COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2261-CR **Cir. Ct. No. 2002CF2988**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY HARMON,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Timothy Harmon pled no contest to second-degree reckless homicide, while armed, arising from the beating death, with a wooden post, of his mother's boyfriend. Harmon claimed no memory of the incident because he was intoxicated at the time. The court sentenced Harmon to fifteen

years of imprisonment, comprised of ten years of initial confinement and five years of extended supervision. On appeal, Harmon contends that the sentence is unduly harsh and an erroneous exercise of sentencing discretion. We disagree, and accordingly, we affirm.

¶2 Sentencing is committed to the discretion of the circuit court and our review is limited to determining whether the circuit court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971).[1] This exercise of discretion contemplates a process of reasoning based on facts that are of record or that are reasonably inferred from the record and a conclusion based on a logical rationale founded upon proper legal standards. ***Id.*** at 277. A strong public policy exists against interfering with the circuit court's discretion in determining sentences and the circuit court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). To obtain relief on appeal, the defendant has the burden to "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992).

¶3 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the

[1] In ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, the supreme court reaffirmed the sentencing standards established in ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). Harmon was sentenced before ***Gallion*** was decided, and the supreme court in ***Gallion***, stated that it applied only to "future cases." ***Gallion***, 270 Wis. 2d 535, ¶¶8, 76. In any event, the ***Gallion*** court did "not make any momentous changes" to Wisconsin sentencing jurisprudence. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. Therefore, we examine Harmon's sentence against ***McCleary*** and its progeny.

public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court may also consider the following factors:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Id. at 623-24 (internal quotations and citation omitted). The circuit court need discuss only the relevant factors in each case. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The weight given to each of the relevant factors is within the court's discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). After consideration of all 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).

¶4 Finally, the length of the sentence imposed by the court will not be disturbed on appeal unless 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 (1975).

¶5 Harmon describes the sentence as "unduly harsh … in light of the mitigating circumstances." Harmon points to his "extensive mental health issues" and "remorsefulness." He contends that his "lack of [a] violent prior record" suggests that this incident was "an isolated event." Finally, he notes that programs such as the Challenge Incarceration Program and Earned Release Program are not

available to him, and therefore, he cannot attempt to "shorten" his confinement time.

¶6 The sentencing transcript reveals that the court considered the gravity of the offense. Because the victim had been killed, the court described the offense as "extremely serious." The court further noted that "[t]his is kind of a scary situation" because there was "not … really an explanation for what happened." The court noted that Harmon "walk[ed] into a room, [and] beat a man to death with very little explanation." The court noted that the possible reason for Harmon's actions, a disagreement earlier in the day in which the victim had asked Harmon to leave, was "clearly so far afield that there's not even a logical connection that can be made to that."

¶7 The court considered Harmon's character. The court acknowledged that Harmon had "some mental health issues that may have played some role" in the crime and that "alcohol use [also] played some role." The court expressed "concern[]" because Harmon appeared to be "totally unpredictable" and he had "just snapped and went off the deep end and beat a man to death without any rhyme or reason to it, [and without] any real explanation." The court noted that there had been "long discussions" about whether Harmon could argue that he was not guilty by reason of mental disease or defect and that Harmon's problems "[did] not arise [sic] to [that] level." The court credited Harmon for taking responsibility for his conduct by pleading no contest. The court also noted that Harmon was taking "medication, and things are going better" because of the medication.

¶8 The court considered the need to protect the public. Describing the crime as an "unpredictable, violent outburst that caused somebody to lose their life for no real logical explanation … [or] reason," the court stated that it needed to "make sure" that a similar incident "doesn't happen again." However, because of the positive factors identified earlier, the court noted that the maximum sentence was not appropriate. Rather, the court stated that "a lengthy period of incarceration is appropriate right now to protect society and to make sure that you're not in a position to do this type of thing again. And hopefully by the time you get out, you'll be of a mindset that this won't happen again."

¶9 The record shows that the sentencing court addressed the relevant factors, including those matters that Harmon points to on appeal – his mental health problems, his remorse, and his lack of a violent background. While Harmon may disagree with the relative weight assigned to the various factors, "[t]he weight to be given each factor is within the discretion of the [circuit] court." ***Wickstrom***, 118 Wis. 2d at 355. The court did not erroneously exercise sentencing discretion.[2]

¶10 We also conclude that the sentence is not unduly harsh or excessive. Harmon faced a potential maximum sentence of twenty years, with a maximum fifteen years of initial confinement. The circuit court expressly rejected the maximum sentence because of several positive factors attributed to Harmon. However, in light of the nature and circumstances of the crime, the sentence imposed is not "so excessive and unusual and so disproportionate to the offense

[2] Harmon's ineligibility for the Challenge Incarceration Program and Earned Release Program does not transform the sentencing into an erroneous exercise of discretion.

committed as to 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. Therefore, the sentence is not unduly harsh and excessive.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.(2003-04).