

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP323-CR

Cir. Ct. No. 2007CF1906

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT HOWARD BURNETT, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert Howard Burnett, Jr., appeals from a judgment of conviction and an order denying his postconviction motion. Burnett claims that the circuit court erroneously exercised its sentencing discretion in several respects. We reject his contentions and affirm.

Background

¶2 Burnett pled guilty to one count of attempted armed robbery by threat of force, as a party to a crime. The criminal complaint reflects that Burnett and two companions armed themselves with a loaded revolver and attempted to rob a group of men working at an automobile repair shop. One victim ran into the road to escape and sustained injuries when he was struck by an oncoming vehicle.

¶3 Pursuant to the parties' plea bargain, the State recommended a prison term but made no recommendation as to the length of the sentence. Burnett requested twenty-four months of initial confinement, followed by an unspecified term of extended supervision. The circuit court imposed a six-year term of imprisonment, bifurcated as three years of initial confinement and three years of extended supervision.¹

¶4 Burnett filed a postconviction motion, claiming that the circuit court improperly assessed the relevant sentencing factors and failed to specify the objectives of the sentence imposed. The circuit court denied the motion without a hearing, and this appeal followed.

Discussion

¶5 Burnett asserts that the circuit court erroneously exercised its sentencing discretion. Our review is deferential. “[W]e start with the presumption that the circuit court acted reasonably.” *State v. Lechner*, 217 Wis. 2d 392, 418,

¹ In addition to imprisonment, the circuit court imposed a \$500 fine. Burnett has not contested the fine, either in his postconviction motion or on appeal. Accordingly, any potential issue in this regard is waived. See *State v. Rogers*, 196 Wis. 2d 817, 828–829, 539 N.W.2d 897, 901 (Ct. App. 1995) (challenges not articulated with specificity in the circuit court are waived).

576 N.W.2d 912, 925 (1998). Burnett must demonstrate “some unreasonable or unjustifiable basis in the record for the sentence at issue.” *See ibid.*

¶6 The circuit court must consider the primary sentencing factors of “the gravity of the offense, the character of the defendant, and the need to protect the public.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *Id.*, 2006 WI App 49, ¶23, 289 Wis. 2d at 606–607, 712 N.W.2d at 82. Additionally, the sentencing court has an obligation to “specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 556–557, 678 N.W.2d 197, 207.

¶7 Here, Burnett asserts that the circuit court improperly assessed the primary sentencing factors by giving inadequate consideration to his character. We disagree. The circuit court characterized Burnett as “a bright guy,” but concluded that he was squandering his investment in training and education. The court discussed Burnett’s inability to be “consistent in managing his affairs.” Additionally, the court took into account Burnett’s five prior convictions. *See State v. Fisher*, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 449, 702 N.W.2d 56, 64 (substantial criminal record is evidence of character). The circuit court gave ample consideration to Burnett’s character.

¶8 The circuit court also discussed the gravity of the attempted armed robbery, noting that one of the victims was so frightened at the sight of a gun that he ran into traffic. As to the public’s need for protection, the circuit court

observed that Burnett was on extended supervision at the time of the offense. The court concluded that Burnett was “not getting the message” in a community setting. We are satisfied that the circuit court appropriately considered the primary sentencing factors in this case.

¶9 Burnett next contends that the circuit court did not consider a variety of mitigating factors. He emphasizes that he was the lookout rather than the gunman in the attempted armed robbery, and he asserts that the circuit court should therefore have deemed his personal culpability “minimal.” This argument understates Burnett’s role. The criminal complaint—the accuracy of which Burnett conceded during his guilty plea—reflects that Burnett was also involved in planning the crime. Burnett points to nothing requiring the circuit court to view one of the masterminds of an offense as a minor participant.

¶10 Burnett further argues that the circuit court gave inadequate consideration to his childhood sexual abuse, his cocaine addiction, his education, and his employment history. Burnett fails to acknowledge, however, that the circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. *See State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 237, 688 N.W.2d 20, 26. Here, the circuit court viewed neither sexual abuse nor drug addiction as particularly relevant to the sentencing. The court acknowledged that Burnett had endured “rough times,” but it rejected the suggestion that his past difficulties justified “acting out.”

¶11 The circuit court did consider Burnett’s education and skills as significant to the disposition, but it did not view these as mitigating factors. Rather, the court was disturbed because Burnett had “much on the ball,” and had

“put something into his life ... in terms of education,” but had failed to capitalize on his abilities. The court has discretion to determine whether it will view any particular factor as mitigating or aggravating in light of the individual defendant and the facts of the case. *State v. Thompson*, 172 Wis. 2d 257, 265, 493 N.W.2d 729, 733 (Ct. App. 1992).

¶12 Burnett next contends that the circuit court failed to explain the objectives of the sentence. We are not persuaded. The circuit court stated that it would impose the punishment that Burnett deserved. *See Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d at 556–557, 678 N.W.2d at 207 (punishment is an appropriate sentencing objective). The court additionally discussed the sentence as an opportunity for Burnett’s rehabilitation. *See ibid.* (rehabilitation is an appropriate sentencing objective). Accordingly, the circuit court required Burnett to participate in several treatment programs during his extended supervision, including cognitive intervention counseling.

¶13 Burnett complains that the circuit court failed to explain why it did not adopt the defense recommendation for two years of initial confinement. In fact, the circuit court had no obligation to give such an explanation. *See State v. Johnson*, 158 Wis. 2d 458, 469, 463 N.W.2d 352, 357 (Ct. App. 1990) (court need not explain its decision to deviate from any sentencing recommendation). Burnett’s complaint in this regard does not identify any potential circuit court error.

¶14 Burnett’s related complaint that the circuit court failed to justify the three-year term of confinement imposed is also unavailing. The circuit court considered the primary sentencing factors as well as additional factors that it found relevant. The court identified appropriate goals and it imposed a sentence to meet

those goals. While Burnett believes that the circuit court’s sentencing rationale does not justify three years of incarceration, “no appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion.” *See State v. Ramuta*, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 800, 661 N.W.2d 483, 490.

¶15 Moreover, the six-year term of imprisonment imposed by the circuit court was far less than the twenty-year maximum Burnett faced. Accordingly, the sentence was neither excessive nor unduly harsh. “[A] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 651, 648 N.W.2d 507, 517 (quoted source omitted) (citation omitted). In sum, we are satisfied that the circuit court properly exercised its discretion to fashion a reasonable sentence.

¶16 Burnett last asserts that his postconviction motion for sentence modification was improperly denied in the face of “clearly identified ... misuses of the [circuit] court’s discretion.” Because we conclude that the circuit court appropriately exercised its sentencing discretion, we reject this contention.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005–06).

