COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP130-CR **Cir. Ct. No. 2014CM303**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN RAY GADDIS,

DEFENDANT-APPELLANT.

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

¶1 CURLEY, P.J.[1] Steven Ray Gaddis appeals the judgment convicting him of one count of retail theft as a repeater, contrary to WIS. STAT. §§ 943.50(1m)(b) and 939.62(1)(a) (2013-14). He also appeals the order denying

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

his postconviction motion. On appeal, Gaddis seeks resentencing, arguing that: the trial court failed to adequately explain its reasons for his sentence; and the trial court based his sentence on inaccurate information. This court affirms.

BACKGROUND

¶2 Gaddis was charged with retail theft as a repeater and disorderly conduct following an incident at a local Walmart during which a security guard observed Gaddis concealing multiple items in his sleeves via the store's security camera. According to the complaint, the security guard then saw Gaddis pick up a package of Reese's peanut butter cups, remove the wrapper, conceal the candy inside his coat, and then walk past the checkout without paying. The complaint further explained that when the security guard approached Gaddis to speak with him about the stolen items, Gaddis pulled out a box cutter and held it in a threatening manner, sliding out the blade and holding it outward. The security guard did not attempt to detain Gaddis, and Gaddis left the store.

¶3 Gaddis pled guilty to the retail theft charge and was sentenced.[2] At the sentencing hearing, the State recommended a prison sentence based on Gaddis' lengthy criminal history—which included twenty-six prior convictions—and the fact that Gaddis slid the blade out of the box cutter and threatened the security guard. The State also argued that Gaddis had substantial substance abuse problems, and that "prison may be able to get him … treatment and get him

[2] The disorderly conduct charge was dropped but read-in.

rehabilitated while also … protect[ing] … the public." Gaddis' attorney argued that a prison sentence "would be an egregious oversentence" given that the crime was not serious and Gaddis never actually thrust the box cutter at the security guard, and given that Gaddis had a substantial work history and was very involved in caring for his mother, who suffered from schizophrenia, and his grandparents, who were elderly.

¶4 The trial court sentenced Gaddis to two years' imprisonment, bifurcated as fifteen months of initial confinement and nine months of extended supervision, with eighty-eight days of sentence credit for time served. The trial court also made Gaddis eligible for the Substance Abuse Program. In its remarks, the trial court explained:

> Okay. Well, Mr. Gaddis, the three [primary] factors the Court has to consider while imposing a sentence [are] … the character of the defendant, … the need to protect the public, … [and] the seriousness of the offense.
>
> I think … when we look at your character, you have a horrible criminal record of past offenses that casts real doubt on your character. And in addition to that, I don't accept the defense's explanation of the knife – box cutter weapon and how it was displayed as being more accurate than the district attorney's description of it. And that's the aggravating circumstance.
>
> So I will follow the State's recommendation of a prison sentence. I think it's appropriate. They could have charged this … as a -- a different kind of felony instead of retail theft as a habitual criminal. Perhaps the reason they chose to charge it that way is … because it's less likely you could defend it successfully … because … your guilt of all the elements of retail theft is absolutely clear….
>
> ….

> I will make you eligible for the Earned Release Program.[3] So you can earn your way out quicker by undergoing treatment and other cognitive intervention.

¶5 Following sentencing, Gaddis filed a postconviction motion for resentencing or sentence modification. The trial court denied the motion, and Gaddis now appeals.

ANALYSIS

¶6 Gaddis seeks resentencing on appeal. He argues that he is entitled to resentencing because the trial court failed to adequately explain its reasons for giving him the maximum penalty permitted. He also argues that the trial court based his sentence on inaccurate information.

(1) The trial court's explanation for Gaddis' sentence was adequate.

¶7 Sentencing is committed to the trial 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 trial court acted reasonably, and do not interfere with the sentence if discretion was properly exercised. *See* ***id.*** at 418-19.

¶8 In its exercise of discretion, the trial court must consider three primary factors: "the gravity of the offense, the character of the defendant, and the

[3] The trial court later issued a ruling clarifying that it meant to make Gaddis eligible for the Substance Abuse Program, as the Earned Release Program was no longer in existence. *See* 2011 Wis. Act 38, § 19; WIS. STAT. §§ 302.05, 973.01(3g).

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 trial court's discretion. ***Id.*** Courts may also consider secondary factors, including:

> (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.

Gallion, 270 Wis. 2d 535, ¶43 n.11 (citation omitted). While courts must give reasons for the sentence imposed, how much explanation is required varies. ***Id.***, ¶39. Likewise, because "the exercise of discretion does not lend itself to mathematical precision," *see* ***id.***, ¶49, the trial court need not "provide an explanation for the precise number of years chosen," *see* ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466. Furthermore, 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 (citation omitted). If our 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,'" then "'the sentence should ordinarily be affirmed.'" ***Id.***, ¶19 (citation omitted).

