COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-2536-CR
01-2537-CR

Cir. Ct. Nos. 99CF516
99CF531

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN C. VANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. John Vang appeals an order denying his motion to modify his sentence. Vang challenges the circuit court's exercise of sentencing discretion. Vang also broadly attacks the manner in which circuit courts exercise sentencing discretion and the manner in which appellate courts review circuit

court sentencing. The court of appeals, however, is constrained to follow established case law. We conclude the court properly exercised its discretion and, therefore, affirm the order.

BACKGROUND

¶2 Vang was charged with armed burglary, theft and child abuse, contrary to WIS. STAT. §§ 943.10(2)(a), 943.20(1)(a), and 948.03(2)(b), all party to a crime. *See* WIS. STAT. § 939.05(1). The charges stemmed from Vang's participation in a gang initiation.

¶3 Vang waived his right to a preliminary hearing. Pursuant to a plea agreement, the armed burglary charge was reduced to unarmed burglary. Vang pled guilty to unarmed burglary, theft, and child abuse. *See* WIS. STAT. § 943.10(1)(a). The circuit court withheld sentence and imposed thirteen years' probation on the burglary conviction, six years' probation on the theft conviction, and six years of probation on the child abuse conviction, all to run concurrently. As a condition of probation, Vang was ordered to serve one year in the county jail with Huber privileges.

¶4 While incarcerated, Vang left the county jail on a pass and did not return. He was later apprehended in Minnesota. Vang waived his right to a revocation hearing and his probation was revoked. The matter was returned to the circuit court for sentencing. The court sentenced Vang to six years in prison on the burglary conviction and gave him a concurrent five-year sentence on the theft conviction. Additionally, the court imposed a two-year sentence for the child abuse conviction to be served consecutive to the other sentences.

¶5 Vang filed a postconviction motion seeking to reduce his sentence. Vang argued that the imposition of the eight-year total sentence was excessive and thus an improper exercise of discretion. The circuit court did not rule on the motion, and it was denied pursuant to WIS. STAT. § 809.30(2)(i).[1]

STANDARD OF REVIEW

¶6 Sentencing is committed to the sound discretion of the circuit court, and we review sentencing determinations under the erroneous exercise of discretion standard. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). When reviewing a sentence, we presume the court acted reasonably because that court is in the best position to consider the relevant sentencing factors and the demeanor of the defendant; therefore, the defendant has the burden of demonstrating an unreasonable or unjustified basis for the sentence. ***State v. Harris***, 119 Wis. 2d 612, 622-23, 350 N.W.2d 633 (1984).

¶7 The primary factors the circuit court considers in sentencing are: (1) the gravity and nature of the offense; (2) the offender's character and rehabilitative needs; and (3) the public's need for protection. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The court may also consider: the vicious or aggravated nature of the crime; any past criminal record or history of undesirable behavior; the defendant's personality, character, and social traits; the

[1] WISCONSIN STAT. § 809.30(2)(i) provides that a motion for postconviction relief is considered denied if the circuit court does not decide it within sixty days of filing.

presentence investigation; the defendant's demeanor at trial; the defendant's age, educational background, and employment record; and the defendant's remorse, repentance, and cooperativeness. ***State v. Borrell***, 167 Wis. 2d 749, 773-74, 482 N.W.2d 883 (1992). The weight to be given each factor is within the discretion of the trial court. ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). If the court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment …." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

DISCUSSION

¶8 Vang concedes that the circuit court considered the proper factors at sentencing. However, he argues that the court did not explain why the eight-year total sentence followed from those factors.

¶9 In Wisconsin, the circuit court must state on the record the reasons for imposing a particular sentence. ***McCleary***, 49 Wis. 2d at 282. Here, the court found that the crime was serious because firearms and ammunition were involved. Next, the court considered Vang's character and found that he was "young," "prideful," and "ignorant," with a "distinct possibility … of putting himself in a position … where serious crimes occur." Last, the court considered the need for public protection and found that Vang's poor judgment "can lead again to innocent people being put at risk." While all of this does not equate to a mathematical formula for the eight-year sentence, it does reflect a reasoned exercise of discretion. That is what the law requires.

¶10 Vang further argues that the court had insufficient information to properly exercise its sentencing discretion. According to Vang: (1) his parents

never appeared before the court; (2) no evaluation was made of any educational or social needs that he may have; (3) the court knew nothing of his background that would allow it to assess the risk of allowing him to remain in the community; and (4) the court made no inquiry into the existence of any alcohol or drug issues.

¶11 However, Vang never suggested at sentencing that there was additional information the court needed in order for it to sentence him. Nor did he request a presentence investigation. Furthermore, the circuit court heard arguments from both the State and defense counsel at the sentencing hearing. The State noted the severity of the crime and that Vang had been given an opportunity "to engage in meaningful rehabilitation." Defense counsel portrayed Vang as a youth who had made a few bad decisions. Defense counsel also noted that Vang had not committed any crimes during the period after he had absconded and that a significant prison sentence would have a negative impact on him. Vang was offered the opportunity to address the court, but declined. We are satisfied that the court had sufficient information. Any deficiencies were due to Vang's choice.

¶12 Vang's real argument is broader based. He begins by observing that, for more than a generation, Wisconsin appellate courts have had the authority to review criminal sentences for an erroneous exercise of discretion. Yet, according to Vang, no appellate court in Wisconsin has found a sentence to be excessive since ***McCleary***. Or, more dramatically, "the Wisconsin Court of Appeals has never in its entire history found a sentence to be excessive" based on the factors correctly considered.

¶13 Vang acknowledges that present case law requires a judge to consider certain factors. But, he asserts that a judge must do more than

mechanically utter magic words. Otherwise, he contends that appellate review becomes a "meaningless ritual."

¶14 Here, for example, Vang recognizes that the trial court used the appropriate factors. Yet, Vang challenges that there is no explanation in the record for why those factors translate into a total sentence of eight years. According to Vang, the court could have said exactly the same thing and sentenced him to double the time. Or, the court could have used the precise language and imposed a sentence that was half the ultimate sentence. There is simply no way, he argues, to convert the sentencing factors into a term of years that can be meaningfully reviewed on appeal.

¶15 In addition, Vang ties these deficiencies to due process and equal protection arguments. Finally, he suggests that some type of sentencing guidelines are necessary in order to address problems of sentencing disparity.

¶16 We acknowledge that Vang has raised serious and thoughtful questions. However, the relief Vang seeks is available only through our supreme court or the legislature. The supreme court has been designated by the constitution as a law-declaring court and is the only state court with the power to overrule, modify or withdraw language from a previous appellate court case. ***Cook v. Cook***, 208 Wis. 2d 166, ¶53, 560 N.W.2d 246 (1997). Therefore, Vang's argument must fail.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.