COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP1977-CR **Cir. Ct. No. 2004CF3618**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL Y. LAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Y. Lay appeals from an amended judgment of conviction for possessing cocaine with intent to deliver, and from a postconviction order denying his sentence modification motion. The issues are whether the trial court erroneously exercised its sentencing discretion and imposed

an unduly harsh and excessive sentence. We conclude that the trial court properly exercised its sentencing discretion; its explanation for the nine-year sentence, albeit twice the length of the State's recommendation but less than the fifteen-year maximum potential penalty, demonstrated why it was not unduly harsh or excessive. Therefore, we affirm.

¶2 Lay pled guilty to possessing between five and fifteen grams of cocaine with intent to deliver, in violation of WIS. STAT. § 961.41(1m)(cm)2. (amended Feb. 1, 2003). In exchange for his guilty plea, the prosecutor recommended a fifty-four-month sentence, comprised of twenty-four- and thirty-month respective periods of confinement and extended supervision, to run consecutive to a reconfinement order resulting from the revocation of his supervision, which would expire in less than four months. The trial court imposed a nine-year sentence to run concurrent to the reconfinement period, comprised of four- and five-year respective periods of confinement and extended supervision. It also declared that Lay would be eligible for the Challenge Incarceration and Earned Release Programs after he had served two years of the confinement portion of his sentence. Lay moved for sentence modification, contending that his sentence was unduly harsh and excessive generally, and specifically in requiring him to serve two years of his confinement sentence before becoming eligible for the Challenge Incarceration and Earned Release Programs. The trial court denied the motion, emphasizing that despite his acceptance of responsibility and his cooperation with the authorities, his "extensive and significant criminal history" justified the sentence, given Lay's "numerous [and failed] opportunities in the past to discontinue his criminal behavior."

> ¶3 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).

¶4 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 weight the trial court assigns to each factor is a discretionary determination. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The trial court should also explain how the confinement term was the minimum amount of custody necessary to achieve the sentencing considerations ("minimum custody standard"). *See* ***State v. Gallion***, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***Larsen***, 141 Wis. 2d at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶5 Lay challenges the sentence as an erroneous exercise of discretion and as unduly harsh and excessive because the trial court did not: (1) give him sufficient credit for his positive behavior; (2) explain how its confinement period met the minimum custody standard; and (3) consider that its decision to delay his eligibility for the Challenge Incarceration and Earned Release Programs for two years would result in delayed placement on waiting lists, depriving Lay of the full benefit of successfully completing either of these programs.

¶6 Preliminarily, the trial court considered the primary sentencing factors. It was mindful of the gravity of the offense. It described this offense to Lay as "ruin[ing] the future of your little baby by your willingness to harm others by spreading this poison, the cocaine, around the community, poisoning dozens of people with the … really more than five grams." It was far more troubled however, by Lay's character. It recited his criminal history including armed burglary, attempted robbery, and several controlled substance offenses, not delineating the misdemeanors of which he had also been convicted. It also emphasized that the public needed to be protected from drug dealers, particularly ones such as Lay who continually repeat their criminal conduct by "doing it over and over and over."

¶7 Lay claims that the trial court failed to credit him sufficiently for his acceptance of responsibility, his cooperation with the police, his remorse, and his desire to modify his behavior. The trial court credited Lay with his positive behavior and attitudes incident to its consideration of his character. It recited numerous "good things" that it "t[oo]k[] into account," such as Lay's attempts to support his baby, his earning his high school equivalency degree, the fact that defense counsel "knows [him] and likes [him]," and that he has a skill and is employable. It also considered Lay's countervailing character concerns and his repeated assurances on what he would do if given another chance after being convicted of a crime. The trial court was mindful however, that Lay "just keep[s] refusing to follow [his] own advice."

¶8 The trial court credited Lay with his positive behavior and considered his mitigating circumstances; the fact that those considerations did not supersede the negative aspects of his character, such as his criminal history, the gravity of the offense or the protection of the public from drug dealers, is not an

erroneous exercise of sentencing discretion. That the trial court exercised its discretion differently than Lay had hoped it would is not an erroneous exercise of discretion. *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).

