COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1988-CR **Cir. Ct. No. 2003CF5778**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARLTON MARUKI JONES,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Carlton Maruki Jones appeals from a judgment entered after he pled guilty to one count of burglary of a building or dwelling and one count of robbery with use of force, both as a habitual criminal,

contrary to WIS. STAT. §§ 943.10(1)(a), 943.32(1)(a) and 939.62 (2003-04).[1] He also appeals from an order denying his postconviction motion seeking sentence modification. Jones claims the trial court erroneously exercised its sentencing discretion and erred in denying his motion seeking a reduction of the sentence imposed. Because the trial court did not erroneously exercise its discretion when it sentenced Jones, and did not err in denying the postconviction motion, we affirm.

BACKGROUND

¶2 On October 5, 2003, at approximately 3:33 a.m., Jones entered the home of eighty-six-year-old Marian R. Brownell, who was asleep in her bed. Brownell awoke to see Jones standing over her. She started screaming. Jones covered her mouth and nose with his hand and told her that if she screamed again, he would kill her. He then demanded money. Brownell gave Jones her wallet, which contained approximately $60 to $80. Jones then fled. He was apprehended a short time later, only after fleeing from the police.

¶3 Jones told police he had been at a party and drank heavily. He stated he had no memory of leaving the party and driving to Brownell's home. He did remember entering the home, placing his hand over Brownell's mouth so she would not scream, and taking her money. Jones was charged as noted above and pled guilty. The State recommended substantial prison time, but did not specify a length of confinement or whether the sentences should be concurrent or consecutive. Jones conceded that prison time was warranted given his past record

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

and the circumstances of the current crimes. He asked for six years' confinement. The presentence investigation report recommended a sentence of five years' confinement and two years' supervision on the burglary and five years' confinement and two years' supervision on the robbery, to be served consecutively.

¶4 The trial court imposed a sentence of twelve years' confinement/five years' supervision on the burglary charge and fifteen years' confinement/five years' supervision on the robbery charge, to be served concurrently. Judgment was entered. Jones filed a postconviction motion seeking reduction in his sentence on the grounds that it was excessive. The trial court denied the motion. Jones now appeals.

DISCUSSION

A. Sentencing Discretion.

¶5 Jones contends the trial court erroneously exercised its sentencing discretion. Specifically, he argues that mitigating factors warranted a shorter sentence, the trial court did not adequately explain why it departed from the recommendation of the presentence investigation report, the trial court neglected treatment as a sentencing objective, and the trial court failed to provide a reasonable explanation for imposing "near maximum" sentences. Based on our review of this case, we cannot conclude that the trial court erroneously exercised its sentencing discretion.

¶6 In reviewing sentencing decisions, this court's review is limited. We will not reverse a sentence absent an erroneous exercise of discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). We

"presume that the trial court acted reasonably unless the defendant shows some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Fuerst***, 181 Wis. 2d 903, 909-10, 512 N.W.2d 243 (Ct. App. 1994). Further, this court cannot find an erroneous exercise of discretion even if we would have imposed a sentence different than did the trial court. ***Cunningham v. State***, 76 Wis. 2d 277, 281, 251 N.W.2d 65 (1977).

¶7 In imposing a sentence, the trial court must consider three primary factors: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. ***Thompson***, 172 Wis. 2d at 264. The trial court need discuss only the relevant factors in each case, ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993), and the weight given to each of the relevant factors is within the trial court's discretion, ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). After considering all the relevant factors, the sentence may be based on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). Finally, there is a strong public policy against interfering with the trial court's discretion in determining sentences. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984).

¶8 Jones refers to the recent pronouncement from our supreme court, ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, in making several of his arguments that the trial court erroneously exercised its discretion. ***Gallion***, however, was decided after Jones was sentenced, and applies only to "future cases." ***Id.*** at ¶¶8, 76. ("In sum, we reaffirm the standards of ***McCleary*** [***v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971),] and require the application to

be stated on the record for future cases.")[2] Thus, ***Gallion*** does not apply to Jones's case.

¶9 In reviewing this case, it is clear that the trial court properly considered the three primary factors. The trial court addressed the gravity of the offense, noting that it was "an outrageous offense. This was a home invasion, an assault on an elderly woman, and it had to be terrifying circumstances." The trial court addressed Jones's character, noting his prior criminal record, his willingness to accept responsibility, and the strong positive comments of Jones's employer. Finally, the trial court considered the need to protect the public, and the community's right to be free of the type of risk that Jones presents. The trial court found that the severity of the offenses, in light of the prior record of repeated offenses over a significant period of time and the need to protect the public outweighed the positive aspects of Jones's character. Clearly, the trial court considered the three primary factors and concluded that the gravity of the offense and need to protect the public were entitled to more weight.

