COURT OF APPEALS DECISION DATED AND FILED

May 20, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP960-CR **Cir. Ct. No. 2003CF4217**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE J. FRANKLIN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY and TIMOTHY M. WITKOWIAK, Judges.[1] *Affirmed*.

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

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[1] The Honorable William Sosnay presided over the jury trial and sentencing in this matter. The Honorable Timothy M. Witkowiak presided over the postconviction proceedings.

¶1 CURLEY, P.J. Jesse J. Franklin, Jr., appeals from a judgment of conviction and an order denying his postconviction motion. A jury found Franklin guilty of one count of possession with intent to deliver tetrahydrocannabinols (THC), contrary to WIS. STAT. § 961.41(1m)(h)2. (eff. Feb. 1, 2003); one count of possession with intent to deliver cocaine, contrary to § 961.41(1m)(cm)3. (eff. Feb. 1, 2003); and one count of being a felon in possession of a firearm, contrary to WIS. STAT. § 941.29(2)(a) (eff. Feb. 1, 2003).[2]

¶2 On appeal, Franklin argues that Attorneys Kohn and Smith were ineffective for failing to fully communicate with him; failing to preserve his speedy trial demand; and failing to follow through and file a ***Terry*** stop motion.[3] He argues that Attorney Toran was ineffective for failing to investigate and for failing to file a ***Terry*** stop motion when Franklin requested him to do so. In addition, he makes the following claims: he was denied his right to a speedy trial; the trial court erred when it concluded that the police officers had reasonable suspicion for an investigative stop and probable cause for his arrest; and the trial court erroneously exercised its discretion in sentencing him. We conclude that Franklin's trial attorneys were not ineffective, he was not denied his right to a speedy trial, and the trial court properly denied his suppression motion. Finally, because the trial court properly exercised its sentencing discretion, we affirm.

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[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] ***Terry v. Ohio***, 392 U.S. 1 (1968).

I. BACKGROUND.

¶3 The underlying facts are that on July 23, 2003, at approximately 3:30 p.m., two uniformed officers in an unmarked squad car were patrolling the area near 29th and Clybourn Streets in Milwaukee following complaints and recent information they had received pertaining to drug dealing in that area. The officer who was driving the squad car observed Franklin standing in the middle of 29th Street engaged in what appeared to be a drug transaction. Specifically, the officer saw Franklin standing near the driver's side of a vehicle that was stopped in the middle of the street, and Franklin was reaching his right hand through the window. The officer acknowledged that he did not see Franklin either retrieve or give anything to the driver of the vehicle.

¶4 The officers circled around the block and proceeded to park on 29th Street. When they pulled up, Franklin was standing at the passenger-side, front window of a van parked on the street. The officer testified that Franklin immediately reached his right hand into the open window and pulled his hand back quickly. Franklin then stepped backwards putting his hands up and throwing a set of keys to the ground while saying, "I didn't do anything, I didn't do anything."

¶5 One of the officers conducted a pat-down search of Franklin, while his partner looked in the van's window. His partner saw a plastic shopping bag on the front passenger seat that contained a green leafy material he believed was marijuana. Franklin was arrested. It was later discovered that the plastic shopping bag also contained a box of sandwich baggies, a digital scale, and an off-white chunky substance believed to be cocaine base. Additionally, following a search of the van, the officers found a loaded .9-mm semiautomatic pistol in the console.

¶6 At his preliminary hearing, Franklin's attorney requested a speedy trial. Afterward, Franklin moved to substitute Attorney Kohn and his law firm for the attorney who represented him at the preliminary hearing. The trial court granted his request. At the hearing on Franklin's motion for substitution, the trial court noted that the record reflected that a speedy trial demand was made, and in response, both Attorney Kohn and the prosecutor advised the court that they were unaware of the demand. The trial court stated that it was not going to honor the request, which had been made to the court commissioner who presided over the preliminary hearing instead of the trial court judge. Notwithstanding, the trial court gave Attorney Kohn the opportunity to enter a speedy trial demand. Attorney Kohn declined to do so and informed the court that he believed the motion to suppress physical evidence obtained from the scene, which had been filed on Franklin's behalf, would be dispositive.

