COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP924-CR **Cir. Ct. No. 2010CF725**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNIE E. RUSSELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Johnnie E. Russell appeals from a judgment of conviction entered after revocation of his probation and the circuit court's denial of his postconviction motion relating to his sentencing after revocation. He contends the court sentenced him based upon inaccurate information and

erroneously exercised its discretion in its imposition of the maximum penalty. We affirm.

¶2 In May 2010, Russell was charged with battery to hospital personnel and disorderly conduct based on an incident in which he threatened and then injured hospital staff.[1] On April 26, 2011, Russell pled no contest to the battery charge and the disorderly conduct charge was dismissed and read in. The court withheld sentence and placed Russell on one year of probation, permitting him to serve the probation in Illinois.

¶3 According to a report by his Wisconsin probation agent, Russell missed a number of appointments with the agent prior to the transfer of his probation to Illinois and was "argumentative" or "confrontational" in his contacts with the agent. Ultimately, Russell's application to serve his probation in Illinois was approved and he was assigned an Illinois probation agent.

¶4 In March 2012, city of Racine, Wisconsin, police informed the Wisconsin agent that Russell was wanted for allegedly breaking his friend's window in February 2012 over a disagreement related to alcohol he and his friend had consumed.[2] The Wisconsin agent contacted Russell's Illinois agent, but she had no updated information on Russell and indicated Russell had missed his February 2012 appointment with her and had made no contact since that time.

[1] According to the criminal complaint, Russell became upset at the hospital and threatened to "hurt someone" after being informed his insurance declined coverage for in-patient drug and alcohol treatment services but that out-patient services could be provided to him. A staff member asked him to change into a gown. He refused and, in attempting to leave, pushed the staff member into a wall causing pain and injury.

[2] Under the conditions of his probation, Russell was to abstain from alcohol.

¶5 In March 2013, police arrested Russell at a hotel in Franklin, Wisconsin, after a routine license plate check of vehicles parked there revealed his warrants. The department of corrections revoked Russell's probation and requested sentencing on the battery to hospital personnel conviction, recommending the maximum sentence—three years' initial confinement and three years' extended supervision.

¶6 At the sentencing-after-revocation hearing, the prosecutor adopted the department's recommendation, and Russell's counsel, acknowledging that the court "is going to impose a prison sentence," asked that it be "the shortest amount possible." The court stated that it had received the department's "report, revocation order and the warrant summary of the reasons for revocation and recommendations." It noted the facts underlying the conviction and found significant that Russell had absconded from probation and that it had been police routine that led to his apprehension; he had not voluntarily reported.

¶7 In pronouncing sentence, the court focused on the gravity of the offense, Russell's character and need for rehabilitation, and the need to protect the community. Regarding Russell's battery to hospital personnel, the court noted that Russell conducted himself in a manner that frightened hospital staff. It considered Russell's prior criminal record, which included battery, domestic abuse, theft and disorderly conduct convictions. The court discussed Russell's actions leading to the revocation, pointing out that, according to a report from the department, after Russell absconded from probation supervision, he committed property damage "because he'd been drinking beer with his friend." The court observed that Russell's behavior "simply has not changed." Following discussion of Russell's use of drugs and alcohol, as well as mental health issues, the court stated that Russell has "serious rehabilitative needs" which would be best

addressed by the department. The court then pronounced Russell's sentence, ordering three years of initial confinement and three years of extended supervision, as suggested by the department and the prosecutor.

¶8 After pronouncing the bifurcated sentence, the court discussed conditions of extended supervision:

> The conditions of extended supervision, absolute sobriety. You may not possess or consume alcohol or controlled substances unless prescribed by a physician ….
>
> *My view is you probably are not involved in any employment, nor were you during the absconding.* I have no idea how you supported yourself. I won't speculate but upon release employment to the best of your ability. If you can't work and are on benefits that's what it will be but the agent and you can determine that but you must seek employment. (Emphasis added.)

The court then stated that Russell would also have to comply with counseling deemed appropriate by his extended supervision agent.

¶9 Russell filed a postconviction motion seeking resentencing, arguing that the court relied on inaccurate information because Russell in fact had been employed during some of the relevant time period and further that the court erroneously exercised its discretion in sentencing Russell to the maximum sentence for his crime. After a hearing, the court denied the motion and Russell appeals.

¶10 Russell repeats on appeal his contention that the circuit court sentenced him based upon inaccurate information.[3] A defendant has a constitutional due process right to be sentenced based on materially accurate information. ***State v. Spears***, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999). Our review is de novo, ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1; however, we generally afford the circuit court's sentencing decision "a strong presumption of reasonability because [that] court is best suited to consider the relevant factors and demeanor" of the defendant, ***State v. Taylor***, 2006 WI 22, ¶18, 289 Wis. 2d 34, 710 N.W.2d 466 (citation omitted). The burden is on the defendant to show by clear and convincing evidence not only that the alleged information is inaccurate, but also that the court actually relied upon the information in formulating the sentence. ***Tiepelman***, 291 Wis. 2d 179, ¶¶14, 26; *see also* ***State v. Harris***, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409.

