COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2946-CR **Cir. Ct. No. 00 CF 6031**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VANESSA RUSSELL,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Vanessa Russell appeals from a judgment of conviction entered after she pled guilty to two counts of possession of a controlled substance-cocaine (five grams or less), with intent to deliver, contrary to WIS.

STAT. § 961.41(1)(cm)1 (1999-2000),[1] and from an order denying her postconviction motion seeking sentence modification. Russell essentially raises three issues of trial court error: (1) whether the trial court properly considered all the factors relevant to sentencing; (2) whether the imposed conditions of probation violated her constitutional rights; and (3) whether the trial court erroneously exercised its discretion in denying her motion for postconviction relief.

¶2 Because the trial court did not erroneously exercise its sentencing discretion, did not violate Russell's constitutional rights to equal protection, privacy or free association, and did not erroneously exercise its discretion in denying her motion for sentence modification, we affirm.

I. BACKGROUND

¶3 During the months of October and November 2000, Russell was involved with her boyfriend in the sale of cocaine to a police informant. As a result, she was charged with four counts of possession of a controlled substance (cocaine), with intent to deliver. On February 20, 2001, she pled guilty to two of the four charges.

¶4 A presentence investigation report was filed with the court, along with favorable character and employment endorsements by a friend of hers, who was also a probation officer, from her minister, and from her employer. In addition, the court had before it a report of her condition of health indicating,

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

among other matters, that she suffered from aortic and pulmonic vascular incompetence.

¶5 The presentence report reflects that during the years 1984-1989, she was convicted of prostitution four times and forgery once. She was placed on probation following four of these incidents. During this same period of time, she was arrested on numerous occasions for prostitution-related activities, none of which led to convictions. The report also indicates a history of cocaine and marijuana usage and that she tested positive for cocaine while the present charges were pending, although Russell disputes the claim.

¶6 The report also shows that Russell has a high school diploma, a diploma in data entry work from MBTI, and that she has attended the University of Wisconsin–Milwaukee.

¶7 The offenses in the instant matter were each subject to a maximum penalty of fifteen years in prison and no more than a $500,000 fine or both. Russell requested a sentence of one year in the House of Correction, straight time, and that she be allowed to maintain her employment. The State recommended two years' initial confinement, three years' extended supervision, a $500 fine, and a six-month license suspension for each count. It recommended a concurrent disposition and requested restitution for the buy money. The trial court imposed a sentence of two years of initial confinement on count one, followed by three years of extended supervision, and a six-month driver's license suspension. For count two, it imposed a two-year period of initial confinement, concurrent to count one, followed by a three-year period of supervision, concurrent to count one, and a six-month driver's license suspension.

¶8 The trial court imposed certain conditions for her supervision. The court ordered Russell to provide her probation agent with the names and birth dates of boyfriends or any other person whom she spent time with after midnight. It also ordered that she was to refrain from contact with anyone who had a felony conviction and required that she perform 1,000 hours of community service. Russell filed a postconviction motion, which was denied. She now appeals.

II. ANALYSIS

A. Sentencing.

¶9 Russell first claims the sentencing court erred for failing to accurately and appropriately consider all the primary and secondary sentencing factors of record pertinent to her sentence. In effect, Russell contends the trial court erroneously exercised its discretion in the weight it assigned to relevant sentencing factors.

¶10 Sentencing is within the sound discretion of the trial court, and we shall not reverse absent an erroneous exercise of sentencing discretion. ***State v. Tarantino***, 157 Wis. 2d 199, 221, 458 N.W.2d 582 (Ct. App. 1990). This exercise of discretion contemplates a process of reasoning based on facts that are of record or that are reasonably inferred from the record and a conclusion based on a logical rationale founded upon proper legal standards. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). A defendant who challenges a sentence has the burden to show that it was unreasonable, and we presume that the trial court acted reasonably. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998).

¶11 The three primary sentencing factors a trial court must consider are: (1) the gravity of the offense; (2) the character of the offender; and (3) the need for

the protection of the public. ***State v. Rodgers***, 203 Wis. 2d 83, 93, 552 N.W.2d 123 (Ct. App. 1996); ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight to be given to each factor is left to the trial court's broad discretion. ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶12 Additional factors that the trial court may take into consideration are: (1) the past record of criminal offenses; (2) any history of undesirable behavior patterns; (3) the defendant's personality, character and social traits; (4) the results of a presentence investigation; (5) the vicious or aggravated nature of the crime; (6) the degree of the defendant's culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, educational background and employment record; (9) the defendant's remorse, repentance and cooperativeness; (10) the defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. ***Larsen***, 141 Wis. 2d at 426-27. These are denominated the secondary factors, which a sentencing court may, but is not obligated to address. *See* ***State v. Lewandowski***, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985). The general deterrent effect of a sentence is also a proper consideration in sentencing. ***State v. Sarabia***, 118 Wis. 2d 655, 674, 348 N.W.2d 527 (1984).