¶7 At the subsequent suppression hearing, the trial court determined that Franklin lacked standing to challenge the search of the vehicle.[4] Attorney Smith, Franklin's attorney at the time, then scheduled a ***Terry*** stop motion for the court's calendar.[5] Two days before the motion was to be heard, Attorney Smith filed a motion to withdraw as counsel. In his affidavit supporting his withdrawal, Attorney Smith advised the trial court that his request was made following Franklin's representations to the court that counsel was not working in his best interest and following Attorney Smith's discovery of a confidential situation

[4] Franklin does not appeal from the trial court's determination in this regard.

[5] Attorneys Kohn and Smith work for the same law firm.

creating a conflict of interest. The trial court granted Attorney Smith's request, and Franklin retained Attorney Toran.

¶8 Attorney Toran pursued the motion challenging the officers' ***Terry*** stop, however, the hearing did not take place until after several adjournments. The trial court concluded that the officers had reasonable suspicion to believe that Franklin had or was about to commit a crime and that the officers had probable cause to arrest him. Consequently, the trial court denied Franklin's request to suppress the evidence obtained.

¶9 On the day that trial was to begin, the court acknowledged that Franklin had filed a motion requesting new counsel, but refused to allow him to obtain another attorney given the numerous adjournments that had occurred and the fact that Attorney Toran was his third attorney. The trial was subsequently adjourned, and on the adjourned trial date, Attorney Toran requested to withdraw as Franklin's attorney. Franklin advised the court that he did not want Attorney Toran to represent him. The trial court again denied the request, concluding that what Franklin "[was] really asking for is additional time and that's really what has been going on here, and this Court, based upon the number of adjournments and the record … doesn't feel that a further adjournment is warranted here." The jury trial commenced, and Franklin was subsequently found guilty of all the charges against him.

¶10 At the sentencing hearing, the trial court concluded that probation was not appropriate based on the serious nature of the offenses and Franklin's prior record. As a result, it sentenced Franklin to the following: four years of imprisonment on count one, possession with intent to deliver THC, comprised of two years of initial confinement and two years of extended supervision; eight

years of imprisonment on count two, possession with intent to deliver cocaine, comprised of three years of initial confinement and five years of extended supervision, to run consecutive to the sentence on count one; and three-and-one-half years of imprisonment on count three, felon in possession of a firearm, comprised of eighteen months of initial confinement and two years of extended supervision, to run consecutive to the sentence on count two.

¶11 Franklin filed a motion for postconviction relief requesting a ***Machner*** hearing to determine if his trial attorneys were ineffective; asking that the trial court examine whether his right to a speedy trial was denied; and seeking sentence modification.[6] In its decision and order denying Franklin's postconviction motion, the court concluded that Franklin's allegations of ineffective assistance on the part of his trial attorneys were "conclusory and insufficient to warrant a ***Machner*** hearing." The court also held that Franklin "[could] not assert that he was denied his constitutional right to a speedy trial when the delays were occasioned almost entirely by the defense." Lastly, the court determined that the trial court properly exercised its discretion in sentencing Franklin such that modification of his sentence was not warranted. Franklin now appeals. Additional facts are provided in the remainder of this opinion as needed.

II. ANALYSIS.

A. Franklin's trial attorneys were not ineffective.

¶12 Franklin claims that three of his trial attorneys were ineffective. In order to substantiate his claim, he must make two showings: (1) that counsel's

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[6] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

performance was deficient; and (2) that this deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "Although we give deference to the trial court's findings of historical fact, whether the facts found by the trial court show that the lawyer's performance was deficient and, if so, whether the deficient performance was prejudicial, are legal issues that we decide independent of the trial court's determination." ***State v. Flynn***, 190 Wis. 2d 31, 47, 527 N.W.2d 343 (Ct. App. 1994), *cert. denied*, 514 U.S. 1030 (1995).

