COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3049-CR
98-3050-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES W. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Charles Johnson appeals a judgment convicting him on five burglary counts. He also appeals an order denying him postconviction relief. The appeal concerns his five consecutive four-year terms. He contends that a new factor, his deafness, requires resentencing. He also contends that the trial

court misused its discretion by failing to explain its rationale for the length of the sentence. We reject his arguments and affirm.

The State charged Johnson with a string of burglaries. He entered a no contest plea to five counts, and in exchange for his plea, nine other charges were dismissed and read in. In sentencing Johnson the court considered the seriousness of his crimes, the effect on the victims, and Johnson's long and varied criminal career.[1]

The court further noted:

> Due to your extensive criminal record ... unless you're confined you will remain a continuing threat to the safety of the community. To not place you in prison would unduly depreciate the seriousness of the crimes that are a part of the continued pattern of criminal behavior engaged in by you. All of the various alternatives to confinement have been tried and failed. Confinement is the only feasible method to deter you from committing crimes now and hopefully in the future. There is a moral need for punishment and prison represents the proper punishment to you and gives the proper message to the public and is also needed to protect the public.

Johnson faced maximum terms of ten years on each count. The trial court sentenced him to five consecutive four-year terms, concurrent to sentences imposed in two other counties.

Johnson subsequently filed a postconviction motion for a reduced sentence, alleging for the first time that he was deaf, and also contending that the sentences were excessive. The trial court denied relief without a hearing.

[1] Johnson, thirty-six years old at the time of sentencing, had spent seventeen of the last nineteen years in prison and had some twenty prior criminal convictions in his record.

Sentencing lies within the trial court's discretion. *See* ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors the court must consider are the gravity of the offense, the character of the offender, and the need for public protection. *See* ***id.*** at 427, 415 N.W.2d at 541. Other related factors to consider include the defendant's record of offenses, the presentence investigation report, the nature of the crimes, the defendant's guilt, and the defendant's demeanor, the impact of the victim, the public's needs and rights, and the defendant's demeanor, traits, remorse and rehabilitative needs. *See* ***State v. Jones***, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989). A sentence is excessive when it shocks public sentiment and violates the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992).

The trial court may reduce a defendant's sentence if a new factor justifies that action. *See* ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). A new factor is a fact highly relevant to the sentence but not known to the trial court at the time of sentencing because it did not then exist or was unknowingly overlooked by all of the parties. *See* ***State v. Rosado***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975).

Johnson's alleged deafness was not a new factor. Johnson does not and could not reasonably claim that he did not know he was deaf at the time of sentencing. Because Johnson knew of it, but said or did nothing to bring it to the

court's attention, he could not later present it as an unknowingly overlooked new factor.[2]

Johnson's sentences were not excessive. As an adult, Johnson has committed numerous crimes and served one prison sentence after another with no discernible deterrent effect. This proceeding involved multiple charges of burglary all committed in a short time, in what may fairly be considered a crime spree. The trial court gave substantial weight to the presentence investigation report and summarized its contents as follows:

> The PSI author indicates you refused to see her on three different occasions before finally cooperating and did admit to the accuracy of the description of the crimes. The author was not impressed with you. She noted you have an ability to minimize and blame others for your behavior and that ability is unbelievable and it is hard for her to comprehend. She commented you have a high degree of comfort with a criminal lifestyle and, of course, had a long term pattern of involvement with criminal activities. She believes you have the ability to succeed conventionally but chooses not to and gave the author the impression that your major goal in life was to be a successful criminal. The report indicated you manifest yourself in crimes for material gain which often involve situations that present danger to others. You show no remorse for your victims. You are superficial and unmotivated to use any of your ability in a proper social setting. The author concluded that no matter how long you're incarcerated whenever you do return to the community it is feared you will return back to a life of crime. Society needs must be considered. PSI author indicated that based upon your extensive criminal history and chronic nature of your negative adjustment when on probation [you] should be sentenced to the Wisconsin state prison system.

[2] He also apparently failed to mention it to defense counsel and the presentence investigator. Transcripts show that Johnson gave prompt and appropriate responses to all questions directed to him.

Given those considerations, and the other factors considered by the court, sentencing Johnson to twenty years in prison out of a maximum potential of fifty years, was an appropriate exercise of discretion.

Johnson next contends that the trial court did not adequately explain why it imposed sentences totaling twenty years, as opposed to a lesser term, such as the total of fifteen years Johnson requested. However, Johnson cites no authority for the proposition that the trial court must explain its sentencing with that level of precision. The trial court cited many factors justifying a lengthy stay in prison for Johnson. The fact that the trial court here did not expressly state why twenty years was appropriate, as opposed to fifteen, was not error. The sentences imposed were well within the range of reasonableness.

Finally, Johnson notes, and the State concedes, that the judgment of conviction erroneously states his sentence. However, there is also agreement that the trial court orally pronounced the correct sentence, and it is that oral pronouncement that controls.[3] *See* ***State v. Perry***, 136 Wis.2d 92, 113, 401 N.W.2d 748, 757 (1987). On remittitur, Johnson may bring a motion to amend the judgment to accurately reflect the sentence as imposed by the trial court.

By the Court.—Judgment and order affirmed.

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

[3] The trial court imposed five consecutive four-year terms, with "[a]ll sentences ... to run consecutive to each other which means 20 years in the Wisconsin State Prison system. These sentences will run concurrent with the Sauk County and Juneau County case."