COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2821-CR **Cir. Ct. No. 2008CF4994**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN M. LEHMAN,

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 CURLEY, P.J. Stephen M. Lehman appeals the judgment convicting him of two counts of burglary of a dwelling, contrary to WIS. STAT.

§ 943.10(1m)(a) (2007-08).[1] He also appeals the orders denying his numerous postconviction motions. Lehman argues that: (1) trial counsel was ineffective for failing to investigate potential witnesses; (2) the trial court erroneously exercised its sentencing discretion by (a) finding Lehman ineligible for the Challenge Incarceration or Earned Release programs, and (b) ordering sentences that Lehman claims are grossly disproportionate to the crimes as well as Lehman's character and rehabilitative needs; and (3) the trial court erred in denying Lehman's postconviction motion requesting sentence modification based on a new factor. We affirm.

BACKGROUND

¶2 On June 17, 2009, Lehman pled guilty to two counts of burglary of a dwelling. According to the criminal complaint, which formed the factual basis for Lehman's plea, the respective burglaries occurred in July and August 2008. In the July burglary, Lehman stole a GPS, Ipod, flashlight, and wallet from the victim's Chevy Suburban, which was parked in the driveway, as well as a bicycle from the victim's garage. In the August burglary, Lehman stole a Blackberry, two purses, wallet, $300 cash, and numerous credit and gift cards from the victim while she was sleeping on the couch in her sister's apartment. While inside the victim's apartment, Lehman bumped into the victim, waking her, and, not surprisingly, frightening her.

¶3 Following his conviction, Lehman was sentenced to eight years' imprisonment on each count, consisting of five years of initial confinement and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

three years of extended supervision. The sentences were to be served consecutively. Lehman was also ordered to pay approximately $1700 in restitution to the victims. In sentencing Lehman, the trial court determined that, based on Lehman's extensive criminal history, including twelve felony and four misdemeanor convictions, Lehman was "high risk," and that "all [that is] left is punishment," as "[r]ehabilitation hasn't worked." The trial court also found Lehman ineligible for the Challenge Incarceration program and the Earned Release program.

¶4 After he was sentenced, Lehman filed a number of postconviction motions, some *pro se* and some through counsel. On September 28, 2009, Lehman filed a motion, *pro se*, to reconsider his eligibility for the Challenge Incarceration program or the Earned Release program. The trial court denied the motion. On February 25, 2010, Lehman, through counsel, filed three motions to withdraw his pleas. These motions were based on: (1) ineffective assistance of counsel; (2) Lehman's eligibility for the Challenge Incarceration or Earned Release programs; and (3) whether the sentence was proportional to the crime. The trial court denied all three motions. On December 15, 2010, Lehman filed another motion, *pro se*, again asking the trial court to reconsider his eligibility for the Challenge Incarceration program or the Earned Release program. The trial court denied the motion. Next, on February 11, 2011, Lehman filed a motion to modify his sentence based on the introduction of the Risk Reduction sentencing program. The trial court denied the motion. Finally, Lehman filed an amended motion to withdraw his pleas based on ineffective assistance of counsel on July 7, 2011. The trial court denied the motion.

¶5 Lehman now appeals. Further facts will be developed below as necessary.

ANALYSIS

¶6 Lehman makes several arguments on appeal. He argues that: (1) trial counsel was ineffective for failing to investigate potential witnesses, including a potential alibi witness; (2) the trial court erroneously exercised its sentencing discretion by (a) finding Lehman ineligible for the Challenge Incarceration or Earned Release programs, and (b) ordering sentences that Lehman claims are grossly disproportionate to the crimes as well as Lehman's character and rehabilitative needs; and (3) the trial court erred in denying Lehman's postconviction motion requesting sentence modification based on the risk reduction statute, which he claims is a new factor. We discuss each in turn.

1. Trial counsel was not ineffective.

¶7 Lehman challenges the trial court's refusal to hold an evidentiary hearing on his ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel."). In ***State v. Allen***, 2004 WI 106, ¶¶12-24, 274 Wis. 2d 568, 682 N.W.2d 433, the Wisconsin Supreme Court reviewed the standard applied when defendants assert that they are entitled to a postconviction evidentiary hearing. Relying on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the ***Allen*** court repeated the well-established rule:

> First, [courts] determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [appellate courts] review *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory

> allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Id., 274 Wis. 2d 568, ¶9 (italics added; citations omitted).

