COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2228-CR **Cir. Ct. No. 2011CF4704**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS DAWAYNE BUTLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Curtis Dawayne Butler appeals a judgment of conviction for two counts of armed robbery with the use of force as party to a crime, entered after his guilty plea. He also appeals an ordering denying his postconviction motion for resentencing or sentence modification. Butler believes

the circuit court erroneously exercised its sentencing discretion and imposed a harsh and excessive sentence. We reject Butler's arguments and affirm.

¶2 According to the criminal complaint, Butler and other individuals approached three victims in two separate incidents on September 25, 2011, and demanded that the victims surrender their possessions. Butler brandished what appeared to be a handgun before punching two of the victims in the head or neck. While investigating, police officers encountered Butler and observed him disposing of an object, which later turned out to be a black BB gun.

¶3 Then-seventeen-year-old Butler admitted brandishing the weapon in the robberies. He was charged with two counts of armed robbery with the use of force as party to a crime. He agreed to plead guilty to both counts. In exchange, the State would recommend prison but refrain from recommending any particular sentence length. The plea bargain also covered three uncharged offenses that would be presented to the circuit court as read-ins for sentencing consideration: two additional armed robberies and an aggravated battery that Butler had committed on September 19, 2011. The circuit court sentenced Butler—who, at the time of the armed robberies was on probation for a juvenile adjudication in a robbery case—to five years' initial confinement and five years' extended supervision on each count, to be served consecutively.

¶4 Butler filed a postconviction motion, seeking a new sentencing hearing or, alternatively, sentence modification from ten years' initial confinement to three years' initial confinement. He claimed the circuit court had erroneously exercised its sentencing discretion because it had "failed to connect its discussion to its ultimate decision." Butler also claimed the sentence was harsh and

excessive. The circuit court denied the motion, stating that there was no erroneous exercise of discretion to be found in the record.

¶5 Sentencing is committed to the circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. 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, 925 (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.***, 217 Wis. 2d at 418–419, 576 N.W.2d at 925. "Discretion is erroneously exercised when a sentencing court imposes its sentence based on or in actual reliance upon clearly irrelevant or improper factors." ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 699, 786 N.W.2d 409, 416 (emphasis omitted). Defendants challenging their sentences must make their case by clear and convincing evidence. ***Id.***, 2010 WI 79, ¶34, 326 Wis. 2d at 700, 786 N.W.2d at 417.

¶6 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***, 2004 WI 42, ¶40, 270 Wis. 2d at 556–557, 678 N.W.2d at 207. 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* ***Harris***, 2010 WI 79, ¶28, 326 Wis. 2d at 698–699, 786 N.W.2d at 415. However, the weight assigned to the various factors is left to the circuit court's discretion. ***Id.***, 2010 WI 79, ¶28, 326 Wis. 2d at 699, 786 N.W.2d at 415. The amount of necessary explanation varies

from case to case. ***Gallion***, 2004 WI 42, ¶39, 270 Wis. 2d at 556, 678 N.W.2d at 207.

¶7 Butler complains that the circuit court "failed to connect its [sentencing] discussion to its ultimate decision." That is, Butler appears to argue that the circuit court must explain the weight it gives each objective or factor and explain how those considerations translate into a specific sentence length. *See* ***State v. Fisher***, 2005 WI App 175, ¶21, 285 Wis. 2d 433, 447, 702 N.W.2d 56, 63. Butler is not entitled to that degree of specificity. *See* ***id.***, 2005 WI App 175, ¶22, 285 Wis. 2d at 447, 702 N.W.2d at 63. 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, 417, 692 N.W.2d 265, 273.

¶8 Our review of the Record satisfies us that the circuit court properly exercised its sentencing discretion. It explained that probation was not appropriate because of the number of victims and the manner in which Butler terrorized them. In addition, Butler had accumulated the current offenses while on juvenile probation for another robbery with force. Thus, confinement was necessary to protect the community from Butler's further behavior because "apparently when [Butler was] on supervision that really didn't help [him] out." Further, the circuit court noted that based on the results from various assessment tools, Butler's actions were not an isolated occurrence but, rather, part of an ongoing pattern. The circuit court commented that citizens have "a right to walk the streets of this city without being terrorized" by groups of individuals, and that Butler's potential for recidivism was "significantly high." Thus, it explained, "it really just comes

down to … a need to have a punishment aspect in these cases … and a deterrence to [Butler] and [his] buddies[.]" The circuit court also explained that in considering all of the offenses, including the read-ins, the number of different victims warranted consecutive, not concurrent, sentences. In short, the circuit court considered only proper objectives and factors. *See* ***ibid.*** That Butler would prefer a different explanation is not a basis for reversal.

