COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP832-CR **Cir. Ct. No. 2012CM2203**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RODNEY VINCENT MCTOY,

DEFENDANT-APPELLANT.

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

¶1 FINE, J. Rodney Vincent McToy pled guilty to two charges of misdemeanor bail jumping involving domestic abuse for not complying with the terms of his release. *See* WIS. STAT. §§ 946.49(1)(a) & 968.075(1)(a). He claims that the circuit court erroneously exercised its sentencing discretion, and appeals

both the judgment and the order denying his motion for postconviction relief. We affirm.

I.

¶2 This case and its antecedent history that the circuit court considered in fashioning its sentence arise from McToy's often abusive relationship with Anita. H. Thus, the criminal complaint in this matter alleged that McToy:

- beat her when she refused to give him money to buy liquor; and
- violated the terms of his release in two criminal cases, also involving the alleged domestic abuse of Ms. H.

When the State issued the criminal complaint in this case, the other two cases were pending in Waukesha County. The first Waukesha case charged McToy with felony strangulation and suffocation involving domestic abuse, *see* WIS. STAT. §§ 940.235(1), 939.50(3)(h), & 968.075(1)(a); misdemeanor intimidation of a domestic-abuse victim, *see* WIS. STAT. §§ 940.44(1), 939.51(3)(a), & 968.075(1)(a); and misdemeanor domestic-abuse battery, *see* WIS. STAT. §§ 940.19(1), 939.51(3)(a), & 968.075(1)(a). The second Waukesha case charged McToy with misdemeanor bail jumping in connection with the first Waukesha case. Both Waukesha cases concerned Ms. H.

¶3 The State told the circuit court in this case's sentencing hearing that the Waukesha felony (strangulation and suffocation) was dismissed because Ms. H. did not appear at the preliminary examination. The State also told the circuit court at the sentencing hearing that it dismissed the battery charge against McToy because Ms. H. "did not appear" on the day scheduled for the jury trial. The State dismissed one bail-jumping charge against McToy in this case, and he

pled guilty to the other two bail-jumping charges. The State recommended that the circuit court sentence McToy on one bail-jumping charge to the time he had already served in custody. Although not material for the issue presented here, the State's recommendation was inartfully transcribed and reads in the transcript: "The State agreed to recommend time served on one count and sentence to the court on the other either."[1]

¶4 The circuit court sentenced McToy to incarceration for two hundred days on one of the charges, with credit for the time he already served in custody, which the parties agreed was one hundred and seventeen days. According to the circuit court, the two-hundred-day sentence was designed to keep McToy in custody pending the trial in the first Waukesha case, which, as we have seen, also involved Ms. H. The circuit court also imposed two years of consecutive probation on McToy's other bail-jumping charge because, as we show below, the circuit court opined that this was necessary to protect Ms. H. from McToy.

¶5 As noted, McToy sought postconviction relief from the sentence, and orally limited the scope of the requested relief to the term of probation. This is how his lawyer (who also represents McToy on this appeal) phrased it at the hearing on McToy's postconviction motion:

> Mr. McToy has already served the two-hundred-day sentence on Count Two in this case that the Court ordered.

[1] If the State was saying that it would leave the sentence on the other charge to the circuit court, the assertion is largely a nullity because, although the State may, of course, *recommend* what it deems to be an appropriate sentence, sentencing responsibility is the circuit court's and not that of either or both parties.

> So, it's a revisiting of the maximum two-year probation sentence that Mr. McToy is interested in revisiting at this point and seeking re-sentencing.

McToy contends that the circuit court erroneously exercised its sentencing discretion because it set the two-hundred-day sentence so that McToy, as he writes in his main brief on this appeal, "would 'remain in custody through the date of his jury trial' in *an unrelated matter* in Waukesha County." (Quoting the circuit court; emphasis added.) This is misleading because both the Waukesha cases and this case concern McToy's domestic-abuse of Ms. H.; they are *not* "unrelated," and, as we explain below, the circuit court appropriately considered the Waukesha cases at the sentencing hearing. Yet neither of McToy's briefs on this appeal disclose that the Waukesha cases involved McToy's abusive relationship with Ms. H. Rather, they consistently refer to the Waukesha matters as "unrelated" or "wholly unrelated." Further, McToy's main brief on this appeal refers to the Waukesha intimidation-of-a-victim case by asserting: "Mr. McToy was not charged with, or alleged to have, intimidated any victim or witness in this case" even though Ms. H. was the victim he was accused of intimidating in the Waukesha matter. We caution Mr. McToy's counsel, Dustin C. Haskell, that lawyers owe *full candor* to the tribunals before which they appear. *See* SCR 20:3.3. *Technically correct* but incomplete assertions can mislead or tend to mislead, as they do here, and this, too, violates the obligation of unalloyed honesty. Haskell is an Assistant State Public Defender and his supervisors should ensure that this is not repeated. McToy also claims that the circuit court's imposition of probation was flawed because, again as phrased by his brief on this appeal, the circuit court "acknowledge[ed] that it did not know how to address Mr. McToy's unspecified 'probationary needs.'"

