COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1968-CR **Cir. Ct. No. 2013CF1453**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARRINGTON ROSS,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Carrington Ross appeals a judgment of conviction, entered upon his guilty pleas to maintaining a drug trafficking place, possessing with intent to deliver more than five but less than fifteen grams of cocaine, and possessing a firearm as a person previously adjudged delinquent for an act that

would be a felony if committed by an adult. *See* WIS. STAT. §§ 961.41(1m)(cm)2., 961.42(1), 941.29(2)(b) (2013-14).[1] He also appeals from the order denying his motion for sentence modification. The issue is whether the circuit court erroneously exercised its sentencing discretion by imposing an aggregate ten-year term of imprisonment. We reject Ross's contentions and affirm.

BACKGROUND

¶2 The police executed a search warrant at 2845 N. 11th Lane, Milwaukee, Wisconsin. Carrington was in one of the bedrooms containing a Smith & Wesson 9mm firearm with fifteen live rounds of ammunition, a baggie with more than six grams of a substance that was subsequently identified as cocaine, and $1,050 in cash, which was on the floor of the closet. In the kitchen, the police found additional amounts of suspected cocaine base, a digital scale, and a quantity of plastic baggies without their corners.[2] The State initially charged Ross with one count of possessing cocaine with intent to deliver and one count of maintaining a drug trafficking place. Subsequently, the State filed an amended information adding a charge of possessing a firearm as a person previously adjudged delinquent for an act that would be a felony if committed by an adult. Pursuant to a plea bargain, Ross pled guilty as charged, and in exchange, the State recommended a prison sentence without specifying a proposed term.

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

[2] At the preliminary examination, a police officer testified that cocaine dealers commonly package cocaine by putting it in the corners of plastic baggies, tying the corners, and then cutting them off.

¶3 At sentencing, Ross asked the circuit court to impose and stay a prison sentence and place him on probation. The circuit court rejected Ross's request and imposed three consecutive, evenly bifurcated terms of imprisonment. The circuit court imposed a four-year term of imprisonment for possession with intent to deliver cocaine, a second four-year term of imprisonment for illegally possessing a firearm, and a two-year term of imprisonment for keeping a drug-trafficking place. Ross's aggregate sentence was thus five years of initial confinement and five years of extended supervision.

¶4 Ross moved to modify his sentences. The circuit court denied the motion in a written order entered without a hearing, and this appeal followed.

DISCUSSION

¶5 Ross seeks sentence modification, alleging the circuit court either failed to consider, or failed to consider adequately, a variety of factors. Our standard of review in such cases is well settled. Sentencing lies within the circuit court's discretion, and appellate review is limited to considering whether discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

¶6 The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider additional factors, including:

> (1) [p]ast 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 and quotation marks omitted). The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶7 A defendant challenging a sentence "has the burden to show some 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 circuit court acted reasonably, and we do not interfere with a sentence if the circuit court properly exercised its discretion. *See* ***id.*** at 418-19. We defer to the circuit court's "great advantage in considering the relevant factors and the demeanor of the defendant." *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶8 In this case, the circuit court considered the mandatory sentencing factors and numerous additional matters. The circuit court described the offenses as serious and discussed the need to protect the public, noting the negative effect of guns and drugs on the safety of the community. The circuit court considered Ross's character, finding that Ross was "polite," but observing that, although he said he was remorseful, "the real thing [the circuit court] heard from [Ross] is, [he's] looking for leniency." The circuit court also recognized that Ross was twenty-seven years old and "certainly old enough to know better," that he had "some sporadic employment background," and that he was "just starting to work

on [his] G.E.D. or H.S.E.D.," which the circuit court acknowledged as a "step in the right direction."

¶9 Ross did not dispute at sentencing, and he does not dispute on appeal, that he has a significant and lengthy juvenile record, including adjudications for fourth-degree sexual assault, battery, possession of a dangerous weapon, and two counts of robbery. The circuit court considered and discussed Ross's juvenile history, emphasizing that he had received substantial services as a youth and nevertheless committed serious crimes as an adult.

¶10 The circuit court appropriately considered Ross's request for probation. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. The circuit court rejected this option, however, explaining that Ross had a "history of bad offenses and not ... following society's rules" and concluded probation "would totally unduly depreciate the seriousness of the crime[s Ross] committed." In light of the totality of the factors, the circuit court imposed an aggregate ten-year sentence.

