COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1856 **Cir. Ct. No. 2006CF885**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM HAROY THORNTON,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. William Haroy Thornton appeals from a judgment of conviction for possession of tetrahydrocannabinols (THC), second offense, and

possession of a firearm by a felon with the habitual criminality enhancer, contrary to WIS. STAT. §§ 961.41(3g)(e), 941.29(2) and 939.62 (2005-06).[1] He also appeals from an order denying his postconviction motion. On appeal, he argues: (1) the evidence against him was insufficient to support his conviction; (2) he should have been allowed to present evidence at the hearing on his postconviction motion; (3) the trial court should have granted his motion for a new trial in the interests of justice; and (4) the trial court failed to adequately explain the reasons for imposing consecutive sentences. We reject his arguments and affirm.

BACKGROUND

¶2 After serving time in prison for crimes including first-degree recklessly endangering safety while armed and possession with intent to deliver while armed, Thornton was paroled in November 2003. On February 8, 2006, his parole agent, Lynda Lund, and other agents from the Department of Corrections (DOC) conducted a parole search of Thornton's bedroom and vehicle. They found marijuana in the bedroom and a firearm in the vehicle. As a result, Thornton was charged with possession of THC with intent to deliver and possession of a firearm by a felon.

¶3 The case proceeded to trial. Thornton, who had several appointed lawyers during the pretrial proceedings, decided to represent himself at the pretrial motion hearing and at the trial to the court. Standby counsel was also appointed and remained throughout the trial. Thornton's defense was that he was not staying in the room where the marijuana was found, and that the gun had been mistakenly

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

left in the vehicle by Thornton's father, who was leaving the car downtown so Thornton could drive it home after meeting with his parole agent. Thornton's sister and father testified on his behalf.

¶4 The court found Thornton's two witnesses incredible, noting that they "told some pretty fanciful stories." The court accepted the testimony of the State's witnesses and found Thornton guilty of simple possession (rather than possession with intent to deliver, as was originally charged), and being a felon in possession of a firearm.

¶5 Thornton was convicted and sentenced as follows. For possessing THC, he received a two-year sentence, comprised of one year of initial confinement and one year of extended supervision. For being a felon in possession of a firearm, he received an eleven-year sentence, comprised of seven years of initial confinement and four years of extended supervision. The two counts were imposed consecutive to one another, and consecutive to any previously imposed sentence.

¶6 Thornton, through his newly appointed postconviction counsel, filed a motion for postconviction relief in which he sought a new trial on the basis of newly discovered evidence and in the interests of justice. In the alternative, he sought modification of his sentence on several grounds, arguing: (1) the trial court failed to adequately explain the basis for making the sentences consecutive; (2) the sentence was unduly harsh; and (3) new factors justified sentence modification.[2]

[2] On appeal, Thornton does not raise the latter two challenges to the sentence and, therefore, we do not address them.

¶7 At the hearing on Thornton's motion, postconviction counsel was permitted to make offers of proof, but was not permitted to call any witnesses. The trial court denied the motion. This appeal follows.

DISCUSSION

¶8 Thornton presents numerous challenges to his conviction and sentence. He argues: (1) the evidence against him was insufficient to support his convictions; (2) he should have been allowed to present evidence at the hearing on his postconviction motion; (3) the trial court should have granted his motion for a new trial in the interests of justice; and (4) the trial court failed to adequately explain the reasons for imposing consecutive sentences. We examine each argument in turn.

I. Sufficiency of the evidence.

¶9 Thornton challenges the sufficiency of the evidence. He argues that there was no direct evidence that he ever possessed the gun or the marijuana, and that the circumstantial evidence was insufficient to support his conviction. When reviewing a conviction for sufficiency of the evidence, we will not reverse "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We may not substitute our judgment for that of the trier of fact. ***Id.*** at 507.

> If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id.

