COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2499-CR **Cir. Ct. No. 2007CF1030**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SENECA JOSEPH BOYKIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed and cause remanded with directions*.

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 NEUBAUER, P.J. Seneca Joseph Boykin appeals from a judgment of conviction for possession with intent to deliver THC, contrary to WIS. STAT. § 961.41(1m)(h)1. (2007-08),[1] and possession of a firearm by a felon, contrary to WIS. STAT. § 941.29(2). Boykin additionally appeals from the trial court's order denying his motion for postconviction relief. Boykin raises two challenges on appeal. Boykin contends that the trial court erred in denying his motion to suppress evidence because the search which led to the evidence underlying his convictions, although conducted by his probation agent, was in fact instigated by the police and, therefore, was an unlawful police search. Boykin additionally argues that the trial court erroneously exercised its discretion by imposing an excessive sentence without explaining its rationale. Based on our review of the record, we reject both of Boykin's arguments. We affirm the judgment and order. However, because of a discrepancy between the sentence as pronounced and the sentence as ordered in the written judgment of conviction, we remand to the trial court for a determination of whether the written judgment of conviction is inaccurate and requires correction.[2]

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] We note that the judgment of conviction appears to conflict with the court's oral pronouncement at sentencing. At the sentencing hearing, the trial court sentenced Boykin to four years for the possession of a firearm by a felon, with two years of initial incarceration and two years of extended supervision, to run consecutive to his sentence of two years for possession of THC, with one year of initial incarceration and one year of extended supervision. However, the written judgment reflects a sentence of six years for possession of a firearm by a felon, with two years of confinement followed by four years of extended supervision.

BACKGROUND

¶2 On August 17, 2007, the State filed a complaint against Boykin alleging twelve counts relating to drug offenses, bail jumping, and possession of firearms. At the time of the charges, Boykin was on probation for possession of THC, second offense, and was under the supervision of Probation Agent Tammi Navis. The evidence underlying the charges was uncovered during a search of Boykin's bedroom, during which both Navis and Officer Joseph Spaulding were present. Boykin filed a motion to dismiss the charges on grounds that the initial warrantless search of his room violated his constitutional rights because neither the probation agent nor the officer had reasonable suspicion to conduct a search. In response, the State filed a motion requesting a more definite statement as to Boykin's challenge. The State asserted that probation officers do not need "reasonable suspicion" to search a probationer's residence and that WIS. ADMIN. CODE § DOC 328.21 (June 1999) allows for a search of an offender's living quarters by field staff if there are reasonable grounds to believe that the quarters contain contraband. Boykin then clarified his view that the search of his bedroom was not a probation search, but a police search because the officer, not the probation agent, initiated the search and opened the bedroom door.

¶3 The trial court held a motion hearing on November 16, 2007, at which both Navis and Spaulding testified. The testimony from the motion hearing reflects that on August 14, 2007, City of Racine Police Officer Sam Stulo received information from a citizen informant that Boykin was the subject of a child support warrant and had been using and selling crack cocaine. Stulo confirmed the existence of the warrant and then contacted Navis and Spaulding, who were both assigned to the community-oriented policing (COP) house where Boykin reported. At the time Navis received Stulo's call, Boykin was at the COP house.

Spaulding took Boykin into custody and, while conducting a search incident to arrest, discovered a plastic blue baggie, commonly referred to as a "gem bag," in Boykin's pants pocket. He informed Navis of his finding and, based on the information from Stulo and Spaulding, Navis determined that as Boykin's agent she would begin an investigation. Navis attempted to reach her supervisors to obtain approval for a home search, but was unsuccessful. Spaulding testified that he and Navis discussed how to proceed and that he suggested to her that "it would probably be in the best interest" to conduct a home visit or a home search. Navis decided to verify Boykin's residence and requested that Spaulding accompany her as he had in the past.

¶4 When Navis and Spaulding arrived at Boykin's residence, Navis spoke to Boykin's grandmother, who was familiar with Navis from previous contacts. Navis explained that they wanted to confirm that Boykin still resided there. When Navis and Spaulding approached Boykin's bedroom, Navis observed that the door was slightly ajar. Spaulding pushed the door open and pointed out a bag containing a green leafy substance and a digital scale on an ironing board. At the same time, Navis observed a bottle of liquor by a window. Spaulding then called his supervisor to obtain a warrant.

¶5 Following the hearing, the trial court made the following findings:

> I've reviewed my notes and the realtime notes. And I believe that this is a very close case, and I want to be very specific with respect to my findings of fact here.
>
> The evidence shows that Officer Stulo had information from a citizen informant who he had used in the past and who had been proven to be accurate in the past, some [fifteen] times, that the defendant, Seneca Boykin, had an outstanding child support warrant and also that he had been using and selling crack cocaine. The information did not indicate where that use and sale was, but it was that he was using and selling crack cocaine.

