COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP436-CR **Cir. Ct. No. 2007CF1363**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEON M. MORRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Deon M. Morris has appealed from a judgment convicting him of uttering a forgery, party to the crime, in violation of WIS. STAT.

§ 943.38(2) (2007-08),[1] and sentencing him to one year of initial confinement and two years of extended supervision, consecutive to another sentence he was serving for a Milwaukee County offense. Morris also appeals from an order denying his motion for postconviction relief.

¶2 Morris raises two issues on appeal: (1) whether the trial court erred when it determined that he was ineligible for the challenge incarceration and earned release programs; and (2) whether the trial court violated his constitutional right to freedom of association when, as a condition of extended supervision, it prohibited him from residing with a member of the opposite sex without permission of the trial court. We conclude that the trial court acted within the scope of its discretion when it determined that Morris was ineligible for the challenge incarceration and earned release programs.[2] Because the trial court amended the conditions of extended supervision during postconviction proceedings to delete the condition restricting Morris' residence with members of the opposite sex, the second issue raised by Morris is moot. We therefore affirm the judgment and order.

¶3 Even if a defendant meets all of the Department of Corrections' eligibility requirements for the challenge incarceration program, the circuit court has

[1] All references to the Wisconsin statutes are to the 2007-08 version.

[2] The State contends that, in his postconviction motion, Morris objected only to the trial court's determination that he was ineligible to participate in the challenge incarceration program, not to its decision indicating that he was ineligible for the earned release program. We agree that Morris' postconviction motion did not clearly express that he was challenging the trial court's ruling as to the earned release program. However, since the factors relied upon by the trial court in denying eligibility for the challenge incarceration program also support its decision to deny eligibility for the earned release program, we affirm the trial court's decision without regard to any waiver of the earned release issue by Morris.

discretion under WIS. STAT. § 973.01(3m) to declare the defendant ineligible. ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112. When determining eligibility for the challenge incarceration and earned release programs, the trial court must consider the same factors it considers for sentencing. *See* ***id.***, ¶¶9-11; ***State v. Owens***, 2006 WI App 75, ¶¶8-9, 291 Wis. 2d 229, 713 N.W.2d 187.

¶4 Appellate review of a sentencing decision is limited to determining whether the trial court erroneously exercised its discretion in imposing sentence. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. To properly exercise its sentencing discretion, a trial court must provide a rational and explainable basis for the sentence. ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. It must specify the objectives of the sentence on the record, which include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. ***Id.***

¶5 The primary sentencing factors that a trial court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Other factors which may be relevant include, but are not limited to, the defendant's past record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation report (PSI); the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor before the court; the defendant's age, educational background and employment history; the defendant's remorse, repentance and cooperation; the defendant's need for close rehabilitative control; and the rights of the public. ***Id.*** The trial court need not discuss all of these

secondary factors, but rather only those relevant to the particular case. ***Id.*** The weight to be given each sentencing factor remains within the wide discretion of the trial court. ***Stenzel***, 276 Wis. 2d 224, ¶9.

¶6 Morris contends that the trial court failed to consider proper sentencing factors, and denied eligibility for the challenge incarceration and earned release programs based only upon its negative views of the efficacy of such programs, an opinion derived in part from statements made by a presenter at a judicial education seminar. Morris' argument is disingenuous and unsupported by the record.

¶7 The record indicates that at sentencing, the trial court expressed its concern that boot camp programs like the challenge incarceration program do not work. The trial court indicated that its opinion was based in part on a presentation at the 2008 Criminal Law and Sentencing judicial education program for Wisconsin judges. However, the trial court also indicated that it utilized the challenge incarceration program when the circumstances of a particular case rendered it appropriate. However, based on Morris' criminal and personal history, the need to protect the public, and the need to deter Morris from future criminal conduct, it concluded that the challenge incarceration and earned release programs were inappropriate in this case.

¶8 No basis exists to conclude that the trial court erroneously exercised its discretion in making this decision. In excluding Morris from the challenge incarceration and earned release programs, the trial court considered his juvenile and adult criminal history, including a juvenile armed robbery and convictions for delivery of cocaine and possession of heroin with intent to deliver. The trial court reasonably deemed Morris' criminal history to be serious. In addition, it

determined that Morris had demonstrated a lack of personal responsibility in multiple ways, noting his poor employment history, his failure to pursue an education, the excuses proffered by him for his current and past offenses, and his fathering of four children with different mothers for whom no child support orders were in place.[3] The trial court also noted that Morris had committed the current offense while released on bail in the heroin case, and that his adjustment to supervision for his past offenses was poor.

