COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1387-CR **Cir. Ct. No. 2007CF5517**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTIAN GERARD SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Christian Gerard Smith appeals from a judgment of conviction entered upon his guilty plea to one count of armed robbery with threat of force, a Class C felony. *See* WIS. STAT. §§ 943.32(1)(b), 943.32(2)

(2007-08).[1] He also appeals from the order denying his postconviction motion for sentence modification. On appeal, Smith renews his challenges to the sentence, complaining that the circuit court erroneously exercised its sentencing discretion and improperly imposed sentence without the benefit of a presentence investigation report. We affirm.

BACKGROUND

¶2 Smith robbed the cashiers of both a gas station and a convenience store while wearing a woman's wig and sunglasses and brandishing a .32-caliber handgun. The State charged him with two counts of armed robbery with threat of force. Pursuant to a plea agreement, Smith pled guilty to one count of armed robbery with threat of force, and the second count was dismissed but read in for sentencing purposes. At the conclusion of the plea hearing, Smith and his counsel asked to proceed immediately to sentencing. The circuit court granted the request.

¶3 Smith urged the circuit court to impose time in jail as a condition of a lengthy term of probation. In support, he presented testimony from family members who explained their view that Smith was suffering from depression and from the stress of seeking and maintaining employment. A member of the community submitted a letter expressing her belief that Smith and his mother had experienced "extreme difficulties" leading "to [Smith] performing [a] crime of desperation." Smith also argued that he was twenty-one years old, that he had a part-time job and strong family support, and that he had no prior criminal record.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 The State recommended prison time in an unspecified amount. The State acknowledged Smith's lack of prior record and acceptance of responsibility, but the State discounted the suggestion that Smith's crimes were born of economic necessity, noting that Smith used the stolen money to buy a car stereo. The circuit court imposed a thirteen-year term of imprisonment, bifurcated as five years of initial confinement and eight years of extended supervision.

¶5 Smith moved for sentence modification, arguing that the circuit court imposed an unduly harsh sentence. He further contended that the court erred by conducting the sentencing proceeding without first ordering a presentence investigation because, he argued, the circuit court lacked sufficient information about his mental health. To support his contentions, Smith submitted some of his high school records indicating that he had "learning problems," a "short attention span," and difficulty following directions. The circuit court rejected Smith's contentions, and this appeal followed.

DISCUSSION

¶6 Smith first claims that the circuit court erred when fashioning his sentence by improperly balancing the sentencing factors and by imposing an unduly harsh penalty.

> When a criminal defendant challenges the sentence imposed by the circuit court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the circuit court, we start with the presumption that the circuit court acted reasonably. We will not interfere with the circuit court's sentencing decision unless the circuit court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶7 Sentencing lies within the circuit court's discretion, and our review is limited to considering whether discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court must consider the primary sentencing factors of "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. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. We defer to the circuit court's "great advantage in considering the relevant factors and the demeanor of the defendant." *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶8 The sentence imposed should represent the minimum amount of custody that is "'consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" ***Gallion***, 270 Wis. 2d 535, ¶44 (citation omitted). The circuit court therefore should consider probation as the first alternative, but the court may reject probation and impose a term of imprisonment if the court concludes that probation would unduly depreciate the seriousness of the offense. *See* ***id.***

¶9 Smith does not assert that the circuit court failed to consider the primary sentencing factors but rather that the court gave "too little weight" to his character, family background, age, and mental health. We disagree. A circuit

court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶10 The record of the sentencing proceeding reflects that the circuit court discussed the primary sentencing factors as well as other appropriate considerations and that it specifically addressed the issues that Smith emphasizes on appeal. The circuit court deemed the offense in this case "very very serious," and the court found that Smith aggravated the seriousness of his conduct by carrying a firearm and wearing a disguise. Further, the court told Smith that it could "n[o]t overlook the second armed robbery" that was dismissed but read in pursuant to the plea agreement. *See* ***State v. Straszkowski***, 2008 WI 65, ¶93, 310 Wis. 2d 259, 750 N.W.2d 835 (read-in charges may be considered at sentencing but do not increase the maximum possible penalty). The court observed that gas stations and convenience stores "are commonly subject[ed] to crimes of this nature," and the court determined that it needed to protect the community by demonstrating that "there are consequences" for those who perpetrate offenses against local businesses. The court characterized Smith as intelligent, but the court also determined that Smith's decision to steal money in order to purchase a luxury item demonstrated "poor judgment … reflect[ing] poorly on [Smith's] character."

¶11 The circuit court recognized that Smith was only twenty years old when he committed the offenses and that he expressed remorse. Additionally, the court discussed a variety of other mitigating factors, including Smith's lack of a prior record and his employment history. The court elected, however, to give little weight to the suggestions that Smith was depressed and under pressure from his

family to "make something of [him]self." The court indicated that these problems are common and did not explain Smith's criminal behavior.

