COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2089-CR
2011AP2090-CR

Cir. Ct. Nos. 2008CF995
2008CF6318

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID LEWIS MARTIN,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. David Lewis Martin appeals from a judgment of conviction, entered upon his guilty pleas, on one count of fleeing or eluding a police officer; two counts of second-degree recklessly endangering safety; and one

count of assault by a prisoner by expelling bodily fluids. Martin also appeals from an order denying his postconviction motion for resentencing. He contends that the circuit court erroneously exercised its discretion when it relied on contradictory premises about Martin's mental health and imposed a near-maximum sentence. We reject Martin's arguments and affirm the judgment and order.

BACKGROUND

¶2 Martin attempted to return a box of male enhancement pills to a vitamin store without a receipt. When the clerk refused to process the return per store policy, Martin became agitated and demanded the clerk give him forty-two dollars from the register. At the same time, Martin made motions that suggested to the clerk that Martin might have a gun. The clerk continued to refuse Martin's requests and, after about fifteen or twenty minutes, Martin left the store.

¶3 Martin drove away and, as he did so, rear-ended a vehicle. Martin, however, did not stop, and the other driver began to pursue Martin. Martin began speeding, travelling sixty-five miles per hour in a forty-mile-per-hour zone, which caught the attention of a patrolling police squad. The squad began pursuing Martin with its lights and siren activated. Still Martin did not stop.

¶4 Martin continued to accelerate, reaching speeds of eighty or ninety miles per hour. He came to a crowded intersection where he was no longer able to weave through traffic. As he approached, he decided to attempt a left turn. He nearly rear-ended a large van but swerved at the last moment, side-swiping the van instead. Three of the six van passengers were injured. Martin's vehicle began to spin around. It hit a snow bank and flipped multiple times before landing.

¶5 Officers approached and directed Martin to exit the vehicle. He refused, again making movements that caused people to believe he had a gun. Eventually, Martin surrendered himself to the police, telling them as he exited the car that he just did not want to go back to jail.

¶6 Martin was charged with failure to stop upon striking, fleeing or eluding a police officer, obstructing or resisting an officer, and two counts of second-degree reckless endangerment. While Martin was in jail pending further proceedings on those charges, he one day spit on the correctional officer who was transporting him from the recreation area. Martin was thus charged in a new case with assault by a prisoner.

¶7 Martin had multiple evaluations regarding both his competency to proceed and possible pleas of not guilty by reason of mental disease or defect (NGI). He has received varying diagnoses, though it suffices to say that they are in the realm of depression and schizophrenia. Martin required at least two visits to Mendota Mental Health Institute to restore his competency to proceed in these matters. The NGI pleas were, however, apparently unsustainable, and Martin ultimately entered a global plea agreement that resulted in his convictions for fleeing, reckless endangerment, and assault. The remaining charges were dismissed and read in at sentencing.

¶8 The State had agreed not to recommend any particular sentence length. Martin asked for probation, telling the circuit court that he thought he would be able to receive appropriate mental health treatment that way. The circuit court noted that Martin's crimes were serious and punishment was warranted, and it determined that Martin's uncontrolled mental health issues posed a risk to the public. It thus imposed the maximum sentence for each of the four counts: ten

years' imprisonment for each of the reckless-endangerment charges and three and one-half years' imprisonment for the fleeing and the assault. The reckless-endangerment and assault sentences were set to run consecutively, with the fleeing sentence concurrent, resulting in a total of eleven and one-half years' initial confinement and twelve years' extended supervision.

¶9 Martin filed a postconviction motion for resentencing. He alleged that the sentence was harsh and excessive, was based on inaccurate information because no one can gauge how his mental health issues will play out in the future, and was inappropriately meant as punishment for being mentally ill. The circuit court denied the motion, explaining that it considered Martin's risk of future behavior based on his prior behavior, including the fact that he had voluntarily stopped taking his medications prior to these incidents. It acknowledged that, indeed, no one can predict the future, which is part of what contributes to the risk of Martin's future dangerousness. It further explained that the sentence was also based on the seriousness of Martin's offenses, and the need for punishment and community protection. Martin now appeals.

DISCUSSION

¶10 The only issue on appeal is whether the circuit court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has a burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with a presumption that the circuit court acted reasonably, and we do not interfere with a sentence if discretion was properly exercised, *see* ***id.*** at 418-19,

even if we might have imposed a different sentence, *see* ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

¶11 In its exercise of discretion, the circuit court is to identify the objectives of its sentence, which include but are not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. ***Gallion***, 270 Wis. 2d 535, ¶40. In determining the sentencing objectives, we expect the circuit court to consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the circuit court's discretion. ***Id.***

¶12 Martin first contends that his sentence was not made on a "rational basis" because it was premised "on two contradictory positions: that Martin's mental illness played little to no role in his commission of the offenses in question, and yet it is the mental illness that makes Martin a danger to the public."

