COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2730-CR **Cir. Ct. No. 2003CF2554**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD O. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and MEL FLANAGAN, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Gerald O. Green appeals from a judgment of conviction entered after he pled guilty to one count of possession with intent to

deliver cocaine, contrary to WIS. STAT. § 961.16(2)(b)(1) (2003-04).[1] He also appeals from an order denying his postconviction motion. Green alleges that the trial court should have granted his motion for postconviction relief because the trial court ignored character evidence, neglected treatment as a sentencing objective, and dismissed the contents of the presentence investigation report. Because the trial court did not err in denying the motion, we affirm.

BACKGROUND

¶2 On April 29, 2003, Green was convicted of one count of possession with intent to deliver cocaine, a Class F felony, which carries a maximum term of imprisonment of twelve years and six months. The complaint alleges that Green sold drugs to an undercover police officer in a Milwaukee area tavern after a contact directed the officer to Green. Green had thirty-one corner cuts of cocaine on him at the time of the arrest.

¶3 Pursuant to the plea agreement, the State recommended two years of confinement and two years of extended supervision. The presentence writer recommended a total sentence of six to eight years, including three to four years of confinement followed by three to four years of extended supervision. Defense counsel advocated for probation with twelve months of conditional jail time. The trial court imposed a sentence of six years of imprisonment, including two years of initial confinement followed by four years of extended supervision. Another charge was dismissed.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 On October 1, 2004, Green filed a motion for postconviction relief, alleging that the trial court failed to follow sentencing guidelines. On October 6, 2004, the trial court denied the motion for postconviction relief, ruling that the record reflects that the sentencing court properly considered mitigating circumstances and sufficiently explained its reasons for not modifying the sentence. Green now appeals.

DISCUSSION

¶5 Green contends that the trial court should have granted his motion for postconviction relief because mitigating factors support a shorter sentence and the court omitted drug and alcohol treatment as a sentencing objective. The State contends that the escalating gravity of Green's offenses, his character challenges, and the court's assessment of Green's treatment needs warrant the sentence the trial court imposed on Green. We conclude that the trial court did not err in denying Green's motion for postconviction relief.

¶6 The standard of review for sentencing and postconviction relief is whether the trial court properly exercised its discretion. When the exercise of discretion has been demonstrated, the trial court's sentencing decision is "'generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted).

¶7 A trial court must base its sentence on the minimum amount of custody or confinement which is consistent with three primary sentencing factors: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. ***Id.***, ¶¶23, 59-61. The weight given each of these factors lies

within the trial court's discretion, and the court may base the sentence on any or all of them. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984); *see also* ***Gallion***, 270 Wis. 2d 535, ¶62. The trial court must also, "by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives." ***Gallion***, 270 Wis. 2d 535, ¶46.

¶8 Green's sentence was not excessive, given the gravity of the offense. The trial court said to Green "that what you were up to was absolutely no good and a serious violation of the law." The trial court noted his criminal history and said, "[i]nstead of it getting better, instead of the severity of your crimes going down, as we expect from people as they age, you're going in the other direction." Green maintains that despite his criminal history, he had no prior prison experience. Yet, even the presentence report stated that: "[Green] displays a blatant disregard for the law and will most likely continue to engage in criminal activities if he is not shown that his behavior is not and will not be tolerated in the community."

¶9 The trial court also considered Green's character when it imposed the sentence. He had a criminal record and the severity of his crimes increased with time. Green, however, points out the positive aspects of his character, such as his temporary employment, his child support payments, and his cooperation with court authorities, which he alleges the trial court overlooked. While the trial court *may* consider other factors, we do not find Green's argument sufficient to justify reducing Green's sentence.

¶10 The trial court also addressed the need to protect the public, stating that the community should be free of the kind of risk that Green's actions present, and that confinement was necessary to protect the public from further such

criminal activity. After considering the three primary factors, the trial court imposed a sentence well below the potential maximum sentence. In addition, the trial court found Green eligible for the earned release program. We are satisfied from our review of the sentencing transcript that the trial court considered the primary factors in imposing the sentence, and properly exercised its discretion. ***State v. Smith***, 207 Wis. 2d 258, 282, 558 N.W.2d 379 (1997).

¶11 We are further not persuaded by Green's argument that the trial court's sentence violated the dictates of ***Gallion*** by failing to afford enough weight to mitigating factors and Green's drug treatment needs. ***Gallion*** did not change the principle that the trial court has the discretion to emphasize any of the sentencing factors as long as it considers all the pertinent factors. *See* ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. Here, the sentencing transcript reflects that the trial court considered all the pertinent factors, including the mitigating factors of Green's remorse and treatment needs. In response to this consideration, the trial court ordered Green eligible for the earned release program. Accordingly, there is no erroneous exercise of discretion or violation of ***Gallion*** in this record.

¶12 We further are not persuaded by Green's contention that the trial court should have given more weight to the presentence investigation report's discussion of Green's treatment needs. The trial court is not bound by the recommendations found in the presentence investigation report. *See* ***State v. Bizzle***, 222 Wis. 2d 100, 105-06 n.2, 585 N.W.2d 899 (Ct. App. 1998). Further, as the State points out, Green's reliance on the presentence investigation discussion is self-defeating because other parts of the report recommended a stiffer sentence and reflected poorly on Green's character. A sentencing court always has an independent duty to look beyond the recommendation of the parties and to

consider all relevant factors. ***Smith***, 207 Wis. 2d at 281-82. The record reflects that the trial court complied with this directive.

¶13 We also reject Green's argument that the trial court should have sent him to the challenge incarceration program. The trial court considered the factors pertinent to both the challenge incarceration program and the earned release program. It determined, based on Green's treatment needs and age, that the latter would be the better program for him. The trial court's decision was reasonable based on the pertinent facts, and demonstrates a process of appropriate reasoning; accordingly, it does not constitute an erroneous exercise of discretion.

¶14 Finally, Green argues that his sentence was excessive. We cannot agree. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Here, the trial court imposed a sentence similar to what the State recommended. It was a sentence well below the maximum potential sentence that Green faced. Given the nature and gravity of Green's offense, his criminal history and character issues, there is no basis for us to conclude that the sentence imposed constituted an excessive sentence. It was not so disproportionate to the offense so as to be shocking to reasonable people. Based on the foregoing, we affirm the trial court.

By the Court.—Judgment and order affirmed.

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