

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP491-CR

Cir. Ct. No. 2011CF1123

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS D. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO and JONATHAN D. WATTS, Judges.
Affirmed.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Marcus D. Thompson appeals from an amended judgment of conviction entered upon his guilty plea to one count of burglary. He

also appeals from an order denying postconviction relief.¹ He asserts that the circuit court erroneously exercised its sentencing discretion. We affirm.

BACKGROUND

¶2 On November 18, 2010, Thompson forced his way into a residence and ransacked it, then fled with assorted property. According to the criminal complaint, he told police that he committed the offense after he saw people moving into the home and “noticed that they had some nice stuff.” The State charged him with one count of burglary. He pled guilty as charged, and the matter proceeded immediately to sentencing.

¶3 Thompson faced a maximum sentence of seven-and-one-half years of initial confinement, five years of extended supervision, and a \$25,000 fine. The State recommended that he serve a thirty-four month term of imprisonment bifurcated as seventeen months each of initial confinement and extended supervision. The State further recommended that he serve the sentence consecutively to a reconfinement term that he was serving for a prior offense following revocation of extended supervision. Thompson and his trial counsel spoke on his behalf but made no specific sentencing recommendation. The circuit court imposed a consecutive sentence comprised of the maximum term of initial confinement and a two-year term of extended supervision.

¶4 Thompson moved for postconviction relief, seeking resentencing. The circuit court denied his motion without a hearing, and he appeals.

¹ The Honorable Jean A. DiMotto accepted Thompson’s guilty plea and imposed the sentence in this matter. The Honorable Jonathan D. Watts presided over the postconviction proceedings and entered the order denying resentencing.

DISCUSSION

¶5 Thompson challenges his sentence. Our standard of review is well settled and places a heavy burden on a convicted defendant. Sentencing lies within the circuit court’s discretion, and appellate 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. This court has a “‘duty to affirm a sentence on appeal if from the facts of record [the sentence] is sustainable as a proper discretionary act.’” *State v. Hall*, 2002 WI App 108, ¶6, 255 Wis. 2d 662, 648 N.W.2d 41 (citation omitted). Moreover, “in instances where a sentencing judge fails to properly exercise discretion, this court will ‘search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.’” *State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695 (citation omitted).

¶6 “Circuit courts must consider three primary factors in determining an appropriate sentence: the gravity of the offense, the character of the defendant, and the need to protect the public.” *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The circuit court may also consider a host of other factors relevant to the defendant, the offense, and the community:

- (1) Past record of criminal offenses;
- (2) history of undesirable behavior patterns;
- (3) the defendant’s personality, character and social traits;
- (4) result of presentence investigation;
- (5) vicious or aggravated nature of the crime;
- (6) degree of the defendant’s culpability;
- (7) defendant’s demeanor at trial;
- (8) defendant’s age, educational background and employment record;
- (9) defendant’s remorse, repentance and cooperativeness;
- (10) defendant’s need for close rehabilitative control;
- (11) the rights of the public; and
- (12) the length of pretrial detention.

Id. (one set of quotation marks omitted). The 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. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis.2d 224, 688 N.W.2d 20. Additionally, 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.” *Gallion*, 270 Wis. 2d 535, ¶40.

¶7 Thompson first asserts that the circuit court did not “directly address” the primary sentencing factors or “identify the factors that were considered” when imposing sentence. We disagree.

¶8 The circuit court addressed the gravity of the offense. The circuit court read aloud from the victim impact statement, which reflected that the burglary had undermined the victim’s sense of trust and had frightened her into moving out of her home. *See State v. Rodgers*, 203 Wis. 2d 83, 93-94, 552 N.W.2d 123 (Ct. App. 1996) (reflecting that a circuit court may assess gravity of the offense by considering its effect on the victim). The circuit court emphasized to Thompson that the victim had “worked hard for the things [she] had” and could not replace the property he took from her.

¶9 Thompson asserts that the circuit court gave inadequate consideration to the gravity of the offense, and he complains that the circuit court “did not discuss the facts of the case at all.” We reject this argument. Thompson fails to recognize that a circuit court has discretion to determine the depth of consideration to afford a sentencing factor. *See State v. Grady*, 2007 WI 81, ¶31, 302 Wis. 2d 80, 734 N.W.2d 364.

¶10 The circuit court considered Thompson’s character, emphasizing Thompson’s lengthy criminal record. *See State v. Fisher*, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). The circuit court noted that Thompson was only twenty-six years old and had prior convictions for “two thefts and [a] burglary crime, as well [as] a drug crime [and a] sexually related crime.” Observing that Thompson was “a man involved in a lot of criminality,” the circuit court found that he had committed “crimes of dishonesty,” that he “lacked empathy” and that he displayed “obvious disrespect for other people.”

