COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1699-CR **Cir. Ct. No. 2006CF3023**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES KATRELL JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order for the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

Before Curley, P.J., Wedemeyer[1] and Fine, JJ.

[1] This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. James Katrell Jones appeals from a corrected judgment of conviction for two counts of recklessly endangering safety and for attempting to deliver cocaine. The issues are whether the trial court erroneously exercised its sentencing discretion by failing to explain the reasons for the length of the confinement portion of its sentence, for departing from the parties' sentencing recommendations, for failing to address how the confinement term was the minimum amount of custody necessary to achieve the sentencing considerations ("minimum custody standard"), for declaring Jones ineligible for the Challenge Incarceration and Earned Release Programs because it determined that he did not have a substance abuse problem, and for denying his sentence modification motion. We conclude that the trial court properly exercised its sentencing discretion in all the challenged respects; the fact that it did so differently than Jones had hoped does not constitute a misuse of discretion. Therefore, we affirm.

¶2 Jones pled guilty to two counts of second-degree recklessly endangering safety with the use of a dangerous weapon, in violation of WIS. STAT. §§ 941.30(2) and 939.63, and for attempting to deliver between five and fifteen grams of cocaine, in violation of WIS. STAT. §§ 961.41(1)(cm)2. and 939.32 (2005-06).[2] These convictions arose out of an attempted drug deal with a confidential informant; when the police approached Jones to arrest him, he panicked and fled. The State recommended a six-year sentence, comprised of four- and two-year respective periods of initial confinement and extended supervision; the defense recommended imposing and staying a five-year sentence,

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

comprised of two- and three-year respective periods of initial confinement and extended supervision, in favor of a five-year probationary term. For the reckless endangering convictions, the trial court imposed two eight-year sentences, to run concurrent to each other but consecutive to the sentence he was serving as a result of the revocation of his probation, comprised of four-year periods of initial confinement and extended supervision. For the attempted drug dealing, the trial court imposed a seven-year sentence, to run concurrent to the reckless endangering sentences but consecutive to any other sentence, comprised of three- and four-year respective periods of initial confinement and extended supervision. Jones moved for sentence modification; the trial court denied the motion.

¶3 Jones contends that the trial court erroneously exercised its sentencing discretion in several respects.

> When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶4 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court accords each factor is a discretionary determination. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The trial court should also explain how the confinement term meets the minimum custody standard. *See* ***State v. Gallion***,

2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***Larsen***, 141 Wis. 2d at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶5 The trial court addressed each of the primary sentencing factors. It assessed "[t]he gravity of the offense [a]s very high." It characterized Jones's conduct as "extremely dangerous" and explained how it could have resulted in injury or death. The trial court acknowledged that Jones acted out of panic, but pointed out that he did not have to compound his unlawful conduct by fleeing and endangering the lives of others. The trial court determined that despite all of Jones's positive attributes, he chose to be in the "awful, selfish, terrible business [of drug dealing.]" The trial court also considered protection of the public. The trial court elaborated on the adverse effects drugs have on the community, and that Jones was "a recidivist drug dealer." The trial court said that

> [d]eterrence of this defendant is very important. As [the trial court] said, he committed the same crime, same type of crime in October, '05, not too long ago. He was on probation with prison hanging over his head. Didn't get the picture. Terrible. So deterrence of the defendant is very important. That means sending a strong message to this defendant.

The trial court properly exercised its sentencing discretion. That the trial court could have imposed sentence differently does not constitute an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

¶6 Jones also contends that the trial court failed to explain why it deviated from the parties' sentencing recommendations, how its aggregate sentence met the minimum custody standard, and why it imposed the particular sentence and initial confinement terms that it did. We disagree.

¶7 The trial court explained that it would "follow the spirit of the agreement that was negotiated here and the spirit of the State's recommendation, but … think[s that] additional extended supervision is appropriate here even though [the trial court] know[s] he has this other [revocation] sentence going on." The trial court imposed a four-year period of initial confinement, precisely what was contemplated by the plea bargain. The trial court explained that it imposed additional supervision time. The trial court also explained that it rejected Jones's recommendation of probation because it "would unduly depreciate the seriousness of the offense" and that "confinement time is needed to protect the community." The trial court did not recite any particular magic words, such as minimum custody standard or least possible punishment; however, it addressed why it rejected probation as a sentencing option.

¶8 The trial court should explain the linkage between the component parts of the bifurcated sentence and its sentencing objectives. *See* ***Gallion***, 270 Wis. 2d 535, ¶46. It does not, however, need "to provide an explanation for the precise number of years chosen." ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466 (citing ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971)).

