COURT OF APPEALS
DECISION
DATED AND RELEASED

September 19, 1996

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

NOTICE

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

No. 96-0604-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TODD D. MOSKONAS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Todd Moskonas appeals from the trial court's order denying his motion to modify his sentence. Moskonas entered an ***Alford*** plea to a charge of third-degree sexual assault contrary to § 940.225(3), STATS., and the court accepted the plea.[1] Sentence was withheld and Moskonas was

[1] An ***Alford*** plea is a guilty plea in which the defendant pleads guilty while either

placed on probation for five years, with ninety days in jail and certain other conditions. His probation was revoked on the ground that he had sexual intercourse with a fourteen-year-old girl. Moskonas was sentenced on January 10, 1992, to a term of five years in prison, with credit of 190 days for time previously served. The judgment of conviction stated that Moskonas "is to receive the sexual offender treatment program in Oshkosh."[2] Moskonas argues on appeal that the trial court erred in denying his postconviction motion for a modification of his sentence on these grounds: (1) the court was without authority to direct his participation in the sexual offender treatment program, (2) the sentence was unduly harsh, (3) he was entitled to a hearing on his motion, and (4) he did not receive all the credit to which he was entitled for the time he served in jail as a condition of probation.

We conclude the court was without authority to order treatment in prison and that portion of the sentence is void. We also conclude that the record conclusively shows the trial court did not erroneously exercise its discretion in sentencing Moskonas to a prison term of five years and he is not entitled to a hearing on this issue. Finally, we are unable to determine on this record whether Moskonas is entitled to additional credit for time served while awaiting sentencing.

The trial court denied Moskonas's postconviction motion for a modification of his sentence, stating that the court had reviewed the transcript of the sentencing hearing and concluded that the sentence was not an abuse of discretion or unduly harsh. The court did not specifically address the particular issues raised by Moskonas in his motion concerning the treatment order or the additional credit due.

(..continued)
maintaining his innocence or not admitting to commission of the crime. ***State v. Garcia***, 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995).

[2] At the same proceeding, sentence was withheld in #91-CR-601, the case in which charges were brought concerning the incidents with the fourteen-year old that gave rise to the probation revocation. Moskonas was placed on twelve years probation in #91-CR-601, concurrent with the five-year prison term in this case. One of the conditions of probation in #91-CR-601 was that he comply with sexual offender treatment at the discretion of his agent.

We first address Moskonas's contention that the trial court lacked authority to order that he participate in the sexual offender treatment program while in prison. The State concedes that the trial court exceeded its authority by including an order for treatment when sentencing Moskonas to a prison term, even though both defense counsel and the prosecutor requested this.[3] We accept the State's concession. Moskonas argues that because of the invalid treatment order, his sentence was unduly harsh and he is entitled to modification of his sentence to time already served.[4] The State's position is that the only relief Moskonas is entitled to is a ruling that the treatment order is void. The State relies on § 973.13, STATS., which provides:

> In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

We agree with the State. The court order on treatment is void, but the sentence of five years in prison is authorized by law and therefore valid.[5] Moskonas argues that this is an inadequate remedy because the Department of Corrections (DOC) officials have already been influenced by the court order's order on treatment. If Moskonas means that a ruling at this time that the treatment order is void will have no practical effect, he is really arguing that this controversy is moot. *See* ***DeLaMatter v. DeLaMatter***, 151 Wis.2d 576, 591, 445 N.W.2d 676, 683 (Ct. App. 1989). Courts generally do not decide moot issues, although they may. ***Id.*** Moskonas provides no authority for the position that, if

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[3] The State relies on § 301.03(2), STATS., which provides in part that the Department of Corrections shall supervise the custody and discipline of prisoners. The State also relies on ***State v. Gibbons***, 71 Wis.2d 94, 98, 237 N.W.2d 33, 35 (1976), which holds that the court may not impose conditions on a prison sentence, and on ***State v. Lynch***, 105 Wis.2d 164, 168, 312 N.W.2d 871, 874 (Ct. App. 1981), which holds that once a court selects the sentence of imprisonment, it may not order specific treatment.

[4] Moskonas asserts that as of March 27, 1996, he had about seven months left to serve on his sentence, and the State accepts this assertion.

[5] Third-degree sexual assault is a Class D felony, § 940.225(3), STATS., punishable by up to five years in prison. Section 939.50(3)(d), STATS.

the issue concerning the treatment order is moot, he is entitled to a reduction in the time he must serve in prison. There is no merit to this contention. He is entitled only to deletion of that portion of the judgment of conviction stating, "Defendant is to receive the sexual offender treatment program in Oshkosh."[6] We direct the trial court to do this on remand.

Moskonas also contends that the trial court erred in denying his motion for postconviction relief without affording him a hearing. We are not certain whether Moskonas's argument that his sentence is unduly harsh is directed only to the treatment order or whether he also intends to challenge the length of his sentence apart from the treatment order. If the former, there was and is no need for a hearing to provide Moskonas the only relief to which he is entitled--a ruling that the treatment directive is void. If the latter, Moskonas is entitled to a hearing unless the motion, files and records show conclusively that he is entitled to no relief on his claim that the sentence of five years, in itself, is unduly harsh and therefore an erroneous exercise of the court's discretion. *See* § 974.06(3)(a), STATS.; ***Nelson v. State***, 54 Wis.2d 489, 498, 195 N.W.2d 629, 633 (1972).[7] We conclude the motion and record conclusively show that Moskonas is not entitled to a modification of the five-year prison term.

