COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP827-CR **Cir. Ct. No. 2003CF5533**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWAIN M. STATEN,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Dwain M. Staten pled guilty to first-degree sexual assault with use of a dangerous weapon and as a party to a crime, and to armed robbery by use of force as a party to a crime. On the sexual assault, the circuit court imposed a thirty-five year prison sentence, with Staten to serve a minimum

of twenty years in initial confinement and maximum of fifteen years on extended supervision. Staten received a consecutive twenty-year prison sentence for the armed robbery, and he was ordered to serve a minimum of ten years in initial confinement. Staten sought postconviction relief, arguing that the circuit court failed to provide an adequate explanation for the sentences imposed. The circuit court denied Staten's motion, and Staten appeals. Because the record demonstrates that the circuit court properly exercised its sentencing discretion, we affirm the judgment of conviction and postconviction order.

¶2 The facts for purposes of this appeal are largely undisputed. Given that both Staten and his accomplice, Monzell Goodman were sentenced by the same circuit court judge and raise the same issue on appeal, the court's opinions on both appeals will use the same statement of facts and law. *See* ***State v. Goodman***, No. 2005AP521-CR, unpublished slip op. (WI App __). Because Staten and Goodman were sentenced separately, however, the analysis for each appellant will examine the circuit court's comments for each defendant. *See* ***id.***

¶3 Initially, we note that Staten and Goodman accepted responsibility for the crimes, but each at various times attempted to cast primary responsibility for the crimes on the other. What is not disputed is that at the time of the crimes, Staten and Goodman were both young men in their late teens. They were out walking and decided to rob someone. Eventually, they settled on a twenty-three-year-old woman in a car. The men indicated that they had a weapon, and the victim complied with their demands due to her belief that at least one of the men was armed and that the men would harm her if she did not follow their instructions. She had only twenty dollars, which she gave to the men. Staten and Goodman blindfolded her and forced her into the trunk of her car. They drove the

victim around to various automatic teller machines and tried to take out money using personal identification numbers the victim gave them.

¶4 During the time they drove the victim around, both men sexually assaulted her. The assaults included penis-to-vagina intercourse, penis-to-mouth intercourse, and mouth-to-vagina intercourse. The woman repeatedly asked the men to stop, but the men verbally abused her, telling her "bitch, stop crying, shut up," and to "do her job," among other things. The victim was released after a few hours, but Staten and Goodman kept her car.

¶5 Staten pled guilty to the charged crimes in exchange for the State agreeing to forego additional charges against him. The State also agreed that it would not recommend a particular sentence, but it noted that it was free to argue for a prison sentence.

¶6 At sentencing, the circuit court first noted that it had reviewed a letter from Staten's aunt and the presentence investigation report. Neither Staten nor the State requested changes or corrections to the report.

¶7 The prosecutor addressed the court, referring to Staten's crimes as "extraordinarily aggravated" offenses. The prosecutor noted that, although Staten and Goodman had "throughout [the prosecutions] tried to minimize their roles in [the crimes] and tried to make the other [look] like the worse offender," both Staten and Goodman were "actively involved and directing the actions that occurred that night." The State further noted that the crimes were, for the victim, "an extremely protracted ordeal," in which she was blindfolded, placed in the trunk of a car, removed from the trunk and placed in the interior of the car where she was sexually assaulted, all the while believing that she would be killed. The prosecutor noted that Staten and Goodman each ignored the victim's repeated

"tearful pleas that she be allowed to leave." Instead, Staten and Goodman made comments to the victim that "were extremely degrading."

¶8 In commenting on Staten's character, the prosecutor acknowledged that Staten had pled guilty, but argued that Staten still attempted to minimize his responsibility. Consistent with the plea deal, the prosecutor requested a prison sentence for Staten, one that was "appropriately proportional" to the nature of the crime, the harm he caused the victim, and the harm to the entire community.

¶9 Defense counsel opened his statement by acknowledging that the severity of Staten's offenses was simply "off the charts" and "aggravated." Counsel noted, however, that the crimes were ones of opportunity and not really planned. He further noted a "definite lack of sophistication" in both Staten and Goodman. In discussing Staten's character and rehabilitative needs, counsel noted Staten's difficult family history, including his father's absence when Staten was growing up and his mother's mental health needs and cocaine problem. Counsel also noted Staten's educational problems, including "a fairly profound learning disability." Counsel pointed out, though, that despite this difficult history, Staten had no prior criminal record other than a single instance of marijuana possession as a juvenile. Defense counsel acknowledged that even though he saw "a kernel of hope here based on Mr. Staten's character and his acceptance of responsibility and remorse," a "significant prison term" was warranted. Counsel requested for Staten the same thirty-five-year prison sentence imposed on Goodman, but asked the court to impose a twelve-to-fifteen year term of initial confinement instead of the twenty years of initial confinement imposed on Goodman. In his personal comments, Staten apologized to the victim, who was not present.

