COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP220-CR **Cir. Ct. No. 2008CF1932**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID D. DYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. David D. Dyer appeals from a judgment of conviction for one count of burglary and one count of attempted burglary, both as

a party to a crime, contrary to WIS. STAT. §§ 943.10(1m)(a), 939.05 and 939.32 (2007–08).[1] He also appeals from an order denying his postconviction motion to modify his sentence. Dyer seeks a new sentencing hearing on grounds that the trial court that sentenced him after his probation was revoked "erroneously exercised its discretion by failing to explain on the Record why Mr. Dyer was ineligible for" the Challenge Incarceration Program ("CIP"). (Some capitalization omitted.) We reject his arguments and affirm.

BACKGROUND

¶2 Dyer entered a plea bargain with the State, pursuant to which he pled guilty to one count of burglary and one count of attempted burglary, both as a party to a crime. An uncharged theft of a firearm was read in.

¶3 The trial court accepted Dyer's plea and at the sentencing hearing in 2009, it discussed the burglary and attempted burglary of two residences, noting that "some planning went into these things" and that Dyer "would have accomplished the second burglary but for the fact the lady was home and you and your buddy decided to run away."[2] The trial court withheld sentence on both counts and placed Dyer on probation for two years, explaining: "I'm going to withhold sentence because if you mess up I want to know how much you've messed up and if it's for crimes then you're going to do some serious time in

[1] All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

[2] The Hon. Dennis R. Cimpl accepted Dyer's plea and sentenced him in 2009. The Hon. Glenn H. Yamahiro sentenced Dyer after his probation was revoked in 2011.

prison for this thing." The trial court also imposed and stayed sixty days of condition time.

¶4 Nearly four months after sentencing, Dyer was ordered to serve the sixty days of condition time after failing to immediately report to his probation agent after being placed on supervision, being arrested for participating in a robbery for which no formal charges were filed, and using both alcohol and marijuana.

¶5 Once he was returned to the community, Dyer again violated the terms of his probation on several occasions.[3] He was given an alternative to revocation in 2010. In January 2011, he "intimidated and threatened to harm" an ex-girlfriend, which led to probation revocation proceedings.

¶6 After Dyer's probation was revoked, he appeared for sentencing before the trial court that had been assigned Dyer's case due to judicial rotation. At the outset, the trial court said it had reviewed the 2009 sentencing transcript, the sentencing-after-revocation summary, and letters submitted on Dyer's behalf.

¶7 The State discussed Dyer's "poor showing" on supervision and recommended three years of initial confinement. Dyer's trial attorney recommended twelve to fifteen months of initial confinement (which would amount to nearly a time-served disposition because of sentence credit), noting the many classes that Dyer completed and his educational plans for the future. The

[3] This information is taken from the sentencing-after-revocation summary that was prepared by Dyer's probation agent.

Department of Corrections recommended a period of eighteen to twenty-four months of initial incarceration.

¶8 The trial court told Dyer that in imposing sentence, it had to consider "the nature of the offense, the needs of the community, your character." It referred to Dyer's "performance on probation" as "dismal," noting that Dyer absconded, used drugs, and "continued to involve [him]self with people interested in committing crimes." It also noted there was no record that Dyer had made any payments toward restitution or completed any of the ordered community service.

¶9 The trial court recognized the two crimes at issue at sentencing—"a burglary and an attempt, both residential"—and commented on the previous sentencing court's intent: "It's clear the [previous] sentencing court tried to give you a break, but also indicated that you could be facing a substantial sentence were you to commit any additional offenses. And you have now done that as well."

¶10 The trial court said that "the recommendation of the department or the contemplation of time served is unduly depreciative of the offense based on the supervision history and the failure to comply with virtually all terms and conditions of probation." It sentenced Dyer to three years of initial incarceration and three years of extended supervision for the burglary, and it imposed a concurrent term of one year of initial incarceration and one year of extended supervision for the attempted burglary. The trial court added: "You will not be eligible for the [CIP], Earned Release or risk reduction. Court finds this is the minimum amount of time necessary to protect the public based on the facts and circumstances of the offenses and also the performance on supervision."

