

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1794-CR

Cir. Ct. No. 2004CF1935

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHERARD DARNELL JENKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sherard Darnell Jenkins appeals from a judgment and an order entered after he pled guilty to delivery of cocaine, second offense, contrary to WIS. STAT. §§ 961.41(1)(cm)1g, 961.16(2)(b)1 and 961.48(2) (2003-

04).¹ His challenge on appeal relates solely to the sentence imposed. Specifically, Jenkins claims the trial court erroneously exercised its discretion when it ruled that Jenkins was not eligible for the earned release program. Based on that, Jenkins seeks resentencing. Because the trial court did not erroneously exercise its sentencing discretion, we affirm.

BACKGROUND

¶2 On April 7, 2004, Jenkins was arrested for selling \$50 worth of crack cocaine to an undercover officer. On October 22, 2004, Jenkins entered a guilty plea to the charge of delivery of cocaine, second drug offense. On November 30, 2004, Jenkins was sentenced to a six-year sentence, with three years of initial confinement followed by three years of extended supervision, to be served consecutively to any other sentence. The trial court found that Jenkins was not eligible for the earned release program.

¶3 Jenkins filed a postconviction motion requesting that the trial court find him eligible for the earned release program. The trial court denied the motion. Jenkins now appeals.

DISCUSSION

A. Sentencing.

¶4 The issue in this case is whether the trial court erroneously exercised its discretion in ruling that Jenkins could not participate in the earned release

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

program. Specifically, Jenkins asserts that the trial court misunderstood Jenkins's representation to the presentence investigation report writer that he did not have a drug problem and this misunderstanding formed the sole basis for the trial court's finding that Jenkins was not eligible for the earned release program. Jenkins also argues that the "check the box" form order issued following his postconviction motion is insufficient to satisfy the trial court's sentencing responsibilities. We are not persuaded by either argument.

¶5 In reviewing sentencing decisions, this court's review is limited. There is "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." *State v. Paske*, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991) (citation omitted). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). "Further, the trial court is presumed to have acted reasonably, and the burden is on the appellant to 'show some unreasonable or unjustifiable basis in the record for the sentence'" *State v. Thompson*, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992) (citation omitted). A trial court's sentence is reviewed for an erroneous exercise of discretion. *Paske*, 163 Wis. 2d at 70.

¶6 It is similarly well-established that trial courts must consider three primary factors in passing sentence. Those factors are the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. *Id.* at 62. The weight to be given to each of the factors, however, is a determination particularly within the discretion of the trial court. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. *State v. Krueger*, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶7 The sentencing court may also consider additional factors, including, the defendant's criminal record, history of undesirable behavior patterns, personality and social traits, results of a presentence investigation, the aggravated nature of the crime, degree of culpability, demeanor at trial, remorse, repentance and cooperativeness, educational and employment history, the need for close rehabilitative control and the rights of the public.

State v. Lewandowski, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985).

¶8 Here, Jenkins challenges the trial court's discussion of whether he admitted to having a drug problem, and whether that fact is sufficient to deem him ineligible for the earned release program. Our review demonstrates that the trial court properly exercised its sentencing discretion by addressing each of the primary sentencing factors and reached a reasonable determination.

¶9 The trial court began its analysis by noting the three primary factors, but the most significant factor for the trial court was that Jenkins was a threat to the public. The basis for the trial court's concern was Jenkins's prior criminal record, particularly the May 10, 2001 conviction for second-degree recklessly endangering safety. This offense was extremely violent and dangerous and involved burning the victim with a blow-torch. Jenkins was on probation from the May 10 conviction when he committed the instant crime.

¶10 The trial court also addressed Jenkins's character, noting both his tendency to blame anyone but himself for his actions and his prior criminal history. Both evidenced bad character. The trial court also noted that the presentence investigation report writer believed Jenkins showed a sociopathic way of thinking and the public needed to be protected from Jenkins committing future violent acts.

¶11 The trial court did discuss the inconsistency between Jenkins's statement to the presentence investigation report writer that he did not have a drug problem and his assertion at sentencing that his drug problem caused him to commit crimes. Although defense counsel advised the court that what Jenkins said to the presentence investigation writer was that "he didn't have an alcohol or drug problem at the time of the interview because he was incarcerated and sober for the first time," the trial court was not persuaded by this interpretation. The trial court interpreted Jenkins's statements to the presentence investigation report writer as Jenkins's attempt to convince the writer that he did not have a drug problem.

¶12 Based on the record before us, we cannot conclude that the trial court erroneously exercised its sentencing discretion or that the trial court's rejection of Jenkins's explanation for the inconsistent statements was incorrect. The trial court considered the appropriate factors and, based on the need to protect the public, imposed a sentence to satisfy that purpose. Regarding the trial court's assessment of the inconsistent drug statements, we cannot conclude that its interpretation of the presentence investigation report statement was erroneous.

¶13 We also conclude that there is a basis to support the trial court's determination that Jenkins would not be eligible for the earned release program. The trial court adequately explained that Jenkins's way of thinking, and the fact that he was a danger to the community, were sufficient to deny him eligibility for the earned release program. Accordingly, the trial court did not erroneously exercise its sentencing discretion.

B. Postconviction Order.

¶14 Jenkins also objects to the form order the trial court used to deny his postconviction motion seeking resentencing. Jenkins cites *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, for the proposition that the directives contained therein were violated when the postconviction court simply checked boxes on a form order to deny Jenkins’s motion. We reject this claim.

¶15 The facts in this case demonstrate that the trial court’s sentencing hearing itself did not result in an erroneous exercise of discretion. Therefore, the *Gallion* directives were satisfied at the actual sentencing hearing. Thus, utilization of a “check the box” form to deny a postconviction motion which, in essence, is simply a re-argument of what happened at the earlier hearing was not improper. Jenkins’s postconviction motion did not raise any new or additional issues, which were not previously addressed during the adequately rendered original sentencing. Accordingly, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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

