COURT OF APPEALS DECISION DATED AND FILED

May 12, 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 No. 2014AP2142-CR **Cir. Ct. No. 2013CF1942**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY D. DEAN, JR.,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Timothy D. Dean, Jr., appeals a judgment of conviction entered upon his guilty plea to burglary as a repeat offender. He also appeals an order denying postconviction relief. Dean claims the circuit court

imposed an unduly harsh sentence and erroneously rejected his claim that a new factor warrants sentence modification. We affirm.

¶2 Pursuant to a plea bargain, Dean pled guilty to one count of burglary as a repeat offender, and the State moved to dismiss a charge of obstructing an officer. Dean faced a maximum sentence of eighteen years and six months in prison and a $25,000 fine. *See* WIS. STAT. §§ 943.10(1m)(a), 939.62(1)(c), 939.50(3)(f) (2013-14).[1] The circuit court imposed eight years of initial confinement and five years of extended supervision, ordered Dean to serve the sentence concurrently with a sentence previously imposed, and declared him eligible to participate in the Wisconsin substance abuse program after he served five years in prison. Dean subsequently filed a postconviction motion seeking sentence modification on the ground that his sentence was unduly harsh. He also alleged the Department of Corrections will not permit him to participate in the Wisconsin substance abuse program, and he argued that the Department's decision constitutes a new factor independently warranting sentencing relief. The circuit court denied the motion, and Dean appeals.

¶3 We first consider Dean's claim that his sentence is unduly harsh. 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 sentences are unduly

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

harsh or excessive, we review them for an erroneous exercise of discretion, and we presume that the sentencing court acted reasonably. ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449. This court will sustain a circuit court's exercise of sentencing discretion "if the conclusion reached by the [circuit] court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion." ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

¶4 A circuit court exercising sentencing discretion 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. The circuit court may also consider numerous other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has broad discretion to determine both the factors it believes are relevant in imposing sentence and the weight to assign to each relevant factor. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶5 Dean contends the circuit court "placed a disproportionate amount of weight on [his] prior record." In his view, the circuit court did not give sufficient weight to his character and to the gravity of the offense.

¶6 We reject Dean's suggestion that his ten prior convictions, four of them for burglaries, should be viewed separately from his character. An extensive criminal record is evidence of character. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56.

¶7 We also reject Dean's contention that the circuit court should have viewed the gravity of the burglary as diminished because "nothing was ultimately

taken from the residence and there was no economic loss suffered by the homeowner." The record reflects police responded to a burglary in progress. The officers pursued Dean as he fled out the front door of the victim's home, and they arrested him hiding under a porch. The victim reported to police that her television, computer and other property "had been moved to just inside the side door." Dean provides no authority for his position that a sentencing court must view the gravity of an offense as mitigated when police catch the offender in the act of committing it.

¶8 Dean points out that, as a consequence of the crime, his probation was revoked and he received four years of initial confinement for a prior offense. Although Dean views this as a mitigating factor, the circuit court instead concluded that, because he committed the instant offense while on probation and while "receiving the best potential programming that we have," his incorrigible behavior warranted a meaningful prison sentence. The circuit court has discretion to determine whether a factor is aggravating or mitigating under the particular circumstances of the case. *See* ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992).

¶9 Moreover, the circuit court fully explained its sentencing rationale in remarks revealing consideration of both aggravating and mitigating factors. The circuit court recognized that Dean had four young children and acknowledged he had made some worthwhile use of his time in custody by working towards a high school equivalency degree. The circuit court placed greater weight, however, on the need to protect the public in light of Dean's lengthy criminal history. The circuit court found that Dean had engaged in an ongoing pattern of criminal behavior, posed a danger to the community, and set a bad example for his own children. The circuit court pointed out he had failed on probation and received a

four-year term of initial confinement for prior offenses, and the circuit court explained that “there should be a progression in sentencing to protect the public. And that’s where we are at now.” The circuit court concluded Dean required a substantial term of imprisonment “to understand that what [he was] doing is stealing from people, hurting people, there are families [a]ffected.”

