

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 10, 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. 2008AP3186-CR

Cir. Ct. No. 2008CF60

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER LONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY and JEFFREY A. CONEN, Judges. *Affirmed.*

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

¶1 PER CURIAM. Christopher Long appeals a judgment of conviction, entered upon his guilty pleas, on two counts of robbery as party to a crime. Long also appeals an order denying his postconviction motion for

resentencing.¹ Long asserts the trial court erroneously exercised its sentencing discretion. We reject this argument and affirm the judgment and order.

BACKGROUND

¶2 Long was initially charged with two counts of armed robbery with the threat of force, as party to a crime, following his admission to police that he had driven a getaway car for Donald Bridges. Bridges was subsequently arrested and charged for the armed robberies of four banks.

¶3 Defense counsel raised an issue of Long's competency, and the court suspended proceedings to have Long evaluated. The first examiner reported that Long was uncooperative, so she recommended an inpatient evaluation. Long was referred to the Winnebago Mental Health Institute, and the psychiatrist who evaluated him opined, to a reasonable degree of medical certainty, that Long was malingering. Following a competency hearing at which this psychiatrist testified, the court deemed Long competent to proceed.

¶4 Pursuant to a plea bargain, Long agreed to plead guilty to two amended counts of robbery as party to a crime. The State agreed to recommend probation, and did so at the sentencing hearing. Long's attorney also asked for probation, with time in the House of Correction if the court thought confinement was necessary. The court ultimately imposed a sentence of three years' initial confinement and three years' extended supervision on the first count, and three and one-half years' initial confinement and three and one-half years' extended

¹ The Honorable William Sosnay entered the judgment of conviction and imposed sentence. The Honorable Jeffrey A. Conen entered the order denying the motion for postconviction relief.

supervision on the second count, concurrent with the first. The maximum possible exposure was fifteen years' incarceration on each count. Long's motion for resentencing was denied. Long appeals.

DISCUSSION

¶5 The appellate standard of review of a circuit court's sentencing decision is well-established: we limit our review to determining whether the circuit court appropriately exercised its discretion. *See State v. Klubertanz*, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 765, 713 N.W.2d 116, 123. To appropriately exercise its discretion, the circuit court considers objectives including, but not limited to, protection of the community, punishment and rehabilitation of the defendant, and deterrence to others. *See State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 556–557, 678 N.W.2d 197, 207.

¶6 In crafting a sentence to fulfill these objectives, the court is to consider the facts relevant to those objectives, including, but not limited to, the gravity of the offense, the defendant's personal and criminal history, and any aggravating or mitigating factors. *See id.*, ¶¶40 n.10, 43 n.11, 270 Wis. 2d at 557 n.10, 559 n.11, 678 N.W.2d at 207 n.10, 208 n.11. The relative weight assigned to each factor and objective is left to the circuit court.² *See State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 233, 688 N.W.2d 20, 24.

¶7 If discretion has been properly exercised, this court “follows a consistent and strong policy against interference with the discretion of the trial

² Long's assertion that the “primary objective of a sentence should be to rehabilitate the offender and the court should first find community based options to assist in reaching that objective” is, therefore without a legal foundation.

court in passing sentence.” *Gallion*, 2004 WI 42, ¶18, 270 Wis. 2d at 549, 678 N.W.2d at 203 (quoting *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512, 522 (1971)). The circuit court’s sentencing is ordinarily “afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.” *State v. Borrell*, 167 Wis. 2d 749, 781–782, 482 N.W.2d 883, 895 (1992).

¶8 Long’s basic argument is that the circuit court erroneously exercised its discretion because it: (1) made conclusions, which it relied upon for sentencing, that were inconsistent with the record; (2) improperly denied him eligibility in the challenge incarceration and earned release programs; and (3) failed to explain the length of his particular sentence. We reject these claims.

¶9 Long first asserts that the court overestimated his culpability in these crimes and failed to fully credit his character. He asserts Bridges “took advantage of,” “had control over,” and “intimidated” him. Long asserts he did not know what was going on inside the banks or decide which banks to rob, and did not believe Bridges was armed.³

¶10 The court specifically acknowledged Bridges was more culpable than Long, but noted that Long nevertheless facilitated the crime and was “a party

³ Long asserts the State conceded he knew very little about what was going on inside the banks and asserts the State is judicially estopped from arguing to the contrary. However, judicial estoppel requires that the party to be estopped convince the first court to adopt its position and act accordingly. See *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶24, 303 Wis. 2d 258, 275–276, 735 N.W.2d 93, 102. Arguably, in sentencing Long to a term other than the one recommended by the State, the court did not adopt or act upon the State’s position. Further, because we may affirm a circuit court for reasons other than those upon which it relied, a respondent is generally permitted to make any argument that supports affirming the circuit court. See *State v. Darcy N.K.*, 218 Wis. 2d 640, 651, 581 N.W.2d 567, 572 (Ct. App. 1998).

to a crime, and that is specifically what the statute” addresses.⁴ The court also did not believe, based on its own observations, that Long was under Bridges’s influence.

¶11 Long also complains he was not given enough credit for his character. He told the court that he wanted money to buy his children Christmas presents. He acknowledged a history of drug use and bad choices. He asserts his cooperation with police and willingness to testify bore positively on his character, and contends the court did not give appropriate weight to his mental health issues.

¶12 The court observed that Long claimed he wanted money to buy Christmas presents but the court opined, and Long ultimately acknowledged, that it was more likely that Long spent the money on his cocaine habit. The court acknowledged Long’s willingness to cooperate, although surveillance videos made it likely Bridges would have been apprehended without Long’s assistance.

