COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP314-CR **Cir. Ct. No. 2011CM253**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRITTON D. MCKENZIE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: DAVID J. WAMBACH, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.[1] Britton D. McKenzie, pro se, argues in effect that the circuit court erroneously exercised its sentencing discretion in imposing an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

excessive or unduly harsh sentence. While McKenzie appears to intend to make several arguments on appeal, I am limited by a prior order of this court to the argument that the sentence is excessive or unduly harsh given McKenzie's health problems. For the following reasons, I reject this argument, and accordingly affirm.

BACKGROUND

¶2 The State charged McKenzie with one count of lewd and lascivious behavior and three counts of misdemeanor bail jumping.[2] At a change of plea hearing, the State amended the criminal complaint to include a fifth count, disorderly conduct, arising out of the same incident that generated the other counts. McKenzie pled guilty to all five misdemeanors alleged in the amended criminal complaint.

¶3 The parties explained at the plea hearing that the State and McKenzie had reached a joint recommendation for three years' probation, with conditions that included sex offender treatment, twenty-five days in jail, and an imposed and stayed sentence of twenty-four months of jail. Separately, the State requested sex offender registration, which was the only aspect of the sentence on which the parties did not agree.

¶4 At the sentencing hearing, the circuit court learned that McKenzie had previously been convicted of lewd and lascivious behavior nineteen times over the course of the previous thirty years. Counsel for McKenzie explained that

[2] McKenzie was charged with bail jumping due to the fact that he was on probation following convictions for disorderly conduct.

a twenty-four month imposed and stayed jail term would provide incentive for McKenzie to adhere to the probation conditions, given his age of sixty-five, his reliance on social security benefits that would be lost if he were to be incarcerated for more than thirty days, his inability to attain work release, and his extensive health concerns. Counsel explained that McKenzie has had his esophagus removed, had a heart attack in 2009, and suffered problems with mobility that would only get worse over time.

¶5 McKenzie told the court that he would "take responsibility here and now and ask that you would sentence me to the maximum amount of jail time that you feel I deserve because I know I deserve it." McKenzie also explained his extensive medical history, including an esophagectomy, quadruple bypass heart surgery, and that his doctors had informed him that he "soon won't be able to walk at all." Finally, he asked the court to impose "probation with whatever conditions you wish" instead of imposing straight jail time.

¶6 The court adopted the joint recommendation. The court sentenced McKenzie to six months on each of the first four courts, to run consecutively to each other, and ninety days on Count Five, to run concurrent to the other counts. The circuit court then stayed this sentence and imposed three years of probation for all five counts, with conditions including participation in sex offender treatment. Conditions also included a twenty-five-day jail sentence on Count One that would begin immediately after sentencing. Finally, the court imposed sex offender registration.

¶7 In its sentencing decision, the circuit court considered McKenzie's "extensive history of exhibitionism," his "resistance to prior treatment and continued criminal activity," his lack of "expression of understanding of [his]

victimization of others," and the need for "community protection." The circuit court determined that immediately imposing an extended jail sentence would only have "the effect of delaying the next victim" and that probation with an imposed and stayed jail term would allow McKenzie access to treatment.

¶8 McKenzie's probation was revoked on April 17, 2013, triggering the imposed and stayed twenty-four-month jail term.

¶9 On September 23, 2013, McKenzie filed a postconviction motion seeking sentence modification and sentence credit. This document, filed pro se, is disjointed and difficult to interpret, but it includes references to concepts that include the following: (1) McKenzie's sentence was excessive because the court did not take into sufficient account his health problems, and (2) McKenzie's health had deteriorated further since sentencing, which merited modification of his sentence.

¶10 Attached to McKenzie's motion for sentence modification before the circuit court was a letter by McKenzie's primary care doctor detailing many health problems. The physician reached the conclusion that, while McKenzie's care "can theoretically be accomplished while incarcerated, it will require multiple [medical treatment] visits and prison resources. From a pure medical standpoint, his condition will be much more stable if not incarcerated."

¶11 At a hearing held on November 5, 2013, the circuit court issued an oral decision denying McKenzie's motion for sentence modification, which was recorded in a written decision on December 18, 2013. In a separate written decision, issued December 6, 2013, the circuit court granted McKenzie's request that the judgment of conviction be amended to reflect sentence credit for fifty-five days spent in the Dane County Jail. McKenzie now appeals.

