COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP640-CR **Cir. Ct. No. 2010CF280**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN A. HASKEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Ryan A. Haskey appeals a judgment convicting him of arson of a building as party to a crime. He argues that the trial court erroneously exercised its discretion in admitting an inculpatory one-party-consent

audio recording and in finding him ineligible for the Challenge Incarceration Program (CIP) or Earned Release Program (ERP). We disagree and affirm.

¶2 A fire inspector determined that a house fire was the result of arson. Police concluded that, before being torched, the house had been burglarized—more than once, as it turned out. Julie Wright told police that Haskey told her that he and an accomplice had committed the arson. Wright agreed to meet with Haskey while wearing a police-provided "wire." During the recorded conversation, Haskey said he and two others committed the arson to cover up evidence of the burglary they had pulled off.

¶3 Haskey was charged with being party to the crimes of burglary of a dwelling, uttering a forged check,[1] and arson of a dwelling. He moved to suppress the recording and any testimony about its contents on the basis that, contrary to WIS. STAT. § 968.28 (2011-12),[2] the State did not obtain prior judicial authorization. The trial court denied the motion, reasoning that Wisconsin's Electronic Surveillance Control Law, WIS. STAT. §§ 968.27-968.33, did not apply to the recorded conversation, as it was not the result of wire-tapping. Haskey pled no contest to the arson charge; the other two counts were dismissed and read in. He appeals.

¶4 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable

[1] A check taken from the burglarized property was used to purchase a propane cylinder and a torch.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted).

¶5 Haskey contends the trial court erroneously exercised its discretion in ruling that the recording was admissible and that Wright could testify about the conversation.[3] Haskey argues that, under ***State ex rel. Arnold v. County Court of Rock County***, 51 Wis. 2d 434, 187 N.W.2d 354 (1971), an unauthorized one-party-consent tape, although "not unlawful," is inadmissible under WIS. STAT. § 968.29(3). ***Arnold***, 51 Wis. 2d at 444.

¶6 As the State points out and Haskey acknowledges, WIS. STAT. § 968.29(3) has been amended since ***Arnold***. Former subsec. (3) was renumbered to para. (3)(a), and para. (3)(b) was created. Section 968.29(3)(b) provides an exception to the statutory requirement for prior judicial authorization for one-party-consent tapes and permits intercepted communications such as the one here to be introduced into evidence in felony prosecutions.

¶7 Haskey also is mistaken in regard to whether Wright could testify about the recorded conversation. The consenting party's testimony describing the conversation he or she engaged in is independent of the recording's admissibility. *See* ***State v. Maloney***, 161 Wis. 2d 127, 129-30, 467 N.W.2d 215 (Ct. App. 1991);

[3] As noted, the trial court concluded that the electronic surveillance law did not apply. Because the parties address the issue as though the recording is subject to the electronic surveillance law, we approach it from that perspective. We may affirm on a ground different than that relied on by the circuit court. ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

see also ***State v. Maloney***, 2005 WI 74, ¶37 n.16, 281 Wis. 2d 595, 698 N.W.2d 583.

¶8 Haskey next contends the trial court erroneously exercised its sentencing discretion. He confines his challenge to the determination that he is not eligible for participation in ERP or CIP. Haskey asserts that the court "merely paid lip service" to considering his program eligibility, despite the presentence investigation report author noting that he was eligible.

¶9 Even if a defendant meets all of the Department of Corrections' eligibility requirements for ERP or CIP, it remains within the trial court's sentencing discretion under WIS. STAT. § 973.01(3g) and (3m) to decide his or her eligibility. *See* ***State v. Owens***, 2006 WI App 75, ¶¶8-9, 291 Wis. 2d 229, 713 N.W.2d 187 (ERP); ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112 (CIP). To properly exercise its sentencing discretion, a court must consider three primary factors—the gravity of the offense, the character of the defendant, and the need to protect the public—and must articulate the basis for the sentence. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984).

¶10 Haskey asserts that the trial court erred because it explained only that it was denying his eligibility "given the nature of the offense and the structure of this Court's sentence," and then focused solely on the nature of the offense. We disagree. First, a trial court has broad discretion in determining the weight to be given to each sentencing factor. ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). In addition, a sentencing court is not required to make separate findings on the reasons for the eligibility decision. ***Owens***, 291 Wis. 2d 229, ¶9. Rather, we may consider whether the overall sentencing rationale also justifies the eligibility determination. ***Id.***

¶11 The sentencing court's sentencing rationale adequately explains why it declared Haskey ineligible for programs that would allow for early release. It noted that the burglaries violated the sanctity of another's home and the arson showed disregard for the lives of the firefighters, all volunteers, and the residents of neighboring houses. It observed that his positive attributes were "out-shouted" by his conscious choices to do "outrageous" and "dangerous" things, that those decisions necessitated punishment, and that the public had to be protected from one who engages in burglaries, forgery, and arson. The ineligibility determinations reflect a proper exercise of discretion.

By the Court.—Judgment affirmed.

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