

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 5, 1997

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. 96-0572-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN BRANNON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Brian Brannon appeals from a judgment of conviction and a postconviction order denying his motion for sentence modification. The issue is whether the trial court erroneously exercised its sentencing discretion. Because we conclude that it did not, we affirm.

Brannon pled guilty to felony escape, contrary to § 946.42(3)(a), STATS. Brannon was within one month of release when he escaped by failing to return to a Huber facility. The trial court imposed the maximum sentence of five years.

Brannon contends that the trial court erroneously exercised its sentencing discretion because it imposed the maximum sentence without due consideration of mitigating circumstances. He claims to have anonymously telephoned police to inform them of his whereabouts so that they could promptly apprehend him. Although Brannon has alcohol-related problems and had escaped to go to a tavern, he had not engaged in any criminal activity. His criminal history is essentially nonviolent. Brannon asserts that these factors do not warrant imposition of the maximum sentence.

While consideration of mitigating factors is appropriate, on appeal our review is limited to whether the trial court erroneously exercised its sentencing discretion.¹ See *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors are the gravity of the offense, the character of the offender, and the need for public protection. *Id.* at 427, 415 N.W.2d at 541. The weight given to each factor is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). Although the trial court

¹ Brannon also seeks clarification of the applicable standard to review a sentence. Citing *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975), Brannon claims that the cruel and unusual punishment standard should be distinguished from the erroneous exercise of discretion standard in *McCleary v. State*, 49 Wis.2d 263, 277-78, 182 N.W.2d 512, 519-20 (1971). From *McCleary*, Brannon extracts the sentencing factors that are most favorable to his position and contends that those factors were not applied here. While the sentencing court may consider numerous factors, it must consider the primary sentencing factors. See *State v. Larsen*, 141 Wis.2d 412, 427, 415 N.W.2d 535, 541 (Ct. App. 1987).

could have properly imposed a lesser sentence, its imposition of the maximum does not necessarily indicate an erroneous exercise of discretion.

Here, the trial court considered the gravity of the offense. In doing so, it concluded that Brannon, a habitual offender serving sentences for obstruction, battery, and operating a motor vehicle after revocation and while intoxicated, knowingly escaped from custody.

It then considered the character of the offender and emphasized that it was principally concerned with Brannon's prior history. He has repeatedly committed serious crimes, such as burglaries and batteries. The trial court explained that even nonviolent crimes often result in violence. It summarized its concern that "[n]othing seems to get [Brannon's] attention, and I think that it's going to take a very great deal before [he is] going to take the criminal law seriously." It added, "Somebody has to do something serious enough to hit him over the head hard enough that he's going to make a determination to become a productive citizen."

The trial court emphasized its obligation to protect the public and to deter the defendant and others from criminal conduct. It noted that leniency was unsuccessful because Brannon failed to succeed in community-based supervision and had most recently escaped from the Huber facility.

The trial court did not ignore the mitigating factors; it considered them. The fact that it was not particularly impressed with those mitigating factors does not demonstrate an erroneous exercise of discretion. Although a lesser sentence was within the appropriate range of discretion, the trial court applied the relevant facts to the sentencing factors and reiterated its reasons for imposing the

maximum sentence. We conclude that this demonstrates a proper exercise of sentencing discretion.

By the Court.—Judgment and order affirmed.

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