¶8 To succeed on this claim, Lehman must allege a *prima facie* claim of ineffective assistance of counsel, showing that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, Lehman must show facts from which a court could conclude that trial counsel's representation was below objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. Because he challenges counsel's effectiveness regarding his guilty plea, to demonstrate prejudice, he must show that "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *See* ***Bentley***, 201 Wis. 2d at 312 (citing ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)). The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, but the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶9 Lehman asserts that he would have gone to trial or pled guilty to lessor offenses if trial counsel had investigated several witnesses that could speak to his defense. He claims that he told his attorney about four specific witnesses that would have testified on his behalf. The first, his roommate, purportedly would have said that he observed the defendant purchase the stolen property items

related to the August burglary charge. The second, Lehman's ex-girlfriend, purportedly would have said she was with the defendant on the evening of the August burglary. The third, a friend who lives in Texas, purportedly would have said that the defendant told her during a telephone conversation that the bicycle in the July burglary was outside leaning against the homeowner's garage, not inside of it. The fourth witness, an acquaintance that Lehman "may" have told his attorney about, would supposedly testify that he saw Lehman purchase some of the stolen goods from the August burglary from an unidentified man at a bar in Greenfield. According to Lehman, the witnesses "could have established Lehman was guilty of crimes other than burglary and with less severe penalties."

¶10 Lehman does not bring a single solid fact before us supporting his arguments. While he speculates that he could have been convicted of lesser offenses "if" certain witnesses "would have testified the way [he] expected," he does not offer an affidavit from any one of these alleged witnesses. The only affidavit in the record is that of Lehman's postconviction counsel, and it primarily states what Lehman told postconviction counsel about these alleged witnesses.

¶11 The trial court expounded on this very problem when it denied Lehman's first postconviction motion:

> No affidavits from any of these potential witnesses and what they would have testified to are attached to the motion….
>
> It is completely unknown to the court what the above witnesses would have actually said had trial counsel performed an investigation. The motion is conclusory and self[-]serving….
>
> Because the defendant's claims with regard to the witnesses he maintains counsel should have investigated are based on mere supposition (not knowing what the witnesses actually would have said), the defendant has not raised an issue of fact which would render counsel's

> performance suspect or cause the court to hold an evidentiary hearing.

¶12 Similarly, with respect to Lehman's final postconviction motion, in which he introduced, for the first time, Adam Laux—the alleged fourth witness who Lehman "may" have mentioned to trial counsel—the trial court concluded:

> No affidavit has been submitted from Adam Laux. Instead, Laux's testimony has been offered through an affidavit of postconviction counsel via an investigator for the public defender's office. Even assuming that Laux would testify as indicated by postconviction counsel, there has been no sufficient showing that trial counsel provided ineffective assistance for failing to investigate this witness. Trial counsel stated that he had no recollection of the defendant advising him about Laux. Even assuming the defendant had advised counsel about this witness, Laux's testimony does not provide the defendant with a "strong argument" for a lesser charge. Laux does not identify which night he was …with the defendant. He did not witness the purchase of stolen goods because this transaction supposedly occurred between the defendant and an unknown man outside the bar. Moreover, Laux has not identified the purse and credit cards the defendant stated that he had purchased as belonging to the victim in the second charged burglary offense. There is no reason to believe that the defendant would have demanded a jury trial based on the weak testimony offered by Adam Laux, particularly in light of the evidence of [Lehman's] confession. Consequently, the court finds no ineffective assistance of counsel with regard to this witness.

(Footnote omitted.)

¶13 We agree with the trial court. There are no solid facts that would support a finding that trial counsel was deficient, nor is there a reasonable likelihood that Lehman would have proceeded to trial. *See* ***Wesley***, 321 Wis. 2d 151, ¶23; ***Bentley***, 201 Wis. 2d at 312. Moreover, with respect to the trial court's remarks concerning Lehman's "confession," we note that during the plea colloquy, Lehman admitted that in the July burglary, he had gone into the victim's garage,

taken the bike, and that the complaint could serve as a factual basis for the plea. He also admitted, regarding the August burglary, to entering the victim's apartment with the intent to steal. Lehman has not submitted any concrete facts in his postconviction motions challenging those conclusions.

¶14 In sum, because Lehman's motion alleges only conclusory allegations, he has not made a *prima facie* case that trial counsel's performance was either deficient or prejudicial, *see* ***Mayo***, 301 Wis. 2d 642, ¶33, and no postconviction hearing was required, *see* ***Allen***, 274 Wis. 2d 568, ¶9.

2. The trial court's exercise of sentencing discretion was proper.

¶15 Lehman contends that the trial court erroneously exercised its discretion with regard to his sentence because the court: (a) found him ineligible for the Challenge Incarceration and Earned Release programs even though he met the criteria for and would benefit from those programs; and (b) sentenced him to a total of ten years' initial confinement and six years' extended supervision, and ordered him to pay approximately $1700 in restitution—a sentence he claims is unduly harsh and excessive.

¶16 Sentencing is committed to the trial court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence "has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with a presumption that the trial court acted reasonably, and we do not interfere with a sentence if discretion was properly exercised. *See* ***id.*** at 418-19.

¶17 In its exercise of discretion, the trial court must identify the objectives of its sentence, including but 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 trial 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 trial court's discretion. ***Id.*** The amount of necessary explanation of a sentence varies from case to case. ***Gallion***, 270 Wis. 2d 535, ¶39. A trial court need not separately state its rationale for finding a defendant ineligible for the Challenge Incarceration or Earned Release programs beyond the factors normally considered at sentencing. *See* ***State v. Lehman***, 2004 WI App 59, ¶18, 270 Wis. 2d 695, 677 N.W.2d 644 (Challenge Incarceration program); ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187 (Earned Release program).