¶13 "An attorney's performance is not deficient unless it is shown that, 'in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" ***State v. Guck***, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992) (citation omitted). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. We need not address both of these factors if Franklin insufficiently demonstrates one. *See* ***id.*** at 697 (holding that "there is no reason for a court deciding an ineffective assistance claim … to address both components of the inquiry if the defendant makes an insufficient showing on one").

¶14 First, Franklin argues that Attorneys Kohn and Smith were ineffective for failing to communicate with him and for not preserving his speedy trial demand. As the State points out, it is not clear what information Franklin believes was not communicated to him, and because Franklin did not submit a reply brief, he provides no insight or clarification on this point. Thus, he falls short of establishing that his attorneys' conduct was "'outside the wide range of

professionally competent assistance'" in this regard. ***Guck***, 170 Wis. 2d at 669 (citation omitted). As for his attorneys' decision to pursue a suppression motion, which potentially would have been dispositive of Franklin's case, in lieu of a speedy trial demand, tactical decisions regarding trial strategy are entrusted to the attorney. *See* **State v. Ambuehl**, 145 Wis. 2d 343, 351, 425 N.W.2d 649 (Ct. App. 1988) (explaining that this court "'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional [legal] assistance'" which could be considered sound trial strategy) (quoting ***Strickland***, 466 U.S. at 689). We cannot conclude that this performance was deficient.

¶15 Franklin next argues the Attorneys Kohn and Smith were ineffective for failing to follow through with a ***Terry*** stop motion after it was clear, following the suppression hearing, that Franklin did not have standing. The record reflects that a stop motion was calendared while Franklin was represented by Attorneys Kohn and Smith. Two days before the motion was to be heard, Attorney Smith filed a motion requesting that his firm be allowed to withdraw as counsel. On the date the stop motion was to take place, Attorney Smith advised the court that Franklin had taken action that created what Attorney Smith believed to be "an absolute conflict." The trial court inquired whether there would be a problem if it conducted the stop motion and then allowed Attorney Smith to withdraw. Attorney Smith concluded that proceeding in such a fashion would be problematic, and, as a result, the trial court allowed him to withdraw before it would hear the motion. Based on this sequence of events, we likewise cannot conclude that Attorneys Kohn and Smith were ineffective for failing to go ahead with the ***Terry*** stop motion.

¶16 Franklin faults Attorney Toran for failing to investigate and for failing to file a ***Terry*** stop motion when Franklin requested him to do so. He

asserts that the delay in time before he was able to have the stop motion hearing made it difficult for him to find witnesses and discover other evidence. Franklin does not elaborate or provide any details as to who the witnesses were or what the other evidence he references would have been. "'[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the [hearing].'" ***Flynn***, 190 Wis. 2d at 48 (citation omitted). Franklin has failed to meet his burden in this regard as it is unclear what further investigation would have uncovered or how the outcome would have differed.

¶17 Moreover, Franklin has not established prejudice by showing a reasonable probability that but for his allegations of errors made by trial counsel "the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694; *see also* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) ("A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant's defense. The defendant must affirmatively prove prejudice."). Because Franklin has failed to show that his trial attorneys' performance was deficient and that he was prejudiced, we conclude he was not denied the effective assistance of counsel.

B. Franklin's right to a speedy trial was not violated.

¶18 Franklin contends he was denied his right to a speedy trial. He offers a chronology of the case and references eight delays and adjournments:

> (1) "The original delay was due to the court and trial counsel for failing to recognize the original demand for a speedy trial."

