COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2623-CR **Cir. Ct. No. 2013CM5299**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN EDDIE FARMER, SR.,

DEFENDANT-APPELLANT.

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

¶1 BRADLEY, J.[1] John Eddie Farmer appeals from a judgment entered on guilty pleas to one count of retail theft (less than $500) and three counts of misdemeanor bail jumping, contrary to WIS. STAT. §§ 943.50(1m)(b) and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14).

946.49(1)(a) (2013-14).[2] He also appeals from an order denying his postconviction motion seeking resentencing. He claims the circuit court erroneously exercised its discretion when it did not identify the primary sentencing factors, did not explain the reason for its sentence, and the explanation given in the written postconviction decision came too late. We affirm.

BACKGROUND

¶2 In December 2013, Farmer was caught stealing razors, soap, and batteries from a Wal-Mart Superstore. The items totaled $195.72. At the time Farmer tried to steal these items from Wal-Mart, he had been previously released from custody after being arrested for three other retail theft cases, one of which also had a bail-jumping count. As a condition of his release, he was ordered not to commit any more crimes.

¶3 Farmer entered into a plea agreement with the State. Farmer agreed to plead guilty to the Wal-Mart retail theft and three counts of bail jumping and the State would dismiss the three pending retail theft cases. The State's sentence recommendation would be time in the House of Correction with the amount left up to the circuit court.

¶4 At the sentencing hearing, the circuit court heard that Farmer had a "very lengthy prior record." In 2002, Farmer was convicted of retail theft, resisting and bail jumping. In 2001, he was convicted of two counts of retail theft. In 2014, he was convicted of retail theft in Waukesha County where he was just

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

sentenced to nine months straight time. In 1998, he was convicted of retail theft and bail jumping. In 1997, he was convicted of retail theft. In 1996, he was convicted of two counts of retail theft. In 1995, he had a conviction for theft and one for retail theft and another theft in 1990. The circuit court also heard that Farmer had three retail theft cases pending at the time he was arrested at Wal-Mart.

¶5 Farmer's attorney asked the circuit court for a concurrent sentence to the nine months he was serving in the Waukesha case, and told the circuit court that Farmer's theft problem stems from addiction but Farmer wants to get treatment. The circuit court also heard that Farmer has cataracts and prostate issues, but has a supportive adult son. Farmer has his GED plus some additional schooling, wants to learn how to use a computer, and was working at the Salvation Army. Finally, Farmer's attorney noted that Farmer is older—72 years old.

¶6 At the sentencing, the circuit court told Farmer that:

- "[Y]our shoplifting is totally out of control."
- "[Y]our record is very bad, and generally I don't like putting elderly people in the House of Correction; but in your case I think it's necessary."
- "I will, however, try to fashion part of my sentence to get you some treatment at the Day Reporting Center."

¶7 The circuit court then sentenced Farmer to:

(1) On count one, the retail theft: nine months in the House of Correction consecutive.

(2) On count two, the first count of bail jumping: six months in the House of Correction consecutive "to be served at the Day Reporting Center where we ask that he be given alcohol assessment and treatment."

(3) On count three, the second count of bail jumping: "26 days in the House of Correction with 26 days credit for pre-trial incarceration. That is a time-served disposition."

(4) On count four, the third count of bail jumping: "sentence withheld and placed on probation for a period of two years" to start at the end of the other sentences, with probation conditioned on AODA assessment and treatment.

¶8 The circuit court waived costs and fees because of Farmer's low income and noted that the sentence imposed was "fairly severe" but "does embody treatment both in the -- in the probationary count and treatment in the form of the Day Reporting count" "where if he behaves himself they'll give him alcohol assessment and treatment and let him live someplace other than in the jail."

¶9 Farmer filed a postconviction motion seeking resentencing, arguing the circuit court failed to identify the sentencing objectives or how the sentence imposed furthers the objectives. The circuit court denied the motion by written order, ruling:

> In this instance, the court considered the defendant's conduct in this case, his age, his education, his prior record, his struggles with addiction, his rehabilitative needs and the need for deterrence and community protection. Although the instant offense when viewed in isolation was relatively minor, the defendant presented with an extensive history of retail theft convictions, referrals and pending charges. Based on that history, it was plainly

> evident to the court that the defendant's shoplifting was "totally out of control" and that a House of Correction sentence was necessary to punish the defendant for his actions and to deter him from committing additional offenses of this nature. Arguably, a maximum sentence would have been justified on all counts based upon the defendant's very bad record and high risk for reoffending; however, the court was mindful of the defendant's age and treatment needs and weighed those factors when it granted release to the Day Reporting Center on count two and ordered a consecutive probation term on count four with an AODA assessment and treatment as conditions. The court acknowledged that its sentence was "fairly severe" but concluded then, as it does now, that the sentence imposed is necessary to achieve the sentencing goals of punishment, deterrence, rehabilitation and community protection.
>
> This court concedes that its sentencing decision could have been more expansive. The court could have gone on for pages and pages of transcript but did not need to do so in this case to state the obvious: that the defendant was a chronic shoplifter who was unwilling or unable to curb his behavior. Some House of Correction time was clearly necessary to punish and deter the defendant and to protect the community (particularly the business community). In the court's view, the amount of confinement time imposed was the minimum amount of custody consistent with those goals. The consecutive probationary sentence was ordered to afford the defendant an opportunity to address his addiction issues after his release from confinement to minimize his risk for recidivism. In sum, the court's sentencing decision was specifically individualized to achieve the court's sentencing goals for this defendant.