¶9 The sentencing transcript here shows that the trial court complied with the law. It considered Gaddis' character, as exemplified by his "horrible"

record. *See* ***Harris***, 326 Wis. 2d 685, ¶28. The trial court considered both the severity of the crime and the need to protect the public by referencing Gaddis' displaying of the box cutter and finding the State's version of events more accurate. *See* ***id.*** Moreover, the trial court considered additional factors, like Gaddis' need for "treatment and other cognitive intervention," which stemmed from Gaddis' substance abuse problems. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 n.11.

¶10 While the trial court could certainly have been more extensive in its comments, review of the record permits only one conclusion: the trial court properly exercised its discretion. Given the defendant's substance abuse problems, extensive criminal history—with over two-dozen prior convictions—and the nature of the incident, this court agrees with the order denying Gaddis' postconviction motion:

> [The trial] court concedes that its sentencing comments could have been more extensive. 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 career criminal with serious rehabilitative needs who was unwilling or unable to curb his criminal behavior. Probation was obviously off the table given the defendant's history. And while there were some mitigating factors in the defendant's favor, the court did not assign any significant weight to them and was not required to do so.

¶11 Furthermore, contrary to what Gaddis argues, the trial court did not need to explain why probation was not an option in more detail than it did. It is clear from the above statement that the trial court thought that probation would not have adequately met Gaddis' rehabilitation and treatment needs, given his criminal record and substance abuse issues. Moreover, the trial court did not need to discuss in great detail why any mitigating factors received little weight. *See* ***id.***, ¶39. Finally, contrary to what Gaddis argues, the trial court *did* discuss his rehabilitative needs, explaining that he required "treatment and cognitive

intervention," and making him eligible for the Substance Abuse Program so that Gaddis could "earn [his] way out quicker."

(2) The trial court based Gaddis' sentence on accurate information.

¶12 This court turns next to Gaddis' argument that the trial court relied on inaccurate information at sentencing. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether this due process right has been denied is a constitutional issue that this court reviews *de novo*. *See* ***id.***

¶13 "[I]n a motion for resentencing based on a [trial] court's alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the [trial] court actually relied on the inaccurate information." ***Id.***, 291 Wis. 2d 179, ¶¶2, 26. If the defendant shows that the sentencing court actually relied on inaccurate information, the burden shifts to the State to establish that the error was harmless. ***Id.***, ¶3.

¶14 Gaddis argues that the trial court relied on two pieces of inaccurate information at sentencing: the State's description of how he brandished the box cutter; and the State's assertion that he could have been charged with a felony.

¶15 Regarding the box cutter, Gaddis argues that the trial court got it wrong because the police reports in the record indicate that he only pulled out the box cutter after the security guard asked him to empty his pockets. According to Gaddis, this version of events is far less aggravating than the version the State provided and on which the trial court relied.

¶16 This court disagrees. Regardless of whether the security guard asked him to empty his pockets, the critical fact revealed by the police reports—and the fact that Gaddis appears to ignore—is that Gaddis did more than simply pull out the box cutter; he opened the blade. By one account, he opened the blade three to four inches. By another account, "he held his hands out with the box cutter" after the blade had been opened. While Gaddis did not thrust the box cutter at the store staff or issue any verbal threats, the reports make clear that Gaddis' opening the blade and holding out his hands was enough to make the store employees feel threatened. Thus, the information regarding the box cutter incident on which the trial court relied at sentencing was not inaccurate. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶¶2, 26.

¶17 Regarding the assertion that he could have been charged with a felony, Gaddis argues that the trial court was wrong because the facts would not have supported a robbery charge pursuant to WIS. STAT. § 943.32(1)(b). Under the robbery statute, the State would have had to show that Gaddis: took and carried away the store's property; intended to steal the store's property; and acted "forcibly"—*i.e.*, threatened the imminent use of force against the security staff. *See* ***id.***; *see also* WIS JI—CRIMINAL 1479 (2009). Gaddis does not dispute that he took and carried away the store's property intending to steal it, but argues the facts do not demonstrate that he made any threats or used any force in taking the candy from the store.

¶18 Again, this court disagrees. One of the police reports indicates that, during the time that the security guard asked Gaddis to empty his pockets, Gaddis took out his box cutter, opened the blade, and "held out his hands with the box cutter." Another police report indicates that security staff felt threatened by this behavior. While certainly not as egregious as a situation in which a defendant

points a loaded gun at a store clerk and commands him to empty the cash register, the above facts *would* support a robbery charge. *See* WIS. STAT. § 943.32(1)(b). Thus, the trial court's comment that Gaddis could have been charged with a felony is not inaccurate. This court also notes that the trial court placed very little weight on this fact at sentencing, explaining that a felony charge would not have likely led to a conviction at trial. As noted, the most important factors the trial court considered were Gaddis' criminal history, the details of the incident, and Gaddis' need for rehabilitation. In any event, the trial court's comment was proper and the sentence will stand.

¶19 In sum, the trial court's comments at sentencing were not inadequate under the law, and the trial court did not rely on inaccurate information in sentencing Gaddis. Therefore, Gaddis is not entitled to resentencing.

By the Court.—Judgment and order affirmed.

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