II.

¶6 Normally, a sentencing challenge is moot once the defendant has served the sentence. *See* ***State v. Theoharopoulos***, 72 Wis. 2d 327, 330, 240 N.W.2d 635, 637 (1976). Nevertheless, the fact that a defendant has already served his or her sentence does not moot a challenge to the sentence if the sentence affects the defendant's rights in some other respect. *See* ***id.***, 72 Wis. 2d at 332–333, 240 N.W.2d at 638. Thus, McToy's challenge to the two-hundred day sentence is not moot because the circuit court ordered that McToy's probation would be consecutive to the sentence, and, therefore, the probation term would have started to run earlier if the two-hundred-day sentence was unlawful. Another rule, however, comes into play that affects McToy's right to challenge the sentence; as we have seen, he specifically disclaimed at the hearing on his postconviction motion a challenge to the sentence, and we ordinarily do not consider matters that were not first presented to the circuit court. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997) (arguments raised for the first time on appeal are generally deemed forfeited). In light of the fact that McToy's sentencing challenges here are intertwined, we consider both his challenge to the sentence and to the term of probation, despite the forfeiture.

¶7 A circuit court has broad sentencing discretion and may give the various sentencing factors the weight it deems appropriate. *See* ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 750, 632 N.W.2d 112, 116. The circuit court's sentencing remarks here showed that it relied, as it must, on the three primary factors material to a rational sentence: (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, 518 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d 535, 565–566, 678 N.W.2d 197, 211.

Indeed, McToy concedes that the circuit court noted that it needed to assess the ***McCleary*/*Gallion*** factors. He contends, however, that the circuit court should not have, in effect, set bail in the Waukesha cases, and that it did not identify McToy's probationary needs. We disagree.

1. *Sentence*

¶8 The circuit court was rightfully concerned not only by McToy's continuing history of abusing Ms. H., but also her refusal to assist in his prosecution, both in the Waukesha case where the State charged McToy with the strangulation/suffocation felony but also in this case where Ms. H. apparently did not appear on the scheduled trial date on the battery charge. As the circuit court recognized, "protection of the public" is a significant sentencing criterion. Ms. H. is a member of the public, of course, and was fully entitled to the circuit court's protection irrespective of whether she wanted it, or was too afraid to request it. The circuit court's on-the-Record explanation was both "'rational and explainable.'" *See* ***Gallion***, 2004 WI 42, ¶49, 270 Wis. 2d at 562, 678 N.W.2d at 209 ("[T]he requirement of an on-the-record explanation will serve to fulfill the ***McCleary*** mandate that discretion of a sentencing judge be exercised on a 'rational and explainable basis.'") (quoted source omitted). Thus, the circuit court noted both that "the protection of [Ms. H.] is an important" sentencing factor: "How do I protect her if she doesn't protect herself by staying away from the defendant?" Further, the circuit court was fully justified in considering all of McToy's history with Ms. H., irrespective of the criminal cases' outcome. *See* ***State v. Frey***, 2012 WI 99, ¶¶44–48, 343 Wis. 2d 358, 375–377, 817 N.W.2d 436, 444–445; ***State v. Arredondo***, 2004 WI App 7, 269 Wis. 2d 369, 404–405, 674 N.W.2d 647, 663 (Ct. App. 2003). The two-hundred-day sentence was designed to protect Ms. H. during the pendency of the Waukesha case and was fully consistent with a

reasoned exercise of discretion. *See* ***State v. Larsen***, 141 Wis. 2d 412, 428, 415 N.W.2d 535, 542 (Ct. App. 1987) (in circuit court's discretion to weigh the various pertinent sentencing factors).

2. *Probation*

¶9 McToy argues that the circuit court did not consider his needs for probation although it referred to his "probationary needs" and expressed frustration at McToy's recidivist domestic-abuse of Ms. H. and her apparent unwillingness to help the State protect her. The circuit court cut through this quandary by not only ordering that McToy be incarcerated during the pendency of the Waukesha case (thereby protecting Ms. H. until that case was finished) but also sought to further protect Ms. H. beyond the pendency of the Waukesha case by making a condition of the two-year probationary term that he have no contact with Ms. H. unless "she comes into court and asks for no violent contact." Indeed, this condition was consistent with McToy's assertion during his allocution that his "big mistake" was keeping in contact with Ms. H. The circuit court recognized that in domestic-abuse cases, anger management was a standard component of probation supervision. Thus, as it explained to McToy, the two-year term of probation would help effectuate the circuit court's "desire is to protect [Ms. H.]" as well as help McToy with his stated goal of avoiding Ms. H. Contrary to McToy's argument on this appeal, the circuit court considered that McToy needed to have an enforcing mechanism to keep him from Ms. H., something his history showed he was unable to do on his own. This is fully consistent with the goals of probation and the circuit court's reasoned exercise of its discretion.

By the Court.—Judgment and Order affirmed.

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