¶13 The court also had before it two medical reports. The first, authored by Deborah Collins, reported that Long was uncooperative with a mental health evaluation, and she recommended inpatient evaluation. That second evaluation, completed at Winnebago Mental Health Institute by Sangita Patel, concluded that, to a reasonable degree of medical certainty, Long was malingering. The court’s disapproval of Long’s behavior is reflected in its sentencing comments.

¶14 Long’s complaints about the court’s conclusions regarding his culpability and character are nothing more than a dispute with the court’s weight

⁴ “Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it[.]” WIS. STAT. § 939.05(1).

and interpretation of the evidence. However, those determinations are strictly within the circuit court's purview and were entirely appropriate, despite Long's disagreement with how various facts of record should be interpreted. The court's determinations on Long's culpability and character are supported by the record, are appropriate for consideration in the overall sentence, and reflect an appropriate exercise of discretion.

¶15 Long next complains the circuit court failed to identify whether he was statutorily eligible for the challenge incarceration and earned release programs prior to discretionarily denying his participation in them. Challenge Incarceration and Earned Release are programs that allow a defendant to convert initial confinement time to extended supervision time, permitting greater time out of confinement but without reducing the overall sentence. *See* WIS. STAT. §§ 302.045(3m)(b) & 302.05(3)(c)2. Although the circuit court has a duty to determine whether a defendant preliminarily meets the statutory eligibility criteria, *see State v. Steele*, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 749, 632 N.W.2d 112, 115, we conclude the failure to explicitly do so here was harmless.

¶16 Assuming an offender meets all other statutory criteria for either program, the final statutory criteria is that the circuit court must, in its exercise of sentencing discretion, declare the offender eligible. *See* WIS. STAT. § 973.01(3g)-(3m); *see also* WIS. STAT. §§ 302.045(2)(c) & 302.05(3)(a)2. That is, while the statutes determine who *can* participate in the programs, the court determines as part of its sentencing discretion whether an offender *should* participate in either program. *See State v. Johnson*, 2007 WI App 41, ¶14, 299 Wis. 2d 785, 796, 730 N.W.2d 661, 666. Here, the court determined Long should not participate in the programs due to the seriousness of his crimes. This is an appropriate consideration, *see Steele*, 2001 WI App 160, ¶11, 246 Wis. 2d at 750, 632 N.W.2d

at 116, and the circuit court would have made the same determination even with a preliminary statement of statutory eligibility. The failure to explicitly declare Long statutorily eligible was, therefore, harmless.

¶17 Finally, Long complains the circuit court did not link the sentencing objectives to the length of the sentence. The circuit court’s “exercise of discretion does not lend itself to mathematical precision.... We do expect, however, an explanation for the general range of the sentence imposed.” *Gallion*, 2004 WI 42, ¶49, 270 Wis. 2d at 562, 678 N.W.2d at 209. Here, Long appears to argue the circuit court must explain the weight it gives each factor and explain how the factors translate into a specific sentence length. See *State v. Fisher*, 2005 WI App 175, ¶21, 285 Wis. 2d 433, 447, 702 N.W.2d 56, 63. That is, his argument appears to be “one that augurs for mathematical precision in sentencing, a proposition that *Gallion* expressly disavows.” See *State v. Ziegler*, 2006 WI App 49, ¶34, 289 Wis. 2d 594, 611, 712 N.W.2d 76, 84. Long is not entitled to that degree of specificity. See *Fisher*, 2005 WI App 175, ¶22, 285 Wis. 2d at 448, 702 N.W.2d at 63.

¶18 The circuit court observed and considered multiple factors, unique to this case, that amply justify the sentence. The court considered the robberies to be “very serious.”⁵ The court was displeased with the malingering diagnosis, stating its belief, based in part on its own observations, that Long was actually quite

⁵ In its sentencing decision, the court abbreviated its discussion of certain facts, like the victims’ comments to the court, because it evidently had sentenced Bridges shortly before Long’s sentencing. Although such incorporation by reference is convenient for the circuit court and may make sense to the parties, it effectively deprives the appellate court of a complete record. The discussion contained on the record in this case is nevertheless sufficient to support the sentence imposed.

aware of what was happening despite his protestations to the contrary, and was instead trying to get “mileage” out of his mental health issues. The court considered that Long joined Bridges strictly for money, which went to support his drug habit, because this motivation indicated Long’s failure to learn from previous punishments for drug-related crimes.⁶ The court credited Long for his cooperation, for obtaining his high school equivalency diploma, and for pleading guilty, but determined that probation was inappropriate because the community needed to be protected and probation would minimize the seriousness of the crimes.

¶19 In short, the court considered only proper objectives and factors. “[S]o long as a sentencing court has considered the proper factors, explained its rationale for the overall sentence it imposes, and the sentence is not unreasonable, the court does not erroneously exercise its discretion simply by failing to separately explain its rationale for each and every facet of the sentence imposed.” *State v. Matke*, 2005 WI App 4, ¶19, 278 Wis. 2d 403, 417, 692 N.W.2d 265, 273. For the foregoing reasons, the court also appropriately exercised its discretion in denying the postconviction motion for resentencing.

By the Court.—Judgment and order affirmed.

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

⁶ Long’s criminal history involved convictions for carrying a concealed weapon, possession of a controlled substance, aggravated battery, and at least two convictions for possession of marijuana, one of which resulted in a three-year prison sentence.

