COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1724-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GLENN ERIC RHODES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

FINE, J. Glenn Eric Rhodes appeals, *pro se*, from the trial court's order denying his motion to modify sentence. Rhodes pled guilty to possession of pepper spray by a convicted felon, in violation of § 941.26(4)(L), STATS., as an habitual offender, *see* § 939.62, STATS., and was sentenced to a two-year period of incarceration. He argues: 1) that he did not violate the statute making it illegal for a convicted felon to possess pepper spray because, according to him, it was not

unlawful for him to possess the substance; 2) that he did not knowingly plead guilty because, he claims, his trial lawyer did not explain to him that it was not unlawful for him to possess the substance; and 3) in his reply brief, that the trial court erroneously exercised its sentencing discretion. We affirm.

Section 941.26(4)(L), STATS., provides:

> Any person who has been convicted of a felony in this state or has been convicted of a crime elsewhere that would be a felony if committed in this state who possesses a device or container described under par. (a) is subject to a Class A misdemeanor. This paragraph does not apply if the person has received a pardon for the felony or crime.

Section 941.26(4)(a), STATS., provides:

> Subsections (1) to (3) do not apply to any device or container that contains a combination of oleoresin of capsicum and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort.

Thus, the reference in § 941.26(4)(L) to the "device or container described under par. (a)" means a device or container that "contains a combination of oleoresin of capsicum and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort." "Subsections (1) to (3)" referenced in § 941.26(4)(a) are provisions relating to weapons more dangerous than those containing oleoresin of capsicum, and making felonies possession of those more dangerous weapons. At his plea and sentencing hearing, Rhodes admitted specifically that the device he was charged with possessing contained oleoresin of capsicum. Moreover, he told the court that he had the pepper spray because he did not know that, as a convicted felon, he could not lawfully possess it.[1] Indeed,

[1] As Rhodes recognizes in his brief on this appeal, his alleged ignorance as to whether he could lawfully possess the pepper spray described in § 941.26(4)(L), STATS., is not a defense. *See* ***State v. Phillips***, 172 Wis.2d 391, 394–396, 493 N.W.2d 238, 240–241 (Ct. App. 1992).

Rhodes admits on this appeal that he possessed the prohibited substance: "It is a fact of record that the only thing that the defendant-appellant [Rhodes] was in possession of was oleoresion [*sic*] of capsicum." Rhodes's first and second claims of alleged trial court error are without merit.[2]

Rhodes's challenge to the trial court's exercise of its sentencing discretion is raised for the first time in his reply brief. Ordinarily we do not consider arguments raised for the first time in a reply brief. *See* ***Rychnovsky v. Village of Fall River***, 146 Wis.2d 417, 424 n.5, 431 N.W.2d 681, 684 n.5 (Ct. App. 1988). Nevertheless, we will address briefly this issue.

Sentencing is vested in the trial court's discretion, and a defendant who challenges a sentence has the burden to show that it was unreasonable; it is presumed that the trial court acted reasonably. ***State v. Lechner***, 217 Wis.2d 392, 418, 576 N.W.2d 912, 925 (1998). The primary factors considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for the public's protection. ***Elias v. State***, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980). If the trial court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless it 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). Here, the trial court recognized that although the "facts particular to

[2] Rhodes's confusion apparently stems from the wording of § 941.26(4)(a), STATS., which exempts devices containing a "combination of oleoresin of capsicum and inert ingredients" from the provisions of the statute dealing with more dangerous weapons, namely § 941.26(1) & (2), STATS. Rhodes evidently reads § 946.26(4)(a) as also exempting pepper-spray devices from § 941.26(4)(L), STATS.; it does not.

this case are not aggravating," Rhodes's long criminal history and the fact that he had not "availed [him]self of the opportunities [to become law-abiding] that have been afforded [him] in the past," required a two-year sentence of incarceration. Rhodes argues that the trial court gave too much weight to his criminal record. Yet, "[t]he weight to be given each factor is within the discretion of the trial court." ***State v. Wickstrom***, 118 Wis.2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984). The trial court considered the appropriate factors, and exercised discretion within the limits set by the legislature.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.