DISCUSSION

¶12 McKenzie argues that the circuit court improperly exercised its discretion in imposing the twenty-four-month sentence that he is now serving, because this sentence is excessive and unduly harsh in light of the facts before the sentencing court, including facts regarding his health conditions at that time.[3]

¶13 One potential problem for McKenzie is that the record in this court does not include a transcript from the November 5, 2013 hearing, in which the circuit court addressed McKenzie's motion for sentence modification. While it appears that he made some efforts in this regard, McKenzie has failed to ensure that this transcript was transmitted to this court. It is the appellant's duty to ensure that evidence material to the appeal is in the record, and failure to do so may be grounds for dismissal. ***State v. Smith***, 55 Wis. 2d 451, 459, 198 N.W.2d 588 (1972).

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[3] Appellate courts follow a liberal policy when judging the sufficiency of pro se pleadings by prisoners. *See* ***State ex rel. Mentek v. Schwarz***, 2001 WI 32, ¶17, 242 Wis. 2d 94, 624 N.W.2d 150. Even giving McKenzie the benefit of this rule, however, this court issued an order on May 16, 2014, concluding that McKenzie's appellate brief in this appeal did not meet the requirements of WIS. STAT. RULE 809.19, save for his claim that the imposed and stayed jail sentence was unduly harsh because the circuit court at the time of sentencing did not give sufficient attention to evidence of his poor health. This court directed the State to respond to that claim alone.

For this reason, I do not address other possible arguments now advanced by McKenzie, such as his apparent argument that evidence that his health has deteriorated since the time of the sentencing hearing constitutes a new sentencing factor. This also precludes my resolution of McKenzie's separate argument that he "spent 54 days in the Dane [County] jail" and that he is entitled to sentence credit for this period of time. On this last point, I will simply observe that, as explained above, the circuit court granted McKenzie's sentence credit claim and ordered that the judgment of conviction amended to reflect this credit.

¶14 However, it is not clear to me whether this failing is fatal to the appeal. If McKenzie had based his argument for modification of his sentence solely on the concept that his health had deteriorated after sentencing, so as to constitute a new sentencing factor, that topic is not at issue in this appeal, and the missing transcript might be irrelevant. At the same time, however, the motion was not so clearly stated. It is possible, perhaps even likely, that the circuit court made findings or observations during the hearing on the motion for sentence modification that could bear on the question of whether the sentence was excessive, because the topics involve potentially overlapping facts and considerations.

¶15 However, I will assume without deciding that nothing in the missing transcript would undermine McKenzie's excessive sentencing argument. Even with that assumption, the excessive sentencing argument fails based on the record that is available.

¶16 First, as the State notes on appeal, "McKenzie himself asked the court to impose the sentence he now contends is unduly harsh," which is an untenable position. A defendant "cannot agree to the recommendation of an imposed and stayed sentence, violate probation, and then take the position on appeal that the sentence was excessive." ***State v. Magnuson***, 220 Wis. 2d 468, 472, 583 N.W.2d 843 (Ct. App. 1998).

¶17 Second, McKenzie disregards the applicable legal standards in making his argument. In determining whether a sentence is excessive or unduly harsh, the circuit court's decision will be upheld unless it is based on an erroneous exercise of discretion. ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449. "As long as the [circuit] court considered the proper factors and

the sentence was within the statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience." ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996); *see also* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 ("When a defendant argues that his or her sentence is excessive or unduly harsh, a court may find an erroneous exercise of sentencing 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.'" (quoted source omitted)). A sentence issued "'well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people.'" ***Grindemann***, 255 Wis. 2d 632, ¶31 (quoted source omitted).

¶18 The twenty-four month imposed and stayed sentence that McKenzie requested, but now challenges, was well within the thirty-nine month maximum that the circuit court could have imposed for all five offenses pursuant to WIS. STAT. § 939.51(3).[4] Thus, the sentence is presumptively not unduly harsh or excessive. *See* ***Grindemann***, 255 Wis. 2d 632, ¶32.

¶19 McKenzie fails to persuade me that, despite the fact that the sentence imposed was well within the maximum, the circuit court misused its discretion in concluding that the sentence was not unduly harsh or excessive. *See* ***id.***, ¶¶32-34.

[4] McKenzie was charged with four Class A misdemeanors, for which imprisonment must not exceed nine months, and one Class B misdemeanor, for which imprisonment must not exceed ninety days. *See* WIS. STAT. § 939.51(3)(a), (b).

As noted above, the sentencing hearing transcript reflects that the circuit court was aware of McKenzie's health problems, which McKenzie described in dire terms at the sentencing hearing, but determined that other sentencing factors that a circuit court must consider, namely McKenzie's character and the need for public protection, weighed in favor of the sentence imposed. *See* ***State v. Gallion***, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197 (the primary sentencing factors for a sentencing court to consider are the protection of the public, the gravity of the offense, and the rehabilitative needs of the offender).

CONCLUSION

¶20 For the forgoing reasons, I affirm the circuit court's order denying McKenzie's motion.

By the Court.—Order affirmed.

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