COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0611-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROMELL LAMPLEY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Romell Lampley appeals from the judgments of conviction for first-degree reckless homicide and first-degree recklessly endangering safety, and from the trial court order denying his motion for postconviction relief. Lampley does not challenge the convictions; he seeks

resentencing. He argues that the trial court erred in denying his postconviction motion to vacate his sentence and hold a new sentencing hearing.

¶2 Lampley contends: (1) his sentence "rests squarely on conclusory findings that cannot be drawn from the record, are wholly inaccurate, and were made in violation of [his] right to notice of the issues to be determined at sentencing"; (2) the sentencing court's "explicit condemnation of [him] based on the court's perception that he 'doesn't acknowledge' responsibility for each and every element of the offense violated [his] right not to incriminate himself"; (3) the court's "spontaneous, race[-]conscious commentary created an appearance of impropriety and suggests that a constitutionally impermissible factor infects this sentence"; and (4) "even absent" this "catalogue of defects, [his] sentence is gravely excessive." We reject his contentions and affirm.

I. BACKGROUND

¶3 For the most part, the factual background is undisputed. On August 22, 1998, Lampley was outside the home of D'Andria Dumas, the mother of his infant daughter, when he became involved in an argument with members of D'Andria's family, including her stepfather, Michael Wilbern. As summarized in the trial court's decision denying Lampley's motion for postconviction relief, the trial testimony established that Lampley

> backed up his Lincoln Continental and then drove it forward over the curb towards Wilbern and his wife, Dana Wilbern. She was pushed out of the way by Mr. Wilbern, and [Lampley] then struck Michael Wilbern with his vehicle. Mr. Wilbern rolled underneath the car and was dragged by [Lampley's] vehicle across the front yard onto the sidewalk. [Lampley] then drove immediately away from the scene. Mr. Wilbern died from the injuries he sustained.

Lampley turned himself in a few hours later. While remorseful, he maintained that at least certain aspects of the incident were accidental or unintentional. The jury, however, found him guilty of first-degree recklessly endangering the safety of Dana Wilbern, and of first-degree reckless homicide of Michael Wilbern.

¶4 The incident brought devastating tragedy to two families. At sentencing, Mr. Wilbern's widow and one of Mr. Wilbern's brothers extolled his virtues, described the devastating effects his death had on their family, and implored the court to incarcerate Lampley for a substantial period. The prosecutor recommended "a very substantial, meaningful period of prison incarceration." The presentence investigation report also recommended incarceration, to "serve the public by protecting it from further assaultive behaviors" and to "stress to [Lampley] the seriousness of his behaviors, which resulted in the death of one of the victims."

¶5 At the time of the incident, Lampley was eighteen years old, and was employed on a full-time basis. He was supporting his daughter and planning to attend college. He had one conviction for operating a vehicle without the owner's consent, for which he was on probation at the time of the instant offenses.[1] Lampley, his lawyer, his mother, and two family friends addressed the court at the sentencing hearing. In addition, over fifty friends, relatives, business people, teachers, religious figures, and community leaders submitted letters describing the good qualities of Lampley and his family, and urging leniency in sentencing.[2]

[1] According to the presentence investigation report, Lampley, just a few weeks after his seventeenth birthday, "saw [a] car running with the keys in it[,] … got into [the] vehicle and drove it around the block[,] stopping when he hit another vehicle."

[2] In addition, two letters were signed by dozens of co-workers and other individuals.

¶6 At sentencing, the court first noted that it had reviewed the presentence report and the many letters on Lampley's behalf. The court acknowledged the three primary sentencing factors, stating that it must consider "the serious nature of this offense, the interest of the community at large, … and the particular characteristics of Mr. Lampley." The court noted that both the Wilbern and Lampley families had "done much in the community" and had "very strong, very religious, very upstanding background[s]," and it emphasized some of the wonderful qualities of both Mr. Wilbern and Lampley.

