COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0860-CR **Cir. Ct. No. 98CF2830**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES E. GRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN and JACQUELINE D. SCHELLINGER, Judges. *Affirmed.*

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

¶1 PER CURIAM. James E. Gray appeals from a judgment entered after a bench trial, convicting him of attempting to obtain a controlled substance

by fraud, contrary to WIS. STAT. §§ 961.43(1)(a) and 939.32 (1997-1998),[1] and possession of a controlled substance with intent to deliver, contrary to WIS. STAT. § 961.41(1m)(b). Gray also appeals from the trial court's order denying his postconviction motion. Gray argues that: (1) the evidence was insufficient as a matter of law to establish "intent to deliver" under § 961.41(1m)(b); and (2) his sentence is excessively harsh. We disagree and affirm.

I. BACKGROUND.

¶2 On May 12, 1998, Woodrow Storey, a pharmacist employed by a mail order pharmacy in New Mexico, received a prescription for sixty-four ounces, a three-month supply, of hydrocodone syrup, a liquid equivalent of the narcotic Vicodin. The prescription was allegedly written by a Dr. Daley in Milwaukee for a patient named Trissa Jones, residing at 3620 West Hampton in Milwaukee. Based on his experience, the pharmacist immediately suspected that the prescription was fraudulent and contacted Dr. Daley's office. Dr. Daley informed the pharmacist that he did not write the prescription and that he never had a patient by the name of Trissa Jones.

¶3 Storey then contacted the Milwaukee Police Department and spoke with Detective James Guzinski. Detective Guzinski directed Storey to fill the prescription as requested and deliver the hydrocodone to Milwaukee via the United Parcel Service (UPS). Prior to shipment, the pharmacy received a telephone call changing the delivery address to 4246 North 69th Street in

[1] All references to the Wisconsin Statutes are to the 1997-1998 version unless otherwise noted.

Milwaukee. The pharmacy had the narcotics shipped to the local UPS office in Milwaukee where the Milwaukee police could intercept the package.

¶4 On May 20, 1998, the Milwaukee police intercepted the package, which contained four 480-milliliter bottles of hydrocodone. The police removed and photographed the bottles. The police then returned only one bottle to the box for delivery, but added additional weight to the box to give it the feel of four bottles. The police also wired the box with an electronic sound alarm and sprayed the box and the bottle with a detection spray, "clue spray," which through the use of ultraviolet light could indicate if an individual had opened the box or handled the bottle.

¶5 On that same afternoon, an undercover detective, posing as a UPS driver, delivered the package to 4246 North 69th Street, where Gray's mother opened the front door, signed for the package and took it inside. The police later observed Gray entering the residence and, approximately three minutes later, the electronic alarm sounded. The police then entered the residence pursuant to a search warrant and found Gray standing over the opened package. His hands later tested positive for the "clue spray." In the residence, the police also discovered a legal pad containing a number of doctor's names and their respective DEA numbers,[2] a packet of blank prescription forms from the Medical College of Wisconsin, and a series of photocopies of an expired prescription with the prescribing doctor's name and DEA number "whited out."

[2] A DEA number is a series of numbers and letters assigned by the Drug Enforcement Administration to individuals authorized to prescribe controlled substances in order to prevent unauthorized drug trafficking.

II. ANALYSIS.

¶6 Gray does not challenge his conviction for attempting to obtain a controlled substance by fraud. However, while admitting that the evidence was sufficient to establish that he possessed the hydrocodone, Gray contends that the State failed to put forth sufficient evidence to establish that he intended to distribute the narcotic in violation of WIS. STAT. § 961.41(1m)(b). We disagree and conclude that the evidence was sufficient to establish that Gray intended to deliver the hydrocodone.

¶7 "[A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Thus, the test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt. *See* ***id.*** at 503-04. Rather, the test is whether this court can conclude that the trier of fact could have been so convinced by evidence that it had a right to believe and accept as true. *See* ***id.*** Further, "if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted." ***Id.*** at 504 (citation omitted).

¶8 Gray argues that the trial court erred in concluding that he intended to deliver the hydrocodone because: (1) the finding of guilt overlooked the fact that although he had ordered four bottles of the narcotic, he actually possessed only one bottle; (2) a single 480-milliliter bottle of hydrocodone is insufficient to

prove intent to deliver; and (3) none of the "usual indicia of drug dealing" were present.[3]

¶9 Gray's argument misinterprets WIS. STAT. § 961.41(1m)(b) and ignores other significant facts relied upon by the trial court. Section 961.41(1m)(b) states, in relevant part:

> POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE OR DELIVER. Except as authorized by this chapter, it is unlawful for any person to possess, with intent to manufacture, distribute or deliver, a controlled substance or a controlled substance analog. Intent under this subsection may be demonstrated by, *without limitation because of enumeration*, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, *and the activities or statements of the person in possession of the controlled substance* or a controlled substance analog prior to and after the alleged violation.

(Emphasis added.) The corresponding jury instruction, WIS JI—CRIMINAL 6035, explains:

> You cannot look into a person's mind to find out intent. The intent to deliver must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon intent. As a part of the circumstances, you may consider the quantity and monetary value of the substance.

