

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 31, 2009

David R. Schanker
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. 2008AP798-CR

Cir. Ct. No. 2005CF2227

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENNY ODELL CHOICE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Benny Odell Choice appeals from a corrected judgment of conviction for multiple armed robberies and a related firearm offense, and from a postconviction order denying his sentence modification motion. The issue is whether the trial court erroneously exercised its sentencing discretion for

allegedly failing to adequately explain its: sentence, departure from the presentence investigator's recommendation, consecutive sentence structure, consideration of mitigating factors, and imposition of a disparately harsh sentence as compared to that of Choice's co-actor. We conclude that the trial court properly exercised its sentencing discretion in all the challenged respects; the fact that it did so differently than Choice had hoped does not constitute a misuse of discretion. Therefore, we affirm.

¶2 Choice pled guilty to two counts of armed robbery with the threat of force, in violation of WIS. STAT. § 943.32(2) (2005-06), one as a party to the crime, in violation of WIS. STAT. § 939.05 (2005-06), robbery with the use of force, in violation of WIS. STAT. § 943.32(1)(a) (2005-06), and intentionally pointing a firearm at a person, in violation of WIS. STAT. § 941.20(1)(c) (2005-06).¹ Originally, the trial court imposed a forty-year aggregate sentence including a twenty-five-year aggregate period of initial confinement.² The trial court granted Choice's motion for plea withdrawal and vacated the sentence.³ After Choice again pled guilty, the trial court resentenced him to the current aggregate sentence of thirty-eight years and nine months, including an eighteen-year, nine-

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Specifically, the trial court imposed two concurrent forty-year sentences, comprised of twenty-five- and fifteen-year respective concurrent periods of initial confinement and extended supervision for the two armed robberies; for the other robbery, the trial court imposed a fifteen-year concurrent sentence, comprised of ten- and five-year respective periods of initial confinement and extended supervision, and for the firearm conviction, the trial court imposed a nine-month concurrent term.

³ The trial court granted Choice's plea withdrawal motion because the plea colloquy was defective. Choice again pled guilty to the charges; he does not challenge his second set of guilty pleas.

month period of initial confinement that Choice now challenges. For the armed robberies, the trial court imposed two fifteen-year consecutive sentences, each comprised of equal seven-year, six-month periods of initial confinement and extended supervision; for the robbery, the trial court imposed an eight-year consecutive sentence, comprised of three- and five-year respective periods of initial confinement and extended supervision, and for the firearm conviction, it imposed a nine-month consecutive term. Choice moved for sentence modification, which the trial court denied. Choice appeals to challenge the current thirty-eight-year aggregate sentence.

¶3 Choice challenges the sentence in multiple respects, contending that the trial court erroneously exercised its sentencing discretion and imposed a disparately harsh and excessive sentence as compared to that of his co-actor, Marquis Osborne. We are satisfied that the trial court properly exercised its sentencing discretion by considering the primary sentencing factors and imposing a reasoned and reasonable sentence. We further conclude that the sentence was not unduly harsh, nor was it disparate because Osborne's single crime and culpability were not comparable to that of Choice.

¶4

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).

¶5 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 accords 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 meets the 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.

¶6 A sentence is unduly harsh, excessive and violative of the Eighth Amendment 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; *see State v. Pratt*, 36 Wis. 2d 312, 322, 153 N.W.2d 18 (1967). "A sentence well within the limits of the maximum sentence is not ... disproportionate to the offense committed" *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983); *see State v. Owen*, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996). Disparity alone is not improper as long as the sentence imposed was properly based upon relevant considerations. *See Ocanas*, 70 Wis. 2d at 189; *State v. Toliver*, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994).

¶7 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). A sentence modification motion raising unduly harsh and disparate challenges is reviewed by the trial court in postconviction proceedings and by the appellate court for an erroneous exercise of

discretion. *See Ocanas*, 70 Wis. 2d at 183-85. We review each of Choice’s sentencing challenges for an erroneous exercise of discretion.

¶8 Choice’s first set of challenges are to the trial court’s claimed failures to adequately explain its reasoning for the length of the sentences, for failing to address how the confinement term was the minimum amount of custody necessary to achieve the sentencing considerations (“minimum custody standard”), for departing from the presentence investigator’s sentencing recommendation, for imposing consecutive sentences, and for failing to consider his positive character attributes as mitigating factors. As in most discretionary decisions, the trial court could have considered the sentencing factors differently than it did, but the standard is whether the trial court properly exercised its discretion and provided sufficient reasons to explain the reasonableness of the sentence it imposed. *See Larsen*, 141 Wis. 2d at 426-28. For the following reasons, we conclude that it did.

¶9 The trial court explained that Choice’s string of “egregious[]” crimes, and “terrible assaultive behavior,” compounded by the use of handguns to exploit “[y]oung people, old people, people who were extremely vulnerable,” warranted serious punishment. Considering the risk to society, the trial court was “going to make sure that [Choice] do[es]n’t bother these people ever again.” The trial court was concerned because “overall the risk factors in this case [are] aggravated and high at this stage of life. Maybe [Choice]’ll mature out of that. [The trial court] hope[s he] do[es] for [his] sake.”

¶10 This explanation addresses why the minimum custody standard warrants a substantial sentence: to protect society’s most vulnerable, whom Choice singled out as victims, and to give him the opportunity to mature and exercise better judgment. Choice seeks specificity and precision that the law does

not require. See *State v. Taylor*, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466 (the trial court does not need “to provide an explanation for the precise number of years chosen”); *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”).