¶10 "In order to overcome the presumption of innocence accorded a defendant in a criminal trial, the state bears the burden of proving each essential element of the crime charged beyond a reasonable doubt." ***Id.*** at 501. ***Poellinger*** recognized that "a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." ***Id.*** at 501-02. ***Poellinger*** also noted that "[r]egardless of whether the evidence presented at trial to prove guilt is direct or circumstantial, it must be sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt." ***Id.*** at 502.

¶11 At trial, the State introduced testimony from five witnesses, including three witnesses from the DOC, a police officer and a drug identification chemist from the State Crime Lab. Lund testified that she served as Thornton's parole agent from November 2003 until August 2006, when his parole was revoked. She said that in January 2004, Thornton began living in a duplex with his two sisters: Sherri Thornton lived in the upper unit and Latanga Thornton lived in the lower unit. Lund said she visited Thornton at the duplex "regularly," on at least a monthly basis.

¶12 Lund testified that sometimes she visited Thornton in the upper unit, and sometimes in the lower unit. She explained that "beginning in April of 2005, our home visits were [conducted] in the basement area within a room in the basement area that [Thornton] indicated was his bedroom."

¶13 Lund said that Thornton did not adjust well to supervision. She explained that he had not found a full-time job, and had tested positive for drugs

and alcohol on several occasions. Lund testified that in January 2006, she received an anonymous call that indicated Thornton was dealing drugs in Racine, and was using a "phon[]y penis device" to tamper with his drug screens.

¶14 On February 2, 2006, Lund and another agent went to Thornton's home for a scheduled home visit. They knocked on the door and received no answer. After they returned to their vehicle to leave, an unknown male came to the door. Lund called out and asked if Thornton was home; the man indicated Thornton was there. Lund and the agent returned to the home and stood in the entrance area of the duplex, next to the stairs leading to the basement. Lund called out for Thornton. She testified:

> [E]ventually he came from the basement area up the stairs, noticed me. He seemed to be startled or surprised to see me.
>
> It appeared he put something behind his back … and immediately started to back up down the stairs. I followed him down the stairs to the basement area to the room that he indicated was his room. I asked him what had been going on, that this was a normal, quick visit. Instructed him to go to Impact for AODA assessment [before] his next appointment [with me].… Then I left the area.

¶15 Lund said that based on Thornton's suspicious behavior on February 2, as well as the anonymous call, she received permission from her supervisors to do a parole search that would include Thornton's bedroom area, his person and any vehicle that he could or would be driving. The search was ultimately scheduled to occur on February 8, unbeknownst to Thornton.

¶16 On that day, Thornton reported to Lund's office for a scheduled appointment. Lund said that when she met Thornton, "he stated he had a really hard time parking." Lund testified:

> I asked him where he parked. He said he was able to bully himself in somewhere. I asked him where he parked, at which time he became evasive with his answers. On several occasions we asked him where he parked. He would not answer the question. Eventually [he] said a friend had dropped him off.

¶17 Lund said she and another agent walked the streets around the State Office Building looking for a vehicle she knew Thornton had driven in the past, a Chevy Beretta. They could not find it. However, later, when they were driving Thornton to his home to conduct the parole search, they found in his wallet a title to a Ford Taurus that was titled in the name of "William Thornton Enterprise[s]," which was the name of a business Thornton had started. They called law enforcement and passed on the information. The vehicle was then found parked on the street about a block from the State Office Building.

¶18 Meanwhile, at the duplex, Lund used Thornton's keys to unlock the front door and the padlock to the basement room that Thornton had, in the past, identified as his bedroom. In the bedroom, they found a mason jar containing suspected marijuana next to Thornton's bed, and a large baggie containing seven individual baggies filled with suspected marijuana, in a shoebox.

¶19 When Lund returned to the State Office Building, she and other DOC employees proceeded to search Thornton's vehicle, using Thornton's keys to enter it. Darryl Bucholtz, a field supervisor with the DOC, testified that before they entered the vehicle, they saw an individual who identified himself as William Thornton, Sr. (Thornton's father), approaching the vehicle. Bucholtz said that he told William that the DOC had received approval to search the vehicle. William then left the scene. Bucholtz testified that when he was searching the vehicle, he raised an armrest between the two front seats and saw the firearm, which was confiscated.