¶10 In its sentencing remarks, the circuit court noted that, in its experience, it had, over time, "seen the worst that human beings are capable of." After a brief discourse on the nature of evil, the circuit court indicated that the case could be reduced to a choice between good and bad. The court noted that it could not "get a handle on" Staten's lack of empathy for the victim when she was crying and begging Staten and Goodman to stop their assaults. The circuit court took issue with some suggestions that Staten was "just going along with Goodman," noting that the case was not about being "with the wrong person at the wrong time," but, rather, was about making choices to act in a particular way. The court noted that the attempts by Staten and Goodman to apportion responsibility for the crimes was unpersuasive because they "both were there," and "both did it, period."

¶11 The court noted that it considered Staten's attempts to place primary responsibility on Goodman as "cowardly" and "not a noble character trait." The court stated that accepting responsibility for the crime for strategic legal purposes was different and less "honest" than accepting responsibility because it is the right thing to do. The court further noted that it was undisputed that Staten and Goodman had committed the crimes "over a protracted period of time and over a significant geographic territory, all for your own satisfaction and selfishness." The court then imposed sentence, noting that it was considering "the seriousness of these offenses, the character of the defendant, and the need to protect the community," and that it was doing so "with the full intention of shaping a fair, just, and appropriate sentence." It then imposed the sentences described above.

¶12 In his postconviction motion, Staten argued that the circuit court had erroneously exercised its discretion at sentencing by failing to specify the objectives of the sentences, the facts relevant to the objectives, or how the sentences imposed advance those objectives. *See* ***State v. Gallion***, 2004 WI 42,

¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court denied the motion, noting particularly that it was the "egregious" character of the offenses, particularly their "horribly demeaning nature" and "the nightmare that the victim had gone through that had dictated the sentences." It further indicated that its comments on Staten's indifference to the victim's pleas and his insensitivity to the victim in general were comments on "his particular character (or lack of character)." The court concluded that its primary objective in imposing the sentences it did was "to protect the community from further attacks [by] the defendant." Staten appeals.

¶13 The standard of appellate review is well-settled. The circuit court has great discretion in imposing sentence. *See, e.g.*, ***State v. Wickstrom***, 118 Wis. 2d 339, 354-55, 348 N.W.2d 183 (Ct. App. 1984). This court will affirm a sentence imposed by the circuit court if the facts of record indicate that the circuit court "engaged in a process of reasoning based on legally relevant factors." ***Id.*** at 355 (citation omitted). The primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). This court will sustain a circuit court's exercise of discretion if the conclusion reached by the circuit court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). This court is extremely reluctant to interfere with the circuit court's sentencing discretion given the circuit court's advantage in considering the relevant sentencing factors and the demeanor of the defendant in each case. ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). Even in instances where a sentencing judge fails to properly exercise discretion, this court will "search the record to determine

whether in the exercise of proper discretion the sentence imposed can be sustained." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶14 In ***Gallion***, 270 Wis. 2d 535, the supreme court reaffirmed the ***McCleary*** sentencing analysis, which cited the importance of the sentencing court's consideration of "the nature of the offense, the character of the offender, and the protection of the public interest." ***McCleary***, 49 Wis. 2d at 274 (citation omitted). ***McCleary*** also emphasized the importance of the sentencing court's exercise of discretion.

> It is thus clear that sentencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed.
>
> In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards…. [T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.

Id. at 277 (citation omitted).

¶15 ***Gallion*** requires the trial court to explain the "linkage" between the sentence and the sentencing objectives. ***Gallion***, 270 Wis. 2d 535, ¶46. Although the appellate standard of review did not change, "appellate courts are required to more closely scrutinize the record to ensure that 'discretion was in fact exercised and the basis of that exercise of discretion [is] set forth.'" ***Id.***, ¶76 (quoting ***McCleary***, 49 Wis. 2d at 277).

¶16 In this instance, we are satisfied that the record demonstrates that the circuit court exercised discretion and set forth the basis of its reasoning on the

record. The circuit court's sentencing comments, perhaps not as exemplary as those the supreme court outlined in ***Gallion***, nonetheless satisfy the criteria for an exercise of sentencing discretion. The circuit court stated and considered the primary sentencing factors, but clearly placed the greatest weight on the seriousness of the offenses and how the nature of the offenses revealed Staten's character. As with Goodman, the circuit court based Staten's sentence not only on the fact of the sexual assaults, but the protracted character of the assaults and the prolonged humiliation of the victim. The circuit court reasoned that, given the nature of the assaults, in which a crime of opportunity, a robbery, had morphed into the prolonged abuse of the victim, substantial sentences were necessary to protect the public from Staten.

¶17 In addition, we agree with the State that Staten's claim that the circuit court failed to consider his full "background or story" is undercut by the record. The record shows that the circuit court discussed at some length Staten's difficult family and educational history, but it concluded that a substantial sentence was required for protection of the public. The record establishes that the circuit court properly exercised its sentencing discretion. Given the circumstances and nature of the crimes, we cannot conclude that the sentences imposed are unduly harsh because they are not "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." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (2005-06).

By the Court.—Judgment and order affirmed.

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