¶11 Choice also criticizes the trial court for failing to explain why it deviated from the presentence investigator’s recommendation of concurrent sentences, recommending nine- to twelve-year sentences for each robbery, proposing a six- to eight-year range for each period of initial confinement, and a three- to four-year range for each period of extended supervision. Choice emphasizes the concurrent nature of the recommendation. The trial court, however, is not obliged to consider any of the sentencing recommendations, much less be bound by them. See *State v. Bizzle*, 222 Wis. 2d 100, 105-06 n.2, 585 N.W.2d 899 (Ct. App. 1998). Insofar as the consecutive sentencing structure is concerned, these were three separate robberies on three different dates against three different victims. The trial court’s explanation for the need to “make sure that [Choice] do[es]n’t bother these people ever again,” and to protect society and afford Choice the opportunity to mature out of his high risk behavior supports imposition of consecutive sentences.

¶12 Choice’s next general area of criticism is that the trial court merely paid lip service to his positive character attributes. The trial court acknowledged that Choice’s life has not “been a bed of roses.” It acknowledged Choice’s “positive signs,” complimenting him on his determination to learn to read and write. It was mindful of Choice’s juvenile record, which it used as “an historical reference. And unfortunately we saw a progression of developments there that led right up to this day. And [the trial court] ha[s] to consider the need to again

protect society.” It considered Choice’s character development as “frightful.” Despite some positive character aspects, Choice’s repeated conduct “here was just basically so wrong” and “is not excusable.”

¶13 The record supports the character factors the trial court considered. That the trial court could have considered the various aspects of Choice’s character differently than it did does not constitute 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).

¶14 Choice’s remaining challenge is that the sentence was unduly harsh, and that its excessiveness was demonstrated by comparing it to Osborne’s four-year sentence containing only a single year of initial confinement. The trial court explained in its postconviction order:

Defendant Choice clearly was not similarly situated with Marquis Osborne in terms of his culpability and rehabilitative needs. The complaint shows that the defendant played a primary role in the March 28, 2005 armed robbery. Moreover, the defendant faced additional counts from other robberies and an additional count of pointing a firearm. He also admitted to two additional armed robberies that were either uncharged or read in pursuant to the plea negotiations in this case. These additional offenses were committed after March 28, 2005 *without Osborne* which shows that the defendant was willing to commit offenses of this nature without any assistance. Under the circumstances, the court finds that the defendant has not alleged a viable claim for sentence modification based upon disparate sentencing.

(Emphasis in original.) Osborne was convicted of a single robbery; Choice was convicted of three robberies and a firearm offense, and admitted to committing other armed robberies. Choice and Osborne are not similarly situated;

consequently, their sentences are not comparable for purposes of demonstrating disparity.

¶15 Nevertheless, Choice’s sentence is not unduly harsh. The trial court told Choice that:

if I put you in [prison] for all the time I could ... we wouldn’t see you for well after [the trial court is] off this earth, [the trial court] can assure you. Despite what people may think, that’s never the intention of the Court or the system, as it were; but what it is, it’s intended to punish you for what you’ve done and the harm that you’ve caused to the victims involved as well as societally and the risk you – the risk you are to society, at least based on the conduct that we’ve seen in this case.

Imposing a thirty-eight-year, nine-month sentence on a man who committed three robberies with force over an eight-day period, robbing a mother in front of her young children, robbing a man at gunpoint, and punching a seventy-four-year-old man for money would not be viewed as “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*, 70 Wis. 2d at 185.

¶16 The armed robberies were each Class C Felonies, each carrying a maximum potential penalty of forty years. *See* WIS. STAT. §§ 943.32(2); 939.50(3)(c). The robbery with the use of force was a Class E Felony, carrying a maximum potential penalty of fifteen years. *See* WIS. STAT. §§ 943.32(1)(a); 939.50(3)(e). The intentionally pointing a firearm offense was a Class A Misdemeanor and carries a nine-month maximum potential penalty. *See* WIS. STAT. §§ 941.20(1)(c); 939.51(3)(a). Imposing a thirty-eight-year, nine-month aggregate sentence for offenses carrying a ninety-five-year, nine-month aggregate sentence is “well within the limits of the maximum sentence [and] is not so

disproportionate to the offense[s] committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Daniels*, 117 Wis. 2d at 22.

¶17 The trial court properly exercised its sentencing discretion. It considered the primary sentencing factors and explained its reasons for imposing the sentence it did. Its explanation was reasonable. Its rejection of Choice’s sentencing challenges in its postconviction order also showed a proper exercise of discretion. Choice’s situation was not comparable to that of Osborne; consequently, his sentence was not disparate. Choice’s sentence was also not unduly harsh in the context of the crimes he committed against “extremely vulnerable” victims; his actions posed a risk to society. His thirty-eight-year, nine-month sentence including an eighteen-year, nine-month period of initial confinement was well within the ninety-five-year, nine-month maximum sentence, including the sixty-year maximum potential period of initial confinement. *See* WIS. STAT. § 973.01(2)(d)2. & 4. That the trial court exercised its discretion differently than Choice hoped it would did not constitute an erroneous exercise of sentencing discretion, nor did it result in a disparate or unduly harsh sentence. *See Hartung*, 102 Wis. 2d at 66.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