Officer Stulo then called Agent Navis, who was working out of the Sixth Street COP House, to give her that information because he knew that Agent Navis was Mr. Boykin's agent. At that time Mr. Boykin was actually meeting with Agent Navis. Officer Stulo then called Officer Spaulding, and both he and Navis had walked out of the Sixth Street [COP] House.

Agent Navis supervises the defendant and the defendant is on probation for charges of possession of THC as a repeat drug offender.

….

She did testify that Mr. Boykin was at her office when she got a call from Officer Stulo, and that eventually Officer Spaulding took the defendant into custody. Agent Navis was not present when Spaulding took the defendant into custody, but she was informed by Spaulding that he had searched the defendant and found a small Baggie referred to as a gem bag. And she found out later per Spaulding that it is the type of bag used for packaging marijuana for sale on the streets.

….

[Navis] testified that once she got that information, she decided to begin her own investigation based on those reports and particularly on the report of the citizen informant. She had previously received information from COP officers and acted on it. She testified that she decided to verify his residence … a place where he resided with his grandparents.

She went to that location with Officer Spaulding. Again, she testified that this was her idea. Spaulding kept trying to testify that it was her idea, but when questioned closely, it becomes a much closer question.

He testified that he told her that the information had been received and that from his experience, the bag was packaging for controlled substances. And he said, quote, you know, since I had a suspicion that maybe he was involved in this, that it would be good to make sure he still had a room over there and to see, you know, what maybe was in plain view inside the room.

Based on the discussions that both of them had, both Officer Spaulding and Agent Navis proceeded to [Boykin's address]. She stated to the grandparents, whom she knew

> because she had been doing monthly home checks, that, quote, we wanted to come in to talk to her to confirm that [Boykin] still resided there. And she said, I asked if we could go up to his room to confirm that.
>
> She testified that she directed what was occurring at the time, however, and that she saw a green leafy substance in plain view. She was attempting to cast the testimony in terms of what she saw. And she testified "we," and then she stopped and said, "or I observed a digital scale on the ironing board."
>
> At that point Officer Spaulding called his supervisor to procure a search warrant. She did not search the room. She stated as the grounds for her search to be her observations and the reliability of the informant.

In a written order entered on November 30, 2007, the trial court denied Boykin's motion based on its finding that (1) the search was a probation search and (2) the probation agent had reasonable grounds to conduct the search.

¶6 Boykin subsequently plead no contest to the possession of THC and the possession of a firearm by a felon. The transcript of the sentencing hearing reflects that Boykin was ultimately sentenced to four years for the possession of a firearm by a felon, with two years of initial incarceration and two years of extended supervision, to run consecutive to his sentence of two years for possession of THC, with one year of initial incarceration and one year of extended supervision.

¶7 Boykin filed a motion for postconviction relief, requesting the court to reverse his convictions or, in the alternative, set the matter for resentencing. As grounds for relief, Boykin alleged that the trial court erroneously exercised its discretion when it denied his motion to suppress evidence and imposed an excessive sentence. The trial court denied Boykin's motion. He now appeals from that denial, as well as the judgment of conviction.

DISCUSSION

¶8 *The Search of Boykin's Bedroom*. Under the Fourth Amendment, all searches and seizures, including probation searches, must be reasonable. ***State v. Hajicek***, 2001 WI 3, ¶3, 240 Wis. 2d 349, 620 N.W.2d 781. A warrantless search is unreasonable unless it falls under a lawful exception to the warrant requirement. ***Id.***, ¶35 (citing ***State v. Griffin***, 131 Wis. 2d 41, 50, 388 N.W.2d 535 (1986), *aff'd*, ***Griffin v. Wisconsin***, 483 U.S. 868 (1987)). In ***Griffin v. Wisconsin***, 483 U.S. at 875, the United States Supreme Court recognized an exception to the warrant requirement for probation searches. The Wisconsin Supreme Court acknowledged this exception in ***Hajicek***: "The special need for ensuring that probationers are rehabilitated and that the public is protected creates an exception to the warrant or probable cause requirement for reasonable searches." ***Hajicek***, 240 Wis. 2d 349, ¶36. This exception applies only to searches conducted by probation agents. ***State v. Griffin***, 131 Wis. 2d at 56-57.

