COURT OF APPEALS
DECISION
DATED AND FILED

January 5, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1972-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS A. EDMONSTON,

DEFENDANT-APPELLANT.

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

¶1 ANDERSON, J.[1] Douglas A. Edmonston is challenging the trial court's exercise of its sentencing discretion. He contends that the court misused its discretion because it failed to consider the primary sentencing factors. We affirm because the court properly exercised its sentencing discretion.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

¶2 Edmonston was charged with criminal damage to property, WIS. STAT. § 943.01(1) (1997-98);[2] resisting an officer, WIS. STAT. § 946.41(1); and disorderly conduct, WIS. STAT. § 947.01, all as a repeater, WIS. STAT. § 939.62. The charges arose from an incident precipitated when Edmonston was celebrating his girlfriend's birthday. Edmonston went to the home of Phillip Hart to find his girlfriend and there was an altercation between Edmonston and Hart. Hart knocked Edmonston unconscious with a piece of wood. When Edmonston regained consciousness, he broke a large window in Hart's residence.

¶3 Police officers located Edmonston at his apartment and told him he was being arrested for criminal damage to property. Edmonston's response was less than courteous: "Fuck you." Edmonston withdrew to his bedroom and climbed into bed. An officer followed him and ordered him to get out of bed. When Edmonston failed to respond to the order the officer grabbed him by the arm to help him out of the bed. While being escorted, Edmonston struggled with the officer and said that he was not going with him. Edmonston launched into a series of racial epithets aimed at the arresting officer while he was being helped into the paddy wagon. The officer transported Edmonston to a local hospital for the treatment of wounds unrelated to Edmonston's refusal to cooperate. In the hospital, Edmonston directed his verbal barrage to the nurses, he removed his underwear and he continued to yell obscenities.

¶4 Edmonston and the State entered into a plea agreement. Edmonston would enter a plea of guilty to the first two counts, the disorderly conduct count would be dismissed and the State would join in a disposition recommendation.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

The joint disposition included thirty days in the county jail on the criminal damage to property count. On the count of resisting an officer, the joint recommendation was a withheld sentence with two years of probation; included was thirty days in jail concurrent to count one and an additional thirty days imposed and stayed to be used at the agent's discretion. The trial court ignored the joint disposition recommendation and imposed two years in prison on count one and consecutive imprisonment of one year and one day on count two.

¶5 The court rejected Edmonston's subsequent motion to modify his sentence based on an alleged misuse of sentencing discretion. Edmonston is now before this court contending that the trial court erred when it focused on his probationary status and his alcohol abuse problems. He argues that there is a misuse of discretion because while the court recited the three principal sentencing factors, "it did not engage in any analysis of the facts."

¶6 Sentencing is within the sound discretion of the trial court and we will not reverse absent a misuse of that discretion. *See* ***State v. Tarantino***, 157 Wis. 2d 199, 221, 458 N.W.2d 582 (Ct. App. 1990). As long as there is evidence in the record that the trial court considered appropriate factors, this court will not second-guess a sentencing decision of the trial court. *See* ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971). There exists a strong policy against interference with the discretion of the trial court in passing sentence. In reviewing a sentence to determine whether discretion has been misused, this court will start with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence disputed. *See* ***State v. Macemon***, 113 Wis. 2d 662, 670, 335 N.W.2d 402 (1983). We are not limited to the transcript of the sentencing but can consider any remarks the court made during postconviction proceedings that explain the sentence

imposed. *See* ***State v. Santana***, 220 Wis. 2d 674, 683, 584 N.W.2d 151 (Ct. App. 1998) ("The transcripts of the sentencing hearing as well as several postconviction hearings make an extensive record of the trial court's comments at sentencing and its explanation for what was considered.").

¶7 In ***State v. Borrell***, 167 Wis. 2d 749, 773, 482 N.W.2d 883 (1992), the primary factors that a sentencing court considers were summarized as: (1) the gravity of the offense, (2) the character of the offender, and (3) the need to protect the public.[3] Although all of the three primary factors must be considered, the sentence may be based upon any one or more of the factors. *See* ***Anderson v. State***, 76 Wis. 2d 361, 366-68, 251 N.W.2d 768 (1977). The weight to be given to any particular factor is within the discretion of the sentencing court. *See* ***State v. Evers***, 139 Wis. 2d 424, 452, 407 N.W.2d 256 (1987).

¶8 The trial court did not misuse its discretion in its sentencing decision. The record shows that the court considered appropriate factors. The court chose to focus on Edmonston's rehabilitative needs. The court stated that in July 1997, Edmonston was placed on four years of probation for burglary and, as conditions of probation, he was barred from consuming any alcohol and he was ordered to participate in alcohol treatment. The court questioned Edmonston about what urge would cause him to ignore a previous court order and drink

[3] As part of these primary factors, the court may consider, among other things: the defendant's criminal record; a history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the rights of the public; and the length of pretrial detention. *See* ***State v. Iglesias***, 185 Wis. 2d 117, 128, 517 N.W.2d 175 (1994). The court may also consider other unproven offenses, as they are evidence of a pattern of behavior and implicate the defendant's character. *See* ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980).

alcohol. Edmonston could not provide an answer satisfactory to the court. The sentencing court stated that Edmonston had also failed to comply with the court order because he did not seek treatment for his alcoholism.

¶9 At the postconviction hearing, the court expanded on its concern that while on probation Edmonston had not addressed his alcohol-related problems. The court stated that after a year of probation, Edmonston had started to drink again and that this was a sign that he had relapsed. He remarked that in the year of probation Edmonston had failed to take the initiative to address his alcohol problem. The court made the astute observation that Edmonston's failures during the first year of probation did not inspire confidence that Edmonston would succeed if the court again placed him on probation. Finally, the trial court concluded that because of Edmonston's failure on probation, he was in need of close rehabilitative control.

¶10 The court properly considered Edmonston's prior record as another indication that confinement was required to protect the public from further criminal activity. The court considered the nature of the offenses when it mentioned concerns with Edmonston's use of racial slurs toward the arresting officer. The court revisited this concern during the postconviction hearing. At that same hearing the court stated its opinion that the incident leading to Edmonston's arrest would be shocking and repugnant to the community.

¶11 The exercise of discretion does not require the court to engage in an extensive analysis of the facts before imposing sentence. All that is required is that the record reflects the court's balancing of the sentencing factors it considered. *See* ***McCleary***, 49 Wis. 2d at 281. Viewing the trial court's comments in toto, we are not persuaded that it failed to properly analyze the

evidence in its exercise of sentencing discretion. We cannot find that the sentence is 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. *See* ***State v. C.V.C.***, 153 Wis. 2d 145, 163, 450 N.W.2d 463 (Ct. App. 1989).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.