COURT OF APPEALS
DECISION
DATED AND RELEASED

April 10, 1996

No. 95-1158-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PRENTISS L. FARR,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Racine County: NANCY E. WHEELER, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Prentiss L. Farr appeals from a judgment convicting him of three counts of delivering cocaine and one count of delivering heroin and from an order denying his postconviction motion seeking sentence modification. We conclude that the trial court properly exercised its discretion in sentencing Farr and affirm.

Farr was charged in the information with three counts of delivering cocaine and one count of delivering heroin within 1000 feet of a

school, one count of delivering cocaine within 1000 feet of a school as party to the crime, and one count of delivering a noncontrolled substance which he expressly represented to the recipient was heroin, as party to the crime. As part of a plea agreement, the allegations that he delivered controlled substances within 1000 feet of a school were deleted. Farr pled no contest to three counts of delivering cocaine and one count of delivering heroin; the other counts were dismissed. The State recommended a twelve-year prison term followed by probation. The court imposed sentences which were concurrent in part and consecutive in part totaling twenty years.

In sentencing Farr, the trial court noted that he had a long criminal history, had had his probation revoked on previous occasions and was, at the time of sentencing in this matter, serving his sixth prison sentence. The court noted that Farr was originally charged with six counts and a penalty enhancer which gave him a possibility of ninety-seven years in prison and substantial fines. The court noted that under the plea agreement, Farr had reduced his exposure to incarceration to a maximum term of thirty years. The court found that Farr had "virtually exhausted the types of [drug] treatment which are available within the community." The court noted that "[d]uring the last treatment program, which apparently the defendant felt was the most effective, he committed the offenses which are the subject of the information in this case and for which he appears for sentencing today." The court found that Farr, while knowing he was addicted to drugs, continued to participate in drug activity and that he sold controlled substances to individuals he did not know, contrary to his contentions that he was not encouraging anyone else to use drugs. The court noted that Farr could have declined to procure the drugs for the undercover officers but did not.

The court deemed probation inappropriate because Farr committed the offenses while on probation and had demonstrated an inability to perform while on probation. The court considered Farr's family situation but felt that granting probation would send a message that criminal activity would go unpunished. The court noted that society requires protection from Farr as a consequence of his continued involvement in drug activity.

In his postconviction motion, Farr asked the trial court to reduce his sentence to a total of twelve years by making his sentences on each count concurrent. He argued that the State engaged in "sentencing entrapment" or

"sentencing manipulation" in violation of his due process rights because undercover officers approached him for drugs several times even though they knew he was an addict and would participate in drug transactions. Farr contended that the numerous transactions were made solely to "stack" the offenses and "ratchet up" his sentencing exposure. Farr argued that the remedy for this violation was to modify the sentences to run concurrently.

Farr also argued that new factors warranted sentence modification because the trial court miscounted the number of prison terms Farr had already served, the prosecutor made an erroneous reference to Farr's alleged failure to report to his probation officer, and additional information about Farr's background and treatment record had surfaced since sentencing.

At the postconviction motion hearing, testimony focused on the manner in which undercover officers approached Farr to purchase drugs. Mark Anton, a special agent with the Department of Justice, Division of Narcotics Investigation in Milwaukee, testified that he was involved in an undercover operation in Racine County in April and May 1993 (the months during which Farr committed the charged offenses). The investigation consisted of a street buy program of six months and the plan was to wait until June and then conduct a sweep of all drug transaction participants. Farr came to Anton's attention, and with the assistance of an informant, cocaine was purchased from Farr on the first occasion in April 1993. Anton returned to Farr's residence without the confidential informant to have a controlled substance transaction directly with Farr. Anton testified that he went to Farr's residence to conduct this transaction to avoid a situation where a confidential informant would not be available to assist in the prosecution of the case and to obtain a first-hand drug transaction experience with Farr which would make the case more solid.

Anton returned to Farr's residence on a third occasion (in early May 1993) to purchase heroin in the hope of learning the source of heroin in the Racine area. Anton explained that the fourth purchase of cocaine and counterfeit heroin from Farr was initiated to see where Farr went to obtain the heroin. The investigators were hoping that as the operation drew to a close they could obtain a search warrant if they could find out where Farr procured the heroin. Anton testified that Farr's home was under surveillance during his

contacts, but the agents were ultimately unsuccessful in following Farr to his heroin source.

Cross-examination of Anton focused on whether Farr was actually followed when he left his residence to procure the controlled substances requested by the undercover agents. Although the incident reports did not state that Farr was followed to the source of the drugs, the agent was unable to say exactly what the surveilling agents had attempted insofar as following Farr.[1] Anton testified that he was aware that Farr used drugs but was unaware Farr was addicted. Anton explained that he did not request heroin from Farr until the third visit because he wanted the second cocaine transaction to go smoothly and he did not want to get himself into a situation where Farr would ask him to use heroin with him.

