COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2313-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD J. CLARK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

¶1 FINE, J. Gerald J. Clark appeals from a judgment, entered on his guilty plea, convicting him of battery as a habitual criminal, *see* WIS. STAT. §§ 940.19(1) & 939.62, and from the trial court's order denying his motion for postconviction relief. The trial court sentenced him to the Wisconsin State Prisons for a term of incarceration not to exceed three years, "consecutive to anything

else." Clark claims that the trial court erroneously exercised its sentencing discretion. We disagree and affirm.

¶2 Sentencing is vested in the trial court's discretion, and a defendant who challenges a sentence has the burden to show that it was unreasonable; it is presumed that the trial court acted reasonably. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912, 925 (1998). The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for the public's protection. *See* ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559, 561 (1980). If the trial court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless 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, 461 (1975). Additionally, WIS. STAT. § 973.15(2) permits a sentencing court to "impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously."

¶3 Clark's battery conviction arises out of a fight he had with the mother of his young child. The woman was seven months pregnant at the time. The criminal complaint alleged that Clark was on probation, and that, as a condition of probation, he had been ordered not to go to the woman's house. The complaint charged that when she reminded him of that, he tore up the probation papers, punched her in the stomach, grabbed her by her neck, and started to choke her. She was able to break free from Clark's hold, and was saved from further injury when police officers arrived.

¶4 Clark denied that he struck the woman in the stomach, but pled guilty nevertheless. The victim told the trial court that Clark walked into her house and they "got to arguing, [and] he kicked me in my stomach and he started choking me." She also told the trial court that Clark had hit her "like two or three times" in the past.

¶5 The defense lawyer explained to the trial court that Clark had pled guilty because "he is sorry for his actions." She asserted that Clark got angry when the victim told Clark that he couldn't see their two-year-old son, and admitted that he "did slap her, hit her," but claimed it was "because he was upset." Clark's lawyer noted that Clark's probation had been revoked, and that "he is facing 18 months." The lawyer asked the trial court "to consider that the time run concurrent with that time, based on the fact that it is the same victim."[1]

¶6 Clark told the trial court that although he "did hit her," he did not hit her in the stomach. He also contended that he had previously prevented another of the victim's boyfriends "from jumping on her." When the trial court asked the victim whether it was true that Clark had not hit her in the stomach, she replied: "No, that's not true."

¶7 Clark's mother was also in court, and told the trial court that although Clark might have "slapped 'em" he "never did me wrong, or sass or curse me every [*sic* any?] day of his life," and that "he always [has] a place to come stay with me."

[1] This contention is neither logically nor legally sound.

¶8 The trial court noted that Clark had two prior battery convictions, and a conviction for disorderly conduct, and that Clark had torn the probation papers. All this indicated to the trial court that "whether it was the level of the beating that she described or whether you hit her, as you describe, the point is that you react, you don't respond and when things don't go the way you want to, you take them into your own hand ... and being violent is the way you've been responding." The trial court then explained that it believed the victim's version of the battery, that Clark's prior experience with probation supervision "hasn't worked," and that it was imposing the three-year consecutive sentence "to deter" Clark and to "punish" him, explaining that any other sentence "would unduly depreciate the seriousness of the offense."

¶9 The thrust of Clark's argument on appeal is, as expressed in his brief, that the trial court "ignored a wealth of mitigating factors that constitute both primary and secondary factors and it omitted to expressly reason on the record the particular weight assigned to each factor." We disagree. The trial court believed the victim's version of the battery, considered both the good things that Clark's mother had said about him and Clark's expressions of remorse, and concluded that the maximum sentence was required to protect society and the victim from Clark's inability to control his temper and to conform his conduct to the law. Although Clark argues that the trial court gave too much weight to the seriousness of both this crime and his prior record, "[t]he weight to be given each factor is within the discretion of the trial court." ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984). Given the seriousness of Clark's crime, his prior record, and his inability to comply with the rules of probation, which undercut his expressions of courtroom remorse, the trial court's sentence does not "shock public sentiment and violate the judgment of reasonable people concerning

what is right and proper under the circumstances." *See* ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461. There is nothing in the record that remotely suggests that the trial court erroneously exercised its discretion in sentencing Clark to prison for the indeterminate three-year period. For the same reason, Clark's additional argument that the trial court erroneously exercised its discretion in denying his postconviction motion is also without merit.

By the Court.—Judgment and order affirmed.

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