> (2) "The second delay was caused by ineffective trial counsel when he requested an adjournment without speaking with Mr. Franklin."
>
> (3) "The third delay was again caused by ineffective trial counsel when he determined he would withdraw and not follow through with filing any motion that would expedite the case."
>
> (4) "The fourth delay can be attributed to both the defense and the [S]tate," because it was the result of newly discovered evidence brought forth by the State, which defense counsel needed time to review.
>
> (5) "The fifth delay … could be attributed to defense counsel, as he had another case and that case had to be addressed first."
>
> (6) "The sixth delay can also be attributed to defense counsel and defense counsel only."
>
> (7) The seventh delay, Franklin contends, can be attributed to the State due to the unavailability of its witness.
>
> (8) "The final delay can be attributed to the defense as counsel was unprepared to proceed."

¶19 Both the Sixth Amendment to the United States Constitution and article I, section 7 of Wisconsin's Constitution protect a defendant's right to a speedy trial. We independently determine the constitutional question of whether Franklin has been denied his right to a speedy trial. *See* ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. We review with deference, however, the trial court's underlying findings of historical facts. ***Id.***

¶20 There are four considerations to balance when determining whether a defendant's right to a speedy trial has been violated: "(1) the length of the delay; (2) the reason for the delay, i.e., whether the government or the defendant is more to blame for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the delay resulted in any prejudice to the defendant." ***Id.***, ¶6. "The right to a speedy trial is not subject to bright-line determinations and must be

considered based on the totality of circumstances that exist in the specific case." ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. Where a violation is established, the sole remedy is dismissal of the charges. ***Id.***

¶21 First, because we have already determined that Franklin's trial attorneys were not ineffective, we are not persuaded that any delays that Franklin attributes to the purported ineffectiveness of his attorneys violated his right to a speedy trial. Furthermore, the record does not support Franklin's characterization of the original delay in his trial, which he blames on "the court and trial counsel for failing to recognize the original demand for a speedy trial." The record is clear that the trial court acknowledged the speedy trial demand made at the preliminary hearing, brought it to the attention of counsel, and gave Franklin's attorney at the time the opportunity to renew the demand, which he declined. Notwithstanding, we will address the four considerations in turn to determine whether any delays attributable to the State violated Franklin's right to a speedy trial. *See* ***Norwood v. State***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976) ("If the delay can be attributed to the actions of the defendant, he cannot be heard to claim that that period of time be considered in deciding whether he has been denied a speedy trial.").

¶22 For the first consideration, "length of the delay," ***Leighton***, 237 Wis. 2d 709, ¶6, the State acknowledges that the two and one-half year delay between Franklin's arrest and the start of his jury trial is presumptively prejudicial. Due to this concession, we turn our attention to the remaining three factors.

¶23 The second consideration, "the reason for the delay," ***id.***, does not favor Franklin as the vast majority of the adjournments were directly attributable to the defense. We disagree with Franklin's representation pertaining to the fourth

adjournment, which he ascribes to both the defense and the State. The record reflects that Franklin's attorney requested this adjournment. Although the State did not oppose the request, the prosecutor advised the trial court that she was ready to proceed with the scheduled jury trial. For any remaining adjournments attributable to the State, we agree with the State's summation that it requested only two, both of which were due to the unavailability of necessary witnesses. We also agree with the State's argument that any delay related to those adjournments does not weigh against it for purposes of our speedy trial analysis. *See* ***Hadley v. State***, 66 Wis. 2d 350, 362, 225 N.W.2d 461 (1975) (recognizing that "[a] missing witness or an ill witness cannot be supplied by the fiat of th[e] court" and can amount to a valid reason for a delay). Because the State justified its adjournments contributing to the delay, we do not consider those periods. *Cf.* ***Norwood***, 74 Wis. 2d at 354 ("If the [S]tate cannot justify the delay, then that period must be considered in deciding the issue of lack of speedy trial.").