¶18 We also review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). 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). "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶19 Applying these standards, we conclude that the trial court did not erroneously exercise its discretion by finding Lehman ineligible for the Challenge Incarceration and/or Earned Release programs. While Lehman contends that the trial court erred in finding him ineligible for these programs because of his relative youth, issues with alcohol, and the fact that he is at a "turning point" in his life, the trial court thoroughly explained why these programs did not fit the objectives of the sentence. *See* ***Gallion***, 270 Wis. 2d 535, ¶40. Specifically, the trial court found Lehman ineligible for either program based on the "continuing nature" of the burglaries, noting that Lehman was "a career criminal" whose record—which included more than a dozen felony convictions—was "one of the worst" the court had "ever seen." (Capitalization omitted.) The court determined that Lehman was "high risk," and that "all [that is] left is punishment," as "[r]ehabilitation hasn't worked." The trial court's decision was therefore not unreasonable or unjustifiable in Lehman's case. *See* ***Lechner***, 217 Wis. 2d 392, 418-19.

¶20 Moreover, we do not find Lehman's sentence to be unduly harsh or excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Lehman's sentence was well within the established maximum penalty for each burglary. *See* WIS. STAT. § 943.10(1m)(a) (2007-08) (burglary of a dwelling a Class F felony); WIS. STAT. § 939.50(3)(f) (penalties for Class F felonies are up to twelve years and six months of confinement and a $25,000 fine). *See also* ***Daniels***, 117 Wis. 2d at 22. Additionally, the trial court thoroughly explained why consecutive sentences were necessary in Lehman's case:

> And not to give you consecutive time on each one of these [sentences] would unduly depreciate the seriousness of the offense. I've read the victim/impact statements about the emotional effects you had here, the stress that you've caused, the financial loss that you caused. [One] writes "it sounds like he's been doing this his whole life. His sentence should be increased. He has … learned

> nothing." [The victims] want restitution. [The August burglary victim says] "I was shaking too much to turn on a light. That wasn't even the scariest part. I reached up for my phone which I had on the table a couple of feet away and it was gone. I suddenly realized that this awful person really had … taken my only way to call for help…. I have nightmares. I feel sick to my stomach…." I mean this is powerful stuff and that's why you got to get consecutive time for each one of these. Because if I didn't … and I saw these people, how could I say I didn't punish you. Because that's all I really have left is punishment. Rehabilitation hasn't worked, deterrence to you hasn't worked, so all I've got is punishment.

(Quotation marks added for clarity.)

¶21 In sum, because the trial court properly exercised its sentencing discretion utilizing proper factors, *see*, *e.g.*, ***Gallion***, 270 Wis. 2d 535, ¶¶39-46, and sentenced Lehman within the applicable maximums, *see* ***Ocanas***, 70 Wis. 2d at 185; ***Daniels***, 117 Wis. 2d at 22, we conclude the sentence was not improper for finding Lehman ineligible for the Earned Release and Challenge Incarceration programs, and was not unduly harsh or excessive. The trial court did not erroneously exercise its discretion, and Lehman's sentence is consequently upheld on appeal.

3. The trial court properly denied Lehman's motion for sentence modification.

¶22 Lehman also argues that the risk reduction statute, *see* WIS. STAT. § 973.031, which went into effect several months after he was sentenced, is a new factor that warrants modification.[2]

[2] *See* 2009 Wis. Act 28 § 9411(2u) (stating that WIS. STAT. § 973.031 was to take effect "on October 1, 2009, or on the 90th day beginning after publication, whichever is later"). Effective August 3, 2011, the risk reduction statute has been repealed. *See* 2011 Wis. Act 38 § 92.

¶23 A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether a fact or set of facts constitutes a new factor is a question of law we decide *de novo*. *See* ***State v. Hegwood***, 113 Wis. 2d 544, 546-47, 335 N.W.2d 399 (1983). If a defendant has demonstrated the existence of a new factor, then the trial court must determine whether the new factor justifies modification of the sentence. *See* ***id.*** at 546. This determination is committed to the trial court's discretion and will be reviewed under an abuse of discretion standard. *See* ***id.*** "A defendant must prove a new factor by clear and convincing evidence." ***State v. Crochiere***, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

¶24 We conclude that the risk reduction statute also did not constitute a new factor. First, as the trial court pointed out and as State argues, it is questionable whether the statute even applies to Lehman. Even if it did, however, the trial court considered that Lehman was a "career criminal" and a serious threat to the public, factors that required a severe sentence. In other words, as we explained more fully above, the trial court fully intended to give Lehman the sentence that it did. In these circumstances, the risk reduction statute, which would have resulted in a decreased sentence, was not germane to what the trial court wanted to do. Thus, the trial court properly exercised its discretion when it found that the risk reduction statute did not constitute a new factor.

By the Court.—Judgment and orders affirmed.

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