

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2010

A. John Voelker
Acting 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. 2009AP1298-CR

Cir. Ct. No. 2008CF5385

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DELAVAGO K. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Delavago K. Moore appeals *pro se* from a judgment of conviction for attempted burglary and from two postconviction orders

denying his sentence modification motions.¹ The issue is whether the trial court erroneously exercised its sentencing discretion by imposing the sentence to run consecutive to a revocation reconfinement period for a reason that Moore claims did not necessarily support the imposition of a consecutive sentence. We conclude that the trial court properly exercised its sentencing discretion by considering the primary sentencing factors and explaining why its sentence met the minimum custody standard, and why it was imposed to run consecutive to another sentence. Therefore, we affirm.

¶2 Moore pled guilty to attempted burglary as a party to the crime, in violation of WIS. STAT. §§ 943.10(1m)(a) (2007-08), 939.32 (2007-08), and 939.05 (2007-08), for cutting the locks on approximately thirty storage lockers in a public storage facility.² The trial court imposed a three-year sentence, comprised of one- and two-year respective periods of initial confinement and extended supervision to run consecutive to a reconfinement period of two years and six months imposed for revocation of Moore's extended supervision as a result of this incident.

¶3 The month after sentence was imposed, Moore moved for sentence modification, complaining that the trial court did not provide sufficient reasons for its sentence, principally for its imposition of a consecutive sentence. The trial court denied the motion because Moore mischaracterized an erroneous exercise of discretion claim as a new sentencing factor, and because the sentencing hearing

¹ Notwithstanding the fact that Moore's sentence modification motions were substantively identical, as were the trial court's successive orders denying each motion, there were two separate motions and two separate orders.

² All references to the Wisconsin Statutes are to the 2007-08 version.

had not yet been transcribed; thus the trial court could not “intelligently evaluate [Moore’s erroneous exercise] claim.” Moore renewed his challenge a month later; the trial court also denied that motion, incorporating by reference its previous order.

¶4 On appeal, Moore’s principal challenge is to the imposition of a consecutive sentence. He also claims that the trial court had the transcript, nullifying its reason for denying his renewed motion. Incident to his principal challenge, Moore also contends that the trial court erroneously exercised its discretion by allegedly failing to provide what he considers an adequate explanation for the sentence, particularly about why a period of confinement was necessary to satisfy the minimum custody requirement.

¶5 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court accords each factor is a discretionary determination. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The trial court should also explain how the confinement term meets the minimum custody standard. *See State v. Gallion*, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197. Whether to impose consecutive or concurrent sentences is also discretionary. *See Cunningham v. State*, 76 Wis. 2d 277, 284-85, 251 N.W.2d 65 (1977). The trial court’s obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See Larsen*, 141 Wis. 2d at 426-28. That the trial court could have exercised its discretion differently does not constitute an erroneous exercise of discretion. *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).

¶6 Preliminarily, whether a transcript of the sentencing hearing had been filed with the trial court when Moore filed his motion is no longer consequential because our review of the sentencing transcript demonstrates that the trial court properly exercised its sentencing discretion. Moore’s principal complaint is that the trial court’s reason for imposing the sentence to run consecutive to the reconfinement period was the need for additional supervision. We first refute Moore’s other challenges to the trial court’s exercise of discretion to provide context to our conclusion that sentencing discretion was properly exercised.

¶7 The trial court considered the primary sentencing factors. The trial court considered the gravity of the offense and characterized the attempted burglary as “very serious” because it was classified as a felony. The trial court explained that people use storage lockers as a temporary place to keep their belongings safe. Moore violated the victims’ reasonable expectation of safety for their belongings by unlawfully breaking into these lockers. The trial court considered Moore’s character. It noted his age, his educational level, his problems with alcohol and drugs, and his prior record, namely that this conviction was Moore’s fifth felony. It considered the need to protect the community from a five-time felon who entered a storage facility and tampered with people’s storage lockers.

¶8 Moore complains that the trial court did not properly explain why a period of initial confinement was necessary. We disagree. The trial court was troubled that Moore committed this offense while on extended supervision for another offense. It considered his prior record, which it surmised would have been worse had Moore not spent considerable time incarcerated. As it told Moore, “to [not] give you a prison sentence after ... your fifth felony would unduly depreciate

the seriousness of this offense.” The trial court’s refusal to unduly depreciate the seriousness of Moore’s attempted burglary satisfies the minimum custody standard.

¶9 Moore’s principal challenge is to the imposition of a consecutive sentence. The trial court expressly told Moore that:

While you are on extended supervision, you are going to have conditions. You had them before. You have got no more extended supervision left. Frankly, that is another reason why I’m going to give you a consecutive term. Because I think when you get out of prison, you should be under ... the Probation Department[’s supervision] and maybe they can do what they failed to do the last time [because you committed another crime while released on extended supervision].

¶10 The trial court told Moore one of the reasons it imposed a consecutive sentence: it wanted Moore supervised. Moore had been supervised previously; that supervision was unsuccessful in that he committed a new crime. The trial court explained why it sought supervision for Moore, who had now committed his fifth felony. Had it imposed the sentence to run concurrent to the reconfinement period, Moore would have had “no more [than six months of] extended supervision left.” During his allocution, Moore expressed hope that he eventually would “[g]et some work release and get some financial stability when I get out and do my ... program ... [so] I eventually can make it to and hopefully have some type of, have more focus upon doing things and being successful in society, doing things right.” As the trial court explained, in response to Moore’s hope and his contention that the probation department did not do its job when he was previously released to extended supervision, “[the trial court is] going to give [the Probation Department] another chance, because [it] can’t let [Moore] out of

prison with nothing [in terms of supervision]. Because if [there is no supervision, Moore] will end up right back there [in prison].”

¶11 The trial court considered the proper factors and explained why it imposed confinement, and the importance of extended supervision; it also responded to Moore’s expressed concerns. It explained how its sentence met the minimum custody requirement, and why it imposed the sentence to run consecutive to the reconfinement period Moore was already serving. The trial court properly exercised its sentencing discretion and imposed a reasoned and reasonable sentence; that it could have imposed a different sentence or a concurrent structure is not an erroneous exercise of discretion.

By the Court.—Judgment and orders affirmed.

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