¶11 Russell focuses on the following statements the circuit court made during the sentencing hearing: "My view is you probably are not involved in any employment, nor were you during the absconding" and "I have no idea how you supported yourself. I won't speculate but upon release employment to the best of your ability." He claims these statements demonstrate the court had an inaccurate "view" when sentencing him because he in fact had been employed for several months during that time period, as confirmed by information he provided the circuit court with his postconviction motion. Russell argues that because

[3] The State contends Russell waived his contention that he was sentenced on inaccurate information by failing to correct the circuit court when it stated at sentencing after revocation that Russell "probably [was] not involved in any employment … during the absconding." As the State itself acknowledges, however, the waiver rule is a rule of judicial administration, and we may ignore a waiver and reach the merits of a case. ***State v. Leitner***, 2001 WI App 172, ¶42, 247 Wis. 2d 195, 633 N.W.2d 207. We choose to do that here.

employment was one of only four of his mandatory conditions of probation, the court's belief that he had not been employed during his probation was "not harmless."

¶12 Our review of the sentencing transcript reveals that the circuit court's comment regarding Russell's employment during his probation was, as the State suggests, merely a rhetorical statement and did not reflect the court's actual reliance in ordering the bifurcated sentence upon a belief that Russell had been unemployed. The fact that a court may mention an inaccurate piece of information during the totality of its sentencing remarks does not lead to the conclusion that the court actually relied upon that information in imposing sentence. *See* ***State v. Lechner***, 217 Wis. 2d 392, 421-22, 576 N.W.2d 912 (1998). It is important to note that the employment comment was made *after* the court ordered the bifurcated sentence and had fully finished explaining its reasons for doing so. The court here properly applied the sentencing factors in determining Russell's sentence, and considering the totality of the court's comments, nothing about those comments suggests the court fashioned the sentence based in any part upon Russell's employment or nonemployment during the time he was in absconder status. We conclude that Russell has not met his burden of showing that the circuit court relied on any inaccurate information in sentencing him.

¶13 Russell also asserts that the "circuit court erroneously exercised its discretion by imposing the maximum penalty … without providing a basis for the sentence or explaining why it was the minimum amount of custody required." Our review of a circuit court's sentencing decision is limited to whether it erroneously exercised its discretion. ***Harris***, 326 Wis. 2d 685, ¶30. A court properly exercises its discretion when it "act[s] reasonably." ***Lechner***, 217 Wis. 2d at 418-19. The court must explain its sentencing decision, including its sentencing objectives and

the relevant facts. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-42, 270 Wis. 2d 535, 678 N.W.2d 197. At minimum, the court must consider the three primary sentencing factors: the gravity of the offense, the defendant's character (and rehabilitative needs), and protection of the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76; ***Gallion***, 270 Wis. 2d 535, ¶¶23, 26, 40-42. The court need not, however, apply a specific formula or format in rendering its decision or act with mathematical precision. *See* ***Gallion***, 270 Wis. 2d 535, ¶49.

¶14 Russell complains that the circuit court "summarized the probation violations as 'not significant,'" and "concluded that 'some incarceration' was necessary," but then sentenced him to the maximum amount of incarceration without adequate explanation. The State counters that the court provided a full explanation for why it was adopting the prosecutor's and the department's recommendation for imposition of the maximum sentence. We agree with the State that the record belies Russell's complaint.

¶15 To begin, we observe that the circuit court order of three years of initial confinement and three years of extended supervision is completely consistent with its statement that "some incarceration" was necessary. Further, as noted, during the sentencing-after-revocation hearing, the circuit court considered the seriousness of the crime underlying the conviction (battery to hospital personnel) and stated that "Russell did act inappropriately, and … in such a manner that the complaint indicates the personnel at the hospital were frightened." The court then addressed Russell's character and rehabilitative needs. It noted his violations of the conditions of probation, including his absconding for over a year and the fact that he did not report voluntarily but was found only by police action. It addressed Russell's need for alcohol and other drug abuse treatment and how

that need had to be addressed in order to protect the public. It examined his prior record as well as the facts of the new wrongdoing he committed while on probation, stating, "[Y]our behavior simply has not changed. That risk cannot be tolerated." The court concluded, the "type and nature of the case, your record and the rehabilitative needs drive me to accept what's been recommended. This case is serious incarceration."

¶16 The court identified and applied on the record the proper sentencing factors. It balanced the relevant considerations, explained its rationale, and imposed a sentence within the range set by the legislature. The weight accorded each factor is within the sentencing court's wide discretion, *see* ***State v. Grady***, 2007 WI 81, ¶31, 302 Wis. 2d 80, 734 N.W.2d 364, and imposing the maximum sentence is excessive only where it is "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," ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Here, it is not.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2011-12).