¶9 Lay's next criticism is that the trial court did not explain how the four-year confinement component of the sentence met the minimum custody standard. The trial court was obliged to protect the public from drug dealers and explained that, despite saying all of the right things and having the potential to lead a productive life, Lay instead

> choose[s] to mess [him]self up and to really ruin … the future of [his] little baby by [his] willingness to harm others by spreading this poison, the cocaine, around the community, poisoning dozens of people with the … five grams or more…. [He] just go[es] and viciously poison[s] others and take[s] parents away from children and – and have them hooked on crack because [he] want[s] to help out [his] family [by earning money].

The trial court explained that "[t]he problem isn't just what [he] did in July. Of course, that's the – that's what [he's] being sentenced for. The problem is [he] never seem[s] to learn."

¶10 Although Lay pleaded for "another chance," the trial court could not rely on Lay's claimed desire to change his ways because he had previously squandered too many opportunities to do so by continuing to engage in criminal behavior, such as drug dealing. We are satisfied that the trial court explained why its sentence met the minimum custody standard considering Lay's history and his convictions.

¶11 Consistent with his other criticisms, Lay also contends that the trial court erroneously exercised its discretion in requiring him to serve two years of his confinement term before becoming eligible for the Challenge Incarceration and Earned Release Programs. He contends that a two-year delay to begin a program that offers him the opportunity for early release to extended supervision frustrates the purposes of these programs, particularly when he will probably not even be placed on the applicable waiting lists until he has served two years (or half of) his confinement term. It is within the trial court's discretion to determine when a defendant may become eligible for the Challenge Incarceration and Earned Release Programs. *See* ***State v. Lehman***, 2004 WI App 59, ¶16, 270 Wis. 2d 695, 677 N.W.2d 644; ***State v. White***, 2004 WI App 237, ¶2, 277 Wis. 2d 580, 690 N.W.2d 880. We conclude that the trial court properly exercised its discretion in determining Lay's eligibility for these early release opportunities.

¶12 Lay also contends that his sentence is unduly harsh and excessive, particularly when it is twice the length of the prosecutor's recommendation. A sentence is unduly harsh when 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***, 70 Wis. 2d at 185. "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). We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶13 Lay acknowledges that the trial court is not bound by any of the sentencing recommendations. *See* ***State v. Bizzle***, 222 Wis. 2d 100, 105-06 n.2, 585 N.W.2d 899 (Ct. App. 1998). Nevertheless, he contends that a sentence twice as long as that recommended by the prosecutor is evidence of its excessiveness. We disagree. The trial court explained that "[t]he problem [wa]sn't just what [Lay] did in July. Of course, that's the – that's what [Lay's] being sentenced for. The problem is [he] never seem[s] to learn." Consequently, the trial court "can't go along with what the lawyers are proposing here. It's got to be more time of relief for the neighbors; that is, the people who live in the community in Milwaukee County and the State of Wisconsin."

¶14 In its postconviction order, the trial court rejected the unduly harsh and excessive challenge generally and specifically insofar as it related to the two-year delay in eligibility for the Challenge Incarceration and Earned Release Programs because

> based on the totality of circumstances presented and given that the maximum penalty in this case was fifteen years in prison[, the sentence imposed was not unduly harsh]. In addition, the court finds it was not unduly harsh to have the defendant first complete two years of confinement time before the Department of Corrections considers him for either of the above two programs given the fact that he had numerous opportunities in the past to discontinue his criminal behavior.

¶15 Possessing between five and fifteen grams of cocaine with the intent to deliver carries a fifteen-year maximum penalty. *See* WIS. STAT. §§ 961.41(1m)(cm)2. (amended Feb. 1, 2003); 939.50(3)(e) (amended Feb. 1, 2003). Imposing a nine-year sentence containing a four-year period of confinement for repeatedly possessing cocaine with the intent to deliver, after being in prison for four different offenses in the last fourteen years "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." *See* ***Daniels***, 117 Wis. 2d at 22.

¶16 We reject Lay's erroneous exercise challenges and his contention that the sentence was unduly harsh and excessive. The trial court considered the primary sentencing factors and explained why it imposed the sentence it did. It afforded Lay credit for his positive and productive behavior, although not as much credit as Lay believed he was due. It explained how its sentence met the minimum custody standard and why a two-year delay in becoming eligible for early release opportunities was justified. Its reasons were reasonable. Its sentence, significantly less than the statutory maximum potential penalty for this offense, was not unduly harsh or excessive. The trial court properly exercised its discretion when it imposed sentence and when it denied Lay's motion for sentence modification.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).