COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP778-CR **Cir. Ct. No. 2012CF752**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL WESLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Carl Wesley entered an ***Alford*** plea[1] to first-degree reckless homicide for delivering heroin, contrary to WIS. STAT. § 940.02(2)(a)

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

(2013-14),[2] resulting in the death of Andrew Debroux. The circuit court sentenced Wesley to ten years' initial confinement (I.C.) and ten years' extended supervision (E.S.) and found him eligible for the Substance Abuse Program (SAP).[3] The Department of Corrections (DOC) later advised that Wesley was statutorily ineligible for the SAP. *See* WIS. STAT. § 302.05(3)(a)1. The court amended the judgment accordingly. Wesley moved for sentence modification, alleging an erroneous exercise of sentencing discretion and a new factor. We affirm the amended judgment and the order denying his postconviction motion.

¶2 Wesley contends his twenty-year sentence is unduly harsh and thus is an erroneous exercise of sentencing discretion. A sentence is unduly harsh only if its length "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.'" ***State v. Davis***, 2005 WI App 98, ¶15, 281 Wis. 2d 118, 698 N.W.2d 823 (citation omitted). In determining whether a sentence is unduly harsh or excessive, we review it for an erroneous exercise of discretion, and we presume the sentencing court acted reasonably. ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449. Given the circuit court's advantage in considering the relevant sentencing factors and the defendant's demeanor, we will sustain its exercise of sentencing discretion if its conclusion "was one a reasonable judge could reach,"

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

[3] Effective August 3, 2011, the legislature amended the title of WIS. STAT. § 302.05 from Wisconsin earned release program to Wisconsin substance abuse program. *See* 2011 Wis. Act 38, §19; WIS. STAT. § 991.11. The earned release program apparently still exists within the substance abuse program. *See, e.g.*, WIS. STAT. §§ 302.05(3)(a)2., 973.01(3g).

regardless if we or another court might have decided differently. ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

¶3 To properly exercise sentencing discretion, 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." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. To evaluate the risk that a defendant poses to the public, the trial court may take into account the defendant's attitude toward the crime and the extent of the defendant's remorse. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915-16, 512 N.W.2d 243 (Ct. App. 1994). The court has broad discretion in determining the weight to give each factor. ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992).

¶4 Wesley contends the court gave too little weight to several mitigating factors: he was a fifty-three-year-old wheelchair-bound paraplegic who requires assistance with medical and personal needs, had served only short jail sentences, never prison, always discharged successfully from probation, apologized to Debroux's mother, and spared the family a trial by entering an ***Alford*** plea. He shifts the blame to Debroux, a drug addict, and points out that the sentence exceeds recommendations of the State, the defense, and the PSI writer.[4]

¶5 The court amply explained its sentencing rationale. It focused on Wesley's refusal to accept responsibility and the need to protect the public. The court noted that he showed little remorse or accountability, a proper consideration

[4] The State recommended seven to ten years' I.C. plus five years' E.S.; defense counsel asked the court to consider four to six years' I.C. and an "appropriate period" of E.S.; and the PSI writer recommended nine to ten years' I.C. and three to four years' E.S.

when evaluating the risk a defendant poses to the public. *See* ***Fuerst***, 181 Wis. 2d at 915-16. It noted that he lived an antisocial life and never had held a job; he continued to sell drugs despite prior drug convictions and even after Debroux's death; and, like a businessman, he followed the demand, switching from crack cocaine to the increasingly more popular, and deadlier, heroin. Emphasizing that this was a homicide case, the court observed that, while users bear some responsibility, Wesley sold this heroin knowing it was from an "unusual batch," even warning Debroux to be careful.

¶6 Finally, a sentencing court is not bound by anyone's recommendation. Reciting that Wesley faced forty years' imprisonment and a $100,000 fine, the judge made clear at the plea hearing "that it is my decision and my decision alone what the appropriate sentence is after I hear the arguments and read the reports of everyone"; Wesley confirmed his understanding. *See* ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. Although it did not need to, *see* ***State v. Brown***, 2006 WI 131, ¶24, 298 Wis. 2d 37, 725 N.W.2d 262, the court explained why it deviated upward from the E.S. recommendations: "[T]he only way to protect the public post-release was to make sure he was … supervised … well into [his] golden years."

¶7 The court supplied on the record a "'rational and explainable basis'" for imposing the sentence it did. *See* ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The sentence imposed, half his exposure and no fine, is not unduly excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). We see no reason to disturb it.

¶8 Wesley next contends that his later-discovered statutory ineligibility to participate in the SAP constitutes a new factor. We disagree.

¶9 After pronouncing Wesley's bifurcated sentence and the E.S. conditions, the court said this:

> As far as the prison sentence is concerned, I will declare you eligible for the Substance Abuse Program. I am hesitating here because you certainly don't highlight any particular need in that area, but I am going to allow the prison authorities to make that final determination if that is truly what is necessary.

¶10 The SAP is a prison treatment program that, upon successful completion, permits an inmate serving a bifurcated sentence to convert his or her remaining I.C. time to E.S. time. *See* WIS. STAT. § 302.05(3). Wesley is statutorily disqualified by virtue of his conviction for a WIS. STAT. ch. 940 offense. *See* § 302.05(3)(a)1. The DOC notified the court about two months after Wesley was sentenced. Wesley claimed it constituted a new factor.

¶11 A new factor is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted).

¶12 A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***id.***, ¶35. The analysis involves a two-step process. ***Id.***, ¶36. The defendant first must demonstrate by clear and convincing evidence that a new factor exists. ***Id.*** Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38. If the defendant does demonstrate the existence of a new factor, the circuit court decides in the exercise of its discretion whether sentence

modification is warranted. ***Id.***, ¶37. We review that decision for an erroneous exercise of discretion. ***Id.***, ¶33.

¶13 The circuit court rejected Wesley's claim of a new factor. It explained that when it sentences on a serious felony matter "really one of the last things on [its] mind is eligibility for those programs," but that it has "developed a practice to err on the side of declaring eligibility as opposed to not." The court reminded Wesley that it "defer[s] to the prison authorities because they are the ultimate authority…. I defer to the institution, and when [an inmate] is not statutorily eligible they send me a letter, like I got in this case, which resulted in a perfunctory amending of the judgment of conviction." The court stated its belief that his heroin trafficking was motivated by money, not to have drugs for his own use, and observed that, in fact, Wesley had told the PSI writer he was only a "social user" of cocaine, had not used since 2007, and was not in need of or involved in any type of AODA program. If he since had developed a problem, it could be addressed within the institution.

¶14 The court already had pronounced the length and structure of Wesley's sentence when it stated his eligibility for the SAP and that it was for the DOC to make the final determination. The eligibility determination thus was not "highly relevant" to the sentence imposed. Wesley has not shown the existence of a new factor. Sentence modification is not warranted.

By the Court.—Judgment and order affirmed.

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