COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1254-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EUGENE F. LINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

DEININGER, J.[1] Eugene Line appeals a judgment that imposed sentences for two misdemeanors following the revocation of his probation on those offenses. He also appeals the denial of a postconviction motion for re-sentencing. He claims the trial court erred by failing to state on the record that it

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

considered appropriate sentencing factors. We conclude, however, that Line has not demonstrated that the trial court relied on an unreasonable or unjustified basis in sentencing him and that, even if the court failed to adequately explain its reasons for imposing the sentence it did, the record shows that the sentence imposed is sustainable as a proper discretionary act. We therefore affirm.

BACKGROUND

Line was convicted in 1994 of battery and theft, both misdemeanors, each carrying a potential maximum jail sentence of nine months. *See* §§ 940.19(1) and 943.20(1), STATS. Also, at that time, he was convicted of two felonies, uttering a forged writing and theft of a firearm. The court withheld sentence on all counts and placed Line on concurrent terms of probation. The court ordered ninety days of confinement in the county jail as a condition of probation on the felony conviction for theft of a firearm. Before ordering probation on all counts, the court made the following remarks at Line's May 3, 1994 sentencing hearing:

> I'm going to assume that you're telling me the truth [regarding the disappearance of a stolen handgun], Eugene. If you don't and you get involved in something that happens to somebody else, you've got 16 years and six months that you can go to prison if you're brought back before me….
>
> I'll go along with the situation. I've shouted at Eugene in juvenile court trying to impress upon him that you should get straightened around. He actually came up to my chambers after all the hullabaloo settled down and thanked me. So Eugene, I agree that juvenile court doesn't do much good, because it's no better than the supervising agents and they're no better than the chief director, doomed to failure. I'm going to give you one last chance. I want you to understand something right now. This is not juvenile court ….
>
> ….

> And the people that you're going to be dealing with over through the Department of Probation and Parole, if they don't like what you're doing, they're going to throw you in the slammer for up to three days at a crack and bring you back before me and ask for a review, and I can throw you in jail up to a year as a condition of probation or if they revoke and have you come back here, they're going to give me a list of all the things you did wrong and I'll say probation didn't work. You've had jail time and that hasn't done anything. The only place that I can send you is one of the places that I visited last Friday, and that's got fence or wire around it, barbwire fence and chain link fence and motion sensors and video cameras and your life is pretty well taken care of, because they'll tell you what time to get up, what time to dress, what time to go to breakfast, what time to go to dinner and what time to go to bed and they do that seven days a week, and that was just one of the nicer places. You can go to the place that has the 20-foot walls and they really tell you where to go and when to do it.

In April 1997, probation on the misdemeanors was extended because Line had failed to pay the full amount of restitution and court costs that had been ordered as a condition. His probation on the two misdemeanors was thereafter revoked and he was returned to court for sentencing on the two offenses. The revocation order and summary are not in the record on appeal. It appears, however, that in April 1997, Line was serving a six-month jail confinement as a condition of probation for another offense, unrelated to the 1994 convictions. The new offense "was charged as a felony battery" and involved "a disagreement with his girlfriend in which he slapped her and admitted to it." In his motion for re-sentencing, Line's postconviction counsel informed the court that probation on the two misdemeanors had been revoked on the basis of an incident that occurred during his incarceration in April 1997. Line "found some marijuana in a baggie behind some books in the jail library. He put the baggie in his sock and took it back to his cell, where it was discovered."

At sentencing, the State recommended that Line be ordered to pay the remaining court costs and that he be sentenced to two consecutive terms of six

months in the county jail. Defense counsel argued for "three months and three months, for a total of six months" in the county jail. Line, himself, did not comment. The court imposed consecutive six-month terms, remarking as follows:

> Well, probation has been tried in these matters and probation has now been revoked and our court said that you can't put a person back on probation for the same charges for which he was placed on probation and now had his probation revoked. So that's no longer a viable alternative. Even if I had to consider it as a viable alternative and it was, I would have to say that it has been tried and been unsuccessful.
>
> Apparently they are holding out enough of an incentive to give you some impression of the act holding over your head.
>
> I am acquainted with Eugene. We go back a long ways. I tried to warn him a long time ago that he was going down the wrong path; and he probably did what I would have done at his age, what do you know about it attitude. We all go through it. Some of us are smart enough to learn from our mistakes and some of us aren't.
>
> I think Eugene that the recommendation by the State is proper under the circumstances as they exist.
>
> I am going to direct as to each count that you be committed to the county jail for a period of six months to run consecutive, one to the other.

Line moved for re-sentencing on the two misdemeanors, which was denied. He appeals the judgment of conviction which imposed the six-month consecutive sentences after revocation and the order denying re-sentencing.