¶20 Thornton argues that this evidence was insufficient to prove that he possessed either the marijuana or the firearm. He asserts that he was living in Port Washington, Wisconsin, rather than in the basement of the Milwaukee duplex. He further contends that the only evidence linking him to the gun was the title showing ownership of the car. He notes that no witnesses testified that he was in the car, and that his own father testified at trial—potentially exposing himself to criminal liability for carrying a concealed weapon—that it was he who drove the car downtown on February 8 and left his firearm in the car.

¶21 We reject Thornton's argument. To the extent there was conflicting testimony, we must defer to the trier of fact, which "determines issues of credibility, weighs the evidence and resolves conflicts in testimony." *See* ***State v. Kienitz***, 227 Wis. 2d 423, 435, 597 N.W.2d 712 (1999). Therefore, the issue becomes whether the testimony presented by the State and relied upon by the trial court provides sufficient proof that Thornton possessed the marijuana and the firearm. We conclude that it does.

¶22 "[T]he term 'possession' includes both actual and constructive possession." ***State v. Peete***, 185 Wis. 2d 4, 14-15, 517 N.W.2d 149 (1994). The pattern jury instruction concerning possession instructs as follows:

> "Possession" means that the defendant knowingly had actual physical control of the item.
>
> An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.
>
> It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.
>
> Possession may be shared with another person. If a person exercises control over an item, that item is in his

> possession, even though another person may also have similar control.

WISCONSIN JI—CRIMINAL 920 (brackets and footnotes omitted). We conclude that the evidence was sufficient to support a finding of constructive possession of both the marijuana and the gun.

¶23 The trial court could have reasonably found that Thornton was living in the basement room of the duplex, and that the marijuana was "in an area over which the person has control and the person intends to exercise control over the item." *See* ***id.*** Lund testified that Thornton told her the basement room was his, and that she visited him there on numerous occasions, including less than one week before the search. She further testified that she entered both the locked duplex and the locked basement room on February 8 using Thornton's keys. Even if the trial court believed that others may have had access to the room (a finding it declined to make), that fact would not negate Thornton's constructive possession of the marijuana. *See* ***id.*** ("Possession may be shared with another person.").

¶24 The trial court also could have reasonably found that Thornton drove the Taurus to his appointment with Lund on February 8. Although Thornton's father testified that he drove it, Lund testified that Thornton said he had parked his vehicle that morning. The trial court was entitled to weigh the credibility of the witnesses and resolve conflicts in the testimony. *See* ***Kienitz***, 227 Wis. 2d at 435. Further, given the location of the gun under the armrest in the Taurus, the trial court could reasonably infer that Thornton "knowingly had actual physical control of the item."[3] *See* WIS JI—CRIMINAL 920.

[3] Thornton does not argue that the driver was unaware of the firearm. Rather, he asserts that he did not drive the vehicle that day.

¶25 Viewing the evidence "most favorably to the state and the conviction," we cannot say that the evidence "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***Poellinger***, 153 Wis. 2d at 501. Therefore, we reject Thornton's challenge to the sufficiency of the evidence.

II. Entitlement to an evidentiary hearing.

¶26 Thornton argues that the trial court erroneously denied him an opportunity to present evidence at the postconviction hearing. A defendant seeking postconviction relief is not entitled to an evidentiary hearing merely because he or she requests one. ***State v. Allen***, 2004 WI 106, ¶10, 274 Wis. 2d 568, 682 N.W.2d 433. A trial court may deny a postconviction motion without an evidentiary hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the [defendant] to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." ***Id.***, ¶12 (footnote omitted).

¶27 Here, Thornton's motion for postconviction relief alleged that an investigator's report of an interview with Thornton's sister Latanga, as well as affidavits from William and Thornton's girlfriend, Karen Goins, supported his motion for a new trial on the basis of newly discovered evidence and in the interests of justice. Latanga reportedly said that she found the marijuana while doing laundry in the basement, and that she put it in the bedroom that was used by another man, Ricky Thornton. She told the investigator that when she told Ricky that the parole agent found marijuana in that room, Ricky replied: "'Damn, they got my shit.'"