¶7 The court then commented on some of the factors that it apparently considered particularly significant. Because many of Lampley's arguments on appeal relate to these comments, we present them at length for a more complete consideration of their context:

> This didn't have to happen. [Lampley] had many chances not to let this happen, and he was the only one that made this happen, and that's very sad. That's very hard to accept.
>
> This was not a situation that he did not have control of. He should have had control of it. He could have had control of it, and he has to suffer the consequences of not exerting those controls or having the character to do so under these pressures.
>
> He drove to the Wilbern home that day … for a perfectly acceptable reason, but when he got there, he was confronted, there was yelling, there was an unfortunate encounter.
>
> But what happened to Romell Lampley at that point was he got angry. He got terribly angry. I don't believe from the evidence that I heard that he was acting out of fear. I believe he was acting out of anger, and that anger can be reproduced in other situations, not just this one.
>
> The victim and Mrs. Wilbern had walked away from the car. They had gone up to their house, close to their house. Mr. Lampley was parked in the street. He drove his car onto the lawn, and there was no reason to do that….

> He had been begged to get out of there. Please, just leave. Please, just leave. Over and over. There was no reason to drive twenty feet out of his way and strike a human being, absolutely no reason. There was no reason to drag that human being the twenty feet back to the street and continue to drive away.
>
> I don't think there's a person in this courtroom that could treat a dog like that. If you accidentally drove down the road and there was a dog there and you hit it, you would feel terrible. You would stop. You would want to help that animal. You'd comfort the owner.
>
> But Mr. Wilbern didn't even have that consideration given to him that day by Mr. Lampley, and I have to consider what that says about … this portion of his character.
>
> And as much as everyone in his family loves him and supports him and I hope will continue to do so, this is part of who he is. He did this this day.
>
> And even in the presentence … he states that Mr. Wilbern was hit by the car he was driving. He doesn't acknowledge that he was controlling the steering wheel, he was controlling the gas pedal, he was controlling the brake, he had control of that vehicle, and recklessly, with … utter disregard for Mr. Wilbern's safety or Mrs. Wilbern's safety, he used that car as a weapon of his anger ….
>
> This is part of a person, a part that could be stimulated to act in the same way under other conditions which would in[cite] his anger.
>
> There's much concern … expressed about his age, his future, and I have the same concern about his age and his future. There's no benefit or joy that comes to me personally when I have to send a young man to prison. I find it a tragedy for the entire community, but it has nothing to do with his age at this point, it has nothing to do with the fact that he's African-American.
>
> If a forty-year-old Polish gentleman [were] here having done the same thing, I would have … to send him to prison.

¶8 Lampley faced a maximum of forty-five years in prison. For the reckless homicide, the court sentenced him to thirty years. For the recklessly endangering safety, the court imposed a five-year sentence and a six-year

probation, both consecutive to the thirty-year prison term; the court stayed the five-year sentence.

¶9 Lampley moved to vacate his sentence on numerous grounds. He also requested a *de novo* sentencing hearing for the purpose of presenting expert testimony regarding the accuracy of the court's assessment of his character and likelihood of engaging in further violence. In support of his request, Lampley offered a report from Dr. Kenneth Smail stating, in part, that the record was "insufficient for a risk assessment by scientific standards," and that there was "very little information that addressed any pattern of violence outside of [the] emotionally charged conflict [Lampley] had with the victims." The court denied the motion without holding a hearing.

¶10 On appeal, Lampley reiterates some of the arguments he presented in his postconviction motion and offers numerous theories in support of his request for resentencing. We conclude, however, that none is persuasive.

II. DISCUSSION

¶11 "Sentencing is a discretionary judicial act and appellate review is limited to determining whether there was an [erroneous exercise] of discretion." ***State v. Borrell***, 167 Wis. 2d 749, 781, 482 N.W.2d 883 (1992). When establishing a sentence, a trial court "should consider all relevant and available information." ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). When exercising sentencing discretion, a court must consider three primary factors: "(1) the gravity and nature of the offense, including the effect on the victim, (2) the character and rehabilitative needs of the offender, and (3) the need to protect the public." ***Id.*** The supreme court has also identified additional factors a sentencing court may consider:

> (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, repent[a]nce and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Harris v. State, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977). "Imposition of a sentence may be based on one or more of the three primary factors after all relevant factors have been considered." ***Spears***, 227 Wis. 2d at 507-08. "[T]he weight to be given any of the factors the circuit court considers in sentencing is fully within its discretion." ***Id.*** at 511. The sentencing court, however, "is required to articulate the basis for the sentence imposed on the facts of record," and "[t]he basis must have 'a logical rationale founded upon proper legal standards.'" ***Borrell***, 167 Wis. 2d at 782 (quoted source omitted).

