasis on immediate, not delayed, treatment and as a means to rehabilitate himself.” In particular, Kelly notes that

the circuit court set alcohol and drug evaluation and completion of treatment plans as conditions of his later supervision.

¶10 However, the circuit court deemed Kelly eligible for a risk reduction sentence, which required Kelly to agree to an assessment of his “criminogenic factors and risk of reoffending” and to cooperate with any “programming or treatment” plan designed to reduce his risk and address the identified risk factors. *See generally* WIS. STAT. §§ 302.042 (2009-10) (*repealed by* 2011 Wis. Act 38 § 13 (eff. Aug. 3, 2011)) & 973.031 (2009-10) (*repealed by* 2011 Wis. Act 38, § 92).³ The risk reduction sentence thus offers Kelly an opportunity for treatment and rehabilitation prior to his extended supervision term.

¶11 Kelly complains the circuit court did not adequately link the sentencing objectives or factors to the length of the sentence. That is, Kelly appears to argue that the circuit court must explain the weight it gives each objective or factor and explain how they translate into a specific sentence length. *See State v. Fisher*, 2005 WI App 175, ¶21, 285 Wis. 2d 433, 702 N.W.2d 56. Kelly is not entitled to that degree of specificity. *See id.*, ¶22. If the circuit court “has considered the proper factors, explained its rationale for the overall sentence it imposes, and the sentence is not unreasonable, the court does not erroneously exercise its discretion simply by failing to separately explain its rationale for each and every facet of the sentence imposed.” *State v. Matke*, 2005 WI App 4, ¶19, 278 Wis. 2d 403, 692 N.W.2d 265.

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶12 Our review of the record satisfies us that the circuit court properly exercised its sentencing discretion. It commented on the seriousness of Kelly’s crimes, noting that sharing drugs by selling them meant that his crimes had a “terrible impact on other people,” with heroin being particularly addictive. The circuit court observed that Kelly was convicted previously for the same cocaine charge and, despite the opportunity presented by extended supervision, Kelly repeated the offense. The circuit court further commented that it was not just a matter of Kelly relapsing to personal use of drugs but that he was involving other people by selling. The circuit court identified mitigating factors but noted that community protection was important, that there needed to be a “serious consequence to the serious behavior,” and stated its belief that the sentence would “serve the purpose still of imposing additional punishment which I think is required here.” In short, the circuit court considered only proper objectives and factors. *See id.* That Kelly would prefer a different explanation is not a basis for reversal.

¶13 Kelly also complains that the circuit court failed to identify whether he was statutorily eligible for the challenge incarceration and earned release programs prior to discretionarily denying his participation in them. Challenge incarceration and earned release are programs that allow a defendant to convert initial confinement time to extended supervision time, permitting greater time out of confinement but without reducing the overall sentence. *See* WIS. STAT. §§ 302.045(3m)(b) & 302.05(3)(c)2. Although the circuit court has a duty to determine whether a defendant preliminarily meets the statutory eligibility criteria, *see State v. Steele*, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112, the failure to explicitly do so here was harmless.

¶14 Assuming an offender meets all other statutory criteria for either program, the final statutory criteria is that the circuit court must, in its exercise of sentencing discretion, declare the offender eligible. *See* WIS. STAT. § 973.01(3g)-(3m); *see also* WIS. STAT. §§ 302.045(2)(c) & 302.05(3)(a)2. That is, while the statutes determine who *can* participate in the programs, the circuit court determines as part of its sentencing discretion whether an offender *should* participate in either program. *See State v. Johnson*, 2007 WI App 41, ¶14, 299 Wis. 2d 785, 730 N.W.2d 661.

¶15 Though the circuit court did not explain its reasons for denying either program during the original sentencing decision, it elaborated on its reasoning in its postconviction decision. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). The circuit court explained that neither program was appropriate in light of the seriousness of Kelly's offenses, the fact of the repeat offense, the required community protection, and the opportunity for a risk reduction sentence. There is no reason to believe, in light of this explanation, that the circuit court's decision would have been different had it first made an express finding of statutory eligibility.

¶16 The maximum possible sentence Kelly could have received was fifty-two years and six months' imprisonment. Concurrent sentences effectively totaling eleven years' imprisonment with risk-reduction eligibility are well within the range authorized by law, *see State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are not so excessive so as to shock the public's sentiment, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The circuit court properly exercised its sentencing discretion in the first instance, and properly exercised its discretion in denying the postconviction motion.

By the Court.—Judgments and orders affirmed.

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