¶28 William's affidavit repeats his trial testimony, but also adds that after he parked the car downtown on February 8, he went to the Grand Avenue Mall to eat and then returned to the Taurus an hour later to retrieve his gun. Goins's affidavit states that she lived with Thornton in a Port Washington apartment at the time of his arrest. She also states that she was the individual who drove Thornton to his appointment in downtown Milwaukee on February 8.

¶29 We conclude the trial court did not erroneously exercise its discretion when it denied Thornton's request for an evidentiary hearing, because the record conclusively demonstrates that Thornton was not entitled to relief. *See* ***id.*** To succeed on his claim for a new trial based on newly discovered evidence, Thornton was required to prove: "'(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). As the trial court noted at the postconviction hearing, the information Thornton proffered was not newly discovered. Assuming Thornton shared a residence with Goins, he knew that at the time of trial and could have called Goins as a witness. In addition, both Latanga and William testified at trial. There is nothing in the report or affidavits to suggest that their additional testimony was not known to Thornton, or that he was not negligent in seeking it.

¶30 Clearly, the evidence was not newly discovered. Postconviction counsel admitted as much when he explained that he was trying to make clear for the trial court that Thornton's competency to represent himself was at issue. We agree with the trial court's analysis that if Thornton wanted to challenge whether he should have been permitted to represent himself, he could have done so, but he did not. The postconviction motion did not support Thornton's claim for a new

trial based on newly discovered evidence. Therefore, the motion was properly denied on that basis without an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶12.

¶31 Thornton's postconviction motion also alleged that he was entitled to a new trial in the interests of justice. At the motion hearing, postconviction counsel stated that the report and two affidavits, as well as the water bill and lease indicating that Thornton lived in Port Washington, supported his motion for a new trial in the interests of justice. Pursuant to WIS. STAT. § 805.15(1), "[a] party may move to set aside a verdict and for a new trial … in the interests of justice." Thornton asserts that his postconviction motion "alleged facts which, if proved, would have entitled him to relief on his motion for a new trial in the interests of justice."

¶32 We conclude that the trial court did not erroneously exercise its discretion when it denied, without an evidentiary hearing, Thornton's postconviction motion for a new trial in the interests of justice. The facts Thornton offered in support of his motion, even if true, do not entitle Thornton to relief. The trial court had already found incredible the testimony of William and Latanga. In addition, evidence that Thornton may have also had an apartment in Port Washington would not negate the fact that he told Lund he lived in the basement of the duplex, that he regularly met with her there and that he had a key to the locked room. Thornton could have exercised control over both the duplex bedroom and an apartment in Port Washington, and therefore his guilt for possession would not be negated. Thus, even if the facts asserted were true and subsequently offered at trial, it was not likely that a new trial "'under optimum circumstances [would] produce a different result.'" *See* ***Garcia v. State***, 73 Wis. 2d 651, 654, 245 N.W.2d 654 (1976) (citation omitted). Because the facts alleged

in the motion did not entitle Thornton to relief, the trial court did not erroneously exercise its discretion when it denied Thornton's motion without an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶12.

III. New trial in the interests of justice.

¶33 On appeal, Thornton argues that the trial court erroneously exercised its discretion when it denied his motion for a new trial in the interests of justice. For the reasons discussed above, we conclude the trial court did not erroneously exercise its discretion when it denied Thornton's motion for a new trial in the interests of justice.

¶34 In addition, Thornton seeks discretionary reversal from this court. We are authorized to grant a new trial in the interests of justice pursuant to WIS. STAT. § 752.35 "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." ***Id.*** Thornton argues that the real controversy was not fully tried because the trial court "was not given the opportunity to hear important testimony on the issue of whether [Thornton] possessed the drugs and gun[] … as set forth in the offer of proof and the affidavits." He also argues that his "presentation and fixation on collateral issues so clouded the material issues that it cannot be fairly said [that] the real controversy was fully tried." We are not convinced.