¶11 Thompson complains that the circuit court did not consider his rehabilitative needs. *See State v. Setagord*, 211 Wis. 2d 397, 416, 565 N.W.2d 506 (1997) (character of the defendant includes “his or her rehabilitative needs”). We disagree. The circuit court explicitly acknowledged Thompson’s disclosure that he was taking steps towards obtaining a high school equivalency degree, and the circuit court stated that he could continue those efforts while incarcerated. The circuit court drew an entirely appropriate conclusion.² *See Gallion*, 270 Wis. 2d 535, ¶61 (noting the circuit court’s finding that the defendant “could best accomplish his rehabilitation in an institutional setting”).

¶12 Thompson asserts, however, that the circuit court did not consider his need for substance abuse treatment, and he points to his 2008 conviction for

² Thompson suggests that the circuit court has a mandatory obligation to consider a defendant’s rehabilitative needs. We need not reach the question of whether the circuit court must consider this factor because we are satisfied that the circuit court considered Thompson’s rehabilitative needs to the extent it deemed appropriate. “We do not give advisory opinions.” *Commerce Bluff One Condominium Assoc. v. Dixon*, 2011 WI App 46, ¶22 n.6, 332 Wis. 2d 357, 798 N.W.2d 264 (citation and one cite of brackets omitted).

possessing cocaine as proof of his treatment needs. Thompson’s position does not take into account the substantial attention that the circuit court paid to his prior crimes. Although Thompson might have preferred that the circuit court view his criminal record as a mitigating factor suggesting treatment needs rather than as an aggravating factor suggesting relentless criminality, the circuit court had discretion to assess his criminal history and draw reasonable inferences from it.³ *See State v. Thompson*, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992) (circuit court has discretion to determine whether a factor is aggravating or mitigating).

¶13 The circuit court considered the need to protect the public. The circuit court found that Thompson was “an experienced criminal” engaged in “unrepentant and flagrant criminality.” Based on Thompson’s extensive criminal history and lack of empathy for others, the circuit court determined that he posed a high risk of reoffending.

¶14 The circuit court viewed a variety of additional factors as relevant to the sentencing decision. The circuit court acknowledged that Thompson promptly admitted responsibility for the burglary and that he cooperated in the investigation by giving a statement to the police. *See Harris*, 326 Wis. 2d 685, ¶28 (circuit court may consider offender’s level of cooperation). In the circuit court’s view,

³ Thompson also suggests that his need for substance abuse treatment is evident from his trial counsel’s “explanation to the court that [he] absconded from probation because he felt he was going to be taken into custody for perceived drug use.” Thompson’s argument is puzzling. He maintained at sentencing that he absconded because his supervising agent unfairly tried to take him into custody to await the results of a urinalysis when “he was certain that the test was going to be clean.” The circuit court was not required to conclude that an allegedly unwarranted suspicion of drug use and a decision to abscond together demonstrate a need for substance abuse treatment. Consequently, we are satisfied that the circuit court properly exercised its discretion when it did not draw the conclusion that he advances here. *See State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695 (our inquiry is whether the circuit court exercised discretion, not whether discretion might be exercised differently).

however, these commendable actions were outweighed by a host of negative considerations.

¶15 The circuit court observed that Thompson had not completed high school and that he was unemployed, and the circuit court was disturbed by the disclosure that he had fathered a child with a woman whose name he never learned. *See id.* (circuit court may consider education, employment record, and history of undesirable behavior patterns). Additionally, the circuit court considered Thompson's failure to comply with the rules of community supervision while serving a term of extended supervision for an earlier criminal conviction. Referring to information that he "did n[o]t have a very productive relationship" with his supervising agent and had committed the instant offense after absconding from supervision, the circuit court concluded that Thompson "think[s] that [he's] in charge and that the law and the rule of law, mean[] nothing. It's not going to get in [the] way of [his] doing what [he] want[s]." *See id.* (circuit court may consider offender's need for close rehabilitative control).

¶16 We therefore cannot agree with Thompson's contention that the circuit court failed to identify or address the factors it considered when imposing sentence. Although the circuit court did not name the factors it considered, it clearly and thoroughly discussed the primary sentencing factors and many others as well. *See Odom*, 294 Wis. 2d 844, ¶25 (circuit court is required to discuss the sentencing factors, not recite them).

