COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP2418-CR
2004AP2438-CR

Cir. Ct. Nos. 2003CF3268
2002CF1991

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYSHION D. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Tyshion D. Davis appeals from a judgment of conviction for possessing cocaine with intent to deliver, a judgment of conviction for distributing cocaine, possessing a firearm as a felon, and felony bail-jumping,

and from a consolidated postconviction order summarily denying his resentencing motion. The issues are whether the trial court erroneously exercised its discretion by failing to obtain the information necessary to impose an individualized sentence and to explain the reasons for the sentence it imposed, and whether defense counsel was ineffective for failing to present a more compelling sentencing argument, most particularly by emphasizing Davis's disadvantaged background that may have mitigated the sentence length or structure. We conclude that the trial court had ample information to impose a reasoned and reasonable individualized aggregate sentence, that it properly exercised its sentencing discretion, and that its failure to consider the proffered mitigating circumstances did not constitute the prejudice necessary to maintain an ineffective assistance claim. Therefore, we affirm.

¶2 In Milwaukee County Circuit Court Case No. 2002CF1991/Appeal No. 2004AP2438-CR, Davis pled guilty to possessing no more than five grams of cocaine with intent to deliver, in violation of WIS. STAT. § 961.41(1m)(cm)1. (2001-02) ("cocaine possession"). A presentence investigation report was filed, but when Davis did not attend sentencing, the trial court issued a bench warrant for his arrest.

¶3 Seven months after the bench warrant was issued, Davis was charged in Milwaukee County Circuit Court Case No. 2003CF3268/Appeal No. 2004AP2418-CR, with felony bail jumping, in violation of WIS. STAT. § 946.49(1)(b) (amended Feb. 1, 2003), delivering no more than one gram of cocaine, in violation of WIS. STAT. § 961.41(1)(cm)1g. (created Feb. 1, 2003), and possessing a firearm as a felon, in violation of WIS. STAT. § 941.29(2)(a)

(amended Feb. 1, 2003).[1] He pled guilty to those three offenses, which were consolidated with the cocaine possession conviction for sentencing.

¶4 Although the presentence report prepared for the cocaine possession was in the record, it was not referenced by the trial court or the parties. The prosecutor and defense counsel independently recommended a ten-year aggregate sentence, but disagreed on the structure of that sentence; the prosecutor recommended a six-year period of confinement, whereas defense counsel proposed a four-year period of confinement. The trial court imposed two concurrent ten-year sentences, comprised of six- and four-year respective periods of confinement and extended supervision. It imposed those sentences however, solely for the two cocaine convictions. For the bail jumping and firearm convictions, the trial court imposed two concurrent two-year sentences, comprised of two one-year respective periods of confinement and extended supervision. The two-year sentence for the bail jumping conviction, however, was imposed to run consecutive to the sentence for cocaine possession, resulting in an aggregate sentence of twelve years, comprised of seven- and five-year respective periods of confinement and extended supervision.

¶5 Davis moved for resentencing, claiming that the trial court erroneously exercised its discretion and that counsel was allegedly ineffective at sentencing. The trial court summarily denied the motion, rejecting Davis's challenges to its exercise of discretion, and ruling that the information proffered in the postconviction motion "would not have weighed heavily with the court for

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

sentencing purposes," determining that Davis had not shown the prejudice necessary to maintain an ineffective assistance claim.

¶6 Davis contends that the trial court erroneously exercised its sentencing discretion because: (1) without the benefit of a presentence report (along with an allegedly ineffective sentencing presentation by defense counsel) it did not have sufficient mitigating information on Davis's character to warrant a more lenient sentence; (2) it failed to impose an individualized sentence; and (3) it failed to explain its reasons for imposing the sentence it did.

> When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted). The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The trial court's obligation is to consider the primary sentencing factors, and to exercise its discretion by imposing a reasoned and reasonable sentence. *See* ***id.*** at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶7 Davis contends that the trial court did not have sufficient information about the mitigating aspects of his character to impose a just sentence. To underscore that contention, Davis emphasizes the trial court's failure to

consider a presentence report. Davis claims that the report prepared for the adjourned cocaine possession sentencing contained information regarding his character, although he also criticizes the failure to, at minimum, update that fourteen-month-old report. Specifically, Davis contends that had the trial court known that he had been placed in foster care at a very young age because of parental abuse, and that he has struggled with the death of a sibling, a learning disability, a disadvantaged background and current mental health problems, it may have imposed a more lenient sentence.