¶12 A defendant challenging his or her sentence has the burden of establishing that the court erroneously exercised discretion by basing the sentence on some unreasonable or unjustifiable grounds. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We note, however, that our analysis begins with the presumption that the court's exercise of discretion was reasonable, and we do not interfere with a sentencing decision absent an erroneous exercise of discretion. ***Id.*** at 418-19. Additionally, we note that a sentence is impermissibly harsh only when 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 (1975).

¶13 Lampley first argues that his sentence "rests squarely on conclusory findings that cannot be drawn from the record, are wholly inaccurate, and were made in violation of [his] right to notice of the issues to be determined at sentencing." Lampley's primary premise is that the court erred in basing his sentence on its assessment of his character and his potential for future violence. He contends that "neither [he] nor the State nor the pre[]sentence report brought forth a single jot of information that suggested this act of violence was anything other than an isolated one; the State never hinted that this offense was indicative of [his] character."

¶14 Moreover, Lampley argues that because he had no notice that whether he had a potentially violent character would be at issue, the court's consideration of that factor was unfair. He says that had he known that the court was going to weigh his potentially violent character, "he would have brought forth yet more evidence of his character and history of conduct." Denying Lampley's postconviction motion, the court commented:

> The victim *died because of* the defendant's actions. This was wholly borne out by the testimony. The court properly considered his inability to control his anger and his actions in this case in determining that the defendant presented a risk to the community. Defendant's characterization of the court's opinions as *factual findings* is rejected, as well as his conclusion that the court therefore relied on inaccurate factual information.
>
> Any contention that the defendant was not put "on notice" of the type of danger he presents to the community is also rejected; the act itself was notice enough.

We agree.

¶15 It is inconceivable that Lampley did not understand the obvious concern any court would have regarding the potential violence of one convicted of crimes like these. Even some of the letters on his behalf addressed this subject.

For example, a member of the board of directors of a high school Lampley attended commented at length on Lampley's character and wrote that, to his knowledge, Lampley "was never confrontational with instructors…, nor has he ever displayed violent tendencies." Similarly, one of Lampley's former teachers wrote that "[t]here was never any back talk, aggressive looks or action from [him] even though [she] had to remind him often about incomplete assignments and extra socializing during class."

¶16 Additionally, the defense repeatedly emphasized that the incident was an isolated one that was not indicative of Lampley's character or potential for violence. Defense counsel argued:

> I believe that there's an opportunity here for consecutive probation. Obviously, we understand there's going to be incarceration, but there's an opportunity for consecutive probation to assure the community that this was not the action of Romell Lampley, it just can't be, based on the number of people that know him, and that's why it was not hard to ask these people, they wanted to do more.
>
> ….
>
> This was a young man who was working hard, helping others. This wasn't a young man who had turned to violence.

Thus we conclude that Lampley had notice of the issue of his character and potential for violence and, indeed, that the defense addressed these very concerns.[3]

[3] Additionally, we conclude that the court did not err in denying Lampley's request for a hearing to present "risk assessment" evidence based on Dr. Smail's report. Denying Lampley's motion, the court commented that it "makes risk assessments every time it sentences an individual without deference to expert scientific analysis" and that, relying on the evidence in this case, it determined that Lampley "presented a risk to the community based on his particular actions." Lampley offers no authority to suggest that the court was not entitled to reach its conclusion on this basis. He points to nothing in Dr. Smail's report that is inconsistent with the court's determination, or that would constitute a new factor requiring resentencing.

¶17 Lampley next argues that "[t]he trial court's explicit condemnation of [him] based on the court's perception that he 'doesn't acknowledge' responsibility for each and every element of the offense violated [his] constitutional right not to incriminate himself." He focuses on the court's comment that he "doesn't acknowledge that he was controlling the steering wheel, he was controlling the gas pedal, he was controlling the brake, he had control of that vehicle, and recklessly, with … utter disregard for Mr. Wilbern's safety or Mrs. Wilbern's safety, he used that car as a weapon of his anger." Lampley maintains that the court "aggravated the sentence on the finding that [he] 'doesn't acknowledge' each of the elements of the offense," thus punishing him for "his perceived refusal to confess."

¶18 A court may not penalize a defendant for refusing to incriminate himself or herself. ***Scales v. State***, 64 Wis. 2d 485, 496, 219 N.W.2d 286 (1974). In sentencing, however, a court may consider a defendant's refusal to admit guilt. ***State v. Baldwin***, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981). In its postconviction decision, the court explained that it had commented on Lampley's refusal to acknowledge "that he was in control of the vehicle at the time of the incident" in order to respond to Lampley's supporters who had indicated that they believed the incident was an accident. We see nothing improper in the court's comments.