¶10 Gray incorrectly attempts to interpret WIS. STAT. § 961.41(1m)(b) as making the quantity and monetary value of the drugs actually possessed the only relevant factor in evaluating his intent to deliver. Under § 961.41, intent to deliver

[3] Gray also argues that the evidence was insufficient because liquid hydrocodone is rarely sold by drug dealers in Milwaukee. However, because Gray has failed to adequately develop this argument, we decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (stating that the court of appeals may decline to review an issue inadequately briefed).

may be demonstrated not only by evidence of the quantity and monetary value of the substances possessed, but also by the activities or statements of the person in possession of the controlled substance. *See* WIS. STAT. § 961.41(1m)(b); *see also* ***State v. Williams***, 168 Wis. 2d 970, 986, 485 N.W.2d 42 (1992) ("[I]ntent to deliver may be demonstrated by the … activities or statements of the person who possessed the drugs."). Therefore, while the fact that Gray did not receive the other three bottles does prevent a conclusion that he ever possessed those bottles, the fact that he attempted to receive a total of four bottles of hydrocodone is relevant regarding his intent to deliver – the fact that he attempted to obtain a three-month supply of the drug constitutes activities which could lead a reasonable trier of fact to conclude that Gray was not interested in the drug solely for personal use.

¶11 This conclusion is further supported by the fact that Gray testified that he did not take hydrocodone himself, but had friends who abused the drug:

> [STATE:] Do you have any experience with Hydrocodone in a liquid form? Have you observed any of your friends use -
>
> [GRAY:] I've seen it. I've never taken it, though.
>
> [STATE:] Have you observed anyone ever taking it?
>
> [GRAY:] Yes.
>
> ….
>
> [STATE:] And would people who are drinking this amount be people who are relatively new to taking this type of drug or would they be –
>
> [GRAY:] No, I'm talking about people who are addicted to opiates.
>
> [STATE:] People who have taken opiates for a long time?
>
> [GRAY:] Yes. I don't know anyone who just takes it for the heck of it.

¶12 In its decision, the trial court explained its reliance on these significant facts:

> The fourth element requires that the defendant intended to deliver hydrocodone. "Deliver" means to transfer or attempt to transfer from one person to another. "Intended to deliver" means that the defendant had the purpose to deliver or was aware that his conduct was practically certain to cause delivery.
>
> ….
>
> The fact of the defendant's own testimony that he knows what liquid hydrocodone is and has individuals and friends who abuse it, the testimony of the defendant would support a conclusion that he possessed it with intent to deliver in that that he states that he has a ready supply of customers, friends who abuse, and he states that he never used liquid hydrocodone himself.
>
> In addition to that, Detective Guzinski testified that liquid hydrocodone is trafficked in Milwaukee in 8-ounce, 12-ounce cough syrup bottles, have a value of [$]100 to $125[, and] that both he and Mr. Storey testified that the equivalent of the packages, the bottles would be 384 tablets of hydrocodone or Vicodin, which are clearly consistent with an intent to deliver, rather than for personal use.
>
> ….
>
> [T]he evidence supports beyond a reasonable doubt the conclusion that the defendant intended to deliver, transfer that liquid hydrocodone to others.

¶13 Based on our review of the same evidence, as well as the other evidence obtained from Gray's residence indicating that he had the means to forge multiple prescriptions, we cannot conclude that the evidence is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found, beyond a reasonable doubt, that Gray intended to deliver the hydrocodone. *See* ***Poellinger***, 153 Wis. 2d at 501.

Accordingly, we affirm his conviction for possession of a controlled substance with intent to deliver.

¶14 Gray also contends that the trial court erroneously exercised its discretion in sentencing him to a total of ten years on both counts, four years for attempting to obtain a controlled substance by fraud and six years for possessing a controlled substance with intent to deliver, consecutive to each other and any other sentences.[4] Gray claims that this sentence is unduly harsh. We disagree.

¶15 Sentencing is left to the discretion of the trial court, and our review is limited to determining whether the trial court erroneously exercised that discretion. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). There is a strong public policy against interfering with the sentencing discretion of the trial court. ***Id.*** Therefore, the burden is on the defendant to show some unreasonable or unjustified basis in the record for the sentence imposed. *See* ***id.*** at 622-23.

¶16 The trial court should consider three primary factors when sentencing: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for public protection. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The trial court may also properly consider the following factors, *inter alia*: the defendant's past criminal offenses, any history of undesirable behavior patterns, the defendant's need for rehabilitative control, the defendant's age and educational background, the results

[4] At the time of sentencing, Gray was serving a fifteen-year sentence due to an earlier revocation.

of a presentence investigation, and the right of the public. *See* ***Harris***, 119 Wis. 2d at 623-24.

¶17 In sentencing Gray, the trial court properly applied these factors:

> Unfortunately, you have a very long criminal record beginning in 1970, including a variety of different offenses from retail theft, credit card fraud, reckless use of a weapon, burglary, failure to support, and a variety of multiple drug violations, robbery, party to a crime, battery, carrying a concealed weapon, obstructing, and the rest are drug-related offenses.
>
> You have been in and out of the prison system. You have been in and out of parole [and] probation. And basically the history seems to be that you get released, you violate again, you go back, you get released … and you keep committing additional crimes and continue to get sentenced.
>
> You have been referred to different treatment programs. You went to the Islamic Family and Social Services, but you violated the program by not attending. [At t]he Vet Place Central you were terminated for noncompliance. So you've had numerous opportunities at community supervision, at rehabilitation within the prison setting, and you continue to violate…. You're clearly a bright individual. You speak very well. You have taken some college classes while you have been in the prison setting. You have had every opportunity in life under those circumstances to have turned your life around through all of those supervisions and other programs, but you have chosen not to do that.

¶18 The trial court properly weighed the sentencing factors and Gray has failed to otherwise establish any unreasonable or unjustified basis in the record for the sentence imposed. Accordingly, we affirm both the judgment and the trial court's denial of the motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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