¶9 Butler also complains that the circuit court may have improperly weighed various factors, overemphasizing, for example, the fact that he had just been placed on probation while ignoring "other contravening factors" like his culpability, rehabilitation potential, or relatively young age. We reiterate, however, that the weight assigned to various factors is left to the circuit court's discretion. ***Harris***, 2010 WI 79, ¶28, 326 Wis. 2d at 699, 786 N.W.2d at 415. The circuit court "is in the best position to determine the relevant factors in each particular case." ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631, 641 (1993). It need not address irrelevant factors. *See* ***ibid.***

¶10 With regard to his juvenile probation, Butler complains that it was not an appropriate factor to consider, as his probation had not "properly" begun: "it takes time for the new social worker to do an assessment and then implement all the programs and impose the necessary structure." Butler was placed on probation on August 16, 2011—a full month before any of the offenses in this case. The circuit court, in denying the postconviction motion, explained that Butler "evidently didn't [take that probation] seriously because he continued to commit offenses shortly after being placed on probation[.]" Thus, regardless of whatever rehabilitative services were supposed to accompany the probationary sentence, it is clear that the circuit court's concern was that the seriousness of the juvenile adjudication and probation sentence themselves had no deterrent effect on

Butler—otherwise, he would have conformed his behavior to the law. We discern no impropriety in considering this factor or in the weight assigned to it.

¶11 With respect to his relative youth, Butler asserts that "serious juvenile offenders should be treated differently than adults who commit serious crimes. Juveniles lack in maturity, have an underdeveloped sense of responsibility and are vulnerable to negative influences and outside pressures[.]" *See* ***Graham v. Florida***, 560 U.S. 48, 130 S. Ct. 2011, 2026 (2010); ***Roper v. Simmons***, 543 U.S. 551, 568–570 (2005) (prohibiting imposition of death penalty on defendants who were younger than age eighteen at time of their offenses).

¶12 However, ***Roper*** only establishes that "because juveniles have lessened culpability they are less deserving of *the most severe* punishments." ***Graham***, 130 S. Ct. at 2026 (emphasis added). A circuit court is not required "to give overriding mitigating significance to the young age of a defendant who has committed a serious crime." ***State v. Davis***, 2005 WI App 98, ¶19, 281 Wis. 2d 118, 130, 698 N.W.2d 823, 829. "In other words, the youth factor does not automatically outweigh all of the other sentencing factors." ***Ibid.***

¶13 Here, the circuit court clearly considered the "terrorizing" nature of the crimes, the number of victims, and the high risk of recidivism to be of greater import to fashioning the sentence than Butler's youth.[1] That Butler would prefer

[1] It does appear, however, that the circuit court may have accounted for Butler's age when it opted for the "low side of the [presentence report's] recommendation because of what [Butler had] stated to the Court[.]"

the circuit court to assign different weights to the sentencing factors does not mean the circuit court erroneously exercised its discretion.[2]

¶14 Butler also complains that his sentences are unduly harsh and excessive. When a defendant argues that a sentence is excessive or unduly harsh, we will deem it an erroneous exercise of discretion "'only where 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, 651, 648 N.W.2d 507, 517 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975)). "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, 108, 622 N.W.2d 449, 456. For the two offenses to which he pled, Butler faced eighty years' imprisonment.[3] The twenty-year sentence Butler received is neither unduly harsh nor excessive.

¶15 Finally, if he did not merit resentencing, Butler alternatively requested sentence modification, either because of a new factor or a harsh and excessive sentence. However, Butler did not, and does not now, identify any new factor and, as we have seen, his sentence was neither harsh nor excessive.

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[2] We reject outright Butler's additional claim that the circuit court should have considered, as a mitigating factor, the fact that his gun was only a BB gun and not a "real" gun. Regardless of the nature of its projectiles, the gun was obviously used to frighten victims into submission. It worked.

[3] If we include the two armed robberies that were read in, then the maximum penalty that Butler faced was 160 years' imprisonment. The aggravated battery count, which appears to be governed by WIS. STAT. § 940.19(6)(a), would add up to six years' imprisonment.

By the Court.—Judgment and order affirmed.

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