COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0643-CR **Cir. Ct. No. 00-CF-50**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY LARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Anthony Larson appeals a judgment convicting him of one count each of second-degree sexual assault and burglary, both as a repeater. He also appeals an order denying his motion for postconviction relief. Larson argues that the circuit court erred by denying his postconviction motion for

sentence credit and sentence modification without an evidentiary hearing. We conclude that the circuit court properly denied Larson's postconviction motion for sentence modification without an evidentiary hearing. We conclude, however, that he is entitled to 146 days of sentence credit. We therefore affirm in part, reverse in part, and remand with directions.

BACKGROUND

¶2 Larson was arrested on February 4, 2000 and ultimately charged with second-degree sexual assault and burglary, both as a repeater. In exchange for his no contest pleas, the State agreed to recommend: (1) twenty-eight years' imprisonment with thirty-two years' extended supervision on the burglary charge; and (2) extensive probation on the sexual assault charge. On June 29, the circuit court sentenced Larson upon his no contest pleas to twenty years in prison with eight years' extended supervision on the burglary conviction. The court withheld sentence on the sexual assault conviction and placed Larson on ten years' probation to run consecutive to the extended supervision imposed on the burglary.

¶3 Larson filed a motion for postconviction relief seeking 146 days of sentence credit, representing the time between his arrest and his sentence. Larson also moved to modify his sentence as unduly harsh. The circuit court did not decide the motion within sixty days of its filing and therefore denied the motion without an evidentiary hearing as a matter of law pursuant to WIS. STAT. RULE 809.30(2)(i).[1] This appeal followed.

[1] WISCONSIN STAT. RULE 809.30(2)(i) provides: "The trial court shall determine by an order the defendant's motion for postconviction relief within 60 days of its filing or the motion is considered to be denied." All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

ANALYSIS

A. Postconviction Motion for Sentence Modification

¶4 Larson argues that the trial court erred by denying his postconviction motion for sentence modification without an evidentiary hearing. Larson asserts that his motion presented a new factor that should have been considered by the circuit court. He additionally challenges his sentence as unduly harsh. We are not persuaded. The court must hold an evidentiary hearing when a postconviction motion alleges facts that would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996). Larson presented no facts in his postconviction motion to entitle him to an evidentiary hearing, and his sentence was not unduly harsh.

1. NEW FACTOR

¶5 Larson argues that new factors should be considered, including "the failure of the [circuit] court to consider the relationship of the 'truth in sentencing' sentence imposed in this case with sentences for similar offenses which were committed prior to January 1, 2000." To that end, Larson attached various documents to his postconviction motion, including: (1) a chart that he claimed was presented at a judicial education seminar sponsored by the Department of Corrections indicating that the average actual time served for burglaries was forty-eight percent; and (2) two documents entitled "Wisconsin Sentencing Guidelines Worksheet"—one guideline referring to burglary and the other referring to second-degree sexual assault. Larson argues that "[t]he existence of the Department of Corrections' chart and the experimental guidelines constitute new factors, or factors unknown to the court at the time of sentencing."

¶6 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, even though it was in existence, it was unknowingly overlooked by all of the parties." ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). In addition, a new factor must have some connection to the sentence; that is, it must operate to frustrate the purpose of the original sentence. *See* ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). Whether the defendant has demonstrated the existence of a new factor is a question of law we review independently. ***Franklin***, 148 Wis. 2d at 8.

¶7 Here, Larson concedes that the documents attached to his motion were "not binding or required of the court in exercising its sentencing discretion." Because the circuit court was not required to consider or impose the sentence suggested by either the chart or the experimental guidelines, we conclude that the information in these documents did not constitute new factors requiring an evidentiary hearing.

2. UNDULY HARSH

¶8 Larson also contends that his sentence was unduly harsh. We disagree. Sentencing lies within the discretion of the circuit court. *See* ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***id.*** There is a strong public policy against interfering with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *See* ***id.*** at 681-82.

¶9 If the record contains evidence that the circuit court properly exercised discretion, we must affirm. *See* ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). "To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record." ***Cooper***, 117 Wis. 2d at 40.

¶10 The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶11 Here, the circuit court considered the seriousness of the offenses and the mitigating circumstances Larson raised, and sentenced him to twenty years in prison out of a maximum possible one-hundred and ten years. Under these circumstances, it cannot reasonably be argued that Larson's sentence is so excessive as to shock public sentiment. *See* ***id.*** at 185.

B. Sentence Credit

¶12 Larson argues that the circuit court erred by denying his postconviction motion for sentence credit. Specifically, Larson claims he should be granted 146 days' sentence credit for the time he spent in jail between his arrest and his sentencing. Although the State contends that Larson failed to exhaust his administrative remedies pursuant to WIS. STAT. § 973.155, it does not oppose the granting of 146 days' credit. We will therefore reverse that part of the circuit court's order denying Larson's motion for 146 days of sentence credit and remand with directions to grant that part of the motion.

CONCLUSION

¶13 Upon the foregoing, we conclude that the circuit court properly denied Larson's postconviction motion for sentence modification without an evidentiary hearing. We conclude, however, that he is entitled to 146 days of sentence credit. We therefore affirm in part, reverse in part, and remand with directions.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

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