¶19 Lampley next argues that the court's "spontaneous, race[-]conscious commentary created an appearance of impropriety and suggests that a constitutionally impermissible factor infects this sentence." Lampley points to the court's comment that the sentence "has nothing to do with the fact that he's African-American," and that prison also would have been appropriate "[i]f a forty-

year-old Polish gentleman [were] here having done the same thing." Again, we reject Lampley's claim.

¶20 In its postconviction decision, the court explained that its comments were in response to "numerous letters which refer to the defendant's race and request that the court give consideration to this very issue in sentencing the defendant." While Lampley disputes that there were "'numerous' letters even referencing [his] race," he acknowledges six letters that, he says, "simply describe [his] value to the African-American community and his history as a good role model."

¶21 A letter from Lampley's aunt asked that the court "not see him as the stereo[]typical African[-]American youth that has plagued the African[-]American community, the last decade." A letter from an advisory board member of the Pieper Boys & Girls Club asked the court to consider that Lampley "has been a role model for young blacks in the community." A letter from a community outreach coordinator requested the court's "compassion and leniency" in sentencing Lampley, claiming that he "set the tone for young African[-]American employees" at Maximus. A letter from a program coordinator for Milwaukee's public school system implored the court to "[g]ive [Lampley] a chance to experience a positive life and be a contributing African[-]American male to our society." A letter from a married couple who "had the opportunity to know … Lampley through his mother" asked for leniency, stating: "In a time when more and more of our young African[-]American males are making choices, sometimes bad choices that interrupt or destroy their lives as well as others[']], we must consider the good things that can result from a second chance." A letter from a member of a high school board of directors acknowledged that "the court will

decide if there is to be a future for … Lampley, or if he like so many other young African[-]American males [is] to be cast aside forever."

¶22 "Racial stereotypes have no place in judicial proceedings." ***State v. Shillcutt***, 119 Wis. 2d 788, 829, 350 N.W.2d 686 (1984) (Abrahamson, J., dissenting). Here, however, for an understandable reason, the court clarified that race was *not* playing any part in its sentencing decision. We see no error in this declaration.

¶23 Finally, Lampley argues that "even absent the foregoing catalogue of defects, [his] sentence is gravely excessive—this otherwise productive, valuable and law-abiding teenager should not forfeit three and a half decades of his life for an isolated, albeit very serious, offense."[4] He reiterates the many mitigating factors that could have led to a lesser sentence, and he contends that he received a sentence "usually reserved for habitually violent, unemployable, crack-smoking thugs."

¶24 Lampley's sentencing presented what some would view as a classic "tough call"—a young defendant with commendable qualities, from an excellent family, who committed horrendous crimes resulting in the death of an outstanding person. No doubt different courts would have weighed the sentencing factors differently. Some, perhaps, as Lampley implies, would have ordered less incarceration. But others might have ordered more. Here the court ordered thirty-five years and stayed five of those years, but it could have incarcerated Lampley

[4] Lampley's characterization of the sentence is somewhat misleading. Although the presentence report recommended prison on both counts, the court ordered probation and a stayed five-year prison sentence for first-degree recklessly endangering safety. Thus, if Lampley complies with probation, he will not serve the last five years of what he terms a prison sentence of "three and a half decades."

for forty-five. And the fact that Lampley was anything but a "habitually violent, unemployable, crack-smoking thug[]" does not necessarily favor him, at sentencing, in all ways. *See* ***State v. Thompson***, 172 Wis. 2d 257, 267, 493 N.W.2d 729 (Ct. App. 1992) (court did not erroneously exercise discretion by considering defendant's "'laudable background' as an aggravating factor at sentencing").

¶25 The court's sentencing comments, in combination with its postconviction elaboration of its sentencing rationale, establish the court's consideration of the appropriate criteria and "a process of reasoning based on legally relevant factors." *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984) (appellate court has duty to affirm sentencing decision if trial court "engaged in a process of reasoning based on legally relevant factors"). Understandably, the court gave great weight to the death of a good man, and to its devastating impact on his fine family. We conclude that the sentence is not "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." *See* ***Ocanas***, 70 Wis. 2d at 185.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).