COURT OF APPEALS
DECISION
DATED AND RELEASED

March 19, 1996

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

NOTICE

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

No. 95-1478-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS ROYSTER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Douglas Royster appeals from the judgment of conviction, following his no-contest plea, for burglary of residential coin-operated laundry machines. He also appeals from the trial court's order denying his motion for sentence modification. Royster argues that: his ten-year prison sentence was based on erroneous information; the trial court placed too much emphasis on his criminal history; and his sentence is cruel and unusual

punishment in violation of the Eighth Amendment. We reject his arguments and affirm.

Royster first argues that the sentencing court considered inaccurate information by considering information provided by a detective who suggested that Royster was responsible for other burglaries. Royster contended that he could not have committed the other burglaries because he was incarcerated at the time. Royster also argues that the sentencing court improperly considered the potential danger to the community caused by damage during burglaries to gas-powered laundry machines, when it was undisputed that the machines Royster had broken into were not gas-powered.

A defendant who requests resentencing based on inaccurate information must show that the challenged information was inaccurate and that the sentencing court actually relied on the inaccurate information in determining the defendant's sentence. ***State v. Johnson***, 158 Wis.2d 458, 468, 463 N.W.2d 352, 357 (Ct. App. 1990).

At the initial sentencing proceeding, Detective Michael Durfee explained why the burglary in this case (which occurred on April 24, 1992) was not charged with later burglaries committed by Royster in October 1992. He told the court that in 1992 he was assigned to coordinate an investigation of laundry room burglaries because some of the burglaries had resulted in ruptured gas lines, leading to the evacuation of apartment buildings. Royster was the final arrest made in the investigation. Detective Durfee implied that Royster may have committed burglaries in the summer of 1993 and therefore, he "pulled every report in the Department's files with [Royster's] name either as a suspect, an arrestee, a victim, a complainant, anything." As a result of that investigation, Detective Durfee found the police report that led to the April 1992 burglary charge.

After hearing Detective Durfee's explanation and defense counsel's objection to Detective Durfee's "strong likelihood theory," the trial court stated that the information was not being "considered as a read-in." The trial court ordered a full pre-sentence investigation and adjourned the proceeding. At the subsequent sentencing hearing, the trial court did not mention Detective Durfee's theory in its explanation of Royster's sentence.

Further, in its order denying Royster's motion for sentencing modification, the trial court also noted that it had not relied on Detective Durfee's suspicions in sentencing Royster. Simply put, there is nothing in the record to indicate that the trial court ever relied on Durfee's statements in sentencing Royster.

Additionally, Royster argues that because his laundry room burglary did not involve gas appliances, the trial court should not have considered the potential danger to the community where gas appliances are involved. He thus claims that the trial court incorrectly sentenced him based on inaccurate information.

According to the sentencing transcript, the trial court was aware that the machines Royster burglarized were not gas appliances. At sentencing, when discussing "punishment, deterrence and protection" of the community, the trial court stated:

> This type of burglary puts the community at substantial risk not only for the loss of sense of security, the financial losses that I've already referred to, but because of the danger of fire, explosion and other risks because of gas leaks that occur when this type of laundry room burglary is committed.

In its order denying Royster's motion for sentencing modification, the trial court noted:

> I was apprised by the assistant district attorney during sentencing that the offense in this instance did not involve a gas appliance. Accordingly, I did not rely on erroneous information with respect to this particular offense.

Royster has not met his burden of showing that the trial court relied on inaccurate information at sentencing. ***Johnson***, 158 Wis.2d at 468, 463 N.W.2d at 357. There was no inaccurate information presented on this issue. The trial court knew that the machines involved in this case were not gas-

powered. Further, Royster did not maintain that he deliberately chose to burglarize only electric laundry machines. Thus, the trial court acknowledged the potential dangers of conduct such as Royster's and properly weighed that information in sentencing as it related not only to Royster's punishment but also to deterrence of others and protection of the community.

Royster also argues that the trial court placed too much weight on his criminal history in light of the fact that this burglary predated two other burglaries for which he had received two concurrent ten-year sentences to the Division of Intensive Sanctions. Royster, however, cites no authority in support of his novel proposition that a sentencing court cannot consider a defendant's other convictions for which by sheer happenstance the defendant has already been sentenced. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (arguments unsupported by legal authority need not be considered).

Finally, Royster argues that his ten-year sentence is "cruel and unusual punishment." Again, we reject his argument.

Our standard of review is whether the trial court erroneously exercised its discretion. ***State v. Plymesser***, 172 Wis.2d 583, 585-586 n.1, 493 N.W.2d 367, 369 n.1 (1992). Our review is limited to a two-step inquiry. ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). We first determine whether the trial court properly exercised its discretion in imposing the sentence. ***Id.*** Indeed, there is a strong policy against an appellate court interfering with a trial court's sentencing determination and, indeed, an appellate court must presume that the trial court acted reasonably. ***State v. Thompson***, 146 Wis.2d 554, 564, 431 N.W.2d 716, 720 (Ct. App. 1988). The second step is to consider whether the trial court erroneously exercised discretion by imposing an excessive sentence. ***Glotz***, 122 Wis.2d at 524, 362 N.W.2d at 182. When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence 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, 461 (1975).

The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis.2d 488, 495-496, 444 N.W.2d 760, 763-764 (Ct. App. 1989). Additionally, the weight to be given each of the factors is within the trial court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984).

Here, the sentencing court noted the seriousness of Royster's crime, remarking on financial losses and the "loss of a sense of security on the part of the victim." The sentencing court also noted Royster's substantial criminal history, which consisted of "six burglary convictions, ... four theft from person convictions, including one where the victim sustained some substantial injuries, ...; also strong armed robbery as a juvenile and several misdemeanors, resisting, retail theft, fleeing and disorderly conduct." The sentencing court also noted Royster's "very deep-seated drug problem" and "entrenched pattern of criminal thinking." The sentencing court referred to the presentence investigator's recommendation "that under no circumstances should [Royster] be a candidate ... for any type of probation or [Division of Intensive Sanctions] sentence, but should instead be sentenced to a considerable period of incarceration." Finally, the sentencing court referred to the interests of the community in needing to be protected from Royster's "further criminal conduct" and from the potential danger posed by this type of burglary.

Based on the factors considered by the sentencing court, we cannot conclude that the sentencing court erroneously exercised discretion. Further, we cannot conclude that "the sentence 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***, 70 Wis.2d at 185, 233 N.W.2d at 461; *see also*

State v. Daniels, 117 Wis.2d 9, 22, 343 N.W.2d 411, 417-418 (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."). Therefore, we affirm the judgment of conviction and the trial court's order denying Royster's motion for a new trial.

By the Court. – Judgment and order affirmed.

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