¶35 The facts Thornton offered in his affidavits and the offers of proof reiterated testimony that was offered and found incredible by the trial court at trial. The limited new information in the affidavits, primarily relating to Thornton's alleged home in Port Washington, does not negate the credible evidence that he exercised control over a room in the basement of the duplex. We are unconvinced that the real controversy was not fully tried.

¶36 Finally, we reject Thornton's suggestion that he is entitled to a new trial because he did not adequately represent himself. If he wanted to challenge the trial court's decision allowing him to represent himself, he could have done so; he has not. We decline to grant a new trial on grounds that Thornton's *pro se* performance resulted in the real controversy not being fully tried.

IV. Challenge to the sentencing.

¶37 Thornton argues that the trial court erroneously exercised its discretion when it sentenced him because the court "failed to articulate reasons for ordering a consecutive sentence and why it was the minimum amount of confinement necessary to achieve the legitimate objectives of sentencing in this case." Thornton concedes that the trial court explained why it was ordering the sentences in the instant case consecutive to any previously imposed sentences, but asserts the court "did not explain why it was ordering [consecutive sentences] on the two counts of this case."

¶38 Our supreme court has recognized that

> [w]hen 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). 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 afforded to each of the relevant factors is particularly within the wide discretion of the trial

court." ***State v. Leighton***, 2000 WI App 156, ¶52, 237 Wis. 2d 709, 616 N.W.2d 126. In order to permit meaningful review, "the trial court 'must articulate the basis for the sentence imposed on the facts of the record.'" ***Id.*** (citation omitted). 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). However, if the trial court "fails to specifically set forth the reasons for the sentence imposed, this court is 'obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***Leighton***, 237 Wis. 2d 709, ¶52 (citation omitted).

¶39 Having examined the transcript of the sentencing and the postconviction motion hearing, we conclude that the trial court explained the primary sentencing factors and applied the relevant circumstances to those factors. The trial court discussed Thornton's background and failed rehabilitation. It gave Thornton some credit for having received his high school equivalency diploma in prison, but noted that since being out of prison, Thornton had manipulated the system, returned to using drugs, acquired a gun and armed himself. The trial court discussed the seriousness of the offense, noting that "having a gun like this out in the community is exceedingly dangerous and very serious." The court addressed the need to protect the public from people who are not supposed to have guns.

¶40 The trial court said that after considering all of the relevant factors, "the only appropriate sentence" was that it was imposing. First, the court imposed a two-year sentence for the marijuana charge and noted that it was to be served consecutive to the sentence Thornton was serving after his parole revocation, because the new crime "is a wholly separate event, separated by 14 years, and is deserving of separate and individual consideration and punishment." The court

imposed a sentence of eleven years on the firearm possession charge, consecutive to Thornton's previous sentence and the sentence on the marijuana charge.

¶41 Although the trial court at that point in the hearing did not explicitly indicate why it was making the sentences for the two possession crimes consecutive to one another, the sentencing hearing as a whole, including the trial court's consideration of the proper sentencing factors, demonstrated a proper exercise of discretion that supports the sentence. *See* ***Leighton***, 237 Wis. 2d 709, ¶52. In addition, at the postconviction hearing, the trial court took advantage of the additional opportunity to explain its sentence. *See* ***Fuerst***, 181 Wis. 2d at 915. The trial court stated:

> I think it is clear from reading this transcript that I was very concerned about Mr. Thornton's prior record, his lack of real rehabilitation in terms of turning his life around and conforming to the requirements of society and I think I made it clear that these were separate offenses, deserving of separate punishments and that is why I entered and ordered consecutive sentences and I think the record is sufficient to support it.

We conclude that the court's statements at sentencing and at the postconviction hearing demonstrate a proper exercise of sentencing discretion. For these reasons, we reject Thornton's challenge to the sentence.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.