COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP427-CR **Cir. Ct. No. 2008CF1681**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH CAVIAR BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Kessler, and Brennan, JJ.

¶1 PER CURIAM. Keith Caviar Brown appeals from a judgment of conviction entered upon his guilty pleas to one count of possessing a firearm as a felon and one count of felony bail jumping. He also appeals from an order

denying his postconviction motion. The only issue is whether the circuit court erroneously exercised its sentencing discretion. We affirm.

BACKGROUND

¶2 City of Milwaukee Police Officer Thomas Marcus approached Brown on a city street after the officer received a complaint that a "suspicious person" was in the area. During the approach, Officer Marcus observed Brown remove a gun from the waistband of his pants, drop the gun on the sidewalk, and run from the scene. Officer Marcus retrieved the gun and determined that it was fully loaded. A second officer, Todd Lewan, chased Brown and arrested him as he was trying to dive underneath a parked vehicle. Officer Lewan searched Brown incident to the arrest and found two tablets of a controlled substance (methylenedioxymethamphetamine, also known as "ecstacy") and a cell phone.

¶3 The State charged Brown with one count of possessing a firearm as a felon, one count of carrying a concealed weapon, and one count of possessing a controlled substance. The State also charged Brown with felony bail jumping because at the time of his arrest he faced sentencing for a felony conviction, and he was out of custody on bond with a condition that he commit no new crimes. As to each of the four counts, the State charged Brown with the habitual offender penalty enhancer.

¶4 Pursuant to a plea bargain, Brown pled guilty to possession of a firearm as a felon and to felony bail jumping. The circuit court granted the State's motions to dismiss the habitual criminality penalty enhancers and to dismiss but read-in for sentencing purposes the charges of carrying a concealed weapon and possessing a controlled substance. At sentencing, the State fulfilled its agreement to recommend two concurrent five-year terms of imprisonment.

¶5 The circuit court imposed a ten-year term of imprisonment for possessing a firearm as a felon, bifurcated as five years of initial confinement and five years of extended supervision. The court ordered Brown to serve the sentence concurrently with a jail sentence that he was already serving. The circuit court imposed a consecutive six-year term of imprisonment for bail jumping, bifurcated as three years of initial confinement and three years of extended supervision. Brown sought sentence modification, which the circuit court denied without a hearing. Brown appeals.

DISCUSSION

¶6 Sentencing lies within the circuit court's discretion, and our review is limited to considering whether discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. We defer to the circuit court's "great advantage in considering the relevant factors and the demeanor of the defendant." *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶7 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, 712 N.W.2d 76. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court erroneously exercises its discretion, however, when it imposes a sentence "on the basis of clearly irrelevant or improper factors." ***Gallion***, 270 Wis. 2d 535, ¶17.

¶8 The circuit court must "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." ***Id.***, ¶40. Additionally, the circuit court must explain the "linkage" between the sentencing objectives and the sentence imposed. ***Id.***, ¶46. The exercise of sentencing discretion, however, "does not lend itself to mathematical precision." ***Id.***, ¶49. Therefore, the circuit court is not required to explain the precise number of years chosen. ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466. Rather, the circuit court must provide "an explanation for the general range of the sentence imposed." ***Gallion***, 270 Wis. 2d 535, ¶49.

¶9 Brown does not dispute that the circuit court properly considered the three primary sentencing factors. The court determined that the offenses were both serious and aggravated. It explained that Brown not only possessed a firearm but concealed it, and that he did so while out of custody awaiting sentencing for another felony offense. Further, the gun was "fully loaded with a round in the chamber." The court characterized Brown as "brash" and "bold," noting with concern that the arresting officers found a video on Brown's cell phone showing Brown handling a firearm. The court additionally observed that "at age twenty-three [Brown] sits here with three -- excuse me -- four felony convictions." *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (criminal record is evidence of character). The court considered protection of the public, explaining that "drugs and guns in combination ha[ve] caused a tremendous amount of harm throughout the community .... Death and injury seem[] to follow that combination around the community."

¶10 Brown contends that the circuit court "failed to mention any mitigating circumstances in this case." As examples of significant mitigating circumstances, Brown points to his claim that he carried a gun because he feared another individual, his prompt surrender of his weapon when the police approached, and his timely guilty plea.

¶11 Brown does not accurately describe the circuit court's sentencing remarks. The circuit court discussed several mitigating factors, including Brown's employment and his supportive family. Further, the court expressly recognized that Brown "came forward and accepted responsibility," but the court observed that Brown received "a tremendous break" in exchange for his guilty pleas because the State dismissed two criminal charges and all of the penalty enhancers. Nonetheless, the court explained that it would "give [Brown] credit" for accepting responsibility, and ordered Brown to serve his sentence on one count concurrently with a sentence that he was already serving. While Brown would have preferred that the circuit court place greater weight on the factors that he views as mitigating, a 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* ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶12 Brown also argues that the circuit court relied on an improper basis for imposing his sentences because the court "hinted" that "it might be sentencing [him] based on a presumption that he was selling drugs." We reject this contention. The circuit court appropriately explored why Brown possessed a controlled substance at the time of his arrest in light of Brown's statement to police that he was "making a good faith effort not to continue to use" narcotics. In response to the circuit court's inquiries, Brown acknowledged that he did continue to use narcotics and that his representations to the contrary were untrue. In the

postconviction order resolving Brown's sentence modification motion, the circuit court clarified that it accepted Brown's explanation that he misrepresented the extent of his drug usage, and the court stated that it did not rely on its initial supposition that Brown carried a gun because he sold narcotics. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court has an additional opportunity to explain its sentence when challenged by postconviction motion). In the court's view, however, Brown's admission that he lied about his drug usage further illuminated Brown's character, and the court explained that it took into account this negative character information in fashioning Brown's sentences.

¶13 Brown next contends that the circuit court failed to provide a sufficient reason for imposing maximum consecutive sentences. "[T]he sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶23 (citation, internal quotation marks, and one set of brackets omitted). Brown argues that the sentences imposed exceed the minimum necessary to accomplish the sentencing goals. We are not persuaded. "'[M]inimum' does not mean 'exiguously minimal,' that is, insufficient to accomplish the goals of the criminal justice system." ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. The circuit court in this case found that the punishment Brown received for prior offenses "obviously didn't deter him." Noting that Brown engaged in a pattern of "escalating" and "dangerous" conduct, the circuit court explained that "the community is entitled to protection" and that the sentences imposed "[are] necessary for protection and for deterrence." Thus, the

court appropriately linked the sentences selected to the goals of deterring Brown and protecting the public. *See* ***Gallion***, 270 Wis. 2d 535, ¶46.

¶14 Finally, Brown complains that the sentences were unduly harsh in light of his relatively young age and his family support. A sentence is unduly harsh 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). The sentences here do not offend public sentiment. Brown pled guilty to two felony offenses, and two additional charges were dismissed but read in for sentencing purposes. *See* ***State v. Straszkowski***, 2008 WI 65, ¶93, 310 Wis. 2d 259, 750 N.W.2d 835 (read-in charges may be considered at sentencing but do not increase the maximum possible penalty). The court explained that Brown's criminal record and his dangerous behavior required lengthy confinement to deter Brown and others from conduct that "too often leads to homicide, death and injury in this community." The court further imposed maximum extended supervision "to insure that the community can be adequately protected from [Brown's] conduct over an extensive period."

¶15 The circuit court properly exercised its discretion by considering appropriate factors to fashion a reasoned and reasonable sentence. That the circuit court could have exercised its discretion 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).

By the Court.—Judgment and order affirmed.

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