

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1973-CR

Cir. Ct. No. 2008CF6285

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN J. BARRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Stephen J. Barry pled guilty to two felonies: (1) possessing cocaine (more than one gram but not more than five grams) with intent to deliver as a second or subsequent offense; and (2) bail jumping. See WIS. STAT.

§§ 961.41(1m)(cm)1r., 961.48, 946.49(1)(b) (2007-08).¹ The circuit court imposed two concurrent six-year sentences. Barry appeals from the judgment of conviction and from the order denying his postconviction motion. The only issue is whether the circuit court erroneously exercised its sentencing discretion. We affirm.

BACKGROUND

¶2 On December 14, 2008, City of Milwaukee police officers stopped a vehicle with no front license plate and determined that Barry was the driver. One of the officers smelled the odor of burnt marijuana and obtained Barry's permission to search his person. During the search, the officers recovered twenty small packages containing a total of 2.66 grams of cocaine. The State charged Barry with one count of possessing more than one gram of cocaine but not more than five grams of cocaine with intent to deliver as a second or subsequent offense. The State also charged him with felony bail jumping, because at the time of the traffic stop, Barry faced a pending charge of possessing cocaine with intent to deliver, and he was out of custody on bond with a condition that he commit no new crimes.

¶3 Pursuant to a plea bargain, Barry pled guilty to both of the charges that arose on December 14, 2008. In exchange, the State agreed to dismiss but read in for sentencing purposes the earlier charge of possessing cocaine with intent to deliver. The State also agreed to recommend a prison sentence without specifying a recommended length for the term of imprisonment.

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

¶4 Barry conceded at sentencing that the State’s recommendation for a prison term was “not unreasonable.” He proposed an aggregate three-year term of imprisonment. The circuit court, however, imposed two concurrent six-year terms, bifurcated as thirty-six months of initial confinement and thirty-six months of extended supervision. The circuit court denied Barry’s postconviction motion challenging the sentences, and Barry appeals.

DISCUSSION

¶5 Barry argues that the circuit court’s sentencing remarks “failed to explain the rationale behind [the] sentencing decision with sufficient specificity.” We disagree.

¶6 Our standard of review is well-settled. Sentencing lies within the circuit court’s discretion, and appellate 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. We presume that the circuit court acted reasonably, and “[t]he defendant has the burden of showing that the ‘sentence was based on clearly irrelevant or improper factors.’” *Id.*, ¶¶18, 72 (citations omitted).

¶7 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 circuit court may also consider the following factors:

- (1) [p]ast record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant’s personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant’s culpability; (7) defendant’s demeanor at trial; (8) defendant’s age, educational background and employment record; (9) defendant’s remorse, repentance and cooperativeness;

(10) defendant's need for close rehabilitative control;
 (11) the rights of the public; and (12) the length of pretrial
 detention.

State v. Harris, 119 Wis. 2d, 612, 623-24, 350 N.W.2d 633 (1984) (citation and quotation marks omitted). The 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. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶8 The circuit court must “specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Gallion*, 270 Wis. 2d 535, ¶40. Additionally, the circuit court must explain the “linkage” between the sentencing objectives and the sentence imposed. *Id.*, ¶46. We do not, however, require the circuit court to explain a sentence with mathematical precision. *Id.*, ¶49. Rather, we expect “an explanation for the general range of the sentence imposed. This explanation is not intended to be a semantic trap for circuit courts. It is also not intended to be a call for ... ‘magic words.’” *Id.* Moreover, we recognize that the amount of explanation needed for a sentencing decision varies from case to case. *Id.*, ¶39.

¶9 “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.” *Stenzel*, 276 Wis. 2d 224, ¶7. 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).

¶10 In the instant case, the circuit court began by discussing the gravity of the offenses, noting that Barry possessed a substantial amount of cocaine and that he committed new offenses while out of custody on bail for a pending charge. The circuit court viewed Barry's character as a mitigating factor in some respects, recognizing that he accepted responsibility and that he had developed "skills and potential that [he] can ... use[] to some day become a productive member of society." Nonetheless, the circuit court noted with concern that Barry continued to sell cocaine despite knowing "how addictive this drug is," and the circuit court took into account Barry's prior conviction for delivering cocaine. *See State v. Fisher*, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (criminal record is evidence of character). The circuit court considered the need to protect the public, noting the toll that addiction takes on families and the frequency with which "drugs are associated with other crimes."

¶11 The circuit court discussed a variety of additional factors. It recognized that Barry was "a young man [with] a baby on the way." Further, the court acknowledged that Barry was articulate and had successfully completed high school, but the court also found that he had chosen to traffic in narcotics as an easy way of making money.

¶12 The circuit court selected deterrence as the primary objective of the sentence. The court explained to Barry that he was "dealing poison within this community." Therefore, the court determined that "a message needs to be sent to [Barry] and to the entire community that if you continue to deal drugs no matter how tender your age is and what volumes of drugs, particularly cocaine, that certainly there needs to be some significant consequences."

¶13 Barry asked the circuit court to impose a “short ... three-year sentence,” bifurcated as eighteen months of initial incarceration and eighteen months of extended supervision. The circuit court observed, however, that Barry received exactly that sentence for an earlier offense and that he did not comply with the terms of his extended supervision. Accordingly, the court rejected Barry’s sentencing recommendation and instead imposed concurrent six-year terms of imprisonment, bifurcated as three years each of initial confinement and extended supervision.

¶14 Barry asserts that the circuit court did not explain which factors “required a sentence of the length imposed by the court.” He believes that the circuit court must identify “the factors on which *it most relies* in determining the appropriate length of sentence in a particular case.” (Emphasis in original.) Barry misunderstands the circuit court’s sentencing obligations. The circuit court is not required to assign comparative weight to any sentencing factor. *Fisher*, 285 Wis. 2d 433, ¶22. The circuit court also has no obligation to state with specificity how the factors it considered translate into a specific number of years of imprisonment. *Id.*, ¶¶21-22. Rather, the circuit court must discuss the relevant factors in a way that explains “a rational basis for the ‘general range’ [of the sentence] it imposed.” *State v. Klubertanz*, 2006 WI App 71, ¶21, 291 Wis. 2d 751, 713 N.W.2d 116 (citation omitted). The circuit court did so here.

¶15 We further reject Barry’s suggestion that the sentences imposed in this case were unduly harsh or excessive.² Barry faced an aggregate prison term of

² Barry’s appellate brief contains assertions in the statement of the appellate issue and in the summary of the argument that the circuit court “impose[d] an excessive sentence.” Although Barry does not develop the contention, we choose to address it for the sake of completeness.

twenty-two years and six months. *See* WIS. STAT. §§ 939.50(3)(f) & (h), 961.48(1)(b). The circuit court imposed a term of imprisonment that required Barry to serve less than a seventh of the available prison time in initial confinement. “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.’” *State v. Prineas*, 2009 WI App 28, ¶29, 316 Wis. 2d 414, 766 N.W.2d 206 (citation omitted). Given the potential maximum term of imprisonment in this case and the factors considered by the circuit court, the imprisonment imposed is neither unusual nor disproportionate. The circuit court properly exercised its sentencing discretion here. *See Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

By the Court.—Judgment and order affirmed.

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

