COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 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. 2009AP135-CR **Cir. Ct. No. 2007CF4354**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND BERNARD SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Raymond Bernard Smith appeals from a judgment of conviction entered on his guilty plea to one count of burglary in violation of

WIS. STAT. § 943.10(1m)(a) (2005-06).[1] He also appeals from an order denying his postconviction motion for sentence modification. Smith alleges that the circuit court erroneously exercised its sentencing discretion by failing to consider the appropriate sentencing factors and failing to explain the linkage between those factors and the sentence. We conclude that the circuit court did not erroneously exercise its sentencing discretion and did not err in denying Smith's motion for sentence modification. Therefore, we affirm.

BACKGROUND

¶2 Smith burglarized two restaurants, the Charcoal Grill in Ozaukee County on July 7, 2006, and a Culver's in Milwaukee County on September 6, 2007. The crimes were similar in nature. Both burglaries involved breaking a window from the outside, climbing inside and taking cash. Further, the burglaries both occurred in the early morning hours before anyone was present.

¶3 The cases were consolidated in Milwaukee County. In exchange for a guilty plea to the Charcoal Grill burglary, the Culver's burglary was dismissed and read in for sentencing. Smith was sentenced to eighteen months of initial confinement followed by two-and-a-half years of extended supervision. He was also made eligible for the Challenge Incarceration Program and the Earned Release Program. The sentence was imposed consecutive to any sentences that had been previously imposed on Smith. Lastly, Smith was ordered to pay restitution in the stipulated amount of $5500.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Smith filed a motion for postconviction relief seeking sentence modification on grounds that the circuit court erroneously exercised its discretion when it imposed the sentence. The circuit court denied the motion without a hearing. This appeal follows.

DISCUSSION

¶5 Smith argues that the circuit court erroneously exercised its discretion when it sentenced him. First, he claims the circuit court failed to consider his character factors, such as his upbringing, education and accomplishments. Second, he claims the circuit court failed to explain how the sentence's component parts promote the sentence objectives, as required by ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. For those reasons, Smith argues that the circuit court should have imposed a concurrent sentence and that his sentence should be modified accordingly.

¶6 The standard of appellate review of sentencing decisions is well-established. There is strong public policy against interference with the circuit court's discretion in sentencing because the circuit court is best suited to consider relevant factors and the defendant's demeanor. ***Id.***, ¶18. Review of sentencing "is limited to determining if discretion was erroneously exercised." ***Id.***, ¶17. Erroneous exercise of discretion occurs "[w]hen discretion is exercised on the basis of clearly irrelevant or improper factors." ***Id.*** The primary factors for the sentencing court to look at 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).

¶7 In order for the sentence to be valid, the circuit court must make a statement "'detailing [its] reasons for selecting the particular sentence imposed.'"

Gallion, 270 Wis. 2d 535, ¶22 (citation omitted). In other words, "***Gallion*** requires the [circuit] court to explain the 'linkage' between the sentence and the sentencing objectives." ***State v. Odom***, 2006 WI App 145, ¶10, 294 Wis. 2d 844, 720 N.W.2d 695 (citation omitted). However, the circuit court is not required to specify the weight it assigned each sentencing factor and how each factor translated into a certain amount of years. ***State v. Fisher***, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56.

¶8 Smith argues that the circuit court failed to consider his character and failed to show a linkage between the sentence and the sentencing objectives. Specifically, Smith argues that the circuit court failed to consider mitigating factors such as "his upbringing, his education, athletic accomplishments, family ties and intelligence." He also contends that the circuit court failed to "credit his effort to cooperate and admit responsibility." For these reasons, Smith argues, a concurrent sentence should have been imposed. We are not persuaded that the circuit court erroneously exercised its discretion.

¶9 The circuit court considered appropriate sentencing factors, including Smith's character. It gave proper weight to the various mitigating factors given by Smith. It acknowledged Smith's education, athletic scholarship, job history and previous stability in his life, but also noted that drugs were a substantial problem for him. It also noted that Smith had other problems which may have led him to commit crimes, but it pointed out that there will likely be things going on every day for the rest of Smith's life that could potentially spur drug usage or criminal activity. Further, it recognized both Smith's acceptance of responsibility for the crimes and his rehabilitative needs, but weighed those factors against the rights of the public to be free from these crimes.

¶10 In addition to the circuit court's recognition of the positive aspects of Smith's character, it gave particular weight to the fact that Smith had engaged in "significant criminal activity" in a relatively short period of time. Specifically, Smith had been caught in six burglaries; three of the burglaries resulted in convictions (including the conviction in the instant case), and three of the burglaries were read in. Due to the severity of the crime of burglary—a Class F felony that exposed Smith to twelve-and-a-half years of imprisonment, a fine of no more than $25,000, or both, *see* WIS. STAT. § 939.50(3)(f) (2005-06)—and the right of the public to be free from these crimes, the circuit court concluded that a sentence of eighteen months of initial confinement and two-and-a-half years of extended supervision was appropriate. It also addressed the inappropriateness of probation, although no party argued that probation was warranted.

¶11 For the same reasons as stated above, we reject Smith's argument that the circuit court did not explain the linkage between the sentence and the sentencing objectives. The circuit court did not find a basis for making the sentence concurrent based on the nature of the offense. Specifically, it acknowledged the fact that although these were not home invasions, they were the latest in a string of six burglaries, three of which were dismissed and read in. Given the frequency and nature of the crimes, the circuit court concluded that a concurrent sentence was not appropriate. Here, the circuit court's statements were sufficiently detailed in explaining the reasons for the particular sentence and were consistent with the requirements of ***Gallion***.

¶12 In sum, we conclude that the circuit court considered the appropriate sentencing factors and adequately explained the linkage between the sentence and the sentencing factors. Moreover, we conclude that a total sentence of four years out of a possible twelve-and-a-half year sentence is 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). Therefore, we affirm.

By the Court.—Judgment and order affirmed.

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