ANALYSIS

Appellate courts in Wisconsin adhere to a strong policy against interference with the discretion of a trial court in passing sentence. In reviewing a sentence to determine whether discretion has been properly exercised, "'the court will start with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the

sentence complained of.'" ***State v. Macemon***, 113 Wis.2d 662, 670, 335 N.W.2d 402, 407 (1983) (quoted source omitted). A trial court exceeds its discretion "only where the sentence 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, 461 (1975).

Line argues that the trial court erroneously exercised its discretion because it failed to state, on the record, the factors influencing its decision.[2] More specifically, Line points to the absence of "any evidence that the court considered the required ***Setagord*** factors." In ***State v. Setagord***, 211 Wis.2d 397, 416, 565 N.W.2d 506, 514 (1997), the supreme court stated that a sentence should "represent the minimum amount of custody consistent with" the "primary" sentencing factors, which are:

> … the gravity and nature of the offense, including the effect on the victim, the character of the offender, including his or her rehabilitative needs and the interests of deterrence, and the need to protect the public.

Line implies that the trial court's failure to more fully link its sentencing rationale to these factors is fatal, and thus, we must remand for re-sentencing. We disagree.

In particular, we reject the implication that we must set aside as erroneous any sentence which is imposed without a complete exposition of the "primary" sentencing factors noted in ***Setagord***. In ***McCleary v. State,*** 49 Wis.2d 263, 273-82, 182 N.W.2d 512, 517-22 (1971), the Wisconsin Supreme Court

[2] In support of this argument, Line cites ***State v. Larsen***, 141 Wis.2d 412, 428, 415 N.W.2d 535, 542 (Ct. App. 1987), where we stated that "[a]n abuse of discretion *might* be found" (emphasis supplied) if a trial court fails to state the material factors that influenced the sentence.

discussed at length both the duty of a sentencing court to set forth in the record a thorough and complete rationale for the sentence imposed, as well as the standards for appellate review of a trial court's sentencing discretion. ***Id.*** The court concluded that "a statement by the trial judge detailing his reasons for selecting the particular sentence imposed" is "requisite to a prima facie valid sentence." ***Id***. at 281, 182 N.W.2d at 521. However, where an "express delineation" of sentencing factors is absent from the sentencing transcript, an appellate court:

> will not … set aside a sentence for that reason; rather, we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained. It is not only our duty not to interfere with the discretion of the trial judge, but it is, in addition, our duty to affirm the sentence on appeal if from the facts of record it is sustainable as a proper discretionary act.

Id. at 282, 182 N.W.2d at 522.

Our review of the record convinces us that the facts before the trial court support the trial court's "choice of sentence." *See* ***id.*** First, we conclude that when a defendant is sentenced following the revocation of his or her probation, it is appropriate for us to consider the trial court's remarks both at the time probation was ordered and when the post-revocation sentence was imposed, especially when the same circuit judge presides at both proceedings. Here, it is apparent that when the trial court first withheld sentence and ordered terms of probation, it considered many of the ***Setagord*** factors. The court demonstrated its awareness of Line's criminal and juvenile record, the gravity of the four offenses for which Line was then being sentenced (involving a potential prison sentence of sixteen and one-half years), his lack of positive response to past rehabilitative efforts, and the need for swift and harsh consequences to serve as a deterrent and protect the public if community supervision proved ineffective.

The trial court's remarks at the initial sentencing in 1994 thus illuminate its more summary remarks in 1997 when it imposed the two consecutive jail sentences after probation had been revoked. At the second proceeding, the court noted simply that it was acquainted with Eugene for a long time, that it had warned him of the consequences of continued misbehavior and that the State's recommended sentence was "proper under the circumstances as they exist." The circumstances in 1997 included the following: Line's probation had been revoked for an infraction involving a controlled substance; he had not fully paid his restitution and court obligations, despite having had three years in which to do so; and, in addition to the four offenses for which he was given probation in 1994, he had now been convicted of an additional offense, one that was assaultive in nature. The sentences imposed were for two separate and unrelated offenses, one involving the theft of checks from an automobile and the other an assault where Line and two others battered another individual in the face and testicles and threatened to kill him.

We cannot conclude that the trial court erred in imposing consecutive jail sentences, each of which was two-thirds of the maximum incarceration allowed, for a repeat offender who had failed on probation, under the facts and circumstances shown in the record to have existed at the time of sentencing. In short, the sentences are not shocking or excessive, and Line has not pointed to any unreasonable or unjustified basis relied on by the trial court in imposing them. While its remarks at the sentencing after revocation were terse, the court's comments at the initial sentencing, together with other matters shown in the record, demonstrate that the sentences imposed are sustainable as a discretionary act.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.