¶10 Farmer now appeals.

DISCUSSION

¶11 Farmer argues the circuit court did not consider the mandatory sentencing factors, did not explain the reasons for the sentence, and the explanation in the postconviction decision cannot undo the insufficient analysis at the sentencing itself. Sentencing is vested in the circuit court's discretion. *See* ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112. The

trial court must consider three primary factors: (1) the seriousness of the crime; (2) the defendant's character; and (3) the need to protect the public. *See* ***McCleary v. State***, 49 Wis. 2d 263, 274, 182 N.W.2d 512 (1971). Courts may also consider secondary factors:

> "(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."

State v. Gallion, 2004 WI 42, ¶43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). Courts must give reasons for the sentence imposed—a "'rational and explainable basis'"; however, how much explanation is required varies. ***Id.***, ¶39 (citation omitted). "[W]hether to impose consecutive, as opposed to concurrent, sentences is, like all other sentencing decisions, committed to the trial court's discretion." ***State v. Johnson***, 178 Wis. 2d 42, 52, 503 N.W.2d 575 (Ct. App. 1993). There is a strong public policy against interfering with the sentencing discretion of the circuit court. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

¶12 The sentencing transcript here shows the circuit court complied with the bare minimum requirements. It considered the severity of the crime when it referred to Farmer's shoplifting as "totally out of control"; it addressed Farmer's character and rehabilitative needs when it noted his "very bad" record, and his need for treatment, including the Day Reporting Center on the second count and AODA and treatment on the fourth count; and it addressed the need to protect the

public when it told Farmer despite his age, Farmer needed to spend time confined at the House of Correction. Although the circuit court certainly could have expanded its decision to include the analysis it provided in the written postconviction order, this court is satisfied that it met the minimum requirements needed to uphold the sentence here. It covered the three primary sentencing factors, provided a reason for the sentences imposed, and fashioned a sentence that was appropriate for Farmer given his past record, his need for treatment, and his chronic shoplifting.

¶13 Further, even when a sentencing court "fails to specifically set forth the reasons for the sentence imposed, 'we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***State v. Hall***, 2002 WI App 108, ¶6, 255 Wis. 2d 662, 648 N.W.2d 41 (quoting ***McCleary***, 49 Wis. 2d at 282). If this independent search shows facts on which the sentence is based, or facts fairly inferable from the record, reasons based on legally relevant factors, and evidence that "'the sentence imposed was the product of that discretion,'" "'the sentence should ordinarily be affirmed.'" ***Hall***, 255 Wis. 2d 662, ¶19 (quoting ***McCleary***, 49 Wis. 2d at 281).

¶14 This court would have preferred that the circuit court, at the sentencing, address each primary sentencing factor more completely and more explicitly state the objectives for the sentence imposed. However, the circuit court did meet the minimum requirements in this particular case. Even if this court had concluded that the circuit court failed to put an adequate reason on the record, this court is obligated to search the record to "'determine whether in the exercise of proper discretion the sentence can be sustained.'" ***Hall***, 255 Wis. 2d 662, ¶6 (citation omitted).

¶15 The record search shows the circuit court provided a more thorough sentencing explanation in its postconviction order, which this court may consider in our search of the record. *See* ***State v. Santana***, 220 Wis. 2d 674, 683, 584 N.W.2d 151 (Ct. App. 1998) ("The transcripts of the sentencing hearing as well as several postconviction hearings make an extensive record of the trial court's comments at sentencing and its explanation for what was considered."). In its postconviction order, the circuit court addressed each of the primary sentencing factors and clearly listed the goals of the sentence and how the sentence imposed met those goals.[3] Based on the postconviction written order, the sentence can be sustained.

¶16 Further, even if this court relies on what is in the record only up until judgment, it is sufficient to uphold the sentence in this case. The criminal complaint sets forth the nature of the charges and that Farmer committed the current crimes while he had other similar charges pending. The sentencing hearing sets forth Farmer's extensive criminal history, which included habitual theft or retail theft, Farmer's age, his addiction issues, his desire for treatment, his health issues, his education, his job, and his supportive son. This information together with what the circuit court actually said at sentencing allows this court to fairly infer: (1) one of the circuit court's sentencing goals was to protect the public from Farmer's chronic shoplifting, especially because Farmer committed the new retail theft while he had other retail theft charges pending; (2) another

[3] In ***State v. Hall***, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41, this court cautioned against circuit courts using the "search the record" obligation "to stuff the record with post-sentencing rationalizations that were clearly absent from the original sentencing decision." ***Id.***, ¶19 n.9. The record shows this is not what the circuit court did here. The postconviction order expanded the analysis from the actual sentencing hearing and more clearly stated what could be reasonably inferred from the circuit court's original sentencing.

goal was to punish Farmer for his "very bad" record and his commission of new crimes while he was out of custody awaiting prosecution on similar pending charges; (3) the circuit court emphasized the need for consecutive sentences in order to punish Farmer and to deter him from reoffending; and (4) the sentence was tailored based on Farmer's advanced age and his need for treatment, as it included treatment in two of the four counts and specifically discussed the opportunity Farmer had to get treatment. From this review, this court determines that "'in the exercise of proper discretion the sentence imposed can be sustained.'" *See* ***Hall***, 255 Wis. 2d 662, ¶6 (citation omitted).

¶17 Although this court agrees the sentencing in this case was not as thorough as it could have been, the record is sufficient to conclude that Farmer's sentence must be affirmed as being a proper exercise of circuit court discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.