¶11 Dyer filed a motion to modify his sentence asking the trial court to make Dyer "eligible for the [CIP] or, in the alternative, vacate Mr. Dyer's sentence and order resentencing." As grounds, Dyer asserted that the trial court had "erroneously exercised its sentencing discretion by failing to explain … why the character of the offender, the seriousness of the offense, and the need to protect the public … warranted a determination that Mr. Dyer was ineligible for the [CIP]."

¶12 The trial court denied Dyer's motion in a written order. It explained:

> The defendant did extremely poorly on probation with drug use and absconding. He threw his opportunity on probation out the window with his subsequent behavior. Under the circumstances, the court believed that a significant sentence was necessary for purposes of punishing and deterring the defendant and, at the same time, protecting the community. An early release program, such as ERP [Earned Release Program] or CIP, would frustrate the court's specific intent, which was that the defendant serve a significant amount of time behind bars. It found then, and it finds now for these particular reasons, that both ERP and CIP are inappropriate in this case. The defendant has shown by his behavior that he cannot follow the rules, that he cannot comply with the terms of supervision, and that he needs a structured setting to address his behavior.

LEGAL STANDARDS

¶13 A trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 557, 678 N.W.2d 197, 207. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it

may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the trial court's discretion. ***Id.***

¶14 The sentencing court is generally afforded a strong presumption of reasonability, and if our review reveals that discretion was properly exercised, we follow "'a consistent and strong policy against interference with the discretion of the trial court in passing sentence.'" ***Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203 (citation omitted). Our analysis includes consideration of postconviction orders denying motions for sentence modification, because a trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243, 247 (Ct. App. 1994).

DISCUSSION

¶15 Dyer's primary challenge to the trial court's exercise of sentencing discretion is his assertion that the trial court failed to explain why it determined that Dyer was ineligible for the CIP.[4] As part of that argument, he first asserts that the trial court failed to adequately address the three primary sentencing factors. We disagree.

¶16 The trial court explicitly recognized that it was considering the gravity of the offense, the offender's character, and the need to protect the public. *See* ***Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d at 851, 720 N.W.2d at 699. It

[4] Even if an offender is statutorily eligible for the CIP, the sentencing court has discretion to declare the offender ineligible. *See* ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 749, 632 N.W.2d 112, 115.

identified the two crimes at issue—burglary and attempted burglary—and it commented at length on Dyer's performance on probation, which included the commission of new crimes. While the trial court may not have repeatedly referenced the three factors by name, it is clear from the sentencing transcript that it considered all three factors. Further, the trial court mentioned twice that it had reviewed the 2009 sentencing transcript, which included the original sentencing court's analysis of those factors. We are unconvinced that the trial court failed to consider the three primary sentencing factors.

¶17 We turn to Dyer's argument that the trial court failed to explain why its analysis of the sentencing factors led it to determine that Dyer was ineligible for the CIP. As the State points out, a sentencing court "does not erroneously exercise its discretion simply by failing to separately explain its rationale for each and every facet of the sentence imposed." *See* ***State v. Matke***, 2005 WI App 4, ¶19, 278 Wis. 2d 403, 417, 692 N.W.2d 265, 273. Thus, the fact that the trial court did not analyze every sentencing factor when it discussed Dyer's eligibility for the CIP does not constitute an erroneous exercise of discretion.

¶18 Moreover, the trial court in fact did explain, both at the sentencing hearing and in its order denying Dyer's postconviction motion, the reason for denying Dyer eligibility for the CIP. Specifically, after declaring Dyer ineligible for the CIP, the trial court stated that it had imposed "the minimum amount of time necessary to protect the public based on the facts and circumstances of the offenses and also the performance on supervision." In making this statement, the trial court was explaining that it did not believe that Dyer should be released early, which would be the case if he were to participate in the CIP. The trial court explained this more fully in its written order: "An early release program, such as

ERP or CIP, would frustrate the court's specific intent, which was that the defendant serve a significant amount of time behind bars."

¶19 For the foregoing reasons, we conclude that the trial court properly exercised its sentencing discretion and adequately explained the sentence in accordance with the dictates of ***Gallion*** and its progeny. Therefore, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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