COURT OF APPEALS
DECISION
DATED AND FILED

OCTOBER 27, 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.

Nos. 98-2225-CR
99-0156-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN S. BERGMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. John S. Bergmann appeals from the judgment of conviction and sentence imposed at resentencing, and from the order denying his motion for reconsideration of the new sentences. He raises fourteen arguments in this appeal, most of which are based on the premise that the sentence he received

when he was resentenced after remand was not proportional to the sentence he originally received. Because we conclude that Bergmann's arguments are without merit, we affirm.

PROCEDURAL HISTORY

¶2 In 1990, Bergmann was convicted after trial of theft from a person, intimidation of a victim, first-degree reckless injury with a dangerous weapon and kidnapping while armed with a dangerous weapon. Bergmann was sentenced to five years each for theft and intimidation, and fifteen years for kidnapping, all concurrent. The court imposed and stayed a fifteen-year sentence for the reckless injury while armed and placed Bergmann on fifteen years of probation consecutive to the prison sentences.

¶3 Bergmann then brought a number of postconviction motions and appeals, which were unsuccessful. Eventually, Bergmann brought a postconviction motion seeking reversal of the "while armed with a dangerous weapon" portion of his convictions. He alleged that the jury instructions were defective under the case of ***State v. Peete***, 185 Wis.2d 4, 517 N.W.2d 149 (1994). The State conceded this point on appeal, and this court remanded the case to the circuit court. By order dated December 12, 1997, the court directed the State to elect whether to retry Bergmann solely on whether he committed the predicate offenses while possessing a weapon. If the State elected not to retry Bergmann, then the circuit court was to resentence Bergmann on the kidnapping and reckless injury counts without the weapons enhancer.

¶4 The State elected not to retry Bergmann, and the circuit court resentenced him to fourteen years on the kidnapping count, and a ten-year stayed consecutive sentence on the reckless injury count, with a concurrent ten-year

probation term. Bergmann filed a motion for reconsideration of his new sentence. The court denied Bergmann's motion. Bergmann appeals from the amended judgment of conviction (98-2225-CR) and the order denying his motion for reconsideration (99-0156-CR).[1]

ANALYSIS

¶5 Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. *See* ***State v. Mosley***, 201 Wis.2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *See* ***id.*** The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. *See* ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given the various factors is within the trial court's discretion. *See* ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

¶6 Throughout his brief, Bergmann makes arguments based on the premise that his new sentence is not proportional to his old sentence. He apparently refuses to admit that he received a shorter sentence in absolute terms (a sentence of fourteen years is shorter than a sentence of fifteen years). Instead, he argues that fourteen years is a greater percentage of the potential maximum sentence for the predicate crime than the fifteen-year sentence was for the crime with the enhancer. In this he is correct—it is a greater percentage of the potential maximum penalty. However, Bergmann has not cited to any authority, nor are we

[1] This court consolidated these appeals by an order dated January 20, 1999.

aware of any, which says that a sentence received after resentencing must maintain the same proportion to the maximum potential sentence as the previous sentence had. The fact remains that Bergmann received a shorter sentence when he was resentenced. His argument that the sentence he received at resentencing was invalid because it was not proportional is without merit. Because this premise is incorrect, the arguments Bergmann makes based on this premise are also without merit.

¶7 In his first argument, Bergmann asserts that the circuit court increased his sentence and found him guilty of the crimes with the "while armed" enhancers. As discussed above, the court did not increase his sentence. The record establishes that the court resentenced Bergmann for the predicate offenses, without the "while armed" enhancers. [2]

¶8 Bergmann's second argument is, in essence, that the circuit court erred because it believed the victim. Bergmann is apparently referring to the circuit court's statement at the resentencing hearing that the victim was "one of the most credible witnesses the court has ever seen." We agree with the State that this comment reflected the court's consideration of the nature of Bergmann's offense, its effect on the victim and the degree of Bergmann's culpability. These are all appropriate factors for the court to consider at sentencing. *See* ***State v. Lewandowski***, 122 Wis.2d 759, 763, 364 N.W.2d 550, 552 (1984).

[2] The State suggests that Bergmann may be referring to the mistaken inclusion of the weapons enhancer in the judgment of conviction. This, however, was subsequently removed at Bergmann's request.

¶9 Bergmann's third, fifth and sixth arguments are all based on the premise that his sentence was proportionally increased. For the reasons discussed, we reject these arguments.

¶10 Bergmann's fourth argument is that the circuit court improperly considered a letter he wrote to the chair of the Parole Commission. Bergmann argues that the letter was not threatening. We agree with the State that the circuit court appropriately considered the letter. Such a letter reflects on both the character of the offender and the need to protect the public. Bergmann's argument that the letter did not meet the legal definition of threatening is irrelevant. It is undisputed that Bergmann wrote the letter and that the chair of the commission felt threatened by it and, as the circuit court concluded, justifiably so. This was an appropriate factor for the court to consider when resentencing Bergmann.

¶11 Bergmann's seventh argument is that the circuit court erroneously exercised its discretion when it considered prison conduct reports which had been expunged by an order of the Winnebago County Circuit Court. As the State points out, however, the expungement order was not a part of the record. The circuit court, therefore, could not have considered it. As the State also notes, however, the record establishes that the circuit court was positively impressed by the record of Bergmann's conduct in prison. Again, Bergmann's argument lacks merit.

¶12 Bergmann's eighth argument is that the circuit court erroneously exercised its discretion when it considered a presentence psychological report. Bergmann has not cited to any authority supporting his argument that this was improper, nor has he offered any logical reason why it should not be considered. We conclude that this argument also lacks merit.

¶13 Bergmann's ninth argument is that the cumulative weight of all of his previous arguments suggests that justice was not served. We must consider, however, the quality and not the quantity of the arguments. We have rejected the premise on which most of his arguments are based and have determined that all of his arguments are meritless. The fact that he has made many meritless arguments does not convince us that the arguments are right.

¶14 The last arguments Bergmann makes are all based on his claim that he received ineffective assistance of counsel at the resentencing hearing. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to prove the elements of ineffective assistance of counsel, it is necessary to preserve the testimony of counsel. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Bergmann, however, did not produce his counsel at the hearing on his motion for reconsideration, nor did he present any other evidence to support his ineffectiveness claims. Because Bergmann did not present any evidence to the circuit court to support his claim of ineffective assistance of counsel, we will not consider the claim here.[3] *See* ***Mosley***, 201 Wis.2d at 50, 547 N.W.2d at 812.

[3] We note that many of Bergmann's claims of ineffective assistance of counsel are based on counsel's failure to object to the errors he claimed the court made during resentencing. Because we have concluded that the court did not make the errors he asserts, then his counsel was not ineffective for failing to object to them.

By the Court.—Judgment and order affirmed.

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