¶24 The third consideration, "whether the defendant asserted the right to a speedy trial," ***Leighton***, 237 Wis. 2d 709, ¶6, also does not weigh in Franklin's favor. Following the initial abandonment of the speedy trial issue, it was never formally renewed by Franklin's attorneys. As previously noted, the decision not to renew the speedy trial demand "is one of those 'tactical' decisions regarding trial strategy that 'counsel is entrusted with the authority to make.'" ***State v. Williams***, 2004 WI App 56, ¶38 n.4 & ¶40 n.5, 270 Wis. 2d 761, 677 N.W.2d 691 (citation omitted). Franklin "'is deemed bound by the acts of his lawyer-agent.'" ***Id.*** (citation and bracketed material omitted).

¶25 This principle also applies to Franklin's contention that some of the adjournment requests made by defense counsel when he was not present cannot be weighed against him. *See* ***id.*** Furthermore, even though there is a *pro se* motion

and a letter written by Franklin in the record reiterating a demand for a speedy trial, the State properly contends that these documents cannot be treated as a request for a speedy trial because Franklin was represented when he filed them. *See* ***Robinson v. State***, 100 Wis. 2d 152, 164-65, 301 N.W.2d 429 (1981) (a defendant has the right to be represented by counsel or to proceed *pro se* but not both).

¶26 Finally, we consider "whether the delay resulted in any prejudice to the defendant," ***Leighton***, 237 Wis. 2d 709, ¶6, even though Franklin's brief provides no analysis on this point. The relevant inquiry to make this determination focuses on "'(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired.'" ***Id.***, ¶22 (citation omitted).

¶27 We agree with the State that the only statement pertinent to the prejudice consideration that we can glean from Franklin's briefing is that he "was incarcerated for a majority of the delay, both on this matter and another matter," and was not able to post bail until well after ninety days following the original speedy trial request.[7] This is insufficient to establish "oppressive pretrial incarceration," ***id.***, particularly given that no details are provided regarding how long he was incarcerated for each "matter" and the circumstances surrounding the incarceration. Franklin does not address the other factors relating to his anxiety

[7] Franklin references that he was unable to post bail until well after ninety days, presumably in reliance on WIS. STAT. § 971.10(2)(a), which provides that "[t]he trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record." However, he does not develop an appellate argument based on the statute. Consequently, we address his claim only as it relates to an alleged violation of his constitutional right to a speedy trial. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (holding that we will not address arguments inadequately briefed).

and concern and the impairment of his defense, *see* ***id.***, ¶22, in the portion of his brief devoted to his argument that he was denied his right to a speedy trial. We nevertheless conclude that neither inquiry supports a conclusion that he was prejudiced by the delay.

¶28 Here, the record strongly supports the conclusion that Franklin did not want a speedy trial where much of the delay was necessitated by the substitution and withdrawal of several of his attorneys and was allowed to afford the defense additional time to locate witnesses. "'[B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates … that the defendant did not want a speedy trial.'" ***Id.***, ¶17 (citation omitted). After considering all the factors, despite the presumptively prejudicial two and one-half year delay, we conclude that the totality of the circumstances establish that Franklin's right to a speedy trial was not violated.[8]

C. The trial court properly denied Franklin's suppression motion.

¶29 Franklin argues that the investigative stop resulting in his arrest violated the principles set forth in ***Terry v. Ohio***, 392 U.S. 1 (1968), and as such, the trial court erred when it denied his suppression motion. He contends that the trial court's findings of fact are erroneous and should be overturned.

[8] Franklin contends that the trial court did not address his demand for a speedy trial even though he raised it in his postconviction motion. Our reading of the court's decision and order denying Franklin's motion for postconviction relief reveals that the court detailed the history of the case and concluded, "Under the circumstances, the defendant cannot assert that he was denied his constitutional right to a speedy trial when the delays were occasioned almost entirely by the defense." Although the trial court's discussion of Franklin's right to a speedy trial fell within the portion of its decision discussing Franklin's claims of ineffective assistance of counsel, the issue was nevertheless addressed.