¶9 Based on these factors, the trial court concluded that Morris was not a proper candidate for early release under the challenge incarceration or earned release programs. It concluded that early release would undermine the deterrent effect of the sentence, and would not adequately protect the public from Morris.

¶10 The trial court clearly considered proper factors which justified its decision to declare Morris ineligible for the challenge incarceration and earned release programs. *See* ***Owens***, 291 Wis. 2d 229, ¶¶10-11; ***Steele***, 246 Wis. 2d 744, ¶¶10-11. Because the trial court considered proper factors when it chose to declare Morris ineligible, no basis exists to disturb its decision on appeal.

¶11 Morris' second argument is that the trial court violated his constitutional right to freedom of association when, as a condition of extended supervision, it prohibited him from residing with a member of the opposite sex without permission of the trial court. However, this issue is now moot.

¶12 An issue is moot when its resolution will have no practical effect on an existing controversy. ***City of Racine v. J-T Enters. of America, Inc.***, 64 Wis.

[3] Morris indicated that he also had a fifth child who died.

2d 691, 700, 221 N.W.2d 869 (1974). The record establishes that when Morris challenged this condition in his postconviction motion, the trial court deleted the condition from the conditions of extended supervision. It replaced it with a condition requiring the Department of Corrections to notify the trial court when Morris enters extended supervision, stating that it will then conduct a hearing on the suitability of Morris' living conditions.

¶13 Because Morris is no longer subject to a condition prohibiting him from residing with a member of the opposite sex when he is released on extended supervision, addressing his argument about freedom of association will have no effect on an existing controversy.[4] While it is true that the trial court has indicated that it will revisit the issue upon notification by the Department of Corrections when Morris is released on extended supervision, the fact remains that at present, Morris is not subject to a condition of extended supervision limiting his right to reside with a member of the opposite sex. Addressing the propriety of a condition that may potentially be imposed in the future would violate the well-established rule that this court does not decide hypothetical cases or render advisory opinions. *See* ***District 4, Board of Ed. v. Town of Burke***, 151 Wis. 2d 392, 400, 444 N.W.2d 733 (Ct. App. 1989).

¶14 At the conclusion of his appellant's brief, Morris also asserts that, merely by indicating that it will hold a hearing on the subject when Morris is released upon extended supervision, the trial court has implicated his right to freedom of association and his state and federal constitutional rights to be free

[4] Although this court has discretion to address moot issues, it does so only in exceptional or compelling circumstances. No such circumstances exist here. *See* ***City of Racine v. J-T Enterprises of America, Inc.***, 64 Wis. 2d 691, 701-02, 221 N.W.2d 869 (1974).

from double jeopardy. As noted by the State, to the extent Morris is arguing that the trial court may not hold a hearing to consider whether to impose a condition of extended supervision upon Morris' release, his argument is undeveloped, lacking meaningful legal reasoning and citation to legal authority. We therefore decline to address it on the ground that it is inadequately briefed.[5] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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

[5] In his reply brief, Morris also raises additional issues. Among other things, he challenges the trial court's consideration of the PSI prepared for the Milwaukee County case and contends that his right to be free of double jeopardy was violated when the trial court considered his prior convictions at sentencing. He also appears to argue that he was sentenced based upon inaccurate information, and that the trial court was limited to considering the uttering offense, not his personal history, in sentencing him. His claim that the trial court could not consider his prior convictions and personal history clearly lacks merit under the sentencing standards set forth above. The remaining issues were not raised in the trial court, nor were they clearly raised in Morris' brief-in-chief. We therefore decline to address them. *See* ***State v. Turner***, 200 Wis. 2d 168, 176 n. 5, 546 N.W.2d 880 (Ct. App. 1996) (an appellate court need not consider an issue that was not raised by the defendant in the trial court); ***In re Estate of Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981) (issues raised for the first time in a reply brief need not be addressed by this court).