¶10 Thus, Jones's claim that the trial court did not give sufficient weight to mitigating factors is unpersuasive. The trial court analyzed the relevant factors and reached a reasonable determination. Likewise, we are not persuaded by Jones's claim that the trial court failed to consider treatment as a sentencing objective. In imposing sentence, the trial court noted that Jones had been to prison and failed to take the steps necessary or seek appropriate treatment to avoid

[2] We recently noted that although ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 "revitalizes sentencing jurisprudence, it does not make any momentous changes." ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. The record reflects that Jones was sentenced on February 10, 2004, two months before ***Gallion*** was decided.

committing crimes. The State pointed out that at the time Jones committed the crime in the instant case, he had only been released from prison a year earlier after serving a four-year sentence for taking the purse of a sixty-six-year-old woman. Given these facts, it is not surprising that the trial court afforded greater weight to severity of the offense and need to protect the public. Further, although the trial court may consider a defendant's treatment needs in imposing a sentence, *see* ***State v. Smith***, 207 Wis. 2d 258, 281 n.14, 558 N.W.2d 379 (1997), it is not required to specifically address this factor on the record as long as the primary sentencing factors are addressed, *see* ***Echols***, 175 Wis. 2d at 683.

¶11 Jones also argues that the trial court failed to explain the need to impose "near maximum" sentences. We are not persuaded. The sentencing transcript provides the reason behind the trial court's decision. Jones had a prior record of repeated offenses over a significant period of time. He had been to prison before and failed to reform his actions. The gravity of this offense, coming together with his prior record, demonstrated that leniency was not appropriate in sentencing. The trial court's explanation, although not lengthy, does not constitute an erroneous exercise of discretion. The trial court offered a reasonable explanation for the sentence imposed. Further, the sentences were imposed *concurrently*, rather than consecutively. Thus, the *maximum* potential punishment that Jones faced was thirty-nine and one-half years. His sentence was nowhere near that.

¶12 Finally, we reject Jones's contention that the trial court should have offered a specific explanation for departing from the presentence investigation report's sentencing recommendations. As the trial court explained in its postconviction order, it did not ignore "the presentence writer's recommendation and dismiss[] drug and alcohol treatment as a sentencing objective. I considered

the presentence report but was not required to adopt the presentence writer's sentencing recommendation. ***State v. Daniels***, 117 Wis. 2d 9[, 343 N.W.2d 411] (Ct. App. 1993)." The trial court's explanation is sufficient. The law is clear that the court is not bound by any of the sentencing recommendations, either of defense counsel or of the presentence investigation report author, as long as the court properly explained its sentence. *See, e.g.*, ***State v. Johnson***, 158 Wis. 2d 458, 464-65, 463 N.W.2d 352 (Ct. App. 1990). Here, the trial court explained the reason for the sentence imposed and therefore did not erroneously exercise its discretion by failing to impose the recommendation of the presentence investigation report author.[3] Jones has not presented this court with any justifiable reason to warrant a conclusion that the trial court erroneously exercised its discretion when it imposed sentence. The trial court addressed each of the primary factors and assessed weight to the factors it found to be the most compelling. We cannot conclude that the sentence imposed was a result of an erroneous exercise of discretion.

B. Postconviction Motion.

¶13 Jones also contends that the trial court erred in denying his postconviction motion, which alleged an erroneous exercise of discretion and argued that the sentence imposed was excessive. We reject Jones's contention.

[3] Jones relies on ***State v. Hall***, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41, for the proposition that the trial court must explain why it departs from the recommendations of the presentence investigation report. ***Hall*** is distinguishable from the instant case because the court in ***Hall*** deviated substantially from the presentence investigation report author's recommendation by nearly 200 years. In the instant case, the departure from the recommendation was only five years, and the trial court adequately explained its reason for imposing the lengthy sentence.

¶14 We have already concluded that the trial court did not erroneously exercise its discretion when it imposed sentence. Accordingly, we address only whether the sentence imposed was excessive. A sentence will be deemed harsh and excessive only when the sentence is so excessive, unusual and disproportionate to the offense committed as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Generally, a sentence less than the maximum potential sentence will not be considered excessive or unduly harsh. *See* ***id.***

¶15 Jones fails to establish that the sentence imposed here was shocking to public sentiment. Although Jones accepted responsibility for his crimes and appeared sincerely remorseful, these actions do not alter the severity of his crime or the impact the victim suffered when an intruder startled her in her home in the middle of the night and threatened to kill her. The facts of this crime, together with Jones's prior criminal record, lead to the conclusion that the sentence imposed was not excessive. Moreover, the trial court did not impose the maximum sentences for these crimes, which were eighteen and one-half years on the burglary count and twenty-one years on the robbery count. Accordingly, we conclude that the trial court did not err in denying the postconviction motion challenging the sentence.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.