

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2014AP215-CR
2014AP216-CR
2014AP217-CR**

**Cir. Ct. Nos. 2012CF8
2012CF29
2012CF30**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BEAU G. GALLIPEAU,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed.*

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

¶1 PER CURIAM. In these consolidated appeals, Beau G. Gallipeau contends that the trial court erroneously exercised its sentencing discretion, sentenced him too harshly, and erred in failing to find him eligible for the Substance Abuse Program (SAP). He also contends the court's ineligibility determination constitutes a new factor warranting sentence modification, because it negated two other counties' determinations that he was eligible. We reject his contentions and affirm.

¶2 January 2012 was not a good month for Gallipeau. He racked up the three Washington county criminal complaints underlying these appeals charging him with theft of movable property greater than \$10,000 and criminal damage to property, both as a party to a crime (PTAC); burglary to a building or dwelling; possession of a firearm by a felon; possession of THC, second or subsequent offense; possession of a non-narcotic controlled substance; and possession of drug paraphernalia. To make matters worse, he accumulated four other Washington county criminal complaints that month alleging similar crimes. In fact, January capped three bad months in a row. In November and December 2011 he was charged with similar offenses in Sheboygan and Ozaukee counties. The disposition of all of these cases comes into play here, as will be explained.

¶3 Pursuant to a plea agreement, Gallipeau entered no-contest pleas to theft of movable property greater than \$10,000 and burglary and pled guilty to the firearm and THC possession charges. The remaining charges and the four other Washington county charges referenced below in footnote 1 were dismissed and read in for sentencing.

¶4 The trial court sentenced Gallipeau to three consecutive sentences of two years' initial confinement (IC) and two years' extended supervision (ES), for a total sentence of six years' IC and six years' ES. Those sentences were ordered consecutive to the consecutive sentences ordered in Sheboygan and Ozaukee counties (three years' IC and three years' ES; four years' IC and four years' ES, respectively), giving him a global three-county sentence of thirteen years' IC and thirteen years' ES.¹ The Sheboygan and Ozaukee county courts had found Gallipeau eligible for SAP. The court here found him ineligible because it deemed it necessary that he serve his full sentences.

¶5 Gallipeau filed a postconviction motion for sentence modification. Without a hearing, the trial court denied the motion in part, ordering that Gallipeau would be eligible for SAP in his third-charged case once he completed his sentences in the first two cases. Gallipeau appeals.²

¶6 Gallipeau contends the trial court erroneously exercised its sentencing discretion by exceeding the recommendations of all parties and giving short shrift to mitigating factors such as his remorse, work history, AODA issues, and psychological problems. We disagree.

¶7 Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of

¹ Gallipeau was sentenced to four years' IC and four years' ES in the Ozaukee county matters, consecutive to his three years' IC and three years' ES in the Sheboygan county case. The Ozaukee and Sheboygan county courts found Gallipeau eligible for SAP.

² Gallipeau does not appeal from the portion of the postconviction order granting him eligibility for SAP in the third of his Washington county cases, case No. 2012CF30.

discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court may consider a host of factors and must consider three primary factors: the gravity of the offense; the character of the offender; and the need for protection of the public. *State v. Smith*, 207 Wis. 2d 258, 281 n.14, 558 N.W.2d 379 (1997). We recognize a “strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably.” *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

¶8 A sentence alleged to be unduly harsh or excessive also is reviewed for an erroneous exercise of discretion; again, we presume the sentencing court acted reasonably. *State v. Scaccio*, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449. 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).

¶9 The court here fully explained its sentencing rationale. It considered the gravity, and sheer number, of Gallipeau’s offenses and noted that restitution totaled nearly \$38,000. It rejected his argument that the victims were businesses, rather than residences, and involved no violence. While the court took mitigating factors into account, it noted that nothing—not opportunities for counseling and treatment, not prison, not probation—seemed to have deterred Gallipeau from his criminal ways or drug and alcohol abuse. It gave greater weight to his high risk to reoffend and the need to safeguard the public. *See State v. Thompson*, 172 Wis. 2d 257, 264-65, 267, 493 N.W.2d 729 (Ct. App. 1992) (weight given

sentencing factors and whether to construe particular circumstance as mitigating or aggravating within trial court's discretion). The court also observed that the parties' joint two-year IC recommendation and concurrent sentences would unduly depreciate the seriousness of the offenses and the harm to victims. *See State v. Douglas*, 2013 WI App 52, ¶20, 347 Wis. 2d 407, 830 N.W.2d 126. Postconviction, the court stated it was satisfied that the sentences imposed were "appropriate, necessary, and in compliance with ... *Gallion*." *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (sentencing court has additional opportunity to explain sentence when challenged by postconviction motion).

¶10 Gallipeau next argues that the trial court erred by finding him ineligible for SAP. Whether a statutorily eligible inmate may participate in SAP depends upon being found eligible for the Earned Release Program (ERP). *See* WIS. STAT. § 302.05(1)(am), (3)(a)2. (2013-14).³ Those determinations rest in the sentencing court's discretion. *See* WIS. STAT. § 973.01(3g).

¶11 The court acknowledged Gallipeau's "substantial substance abuse problems" but nonetheless found him ineligible for the ERP and SAP. The court explained that they had not worked for him in the past, it saw no reason to think they would work in the future, and, "given everything I know about Mr. Gallipeau," found it necessary for him to serve his entire sentences.

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶12 Gallipeau does not show that the trial court based its sentences or the denial of eligibility for SAP on improper or unreasonable factors. That the court exercised its discretion differently than he had hoped or than how another court might have does not demonstrate an erroneous exercise of discretion. *See State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

¶13 Finally, Gallipeau asserts that the court’s ineligibility finding negated the Sheboygan and Ozaukee county courts’ findings of eligibility, presenting a new factor that warrants sentence modification.

¶14 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, even though it was then in existence, 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). A trial court has discretion to modify a sentence if a defendant shows the existence of a new factor. *Id.*, ¶33. We review de novo whether Gallipeau has demonstrated that a new factor exists. *See id.*

¶15 Gallipeau’s Sheboygan and Ozaukee county sentences predated his sentencing here. The trial court ruled in its postconviction order that it was “well aware” at the time of sentencing that imposing consecutive sentences and finding Gallipeau ineligible for the ERP would negate his ERP eligibility on his other sentences, a consequence it “fully intended.” Gallipeau has not demonstrated the existence of a new factor.

By the Court.—Judgments and order affirmed.

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