In its memorandum decision denying Farr's sentence modification motion, the court found Farr's argument regarding sentence stacking unconvincing in light of evidence of Farr's willingness to engage in drug transactions on each occasion he was approached and Anton's testimony that investigators continued to work with Farr in the hope that they would be able to make inroads into the local heroin market through him. The court specifically found "no inappropriate law enforcement activity in this case. The court finds no evidence that the agents continued to buy from the defendant for the sole purpose of ratcheting up a sentence."

The court also rejected Farr's request for sentence modification based on new factors. While the court acknowledged that it erred in counting the number of prison terms Farr had already served,[2] Farr's prior record was nevertheless an appropriate consideration at sentencing and the difference between having served five prior prison terms and four prior prison terms was not a factor which would have affected or frustrated the purpose of the trial court's sentences. The trial court also rejected Farr's claim that it misconstrued Farr's missed treatment appointments. Finally, the court concluded that

[1] The reports indicated that on certain occasions the agents were able to follow Farr part of the way to his source, but did not explain why they did not follow him all the way.

[2] Farr had served five, not six, previous terms at the time of sentencing in this case.

supplementary information regarding Farr's treatment for drug addiction was information which could have been or was presented at the time of sentencing and did not constitute a new factor. Farr appeals.

Farr renews his sentence manipulation or stacking argument on appeal. Findings of fact by a trial court will be upheld by this court unless they are clearly erroneous. *See* § 805.17(2), STATS. Here, the trial court made factual findings that there was no inappropriate law enforcement activity and no evidence that agents continued their contacts with Farr for the sole purpose of "ratcheting up" his sentence. These findings are not clearly erroneous in light of Anton's testimony at the postconviction motion hearing.

We further reject Farr's sentencing manipulation argument on the grounds that the sentencing manipulation or entrapment claim was designed for the federal determinative sentencing scheme which no longer allows judges to take alleged outrageous official conduct into account at sentencing. *See* ***United States v. Staufer,*** 38 F.3d 1103, 1106-07 (9th Cir. 1994); *see also* ***United States v. Harris,*** 997 F.2d 812, 818 (10th Cir. 1993) (a federal court cannot adjust a sentence to account for similar charges that exaggerate a defendant's culpability due to the repetitive nature of the criminal activity). Wisconsin is an indeterminate sentencing state where trial courts exercise discretion in sentencing. Because a trial court may consider a host of factors in sentencing, *see* ***State v. Borrell,*** 167 Wis.2d 749, 773-74, 482 N.W.2d 883, 892 (1992), such a claim is incompatible with Wisconsin's approach to sentencing.

We turn to the specific question of whether the trial court properly exercised its discretion in sentencing Farr. We presume that the trial court acted reasonably, and Farr must show that the trial court relied upon an unreasonable or unjustifiable basis for its sentence. *See* ***State v. J.E.B.,*** 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied,* 503 U.S. 940 (1992). The weight given to each of the sentencing factors is within the sentencing judge's discretion. ***Id.*** at 662, 469 N.W.2d at 195. Public policy strongly disfavors appellate courts interfering with the sentencing discretion of the trial court. ***State v. Teynor,*** 141 Wis.2d 187, 219, 414 N.W.2d 76, 88 (Ct. App. 1987).

The primary factors to be considered by the trial court in imposing a sentence are the gravity of the offense, the offender's character and the need to

protect the public. ***Borrell,*** 167 Wis.2d at 773, 482 N.W.2d at 892. The trial court considered these factors at the sentencing hearing. In his reply brief, Farr argues that the sentencing judge had discretion to consider the conduct of law enforcement in pursuing Farr. The court did consider that factor on postconviction motion and specifically found that there was no inappropriate conduct. We discern no misuse of the trial court's discretion in sentencing Farr. Farr has not shown that the court relied upon an unreasonable or unjustifiable basis in imposing sentence. *See* ***J.E.B.,*** 161 Wis.2d at 661, 469 N.W.2d at 195.

As with the length of the sentence, whether sentences shall be served consecutively or concurrently is entrusted to the trial court's discretion. *See* ***State v. Hamm,*** 146 Wis.2d 130, 156, 430 N.W.2d 584, 596 (Ct. App. 1988). "[T]he factors that apply to the length of sentence also apply to whether sentences will run consecutively." ***State v. Anderson,*** 163 Wis.2d 342, 350-51, 471 N.W.2d 279, 282 (Ct. App. 1991). The trial court's rationale for the length of its sentences on each count also supports its decision that the sentences be served consecutively. We do not see any misuse of discretion.

We also agree with the trial court that Farr did not demonstrate the existence of new factors warranting sentence modification. A new factor is a fact relevant to the imposition of the sentence and unknown to the trial court at the time of sentencing, ***State v. Kaster,*** 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989), or which frustrates the sentencing court's intent, ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Here, the court noted that none of the alleged new factors either frustrated its intent at sentencing or were relevant to the imposition of sentence. Our review of the sentencing record bears this out.

By the Court.—Judgment and order affirmed.

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