¶9 The trial court was troubled that Jones was dealing drugs while on probation for a different drug offense rather than taking advantage of his earlier

opportunity on probation; it was persuaded by the importance of deterrence. As the trial court explained at sentencing:

> [the trial court] ha[s] to tell the people in the community that this is a very bad idea, the running of [a] cocaine business, crack cocaine. What a horrible drug. The running of a crack cocaine business. A bad decision, and that's what it is. Dealing drugs isn't a bad decision, it's a bad business. But to try to get away from the police, whether it's running away from the police or doing what you did, putting the police in direct danger, people in the community have to know how serious that conduct is and [this court's] sentence to you has to tell people in the community how serious the criminal justice system is going to look at that type of conduct so that they understand that this drug business is a dumb way to make money. It's an expensive way to make money. That disregarding lawful police orders or … putting police in some type of danger is a bad decision.
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> These are the goals of the sentence. [The trial court has] considered probation. [The trial court] think[s] that first of all would unduly depreciate the seriousness of the offense. That's by far the biggest reason here. [The trial court] think[s] some … confinement is needed to protect the community.

The trial court explained why a lengthy period of confinement was warranted. Although it did not specify why it imposed the precise duration of the sentences that it did, it provided ample reasons to demonstrate a proper exercise of sentencing discretion and how its sentence met the minimum custody standard.

¶10 Jones also challenges the trial court's exercise of sentencing discretion for declaring him ineligible for the Challenge Incarceration and Earned Release Programs for lacking a substance abuse problem.[3] Jones contends that the

[3] Both the Challenge Incarceration and Earned Release Programs allow an eligible inmate, who successfully completes either program, to be released early from prison to extended supervision. *See* WIS. STAT. §§ 302.045(1) and (3m); 302.05(3)(c)2. (amended July 27, 2005). The time remaining on the confinement portion of the inmate's sentence is then converted to (continued)

trial court erred in its determinations that he was ineligible for each program, and did not have a substance abuse problem; he further contends that the trial court also failed to properly exercise its discretion in determining whether participation in either of these programs would have benefitted him. We reject these challenges.

¶11 In determining eligibility for these programs, WIS. STAT. subsections 973.01(3g) (earned release) and (3m) (challenge incarceration) (amended Apr. 20, 2006) each use the identical phrase "the [trial] court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible [for the respective] program … during the term of confinement in prison portion of the bifurcated sentence," to describe the trial court's responsibility. We have previously held that "the statute [does not] require completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the [program eligibility] determination." ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187. Eligibility for these programs is discretionary, applying the same criteria as those considered when imposing sentence. *See* ***State v. Steele***, 2001 WI App 160, ¶¶8-11, 246 Wis. 2d 744, 632 N.W.2d 112.

¶12 Regardless of Jones's threshold eligibility for these programs, it is within the trial court's discretion to determine whether his participation in these programs is appropriate. *See* WIS. STAT. § 973.01(3g) and (3m) (amended Apr.

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extended supervision so only the confinement portion is reduced, not the total sentence. *See* §§ 302.045(3m); 302.05(3)(c)2. (amended July 27, 2005).

20, 2006). Jones contends that the following trial court comments demonstrate a misuse of discretion:

> [The trial court] do[es] not find the defendant eligible for the Boot Camp [Challenge Incarceration] or Earned Release program. [The trial court] do[es]n't see a drug addiction here and it is [the trial court's] intent that he serve the entire time, as [the trial court] say[s] as deterrence to the community and as deterrence to the defendant.

¶13 Participants in the Challenge Incarceration Program receive "substance abuse treatment and education." WIS. STAT. § 302.045(1). The Earned Release Program is also known as the "Wisconsin Substance Abuse Program." WIS. STAT. § 302.05. The trial court evaluated Jones during the sentencing hearing and determined that he was "a drug dealer with good connections"; the trial court expressly commented that Jones "is not an addict that stumbled into [drug dealing]." The trial court concluded that Jones did not require treatment for substance abuse, particularly when successful completion of that program would result in his early release. It was the potential for early release that was most prominent in the trial court's reasoning to deny Jones eligibility for these programs. As the trial court emphatically stated, "it is [the trial court's] intent that [Jones] serve the entire time … as a deterrence to the community and as a deterrence to the defendant." The trial court imposed a period of initial confinement that it thought Jones deserved. It could have imposed a much longer sentence, either outright or by structuring the sentences consecutively, but it did not want Jones to serve less than the four-year term it imposed. The trial court expressed its rationale, which was reasonable under the circumstances. Participation in these programs is discretionary. *See* WIS. STAT. § 973.01(3g) and (3m) (amended Apr. 20, 2006). The trial court properly exercised its discretion in

denying Jones the opportunity to participate in these programs, to deprive him of the opportunity of early release from initial confinement.

¶14 Jones's remaining challenge was that the trial court erroneously exercised its discretion in denying his sentence modification motion. First, our rejection of his other challenges necessarily deprives him of this challenge. Second, the trial court summarized its rationale for denying sentence modification in its postconviction order:

> Although the defendant contends that those goals, objectives and reasons should have focused more on his rehabilitation, the defendant will remember that he was previously given an opportunity to rehabilitate himself when he was placed on probation in his other case and that he went out again and sold drugs.

This explanation alone constitutes a proper exercise of discretion justifying denial of Jones's sentence modification motion. *See* ***Fuerst***, 181 Wis. 2d at 915.

By the Court.—Judgment and order affirmed.

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