¶8 The trial court considers an offender's character as one of the primary sentencing factors. *See* ***Larsen***, 141 Wis. 2d at 427. Consideration of the primary sentencing factors is necessary, a presentence report is not. *See* ***State v. Jackson***, 187 Wis. 2d 431, 439, 523 N.W.2d 126 (Ct. App. 1994).

¶9 The trial court had adequate information about Davis's character. It was advised of Davis's criminal history, his drug problem that began when he was sixteen, his "rough life … because he didn't always live with [his mother and brother] when he was younger …. And [his] being in and out of trouble." The mother of one of Davis's children and Davis's brother told the trial court that Davis was a good father and "a good person" who "deserves a second chance." The trial court focused on Davis's drug problems and his drug-related crimes; it related drugs to violence and was mindful that its sentence was also for Davis possessing a gun as a felon. The trial court did not erroneously exercise its sentencing discretion when it focused on Davis's criminal history, his drug problems, and the necessity for supervision in a confined setting. In its postconviction order, the trial court explained that more specific facts on Davis's disadvantaged background "would not have weighed heavily … for sentencing purposes." We conclude that the trial court had ample information about Davis;

Davis is not entitled to resentencing to amplify specific examples of his disadvantaged background or mental health problems that did not relate specifically to the offenses for which it was imposing sentence.

¶10 Incident to that criticism, Davis also contends that defense counsel was ineffective for failing to apprise the trial court of mitigating information about his disadvantaged background and mental health problems, and for failing to serve as a more persuasive advocate. To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶11 Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91. Specifically, "[w]e will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice

rather than upon judgment." ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983).

¶12 Davis would have preferred a more emotional sentencing presentation focusing on his disadvantaged background, rather than defense counsel's dispassionate, pragmatic approach, emphasizing what he perceived as the trial court's principal concerns and the most damaging aspect of Davis's character, his drug problem. Defense counsel recognized the seriousness of these offenses and did not seek to minimize the troublesome aspects of Davis's character or his conduct. He immediately emphasized Davis's long-standing drug problems, and explained that the firearm for which Davis was convicted was found at his mother's home, not in Davis's "possession."[2] Defense counsel asserted Davis's acceptance of responsibility and his supportive family as reasons favoring the lesser period of confinement that he recommended. He then explained the difference between the sentence structure recommended by the State, as opposed to that of the defense (both recommended a ten-year sentence, the State sought a six-year period of confinement as compared to the defense's recommendation of only four years). He emphasized the need for drug treatment, explaining that the differential between four and six years would be better spent in extended supervision (compelling Davis to "to[w] the line"), than it would be in confinement (where Davis would arguably receive a comparable amount of drug treatment whether he was confined for four years or six).

[2] Defense counsel did not argue that the discovery of the firearm in the home of Davis's mother did not support his felon in possession of a firearm conviction. He explained that the situation was less dangerous than it may have appeared. Davis was not armed while absconding and trafficking drugs; the firearm was found at his mother's home.

¶13 Defense counsel adopted a dispassionate approach, emphasizing Davis's obvious problems. Defense counsel elected to present what he believed was an effective structure to punish Davis and treat his drug problems, rather than presenting an impassioned plea for leniency, emphasizing Davis's disadvantaged youth and mental health problems. Considering Davis's return to court on a bench warrant, the approach defense counsel selected was a reasonable sentencing strategy, which is not challengeable in the ineffective assistance context. *See* ***Strickland***, 466 U.S. at 690-91. Defense counsel's sentencing presentation was not deficient; consequently, prejudice is legally immaterial. *See* ***Moats***, 156 Wis. 2d at 101. Nevertheless, the trial court expressly ruled that the alleged deficiencies in defense counsel's sentencing presentation "would not have altered the court's sentencing decision." Consequently, Davis's ineffective assistance claim fails.