¶11 Ross asserts the circuit court did not rely upon the presentence investigation report prepared in this matter. Preliminarily, we note this contention, if true, would not identify an error because the weight to accord the presentence investigation rests entirely in the circuit court's discretion. *See* ***id.***, ¶43 & n.11. As the State accurately asserts, however, the circuit court in fact did consider the presentence investigation report, telling Ross: "[t]here seems to be a lot of minimizing going on based on the P.S.I. There is not a lot of acceptance of responsibility." Ross's real complaint is the circuit court did not rely on the portions of the presentence investigation report that were favorable to him. This complaint does not entitle him to relief. Our inquiry is whether the circuit court reasonably exercised its discretion, not whether another circuit court judge might

have reasonably exercised discretion differently. *See* ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. Accordingly, we reject Ross's contention that sentence modification is warranted because the circuit court did not rely upon the presentence investigation report.

¶12 We also reject Ross's contention that the circuit court did not take into account the presentence investigation author's recommendation for concurrent time. To the contrary, the circuit court clearly stated its understanding that the author of the presentence investigation recommended concurrent sentences. With equal clarity, the circuit court expressly rejected the recommendation, explaining that the crimes were "incredibly serious" and therefore the sentences "should all be consecutive." The circuit court did not err. "The recommendations of the prosecutor, defense counsel, victim and presentence investigation report author are nothing more than recommendations which a court is free to reject." ***State v. Bizzle***, 222 Wis. 2d 100, 105 n.2, 585 N.W.2d 899 (Ct. App. 1998).

¶13 Next, Ross asserts the circuit "court did not take [his] lack of adult criminal record into account." In fact, the circuit court recognized that Ross "do[es]n't have an adult court criminal record." Ross goes on to present a related complaint that the circuit court "relied upon [his] juvenile record." Certainly, the circuit court emphasized Ross's history of juvenile offenses, but the circuit court did not err by doing so. The rule is long settled that "[p]rior juvenile court proceedings involving the defendant, and even adjudications of delinquency subsequently invalidated or set aside, may be reviewed." ***Hammill v. State***, 52 Wis. 2d 118, 120, 187 N.W.2d 792 (1971) (footnotes omitted).

¶14 Next, Ross argues the circuit court "should have placed greater emphasis" on a letter he wrote to the court and on letters filed by his friends and

family. Ross offers no authority to support this position, and we know of none. The circuit court had discretion to assign the letters whatever weight the court thought appropriate. *See* ***Stenzel***, 276 Wis. 2d 226, ¶16. To the extent Ross suggests the circuit court did not consider the letters at all, the record reflects otherwise. The circuit court assured Ross at the outset of the sentencing proceedings that it had "read the whole series of letters that have come in from friends and family of Mr. Ross" as well as "some added materials from Wisconsin Lutheran Institutional Ministry." Accordingly, we reject Ross's claim for sentence modification based on an alleged failure to consider the letters and supporting documents filed on his behalf.

¶15 Finally, Ross suggests his aggregate sentence was unduly harsh. We disagree. Ross faced an aggregate maximum of twenty-eight years and six months of imprisonment and a fine of $85,000.[3] The circuit court, however, imposed less than half of the available term of imprisonment and did not require Ross to pay any fine.

¶16 A sentence is unduly harsh "'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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Sentences within

[3] Ross faced: (1) fifteen years of imprisonment and a $50,000 fine for possessing cocaine with intent to deliver, *see* WIS. STAT. §§ 961.41(1m)(cm)2., 939.50(3)(e); (2) three years and six months imprisonment and a $10,000 fine for maintaining a drug trafficking place, *see* WIS. STAT. §§ 961.42, 939.50(3)(i); and (3) ten years of imprisonment and a $25,000 fine for possessing a firearm as a person adjudged delinquent for an act that would be a felony if committed by an adult, *see* WIS. STAT. §§ 941.29(2)(b), 939.50(3)(g).

the statutory maximums, however, are "not so disproportionate to the offense[s] committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***id.*** (citation omitted). The sentences here are well within the maximum allowed by law. We cannot say that the circuit court imposed sentences that are shocking or excessive for a constellation of crimes involving a firearm, cocaine, and a home base for illegally marketing controlled substances in the Milwaukee community.

By the Court.—Judgment and order affirmed.

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