¶12 In the postconviction order denying Smith's motion for sentence modification, the circuit court assured Smith that it had considered all of the information presented at sentencing, including the information that Smith and his family "were having some hard times," and that Smith was under stress because his stepfather "hollered at [Smith] a lot about getting a job." *See* ***State v Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court may explain its sentence further when challenged in a postconviction motion). The court stated that it took into account information about Smith's "circumstances, his character and the need to protect society" when fashioning the sentence in this matter.

¶13 Although Smith presented facts at sentencing that might have supported a sentence different from the thirteen-year term of imprisonment selected by the circuit court, he has not shown that his sentence was the product of improper considerations. Smith shows only that the circuit court exercised its discretion differently than Smith would have preferred. That, however, is not an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (reviewing court considers whether discretion was exercised, not whether discretion could have been exercised differently).

¶14 We are also satisfied that Smith's sentence is not unduly harsh. A sentence is unduly harsh when it 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).

¶15 In fashioning a sentence here, the circuit court determined that Smith posed "a threat to the community." The court emphasized that Smith committed two armed robberies while carrying a gun and wearing a disguise, and the court described his conduct as "frightening." The court explained that it considered probation but rejected that option because it would unduly depreciate the seriousness of Smith's conduct and "would send the wrong message to [Smith] and to the community."

¶16 Smith faced a forty-year maximum term of imprisonment upon his conviction for one court of armed robbery with threat of force. *See* WIS. STAT. § 939.50(3)(c) (establishing the penalty for a Class C felony). The thirteen-year term of imprisonment that the court imposed does not offend public sentiment under the circumstances. "A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable." ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449.

¶17 We turn to Smith's contention that the circuit court erred by proceeding to sentencing without first ordering a presentence investigation report pursuant to WIS. STAT. § 972.15(1).[2] Smith argues on appeal, as he did in his postconviction motion, that a presentence report "may have revealed the

[2] We note that Smith's objection to his sentencing on the ground that the circuit court failed to order a presentence investigation report is subject to judicial estoppel. A circuit court may order a presentence investigation "[a]fter a conviction." WIS. STAT. § 972.15(1). In this case, Smith entered a guilty plea and then requested, both personally and through his attorney, to proceed immediately to sentencing. The circuit court granted the request. In postconviction proceedings, Smith asserts that the circuit court should have delayed sentencing and ordered a presentence investigation. The doctrine of judicial estoppel precludes a party from asserting such inconsistent positions at different stages of litigation. *See* ***State v. English-Lancaster***, 2002 WI App 74, ¶19, 252 Wis. 2d 388, 642 N.W.2d 627. The State, however, did not raise an estoppel argument in this matter, and we choose to address Smith's claim on the merits.

seriousness and relevance of Smith's mental health to the acts committed." We are not persuaded.

¶18 A sentencing court has no obligation to order a presentence investigation report, and the decision to order one is discretionary. ***State v. Jackson***, 187 Wis. 2d 431, 439, 523 N.W.2d 126 (Ct. App. 1994). Smith's contention that a presentence report might have offered revealing information about his mental health is wholly conclusory and therefore insufficient to warrant any action by the circuit court. *See* ***State v. Allen***, 2004 WI 106, ¶¶12-13, 274 Wis. 2d 568, 682 N.W.2d 433 (circuit court may deny a postconviction motion without a hearing when key factual allegations in the motion are conclusory).

¶19 At the sentencing hearing, Smith and his family fully advised the circuit court that they believed Smith's actions were caused by psychological problems. Smith's stepfather told the circuit court that he believed Smith was depressed and experiencing stress. Smith's uncle told the circuit court that Smith would benefit from "some type of mental health program, because obviously something is going on." Trial counsel drew the court's attention to the family's concerns.

¶20 The circuit court examined Smith's postconviction submissions and determined that they did not demonstrate the need for a presentence investigation to assist the court in understanding Smith's mental state at the time of the offenses. The court explained that the high school records Smith submitted reflected only some learning problems. The court indicated that the records neither supported Smith's contentions that he suffered depression and stress nor "shed[] any more light on the subject [of his mental health]" than did Smith's original sentencing presentation. In sum, Smith's postconviction speculation about the ways in which

a presentence investigation might have aided him at sentencing offered no concrete reason to believe that such an investigation would have uncovered any significant information. Accordingly, Smith failed to show that the circuit court erred by imposing sentence without ordering a presentence investigation.[3] *Cf.* ***State v. Cole***, 50 Wis. 2d 449, 458-59, 184 N.W.2d 75 (1971) (circuit court with knowledge of pertinent facts for sentencing does not erroneously exercise discretion by refusing to order presentence report).

By the Court.—Judgment and order affirmed.

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

[3] In his appellate brief, Smith states that his trial counsel "failed to request" a presentence investigation report. Because trial counsel waived the opportunity to make such a request, the normal postconviction procedure is to challenge trial counsel's waiver through the rubric of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. We see no basis for another approach in this case. Smith, however, did not proffer any argument that his trial counsel performed ineffectively under the two-part analysis followed by this court. *See* ***id.***, ¶48 (explaining that defendant claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense). Accordingly, we do not address the issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (issues insufficiently developed do not warrant a response).