Apart from the treatment order, the only allegations arguably supporting Moskonas's claim of an unduly harsh sentence are his assertions that he "did do more time on his prison sentence than the average inmate convicted of the same offense." If Moskonas means that he has had to serve more of his five-year prison term than others with five-year sentences for the same offense, that is not a challenge to the court's sentence of five years. It is DOC, not the court, that grants parole prior to the expiration of a prison term.[8] If Moskonas means that the average person convicted of the same crime is

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[6] Because of our conclusion that the treatment order is void, we do not consider Moskonas's argument that the trial court's error in entering that order was a new factor entitling him to a modification of his sentence.

[7] We treat Moskonas's motion for modification of sentence as a motion brought under § 974.06(1), STATS., because it was filed long after the deadline for a motion to modify a sentence under § 973.19(1), STATS.

[8] With certain exceptions not applicable here, the earliest dates on which the Department of Corrections may parole an inmate are established by statute. Section 304.06(1)(b), STATS.

sentenced to less than five years, even if true that is not a basis for challenging his sentence. Disparities in sentencing from one case to the next do not show an erroneous exercise of discretion. *See* ***Ocanas v. State***, 70 Wis.2d 179, 187-88, 233 N.W.2d 457, 462 (1975). Disparities must be arbitrary or based on considerations not pertinent to proper sentencing discretion in order to constitute a denial of equal protection. ***Id.***

We have reviewed the transcript of the sentencing proceeding and are convinced that it demonstrates conclusively that the trial court did not erroneously exercise its discretion in sentencing Moskonas to five years in prison.

The primary factors a court must consider in fashioning a sentence are the gravity of the offense, the character of the offender and the need for public protection. ***McCleary v. State***, 49 Wis.2d 263, 276, 182 N.W.2d 512, 518 (1971). The court may also consider, among other things, the defendant's criminal record; history of undesirable behavior patterns, personality, character and social traits; results of a presentence investigation; vicious or aggravated nature of the crime; degree of culpability; demeanor at trial; age, educational background and employment record; remorse, repentance and cooperativeness; need for close rehabilitative control; rights of the public and length of pretrial detention. ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994) (emphasis added).

Moskonas was initially charged with first-degree sexual assault of a five-year-old child under § 940.225(1), STATS., 1987-88, which at that time was punishable by a term of imprisonment up to twenty years. His plea bargain reduced his exposure to five years, the maximum term for third-degree sexual assault. *See* §§ 940.225(3) and 939.50(3)(d), STATS. In sentencing Moskonas to the maximum of five years after his probation was revoked for sexual assault of another child, the court considered the gravity of the offense, the need to protect the public, the assault of another child while on probation for this case, his failure to work on correcting his problem, and his need for treatment. These are appropriate factors for the court to consider and provide a reasonable basis for the five-year sentence.

Moskonas also contends that the trial court erred in denying the request in his postconviction motion for additional credit for time served in jail

as a condition of the probation initially ordered by the court. Moskonas asserts that while he was serving ninety days in jail as a condition of probation in this case, he was found guilty of operating after revocation, second offense, and sentenced to ten days in jail to run concurrent with the ninety days he was already serving. But, according to Moskonas, he was erroneously required to serve the ten days consecutive to the ninety days, and he should receive credit for the ten days against his prison term in this case.

The record does indicate that Moskonas was sentenced to ten days for operating after revocation, to be served concurrently with the jail time that was a condition of probation in this case.[9] However, there is nothing in the record that shows how much time Moskonas actually served in jail and for what charges. Moskonas has attached to his brief a copy of a letter from the Sheriff's Department of Portage County indicating that he was incarcerated from 10/13/88 to 1/19/88 for "sexual assault, no valid driver's license." Because this letter does not appear in the record, we cannot consider it. *See* ***State v. Edwardsen***, 146 Wis.2d 198, 211-12, 430 N.W.2d 604, 609 (Ct. App. 1988). We conclude the record is insufficient to permit us to determine whether Moskonas is entitled to additional credit for jail time served in connection to the offense in this case. *See* § 973.155(1)(a), STATS.[10]

We also note that § 973.155(5), STATS., states that persons may petition DOC for sentence credit as provided under the statute and, if DOC "... is unable to determine whether credit should be given, or otherwise refuses to ...," the person may petition the sentencing court for relief. Moskonas does not indicate that he has first raised this issue with DOC. We conclude he should first raise this issue with DOC before petitioning the sentencing court.

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[9] The transcript of the plea hearing and sentencing on the charge of operating after revocation is contained in this record. Although that charge was presumably brought in a separate case, the transcript is captioned 87-CR-220, the trial court case number for this case. The same transcript shows that a motion concerning release time from jail for babysitting was addressed. That motion did relate to the probation imposed in case no. 87-CR-220, and is no doubt the reason the caption contains that case number.

[10] Even were we to consider this letter, we cannot tell how many days Moskonas served in jail as a condition of probation for this offense and how many days he served in jail for the operating after revocation offense. To receive credit on his sentence in this case for time served, the time served must be related to the offense for which Moskonas was sentenced in this case. *See* § 973.155(1)(a), STATS.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.