¶9 Boykin contends that the trial court erred in its determination that the search of his bedroom was a probation search, not a police search.[3] The standard of review to be applied to this determination was set forth in ***Hajicek***, 240 Wis. 2d 349, ¶2. There, the court held:

> [T]he determination of whether a search is a police or probation search is a question of constitutional fact reviewed according to a two-step process. First, we review the circuit court's findings of historical fact under the

[3] The State contends for the first time on appeal that neither a "probation search" nor a "police search" occurred prior to the application for a search warrant. It discusses at length the distinction between a probation "home visit" and a probation "home search," both in case law and in the Wisconsin Administrative Code and Department of Corrections Probation Manual. Because we affirm the trial court's decision as to the probation search, we need not address this argument.

> clearly erroneous standard. Second, we review the circuit court's determination of constitutional fact de novo.

Id.[4]

¶10 Boykin contends that his probation agent was acting as a "stalking horse" for the police in conducting the search of his bedroom; in other words, she used her authority as a probation officer to help the police evade the warrant requirements of the Fourth Amendment. *See* ***State v. Wheat***, 2002 WI App 153, ¶20, 256 Wis. 2d 270, 647 N.W.2d 441. However, the trial court's findings do not support Boykin's claim. Specific to this allegation, the trial court made the following findings: (1) Boykin was on probation for possession of THC as a repeat offender; (2) Navis had reliable information from a COP officer that Boykin was using and selling crack cocaine; (3) Navis needed permission from her supervisor to conduct a probation search, but because Navis could not reach her supervisor, she decided to do a home check to verify Boykin's place of residence; (4) Navis directed what occurred at Boykin's residence—she talked to the grandparents, and she proceeded to Boykin's bedroom; (5) Spaulding opened the door for protective purposes; and (6) Navis observed the "green leafy substance" in a bag on the ironing board and the scale. Based on our review of the record, the trial court's findings of historical fact are not clearly erroneous.

[4] Generally, if the search is held to be a probation search we must also determine whether the search was reasonable, meaning that the probation officer had "reasonable grounds" to believe that the probationer had contraband. ***State v. Hajicek***, 2001 WI 3, ¶3, 240 Wis. 2d 349, 620 N.W.2d 781. However, we agree with the State that Boykin's challenge is confined to the nature of the search, whether it was a probation search or police search. Boykin did not challenge, either before the trial court or on appeal, the reasonableness of the search or the probation agent's authority to conduct a probation search absent permission from her supervisor. We therefore need not reach these issues.

¶11 We acknowledge Boykin's contention that there is testimony from the suppression hearing which seems to indicate that Spaulding suggested a home check to Navis for purposes of confirming that Boykin still lived at the residence.[5] However, it is also clear from the testimony that the ultimate decision to conduct a home visit was made by Navis. Navis testified that, based upon information from Stulo that Boykin had been "selling and using cocaine," and also information from Spaulding that he had found a "gem bag" in Boykin's pocket, Navis determined that she, "as an agent, would begin [her] own investigation." She testified, "I decided to verify the residence, and I asked Officer Spaulding to come with me as

[5] The transcript of the motion hearing reflects that after Navis failed to reach her supervisor, she and Spaulding discussed how to proceed.

> [Defense counsel:] You state in your report that both you and Ms. Navis talked about what to do, and at that point it was decided to go to Mr. Boykin's home. Is that correct?
>
> [Spaulding:] Correct.
>
> [Defense counsel:] You had some input on that decision or who—both of you did—who made the final decision?
>
> [Spaulding:] I—she made the final decision.
>
> [Defense counsel:] Did you make some suggestions to her as far as what should happen next?
>
> [Spaulding:] I did, yes.
>
> [Defense counsel:] And was one of those suggestions to go and do a home visit by Mr. Boykin's house?
>
> [Spaulding:] I said it would probably be in the best interest, yes.
>
> [Defense counsel:] Basically because she had not received permission from her supervisors. Is that correct?
>
> [Spaulding:] I, I had made my initial suggestion to her that we do a home visit or a home search due to the suspicions of the controlled substances.

he has in the past." When asked whether she was in control of the situation as far as directing what occurred at Boykin's residence, Navis responded "Yes." Navis's testimony supports the trial court's finding that Navis "ultimately made the decision to do a home visit in anticipation of a probation search."[6]

¶12 Relying on the trial court's findings of historical fact, we review de novo its determination that the search was a probation search, not a police search. First, the trial court's findings indicate that it was Navis who instigated the search based on the information provided to her by Stulo and Spaulding. The fact that the police provide the information that leads to a probation search does not make the probation search unlawful, nor does an agent's cooperation with law enforcement change the nature of the search. ***Hajicek***, 240 Wis. 2d 349, ¶33 (citing ***State v. Griffin***, 131 Wis. 2d at 57, and ***State v. Flakes***, 140 Wis. 2d 411, 427, 410 N.W.2d 614 (Ct. App. 1987)). Second, the trial court found that Spaulding took the lead in pushing open the door for protective purposes. When a probation officer conducts a search while police are present only for protective purposes, the police presence does not change the nature of the search. ***Hajicek***, 240 Wis. 2d 349, ¶30 (citing ***State v. Griffin***, 131 Wis. 2d at 62-63).

