COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2130-CR
2011AP2131-CR

Cir. Ct. Nos. 2009CF317
2009CF142

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL G. HAMMOND,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Waukesha County: RICHARD CONGDON and MARK D. GUNDRUM, Judges, and JOSEPH D. McCORMACK, Reserve Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Daniel Hammond appeals judgments of conviction and orders denying postconviction relief. He argues the circuit court erroneously

exercised its sentencing discretion. He also seeks sentence modification based upon a new factor. We reject his arguments and affirm.

¶2 A criminal complaint charged Hammond with three counts of identity theft for financial gain for taking three credit cards and cash from a wallet inside a parked vehicle. In a separate case, Hammond was charged with a total of fifteen criminal counts surrounding a motor vehicle accident in which Hammond, while under the influence of controlled substances, crashed into a house in the town of Mukwonago while his four children were in the vehicle.[1]

¶3 Hammond reached a plea agreement and was convicted of one count of causing injury by operating a vehicle while under the influence of a controlled substance; one count of causing injury by operating while under the influence of a controlled substance with minor child in vehicle; and one count of misappropriating identification information to obtain money. The circuit court imposed a sentence of four years' initial confinement and five years' extended supervision on the first count; a concurrent twelve months on the second count; and imposed and stayed one year initial confinement and two years' probation on the third count, consecutively.

¶4 During sentencing, the circuit court also mistakenly granted Hammond eligibility into the earned release program.[2] The court subsequently sent him a letter explaining that the statute under which he was convicted, WIS.

[1] Hammond's two cases are combined on appeal.

[2] The fact that Hammond was precluded from eligibility for the earned release program was unknown to the court, the defendant and defense counsel, and the State likewise did not raise the matter.

STAT. § 940.25,[3] "does not qualify for the Earned Release Program." Hammond filed two postconviction motions seeking sentence modification.[4] The circuit court denied his motions and this appeal follows.

¶5 Our review of sentencing decisions is limited to determining if discretion was erroneously exercised. ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. Sentencing decisions are afforded a presumption of reasonability consistent with our strong public policy against interference with the circuit court's discretion. ***Id.*** The defendant bears a heavy burden of showing that the circuit court erroneously exercised its discretion. ***Id.*** To carry that burden, a defendant must show by clear and convincing evidence that the sentencing court actually relied upon an improper sentencing factor. ***Id.***, ¶34.

¶6 Hammond argues the circuit court erroneously exercised its sentencing discretion by not sufficiently considering probation as an option. He notes that the presentence investigation author, defense counsel, and the presentence AODA counselor recommended probation. Hammond insists the court demonstrated "a rather mechanical recitation for rejecting probation rather than rational reasoning process and explained sentence." *See* ***State v. Gallion***, 2004 WI 42, ¶¶26, 76, 270 Wis. 2d 535, 678 N.W.2d 197.

[3] All references to the Wisconsin Statutes are to the 2009-10 version.

[4] Hammond thereafter filed notices of appeal in both cases, but then moved to voluntarily dismiss the appeals and to permit him to file a further WIS. STAT. RULE 809.30 postconviction motion as to sentencing issues, which we granted. The Honorable Richard Congdon presided at the sentencing hearing; the Honorable Joseph McCormack presided at the first postconviction motion hearing and the Honorable Mark Gundrum presided at the second postconviction motion hearing.

¶7 We disagree. A sentencing court may use the recommendations of counsel and presentence reports as "touchstones in [its] reasoning"; however, it is not obligated to do so. ***Id.***, ¶47. In this case, the sentencing court considered these recommendations, but its main reason for rejecting probation was Hammond's character, including Hammond's prior experience with probation. The court stated:

> I need to protect the public. I have to ask myself, are you a good risk. And I have to answer no, you're not a good risk to be put back into the community. I'm asked to consider probation. Well, you have had three kicks at that cat. Two times they've been revoked, and one time has been extended because you couldn't meet whatever conditions you had to meet. I'm afraid probation is not the answer.

¶8 The court was also concerned with the gravity of the offenses. The court opined that "it would unduly depreciate the gravity of these crimes" to place Hammond on probation. *See* ***id.***, ¶42 (providing that while a court must consider probation as the first alternative, a court may reject probation if it finds that it would "unduly depreciate the seriousness of the offense"). The court provided Hammond an adequate and rational explanation for the sentence given.

¶9 Hammond next argues the circuit court erroneously exercised its discretion by imposing a "needlessly excessive and unduly harsh sentence …." To support his claim, he notes that he pled to the offenses, accepted that he was drug-dependent, and demonstrated success on AODA counseling.

¶10 Again, we disagree with Hammond. The sentencing court stated Hammond "might just be a little bit too late." The court stated:

> People have already been hurt. Homes have been damaged. Your own children have been injured and hospitalized. [The victim] is going to be not working his usual self for maybe indefinitely. And you have finally realized that you have a drug dependency.

¶11 The court also found that Hammond did not take responsibility for stealing the credit cards, and that it did not "detect a great deal of remorse" from Hammond. In any event, given the sentencing court's rationale, we conclude the sentence was neither harsh nor excessive given the seriousness of the offenses.

¶12 Finally, Hammond argues that he is entitled to a modification of his sentence on the basis of a new factor. Specifically, he argues the court's finding that he was eligible for the earned release program is a new factor.

¶13 In denying his request for postconviction relief, the circuit court found the decision to grant Hammond eligibility was "perfunctory." It also found the decision to grant eligibility was only an "afterthought." The transcript supports these findings. After imposing sentence, the sentencing court stated:

> If I hadn't, and I don't think I did, I am also finding that the defendant is not eligible for the Challenge Incarceration Program, but that he is eligible for the Earned Release Program. And I'm basing that on the presentence investigation report.

¶14 The transcript demonstrates the sentencing court was focused on "the extreme wrong and harm done," the seriousness of the offenses, and Hammond's prior record of harms to the public. The court focused on these factors far more than the rehabilitative aspect of the earned release program. The court determined that Hammond was "not a good risk to be put back into the community," and that confinement was "necessary to protect the public from further criminal activity."

¶15 We reject Hammond's argument that the sentence was premised on rehabilitation, which according to Hammond could be met by completing the earned release program and its access to AODA treatment. In fact, the transcript is

clear that the court's sentence was not focused on Hammond's rehabilitation and his AODA treatment, but on protecting the public. Eligibility for the earned release program was simply not a driving factor in the court's sentence. Hammond fails to meet his burden to demonstrate by clear and convincing evidence that his ineligibility presents a new factor justifying modification of his sentence. The court properly concluded that modification of his sentence was not justified.

By the Court.—Judgments and orders affirmed.

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