¶13 Contrary to counsel's representation, though, the circuit court did not conclude that Martin's mental illness played "little to no role" in the offenses. Rather, it simply determined that his mental illness was not the direct cause of his crimes, a conclusion implicitly accepted by Martin when he decided to abandon pursuit of the NGI pleas.

¶14 We also reject any notion that the circuit court could not or should not have considered Martin's mental illness or the possibility that it made him a danger to the community. Martin himself urged the circuit court to consider his mental health issues in mitigation of the sentence, and we do not review invited error. *See* ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 642-43, 566 N.W.2d 158 (Ct. App. 1997). Further, Martin provides no citation to demonstrate that a defendant's

mental health is not a valid sentencing factor. A defendant's health is a valid sentencing consideration, as are the defendant's degree of culpability and rehabilitative needs, so surely "mental health" falls somewhere under these umbrellas. *See* ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989) (health as factor), *overruled in part on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶52, 333 Wis. 2d 53, 797 N.W.2d 828 (withdrawing ***Michels***' language regarding "new factor" test); *see also* ***Odom***, 294 Wis. 2d 844, ¶7 (culpability and rehabilitative needs as factors). Indeed, we do not require drug-addicted or alcoholic defendants to have been under the influence of their particular vice when committing a crime before we allow the sentencing court to consider those defendants' rehabilitative needs relative to their addictions. Similarly, we are not persuaded that a defendant with mental illness must be in the throes of a manic episode or hallucination at the time he commits a crime in order for the sentencing court to consider his rehabilitative needs relative to that illness.[1]

¶15 Martin's main concern actually appears to be his disagreement with the weight the circuit court assigned to various sentencing factors and objectives, like seriousness of the offense and the need for punishment. He asserts that there "is nothing on the record to suggest this was in any way a violent or serious offense," particularly in light of the single misdemeanor comprising his prior record. Martin also complains that the circuit court failed to comply with the mandate to impose the "'minimum amount of custody necessary,'" *see* ***Gallion***,

[1] It therefore goes without saying that we reject Martin's argument that a "nexus" must exist between the crime and the mental illness before the mental illness can be considered at sentencing.

270 Wis. 2d 535, ¶23 (citation omitted), because it erroneously concluded "that mental health treatment is best administered in prison."

¶16 Our review of the sentencing transcript, though, satisfies us that the circuit court properly exercised its discretion. The circuit court considered Martin's crimes to be "extremely serious," "egregious," and "flagrant" violations of the law, calling for the maximum sentences. By fleeing police, Martin had endangered drivers, pedestrians, and others, with injury to the unsuspecting being exactly what happened here. The circuit court further noted that spitting on the officer was an intentionally defiant act for which no mitigating circumstances existed at the time. Although Martin argues there is nothing in the record to suggest his crimes were violent or serious, he acted as though he were going to commit an armed robbery of the vitamin store, three people in the van were injured and one is now dealing with chronic pain, and the van itself was totaled. The circuit court thus noted that though it was considering Martin's rehabilitative needs, it also believed Martin was in need of punishment for, and the community in need of protection from, whatever caused Martin to make poor choices.[2]

¶17 In addition, the circuit court did not conclude that mental health treatment was "best administered in prison."[3] Rather, it concluded that treatment

[2] It is true that the circuit court noted that Martin posed a danger to the public because of mental health "problems [he] cannot control," but this is not wholly unsupported by the record. Martin had stopped taking his medications prior to these incidents, although he claims it was because of a lapse in insurance. He also went to the vitamin store to try to get money because he was frustrated by being out of work, and the circuit court noted that Martin seemed to be frustrated generally by modern life.

[3] The main appellate brief in this matter was prepared by Attorney Kimberley Alderman. We are troubled by her representation of the circuit court's findings with regard to treatment being "best administered" in prison. Attorney Alderman's characterization misrepresents both the spirit and the letter of the circuit court's rulings and is perilously close to violating the requirement of candor to the tribunal. *See* SCR 20:3.3(a)(1).

for Martin's mental illness was "more appropriate in a confined setting[.]" It explained that probation was not appropriate because it believed Martin would not follow through on any treatment. Given that Martin had stopped taking his medications prior to the current incidents, that concern is not clearly erroneous.

¶18 Ultimately, the circuit court placed great emphasis on community protection and punishment, stemming in no small part from the seriousness of Martin's crimes. That is the circuit court's prerogative, no matter how strenuously a defendant may wish for an alternate result. The circuit court considered no improper factors and Martin has shown no unjustifiable basis for his sentences, so we must affirm.[4]

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[4] Given that the sentences reflect a proper exercise of discretion, we summarily reject the argument that resentencing is warranted in the interests of justice.