¶14 Davis also alleges that the trial court failed to impose an "individualized" sentence. We disagree. The trial court explained the primary sentencing factors, the seriousness of the offense, the offender's character ("who you are as an individual, generally, your background, your age, your education, employment, prior criminal record, any rehabilitative efforts you've undertaken"), societal concerns (punishment, deterrence and rehabilitation) and the importance of those factors. It was troubled by the seriousness of the offenses and was mindful that the drug charges involved "an awful lot of cocaine." It explained, at length, the extensive ramifications of drug dealing to the community, summarizing its concerns by explaining that "when you deal drugs, you bring crime and violence into neighborhoods."

> And, sadly, we know that drugs and guns go hand-in-hand. And, unfortunately, drug deals go bad. Guns get fired, and innocent kids, walking down the street, playing

> in their yards, or even sitting in their homes have been shot by stray bullets, and some of them have died. And that's pretty sad and frightening for those families, for those children who have to live in those crime-infested neighborhoods that are brought about by that drug trafficking. And that's why [the trial court] consider[s] it to be a very serious offense.

The trial court amply "individualized" Davis's sentence.

¶15 Davis also contends that the trial court failed to explain its reasons for imposing the sentence it did, or the duration of that sentence, why it was the minimum amount of custody necessary to achieve the sentencing considerations ("minimum custody standard"), why it imposed consecutive rather than concurrent sentences in one particular respect, and why it deviated from the prosecutor's recommended sentencing structure. Davis seeks a specificity in sentencing that the law does not require. *See* ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483 ("no appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion").

¶16 The trial court considered the primary sentencing factors and provided its reasons for the sentence. The trial court is not obliged to explain the reason it imposed the precise amount of confinement it did, as long as it explains its reasons for the total sentence as required by ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). *See* ***Ramuta***, 261 Wis. 2d 784, ¶25.

¶17 The trial court addressed the minimum custody standard in explaining Davis's "substantial prior criminal record," and the bases for its conclusion that Davis "can't be supervised in the community, that if [Davis is] going to turn [his] life around, it's going to have to be in a structured, confined setting." The trial court was mindful that the four offenses for which it was imposing sentence involved drugs, which it also related to the firearm offense.

The trial court characterized these offenses as "serious because of what drugs are doing throughout our community. They're destroying the lives of individuals, of families, of children, and so many of the other crimes we see in court every day are drug-related crimes." Davis's bail-jumping did not improve his stature with the trial court. In its postconviction order, the trial court expressly explained that

> [t]he primary factor was the protection of the community, given that defendant had basically absconded prior to sentencing in Judge Fiorenza's court, gone back out and sold drugs, possessed a firearm as a convicted felon and essentially continued with the same way of life in which he had previously engaged himself. Although the defendant's particular background is unfortunate, it is not a factor which mitigates the seriousness of the offense or the need for protection from drug dealing in the community. The court cannot find that [defense] counsel was ineffective for failing to bring these issues to the court's attention. Specific knowledge of those factors would not have altered the court's sentencing decision.

¶18 The trial court's failure to specifically explain why it imposed one of the two-year sentences to run consecutive to the others, does not constitute an erroneous exercise of discretion. The trial court was troubled by the fact that Davis had absconded after pleading guilty to possessing cocaine; our independent review of the record indicates that the trial court would have essentially failed to punish Davis for absconding had it imposed that two-year bail-jumping sentence concurrently to the three other sentences.[3]

¶19 The trial court is obliged to explain the sentence it imposed. *See* ***McCleary***, 49 Wis. 2d at 278. It is not required to explain why it failed to follow

[3] Although the trial court viewed "drugs and guns [as] go[ing] hand-in-hand," it imposed the firearm sentence concurrently, presumably mindful that the firearm did not have a significant role in the drug incident.

every detail of the parties' joint sentencing recommendation. *See* ***Ramuta***, 261 Wis. 2d 784, ¶25.

¶20 We conclude that the trial court properly exercised its sentencing discretion. It was not required to do so with the precision and specific explanations Davis suggests. Davis presumably expected that he would receive the aggregate sentence jointly recommended by the parties, not one that was two years longer (one year more of confinement and one year more of extended supervision). The trial court's imposition of a two-year consecutive sentence for absconding after Davis's conviction for cocaine possession without a specific explanation is not an erroneous exercise of discretion. It is also not an erroneous exercise of discretion to evaluate the sentencing factors differently than Davis suggested. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

By the Court.—Judgments and order affirmed.

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