¶13 Finally, we acknowledge, as the trial court did, that the interaction of Spaulding and Navis preceding the search requires close attention. However, the cooperation of law enforcement and probation supervisors for the purpose of

[6] We recognize Navis's testimony that she determined to do a "home visit" as compared to a "home search." However, this does not impact our analysis. The trial court considered, and the parties argued, the search of Boykin's bedroom in terms of the more rigorous "reasonable grounds" requirements of a probation "home search." As noted earlier, Boykin's challenge on appeal is limited to his contention that the search was a "police search," not a "probation search"; he does not challenge the reasonableness of a probation search.

preventing crime is a specific goal of probation supervision. ***Hajicek***, 240 Wis. 2d 349, ¶33 (citing WIS. ADMIN. CODE § DOC 328.01(5) (June 1999)). Here, we conclude that the search of Boykin's bedroom was a probation search conducted by and under the direction of Boykin's probation agent. "[A] probation officer cannot be a 'stalking horse' of law enforcement if the probation officer instigated the search." ***Wheat***, 256 Wis. 2d 270, ¶21. We therefore uphold the trial court's denial of Boykin's motion to suppress evidence.

¶14 *Sentencing*. We turn next to Boykin's contention that the trial court erroneously exercised its sentencing discretion both by failing to adequately explain the rationale for the sentence and by imposing an excessive sentence. Based on our review of the sentencing transcript, we reject Boykin's argument.

¶15 Sentencing is well within the discretion of the trial court, ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987), and the trial court has great latitude in determining a sentence, ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). On appeal, our review is limited to determining whether there was an erroneous exercise of discretion. ***Larsen***, 141 Wis. 2d at 426. "[S]entencing decisions of the [trial] court are generally afforded a strong presumption of reasonability because the [trial] court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted).

¶16 Boykin concedes that the trial court "amply" explained why probation was not an option given the facts and circumstances of his case; however, he contends that the trial court failed to adequately explain its specific reasons for the length of initial incarceration. Boykin is correct that "judges are to explain the reasons for the particular sentence they impose," or in other words,

they must "provide a 'rational and explainable basis' for the sentence." ***Id.***, ¶39 (citation omitted). In doing so, the court must specify the objectives of the sentence on the record, which include but are not limited to the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. ***Id.***, ¶40. It must identify the general objectives of greatest importance, which may vary from case to case. ***Id.***, ¶41. The trial court must also describe the facts relevant to the sentencing objectives and explain, in light of these facts, why the particular component parts of the sentence imposed advance the specified objectives. ***Id.***, ¶42. Similarly, it must identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the sentencing decision. ***Id.***, ¶43.

¶17 Here, the sentencing transcript reflects that the court identified the factors it considered and its objectives and fashioned a sentence well within the permissible range. The court noted that at the time of the current offense, Boykin was on probation for a charge of possession of THC as a repeat drug offender. The court observed that Boykin was putting himself at great risk, as well as his grandparents, by possessing THC again. The court also noted that during a previous period of probation, Boykin had been the subject of two violation investigation reports, had not completed an intervention program, and had two positive drug tests. The court determined, "Clearly confinement is necessary here. The problem that I see is that on probation in the past, they've tried to give you some counseling, tried to put you on the right path, Mr. Boykin, but that has not been … fruitful." While Boykin is correct that the court did not specifically address the length of confinement, it is readily discernable from its observations that the length of confinement is tied to Boykin's need for rehabilitation and the court's need to impress upon Boykin the seriousness of his conduct.

¶18 We also reject Boykin's claim that his sentence was excessive. As the trial court explained, the maximum confinement Boykin faced upon sentencing was fourteen years for the possession of a firearm by a felon as a habitual offender, and seven and one-half years for the possession of THC with intent to deliver as a repeat drug offender. Because Boykin's actual sentence is well within the maximum sentence limit, it cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("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.").

CONCLUSION

¶19 We conclude that the trial court's findings of fact were not clearly erroneous and thus supported a determination that the search of Boykin's bedroom was a probation search, not a police search. We further conclude that no basis exists to disturb the sentences imposed by the trial court. The record reflects that the trial court properly exercised its discretion in arriving at a sentence well within the limits of the maximum allowed. We therefore uphold the trial court's denial of Boykin's motion to suppress evidence. We affirm the judgment of conviction and the order denying Boykin's motion for postconviction relief. We remand for the trial court's review of the sentence as set forth in the judgment of conviction.

By the Court.—Judgment and order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.