COURT OF APPEALS
DECISION
DATED AND RELEASED

August 7, 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. 95-2913-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT MC CULLOUGH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Robert McCullough appeals from a judgment convicting him as a habitual offender of battery to a police officer, disorderly conduct and resisting a police officer, and from an order denying his postconviction motion. He argues that the trial court erred in granting a directed verdict against his insanity defense and in considering his earned presentence credit in increasing the sentence imposed. We affirm the judgment and the order.

The convictions arise out of McCullough's conduct when he was taken to the Lakeland Hospital by a police officer. McCullough was intoxicated. When police officers attempted to place arm and leg restraints on him because of his unruly conduct, he resisted and head-butted one of the officers. McCullough entered a plea of not guilty by reason of mental disease or defect.

In the mental responsibility phase of the trial, McCullough presented the expert testimony of Dr. Frederic Will, a psychiatrist. Will testified that McCullough's ability to comprehend, understand and control is that associated with a twelve- to sixteen-year-old. He opined that McCullough's ability to understand the wrongfulness of his conduct and conform his behavior to the requirements of the law would be "consistent with the level of a normal teenager, but not at the level of a normal responsible adult." When asked if McCullough could conform his conduct to the requirements of the law, Will responded, "He would be able to conform his conduct to requirements. Yes, he would. If he understands and if he wanted to, yes."

At the close of McCullough's case on the mental disease defense, the trial court granted the prosecution's motion for a directed verdict against the defense. McCullough argues that the expert's testimony, even though inconsistent, was sufficient to raise a factual question for the jury.

A trial court is permitted to direct a verdict against a defendant if it finds that "there is no credible probative evidence toward meeting the burden of establishing the defense of not guilty by reason of mental disease or defect by a preponderance of the evidence after giving the evidence the most favorable interpretation in favor of the accused asserting the defense." ***State v. Leach***, 124 Wis.2d 648, 663, 370 N.W.2d 240, 249 (1985), *cert. denied sub nom.* ***Leach v. McCaughtry***, 498 U.S. 972 (1990). The verdict should be directed if there is but one inference or conclusion that can be reached by a reasonable person. ***Id.*** at 664, 370 N.W.2d at 249. Our standard of review is whether the trial court was "clearly wrong." ***Id.*** at 665, 370 N.W.2d at 249.

McCullough was obligated to present evidence on the ultimate issue that as a result of his mental condition he lacked substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. ***State v. Duychak***, 133 Wis.2d 307, 316-17, 395 N.W.2d

795, 800 (Ct. App. 1986). Although Will testified that McCullough had a "substantial alteration in the ability to conform," he never testified as to the ultimate issue. His indication that McCullough had the functioning and understanding of a teenager was not sufficient to meet the legal test of nonresponsibility. A teenager is not afforded any lesser degree of responsibility with respect to obeying and cooperating with a police officer. Indeed, a teenager may be charged as an adult for some crimes. There was no evidence that a teenager could not appreciate the wrongfulness of aggressive behavior in a hospital emergency room or that a teenager is unable to conform his or her conduct to that required by the law.

McCullough characterizes the expert's testimony to be that he had the mental responsibility of a twelve-year-old. He then suggests that it is not an indisputable conclusion that a twelve-year-old is capable of understanding adult concepts of right and wrong. The expert's testimony was not as precise as McCullough would have us believe. Will gave an age range of McCullough's functioning but linked McCullough's understanding of the wrongfulness of his conduct and ability to conform his conduct to the law to that of a teenager.

Further, the phrase "substantial alteration" is vague. The standard is lack of substantial capacity. A jury would be left to speculate as to whether McCullough's impairment rendered him incapable of either appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of the law. The directed verdict was therefore proper. *See* ***Leach***, 124 Wis.2d at 664, 370 N.W.2d at 249 (need sufficient proof to remove the ultimate fact from the field of mere speculation and conjecture).

McCullough was sentenced to two years, five months, and twenty-three days imprisonment on the battery conviction. He was given presentence credit for five months and twenty-three days. McCullough argues that the sentence impermissibly subverts his right to have time previously served applied toward the reduction of an appropriate sentence. *See* ***Struzik v. State***, 90 Wis.2d 357, 367, 279 N.W.2d 922, 926 (1979).

In ***State v. Walker***, 117 Wis.2d 579, 586, 345 N.W.2d 413, 416 (1984), the court gave an admonition that "time previously served should not be a factor in the exercise of sentencing discretion because such credit is a

constitutional right of the defendant which exists independently of what the trial judge determines to be appropriate punishment for a given offense." In ***Struzik***, the court held that a sentence of five years and fourteen days when the defendant was entitled to fourteen days sentence credit was a "clear abuse of discretion." ***Struzik***, 90 Wis.2d at 367-68, 279 N.W.2d at 926. However, what ***Struzik*** and the admonition given in ***Walker*** censure is the use of a sentencing procedure where the court first determines the sentence credit, then determines the sentence and then applies the credit. *See* ***Walker***, 117 Wis.2d at 586, 345 N.W.2d at 416 (caution that the statutory procedure of first determining and imposing the appropriate sentence must be followed); ***Struzik***, 90 Wis.2d at 367, 279 N.W.2d at 926 (trial court's "technique" subverted right to credit).

We conclude that ***Struzik*** does not directly apply. The trial court did not make a finding as to the sentence credit to which McCullough would be entitled prior to explaining or imposing its sentence. The existence of the five-month, twenty-three days credit was brought out in the arguments before sentencing. Both the prosecution and defense argued the significance of the five-month, twenty-three day sentence credit to which McCullough would be entitled. This was not an instance where an improper technique was utilized.

We look to whether the trial court erroneously exercised its discretion in imposing a sentence so closely linked to the sentence credit. We must start with the presumption that the court acted reasonably and with the requirement that the defendant must show some unreasonable basis for the sentence. ***State v. Thompson***, 146 Wis.2d 554, 565, 431 N.W.2d 716, 720 (Ct. App. 1988).

There is no doubt that the trial court gave consideration to the recognized primary factors and other appropriate sentencing considerations. *See* ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178, *cert. denied*, 115 S. Ct. 641 (1994). One of the recognized factors is the length of pretrial detention. ***Id.*** Here, McCullough argued at sentencing that the five months and twenty-three days already served was a significant penalty in and of itself such that a shorter sentence was warranted. He also conceded that if he was given a two-year sentence, he would be eligible for parole after six months and with the available sentence credit he would serve very little prison time. McCullough sought a short sentence so that he would be immediately eligible for treatment

programs which are typically provided closer to the inmate's eligibility for release.

The trial court specifically mentioned parole eligibility as a factor in the sentence. Not only had it been invited to consider this factor by the arguments before it, it did so in the context of trying to obtain the treatment McCullough needed. It concluded that "there is no other setting that is going to work for you as well as ... the Wisconsin State Prison System."

At no point did the trial court exhibit an intent to deprive McCullough of his sentence credit. Rather, as the trial court explained at the postconviction hearing, it structured the sentence so that McCullough would serve a meaningful amount of time in prison so that he could receive treatment there. Yet at the same time the court did not want to impose an extended period of incarceration. We note that McCullough's exposure on the battery conviction was eleven years and that the prosecutor recommended six years imprisonment.

Although the trial court chose a risky and unartful manner of uttering its sentence, we cannot conclude that the sentence was an erroneous exercise of discretion. It was not designed to deny McCullough his sentence credit. Moreover, McCullough has not shown any unreasonable basis for the sentence.

By the Court.—Judgment and order affirmed.

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