¶17 Thompson next complains that the circuit court failed to identify any sentencing goals and link them with the sentence selected. Again, we cannot agree. The sentencing remarks reflect that the circuit court selected protection of

the community as the primary sentencing objective. The circuit court explained to Thompson:

you refuse to submit to the rule of law and to authority. You'd rather do things your way. That's fine, but doing things your way is going to have to be in prison because I can't trust you in the community for even a second, any further than I can see you. I can't trust you.

Thus, the circuit court linked the goal of protecting the community with a maximum period of initial confinement, finding that “even a second” in the community presented a risk to the public.

¶18 We further disagree with Thompson’s position that the circuit court failed to select a sentence representing the minimum amount of custody consistent with the sentencing factors. *See State v. Ramuta*, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. The circuit court explicitly considered but decided against several sentencing options that it deemed insufficient for Thompson under the circumstances. Thus, as required, it considered probation as the first sentencing alternative. *See Gallion*, 270 Wis. 2d 535, ¶25. The circuit court rejected that option, however, stating that probation would “mock” both “the seriousness of the offense” and “the integrity of the victim.” The circuit court similarly considered but rejected the State’s recommendation for seventeen months each of initial confinement and extended supervision, deeming such a sentence “wholly inadequate” given his criminal history.

¶19 Thompson complains that the circuit court gave an insufficient explanation for rejecting the State’s sentencing proposal. His complaint is meritless. First, a circuit court has no obligation to explain its decision to deviate from any particular sentencing recommendation. *State v. Grindemann*, 2002 WI App 106, ¶28, 255 Wis. 2d 632, 648 N.W.2d 507. Second, in the circuit court’s

view, Thompson was “living the life of a complete outlaw.” That conclusion, coupled with the circuit court’s finding that he could not be trusted in the community for “even a second,” amply explains the decision to reject the State’s sentencing proposal and instead to impose a maximum term of initial confinement. Although Thompson may believe that his needs and the community’s safety could be adequately served by a more lenient sentence, that belief is not a basis for concluding that the circuit court erroneously exercised its discretion. *See State v. Harris v. State*, 75 Wis. 2d 513, 521-22, 250 N.W.2d 7 (1977).

¶20 Last, we turn to Thompson’s complaint that the circuit court erred by finding him ineligible to participate in the challenge incarceration program and the earned release program.⁴ We begin by noting that Thompson did not raise this claim in his postconviction motion, and the circuit court therefore had no opportunity to address his arguments. Accordingly, Thompson forfeited appellate review of the issue. *See State v. Huebner*, 2000 WI 59, ¶¶10-11 & n.2, 235 Wis. 2d 486, 611 N.W.2d 727.

¶21 Nonetheless, we have the power to consider a forfeited issue. *See id.*, ¶28. We briefly do so here. The challenge incarceration program and the earned release program are both treatment programs that, upon successful completion, permit an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(3m)(b)1., 302.05(3)(c)2.a. The circuit court has discretion to

⁴ Effective August 3, 2011, the legislature renamed the Wisconsin earned release program, and it is now known as the Wisconsin substance abuse program. *See* 2011 Wis. Act 38, ¶19, WIS. STAT. § 991.11 (2009-10). We discuss the program using the name that applied at the time of Thompson’s sentencing on May 6, 2011. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

determine whether an inmate is eligible to participate in the programs. *See* WIS. STAT. § 973.01(3g)-(3m). The circuit court is not required, however, to exercise discretion by making completely separate findings about an inmate’s eligibility to participate. A circuit court properly exercises its discretion in denying an inmate the opportunity to participate in the earned release program if “the overall sentencing rationale also justifies” the eligibility determination. *See State v. Owens*, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187. Similarly, the circuit court may deny an inmate eligibility for the challenge incarceration program based on one or more of the sentencing factors. *See State v. Steele*, 2001 WI App 160, ¶11, 246 Wis. 2d 744, 632 N.W.2d 112.

¶22 The circuit court decided that Thompson was ineligible to participate in the earned release and challenge incarceration program because he had a history of absconding from supervision. That history is a component of the risk Thompson poses to the public and is an entirely appropriate sentencing consideration. *See Harris*, 326 Wis. 2d 685, ¶28. Moreover, we have already concluded that the circuit court properly exercised its sentencing discretion in imposing a maximum term of initial confinement upon finding that Thompson was an “outlaw” who could not be trusted in the community. This rationale also justifies the circuit court’s decision not to permit Thompson to participate in programs that lead to early release from incarceration.

¶23 In sum, the record discloses no basis for concluding that the circuit court erroneously exercised its sentencing discretion. We affirm.

By the Court.—Judgment and order affirmed.

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