¶30 "The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures." ***State v. Young***, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729 (footnotes omitted). We review with deference a trial court's factual findings on a motion to suppress evidence. ***State v. Eskridge***, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434. We independently decide whether the facts establish that a particular search or seizure occurred and, if so, whether it violated constitutional standards. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990).

¶31 An investigative stop is permissible if the law enforcement officers reasonably suspect, considering the totality of the circumstances, that some type of criminal activity either is taking place or has occurred. ***Terry***, 392 U.S. at 22 ("police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest"); *see also* WIS. STAT. § 968.24 (codifying the standard for an investigative stop); ***Richardson***, 156 Wis. 2d at 139. In order to establish reasonable suspicion, "a police officer [must] possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." ***Young***, 294 Wis. 2d 1, ¶21.

¶32 The trial court found that the officers observed Franklin standing in a roadway talking to another individual who was in a car, in an area known for drug activity. After circling the block and parking, the trial court found that the officers observed Franklin, who had reached into the front passenger window of a van, back away, and drop his keys while appearing nervous and stating something to the effect of, "I didn't do anything. I was just talking to my friend Tyrone." For his safety, one officer patted Franklin down while the other officer looked into the

van window and observed a plastic bag in plain view, which appeared to contain marijuana. We conclude that these facts and the totality of the circumstances supported "a reasonable belief that criminal activity [was] afoot." ***Id.***

¶33 Next, we must determine whether the police had probable cause to arrest Franklin. The State argues that the police had probable cause to arrest Franklin for violating MILWAUKEE, WIS., ORDINANCE § 101-3, which adopts WIS. STAT. § 346.29(2) prohibiting a person from standing or loitering on any roadway "if such act interferes with the lawful movement of traffic."[9] ***Id.*** We agree.

¶34 WISCONSIN STAT. § 800.02(6) provides, "A person may be arrested without a warrant for the violation of a municipal ordinance if the arresting officer has reasonable grounds to believe that the person is violating or has violated the

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[9] MILWAUKEE, WIS., ORDINANCE § 101-3 states in pertinent part:

> 1. CITY ADOPTS STATE RULE. The city of Milwaukee adopts ch. 346, Wis. Stats., 1969, and all subsequent amendments thereto defining and describing regulations with respect to vehicles and traffic for which the penalty is a forfeiture only, including penalties to be imposed; except as provided in s. 101-34.

Even though the trial court does not appear to have relied on § 101-3 in upholding the lawfulness of the officer's stop and arrest of Franklin, "[w]e may sustain the trial court's holding on a theory not presented to it, and it is inconsequential whether we do so *sua sponte* or at the urging of a respondent." ***State v. Truax***, 151 Wis. 2d 354, 359, 444 N.W.2d 432 (Ct. App. 1989). Also, when the trial court inquired of one of the officers during the hearing what the basis was for Franklin's arrest, it learned that the arrest was based on "[t]he totality of everything, possession of marijuana, right where he was reaching there was an open bag that I could see marijuana, the cocaine was in the bag, loitering and illegal drug activity and standing in the roadway." In addition, the officer testified that there was an open municipal warrant for the defendant.

Franklin did not file a reply brief offering any response to the State's argument in this regard and accordingly, conceded the issue. *See generally* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶4, 293 Wis. 2d 668, 721 N.W.2d 127, *review granted*, 2007 WI 16, 298 Wis. 2d 94, 727 N.W.2d 34 (holding that cross-appeal issues were conceded when party failed to respond in reply brief to the cross-respondent's argument).

ordinance." "[T]he reasonable grounds standard as stated in sec. 800.02(6), Stats., is … synonymous with the constitutional standard of probable cause." ***City of Milwaukee v. Nelson***, 149 Wis. 2d 434, 455, 439 N.W.2d 562, *cert. denied*, 493 U.S. 858 (1989).