¶10 The circuit court provided a “‘rational and explainable basis’” for imposing the sentence chosen. *See* ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). Moreover, the sentence Dean received is well within the maximum allowed by law. We presume that a sentence well within the maximum sentence is not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507. Dean fails to overcome the presumption here. The circuit court considered proper and relevant sentencing factors, and we conclude that the circuit court properly exercised its discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 (“our inquiry is whether discretion was exercised, not whether it could have been exercised differently”). No basis exists to disturb the sentence.

¶11 Dean next alleges the Department of Corrections will not allow him to participate in the Wisconsin substance abuse program, and this, he says, constitutes a new factor warranting sentence modification. We disagree.

¶12 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). A circuit court may modify a defendant’s sentence upon a showing of a new factor. ***Id.***, ¶35. The

analysis is two-pronged. *See* ***id.***, ¶36. One prong requires the defendant to show by clear and convincing evidence that a new factor exists. ***Id.*** This presents a question of law. ***Id.*** The other prong requires the defendant to show that the new factor justifies sentence modification. *See* ***id.***, ¶37. This determination rests in the circuit court's discretion. ***Id.*** Because the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence, a court need not address both prongs of the analysis if the defendant fails to prevail on one of them. ***Id.***, ¶38.

¶13 Dean's claim involves his eligibility to participate in the Wisconsin substance abuse program, a prison treatment program that, upon successful completion, permits an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. § 302.05. The determination of whether an inmate is eligible to participate in the program rests in the circuit court's discretion. *See* ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187 (discussing the program under its previous name, the earned release program).[2] The circuit court, however, does not classify an offender as a participant in the program. *See* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) (after prison term is selected, circuit court may not order specific treatment; control over the care of prisoners is vested by statute in the overseeing department). Thus, although the circuit court has authority to declare an inmate eligible for the Wisconsin substance abuse

[2] Effective August 3, 2011, the legislature amended the title of WIS. STAT. § 302.05, changing the name of the Wisconsin earned release program to the Wisconsin substance abuse program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11.

program, the Department of Corrections decides whether the inmate may participate.

¶14 Here, Dean alleges the Department will not permit him to participate.[3] Assuming that is true, the claim does not establish a new factor. The circuit court explained at sentencing that Dean would have the benefit of the Wisconsin substance abuse program only "if he decides to participate and the Department of Corrections thinks it's appropriate." Thus, the sentencing court expressly recognized that Dean's admission to the program depended on the Department of Corrections finding the program appropriate for him and allowing him to participate. In light of the plain language of the circuit court's sentencing pronouncement, Dean cannot demonstrate the circuit court either overlooked or did not know at sentencing that the Department might exclude him from the program. *Cf.* ***Harbor***, 333 Wis. 2d 53, ¶40.

¶15 Moreover, Dean cannot show that the potential for participation in the Wisconsin substance abuse program was "highly relevant" to the sentencing decision. *See* ***id.*** In postconviction proceedings, the circuit court explained it "did not base the length of confinement on the defendant's participation in that program." *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (court has additional opportunity to explain sentence when resolving postconviction motion). The record supports the circuit court's explanation. The circuit court had already pronounced the length and structure of Dean's sentence before stating his eligibility for the program and advising him that the Department

[3] Dean does not provide any supporting documentation for his claim that the Department of Corrections will not permit him to participate in the Wisconsin substance abuse program, nor does he explain the reason for the Department's decision.

of Corrections would make the final determination about his participation. The record thus shows the eligibility determination was not highly relevant to the sentence imposed.

¶16 Dean fails to satisfy the first prong of the new factor analysis. We therefore need not address the second prong. *See* ***Harbor***, 333 Wis. 2d 53, ¶38. Because Dean cannot satisfy both prongs, he cannot demonstrate the existence of a new factor. *See* ***id.*** Sentence modification is unwarranted. *See* ***id.***

By the Court.—Judgment and order affirmed.

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