

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 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. 2006AP2001-CR

Cir. Ct. No. 2005CM634

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. SIMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ David Sims appeals a judgment of conviction for possession of THC and misdemeanor bail jumping and an order denying

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

postconviction relief. Sims argues the trial court impermissibly punished him when he refused to accept probation by imposing the maximum consecutive sentences. We disagree and therefore affirm the judgment and order.

BACKGROUND

¶2 On January 17, 2006, Sims was convicted of possession of THC and misdemeanor bail jumping. At sentencing, the State recommended two consecutive three-month sentences. Before addressing Sims, the court stated that if he refused probation, its “attitude on somebody like that is, with your history, with this offense that you’ve committed while you’re out on bond, then you go serve the maximum.” Sims indicated he did not want probation. The court then stated that based on Sims’s history, his record, and the seriousness of the offense, “the best part of this sentence should be to make sure that [Sims] learn[s] how to follow the rules.” The court then sentenced Sims to the maximum of six months on the possession of THC and nine months on the bail jumping to run consecutive to each other. Sims filed a motion for postconviction relief and the court denied that motion on August 2, 2006.

DISCUSSION

¶3 Sims argues the court impermissibly punished him by imposing maximum consecutive sentences when he refused probation. Sentencing is a discretionary decision we will not disturb absent an erroneous exercise of that discretion. *State v. Taylor*, 2006 WI 22, ¶17, 289 Wis. 2d 34, 710 N.W.2d 466. “When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion.” *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. “[S]entencing decisions of the circuit

court are 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.” *Id.*, ¶18. The primary factors a court must consider include the gravity of the offense, the character and rehabilitative needs of the defendant, and protection of the public. *Id.*, ¶27. The court may also consider the defendant’s history of criminal offenses, including: pending charges, the defendant’s personality, character and social traits, his truthfulness, remorse, repentance and cooperativeness, the need for close rehabilitative control, and the rights of the public. *Id.*, ¶43 n.11. The court has an opportunity to clarify its decision at the postconviction motion hearing. *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶4 In this case, the court warned Sims it would impose the maximum sentence if Sims refused probation. After Sims refused probation, the court stated, “probation was the appropriate result in this case.” The court then sentenced Sims to the maximum. Sims argues, “if the judge concluded that probation were an appropriate alternative, there was no need for a maximum sentence.” While at first blush this argument has logical appeal, it ignores the court’s reasoning for believing probation would have been the appropriate result. The court did not state probation would be appropriate because Sims did not deserve a severe punishment or Sims did not pose a risk to the community. Rather, the court stated:

[I]f an individual comes in here and has a record involving drugs, and has another drug offense, and has a history of probation being revoked, and resisting and bail jumping and not complying with rules from the probation officer, and not complying with rules from a Court, and not complying with rules of your bond, my opinion is—and especially in this case, considering your age, your record, the seriousness of this offense—is that the best part of this

sentence should be to make sure that you learn how to follow the rules.

....

But when an individual refuses [probation], I take that as you're not willing to comply with rules, whether they're rules that I set, the rules that your agent sets.

....

I am letting you know that because I think based upon the seriousness of this offense, your reluctance at following rules in the past, your continued use of drugs, that there is an issue that needs to be monitored. That is your drug use.

¶5 These statements indicate the court's desire to fashion an appropriate sentence based on Sims's character and to closely monitor Sims to meet his rehabilitative needs. Unfortunately, Sims took away the option of probation, and the court then had to consider what would best help Sims learn to comply with rules.

¶6 At the postconviction motion hearing, the court clarified its reasoning for imposing the maximum sentence after Sims refused probation. The court stated:

At that sentencing hearing on January 17, I had an individual that didn't want to follow the rules, has never followed the rules, and would not want to comply with the law. In my opinion to accomplish rehabilitation, deterrence, punishment, and protection of the community, I thought the best approach to get to those results would be to get Mr. Sims to finally do something he was ordered to do, to have some degree of supervision over him, and to have him get the treatment or counselling that he needs....

When I was faced without a probation option, I then thought the rehabilitation objective was diminished ... to [maximize] that deterrence that Mr. Sims not harm the community, specific deterrence, that the more he was incarcerated, the more the community would be protected and the more he'd be prohibited from engaging in future criminal conduct.

It is clear from the record the court's consideration of Sims's refusal of probation was not an improper factor. Rather, the court considered how Sims's refusal reflected on his character and impacted his rehabilitative needs.

¶7 Sims also argues his sentence was selected as a result of a mechanistic sentencing policy. *See State v. Ogden*, 199 Wis. 2d 566, 572, 544 N.W.2d 574 (1996). A sentence is unreasonable and unjustified if it is the result of a preconceived policy and does not take into account individual factors. *Id.* at 572-73. The record shows the court examined the individual factors of Sims's case before imposing the sentence. Specifically, the court considered Sims's history of bail jumping, continued drug use, and his inability to follow rules. Therefore, the sentence was not the result of a mechanistic sentencing policy.

¶8 Finally, Sims argues the court failed to consider the three primary sentencing factors. Sims first argues the court failed to consider the seriousness of the offense. To the contrary, the record indicates the court did consider the seriousness of the offense stating, "and especially in this case, considering your age, your record, the seriousness of this offense." While Sims argues his offense was not serious and implies the maximum sentence was therefore inappropriate, this is not the only factor the court considered. In this case, the court properly considered Sims's past history of drug abuse in addition to the current offense in fashioning an appropriate sentence.

¶9 Sims also argues the court did not address the need to protect the public before sentencing him. The record indicates the court considered Sims's history of bail jumping, continued drug use, and his inability to follow rules. These are all factors that affect public safety. At the postconviction motion hearing, the court clarified its reasoning stating that to "accomplish rehabilitation,

deterrence, punishment, and protection of the community” the court needed to “get Mr. Sims to finally do something he was ordered to do” The court concluded “the more he was incarcerated, the more the community would be protected and the more he’d be prohibited from engaging in future criminal conduct.” In this case, the court believed the maximum sentence would help protect the public by preventing Sims from engaging in a pattern of continued criminal conduct.

¶10 Finally, as noted above, the court considered Sims’s character and rehabilitative needs, specifically noting his inability to follow rules. The court elaborated on Sims’s character at the postconviction motion hearing noting that Sims had a bad attitude and was disrespectful to his attorneys and to the court. Therefore, the court considered all three primary sentencing factors.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

