

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2075-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONNIE C. BARNES,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Ronnie C. Barnes appeals from a judgment entered after he pled no contest to attempted burglary, contrary to §§ 943.10(1)(a) and 939.32, STATS. He also appeals from an order denying his postconviction motion seeking resentencing or sentence modification. Barnes claims that a sentence “consecutive to any other sentence” is an erroneous exercise of discretion when

the court does not have accurate information about a defendant's sentence structure. Because § 973.15(2), STATS., gives the trial court the discretion to impose a consecutive sentence under these circumstances, we affirm.

I. BACKGROUND

Barnes was originally charged with one count of burglary. On March 5, 1997, pursuant to an agreement with the State, he pled no contest to a reduced charge of attempted burglary.

The trial court sentenced Barnes to a four-year prison term, to operate "consecutive to any other sentence." At the time of sentencing, Barnes was still serving a fifty-four month term of probation, subject to a fifty-four month prison term, that had been imposed and stayed following a previous burglary conviction. Approximately three months after sentencing in the instant case, Barnes's probation in the prior case was revoked.

Barnes filed a postconviction motion asking the trial court for resentencing or sentence modification. He argued that the trial court did not have a clear understanding of his previous sentence structure and, as a result, it erroneously exercised its discretion when it sentenced him to a four-year prison term "consecutive to any other sentence." In addition, Barnes argued that the subsequent revocation of his probation was a "new factor" that would justify resentencing or sentence modification.¹ The trial court denied his motion. The trial court indicated that it had knowledge at sentencing that Barnes was under

¹ Barnes abandoned this argument on appeal and, therefore, we do not address it. See *Reiman Assocs., Inc. v. R/A Advertising, Inc.*, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

some type of supervision, and it was irrelevant as to whether the supervision was probation or intensive sanctions. Barnes now appeals.

II. DISCUSSION

Barnes claims that the trial court erroneously exercised its discretion when it imposed his sentence “consecutive to any other sentence” without knowing the specific information about the sentence he was currently serving. We review discretionary sentencing determinations with deference to the sentencing court. *See State v. Lechner*, 217 Wis.2d 392, 418-19, 576 N.W.2d 912, 925 (1998). In addition, in addressing the sentencing issue, we must interpret a statute, which is a question of law that we review *de novo*. *See State v. Lipke*, 186 Wis.2d 358, 363, 521 N.W.2d 444, 445-46 (Ct. App. 1994). The statute at issue is § 973.15(2), STATS., and the question raised is whether the statutory language authorizes a trial court to impose a sentence “consecutive to any other sentence,” even when the precise nature of the “other sentence” is not known. The trial court concluded that the statute conveys that authority. After our review, we agree. Consequently, we conclude that the trial court did not erroneously exercise its discretion when it imposed sentence.

Section 973.15(2)(a), STATS., provides: “Except as provided in par. (b), the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously.”

When interpreting a statute, we must examine its plain meaning. If no ambiguity exists, then we must follow the statute’s plain meaning. *See State v. Woods*, 173 Wis.2d 129, 136, 496 N.W.2d 144, 147 (Ct. App. 1992). The statute clearly states: “the court ... may provide that any such sentence be ... consecutive

to any other sentence imposed ... previously.” We have interpreted this statute to mean that a trial court may impose a prison term to operate consecutive to a previously imposed and stayed sentence, even though the defendant is placed on probation and the probation has not been revoked. *See State v. Thompson*, 208 Wis.2d 253, 256, 559 N.W.2d 917, 918 (Ct. App. 1997). Here, the trial court ordered that its sentence was to run consecutive to any other sentence. The only difference between *Thompson* and the instant case is that here Barnes argues that the trial court was not aware of the probation and the imposed and stayed fifty-four month sentence. The trial court, however, was aware that Barnes was currently under some type of supervision. Under these circumstances, we conclude that the statute authorizes a trial court to impose a sentence consecutive to any other sentence, even if the court did not have correct information about a defendant’s sentence structure. The trial court acted within its discretion when it determined that Barnes should receive consecutive time for his crime.

Barnes argues that sentencing discretion was not properly exercised here because the trial court lacked true and correct information about his sentence structure. We reject his argument. A court properly exercises its sentencing discretion when it considers, at a minimum, the gravity of the offense, the offender’s character and the public’s need for protection. *See State v. Schordie*, 214 Wis.2d 229, 233, 570 N.W.2d 881, 883 (Ct. App. 1997). These are the same factors that a court must consider when deciding whether to hand down a concurrent or consecutive sentence. *See Cunningham v. State*, 76 Wis.2d 277, 285, 251 N.W.2d 65, 69 (1977). In addition, a sentencing court may consider subsidiary factors such as the past record of criminal offenses; however, the supreme court has decided that it is within the trial court’s discretion whether to

consider subsidiary factors. *See State v. Echols*, 175 Wis.2d 653, 682-83, 499 N.W.2d 631, 640-41 (1993).

In the instant case, the trial court articulated the factors it considered in sentencing Barnes, and those factors were consistent with the factors required by *Schordie*. *See Schordie*, 214 Wis.2d at 233, 570 N.W.2d at 883. It noted that the act in question, a commercial burglary,² was a serious property offense. Despite the fact that nothing was stolen, the court determined that Barnes had the intent to steal, and it noted that he had received a considerable break by the reduction of the charge from burglary to attempted burglary.

Regarding Barnes's character, the trial court made several observations. It noted that this was Barnes's fifth burglary-type offense and, despite being placed under supervision in the past, he continued to involve himself in criminal activity. On the other hand, the trial court also considered the facts that Barnes had a high school diploma and that he had completed a vocational technical program; however, it also noted that despite having the ability to be a contributing member of society, Barnes had instead repeatedly chosen to involve himself with the drug subculture and criminal activity. As a result, the trial court concluded that Barnes must be held accountable for his choices.

Lastly, the trial court considered the interests and needs of the community. It noted that the community demands that criminals be punished for breaking the law. In addition, the trial court stressed that the sentence should be a deterrent to both Barnes and to the general population. And finally, the trial court

² The criminal complaint charged Barnes with burglary in violation of § 943.10(1)(a), STATS. As mentioned earlier, this charge was reduced pursuant to a plea agreement.

recognized that it must protect society from further crimes Barnes may commit. As a result, the trial court decided it would impose a sentence “consecutive to any other sentence” in order to ensure that its sentence would be separate, distinct and consecutive to whatever additional time Barnes might be facing, whether it be an imposed and stayed sentence, or otherwise. The trial court indicated its intent to make Barnes’s sentence consecutive to any other period of incarceration or supervision.

Based on its review of the gravity of the offense, the defendant’s character and the interests and needs of the community, and relying on the authority provided by § 973.15(2), STATS., the trial court properly exercised its discretion by imposing a sentence “consecutive to any other sentence” despite the fact that the court did not have correct information about the defendant’s sentence structure at the initial sentencing. The trial court considered the proper factors and, in doing so, indicated that Barnes’s sentence in this case should be consecutive to any preexisting sentence.

By the Court.—Judgment and order affirmed.

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