¶35 The trial court found that the officers observed Franklin standing in a roadway talking to another individual who was in a car, a fact which Franklin admitted. It follows then that these findings are not clearly erroneous. Consequently, we are satisfied that the officers had reasonable suspicion to support the initial stop and that they also had probable cause to arrest Franklin. Accordingly, we affirm the trial court's decision to deny the motion to suppress.

D. The trial court properly exercised its sentencing discretion.

¶36 Franklin bases his argument that the trial court erroneously exercised its discretion in sentencing him on the following: "[he] had not been in trouble with the law for nearly four years at the time of this offense"; he is the father of two children and "was attempting to help support the children"; he was "seeking employment so that he could continue with his life"; and, that while he maintained his innocence during the trial, "[he] did apologize to his family for having to be involved with the entire situation." This argument is unavailing.

¶37 Trial courts are vested with discretion at sentencing; consequently, we review sentencing decisions only to determine whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.*** However, where it is evident that the trial court exercised its discretion, we "'follow[] a consistent and strong policy against interference with the discretion of the trial

court in passing sentence.'" ***Id.***, ¶18 (citation omitted). "'[S]entencing decisions of the [trial] court are generally afforded a strong presumption of reasonability because the [trial] court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Id.*** (citation omitted).

¶38 Trial courts are to explain on the record the reasons for and objectives of the sentence imposed. ***Id.***, ¶¶39-40; *see* ***McCleary v. State***, 49 Wis. 2d 263, 280-81, 182 N.W.2d 512 (1971). The primary factors for the court to consider in sentencing "are the gravity of the offense, the character of the offender, and the need for protection of the public." ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). Courts also can consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentence and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id. at 623-24 (citation omitted).

¶39 Here, the trial court addressed the serious nature of the offenses. The court stated: "[Cocaine] causes harm to the people that use it, and it affects the lives of the people that are around them, their family in particular. It affects the neighborhoods, and it has an impact on our community." In addition, the trial court referenced the significant amount of marijuana Franklin had—over 300 grams—which would have been distributed in the community and caused harm. The court noted that marijuana "leads [people], at the very least, very often, to try

other drugs, and I can say that with some certainty having heard cases for as many years concerning this."

¶40 With respect to Franklin's character, the trial court found that he was an intelligent man, who was thirty-seven at the time of sentencing and had graduated from high school. The trial court was aware that Franklin was a certified welder and has two children. The trial court went on to point out Franklin's prior record and that he was being supervised when he committed the offenses at issue. The trial court also said that it did not find Franklin's trial testimony to be credible.

¶41 In considering the protection of the community, the trial court indicated that probation was not appropriate based on the serious nature of the offenses and Franklin's prior record. When it ordered the sentence imposed on the charge of possession with intent to deliver cocaine to run consecutive to the sentence imposed on the charge of possession with intent to deliver THC, the court stated a sentence of consecutive terms was necessary because to do otherwise "would depreciate the seriousness of that offense [possession with intent to deliver cocaine] in the eyes of the community." Similarly, when it imposed a sentence on the felon in possession of a firearm charge to run consecutive to the sentences imposed on the other two charges, the trial court again explained the serious nature of the charge and concluded, "if I were to give a concurrent sentence, there, again, I believe I would be depreciating the seriousness in the eyes of the community."

¶42 On appeal, Franklin argues, in essence, that the trial court should have placed more emphasis on those traits, which he deems to be favorable to his character. This argument overlooks that "[i]t remains within the discretion of the [trial] court to discuss only those factors it believes are relevant, and the weight

that is attached to a relevant factor in sentencing is also within the wide discretion of the [trial] court." ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20 (citation omitted).

¶43 The record reflects that the trial court identified the various factors it considered in fashioning Franklin's sentence. The factors were relevant and proper. The sentences imposed are not "so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶44 Based on the foregoing, we affirm the judgment of conviction and the order denying Franklin's postconviction motion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.