¶13 Finally, the length of the sentence imposed by a trial court will be disturbed on appeal only where the sentence 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 v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶14 Russell claims the trial court erroneously exercised its sentencing discretion because: (1) it ignored compelling primary factors in order to achieve a specific result of placing her in confinement for a lengthy period of time coupled with restrictive conditions of probation upon release; (2) the court failed to take into account community-based treatment and rehabilitation measures; (3) the court was inconsistent in its objectives: both denying and affirming that the sentence was primarily intended to address her rehabilitative needs; (4) the court rejected the recommendation of the probation report set forth in the pre-sentence investigation; (5) the term of sentence was excessive; and (6) the sentence violated her right to equal protection. We shall examine each assertion in turn by reviewing the sentencing and postconviction records and transcripts.

¶15 The sentencing transcript reflects that the trial court properly addressed the gravity of the offense and the need to protect the community from drug trafficking. It went to some length in describing the relationship between cocaine trafficking and the effects it has upon the neighborhoods where it occurs, i.e., making burglaries, robberies, batteries, child abuse, child neglect, and terror part of daily life.

¶16 The trial court also spent some time addressing Russell's character, criminal history and failure to benefit from past rehabilitative resources. The court first reviewed her criminal record from the 1980's, noting all of the numerous support systems that were available to her during that period and how she utilized this assistance. The court questioned why she allowed herself to again fall under the bad influence of a male friend, turn her back on the efficacious assistance that these support systems provided, and return to criminal activity of a far more serious nature. The court rejected Russell's explanation that her drug activity "just happened." From the record of her past probationary episodes, the court

concluded she decided she did not want help and would do only what she wanted to do. In short, the court held her responsible for failing to learn from her youthful experience as a probationer. In the court's judgment, there was no excuse for her current conduct. These considerations all reflected upon her character and played a significant part in the court's sentencing process. Because the sentencing transcript reflects that the trial court properly considered the three primary factors, we reject Russell's claim to the contrary.

¶17 As a subpart of her claim that the trial court failed to consider the primary factors, Russell also claims the trial court failed to assign positive weight to the following factors: (1) she had no prison experience; (2) there was no basis to assume she could not be successfully rehabilitated or supervised since she had successfully completed a period of probation in 1985; (3) she was not involved in gangs and had no negative or violent affiliations of any kind; (4) she had an employment history that indicated she was productive, responsible, an asset to society, independent, resourceful, and did not rely on drug selling for financial means; (5) she had a loving and concerned family in the near community; (6) she was young; (7) she was extremely cooperative with the authorities; (8) she did not have the benefit of recent counseling, treatment or services; and (9) the PSI author indicated she was a low to moderate risk for re-offending.

¶18 Initially, we note that alleged factor (2) is not a factor but an argument cloaked as a factor. The remaining factors on Russell's list are not primary factors, and therefore the court was not obligated to consider them. Regardless, the court did take into account that in the 1990's Russell had acquired sources for community support, such as her employer, a friend-probation agent, and her caring parents. The trial court also observed that Russell was no longer young, she had no history of depravity, she had a good income, she had attended

Horizon House, and was aware of other community programs that were available to her.

¶19 It is obvious from the content of Russell's argument that she was dissatisfied with the weight the court assigned to these factors. The court, however, was not required to consider the factors on Russell's list, and the weight to be assigned to the sentencing factors is wholly discretionary. *See* ***Lewandowski***, 122 Wis. 2d at 763. Thus, we conclude the court did not erroneously exercise its sentencing discretion.

¶20 Russell next claims the sentencing court failed to take into account available community-based treatment and rehabilitative services. The record refutes this contention. A major thrust of the court's sentencing remarks focused on all the various services to which Russell had been exposed and for the most part had previously utilized in her younger years. The court questioned Russell as to why, after successfully availing herself of these services in the 1980's, she did not again return to them for support. This was particularly important in the court's mind, especially in light of the friends who submitted character references at sentencing, i.e., a probation officer, a minister and her employer.

¶21 It is evident from a reading of the transcript that the court was well aware of the many rehabilitative services available in the community as is demonstrated by the nature of the conditions that were imposed for her three-year period of supervision post-incarceration. The crucial element for disagreeing with the merits of Russell's contention is the court's reasonable conclusion that her life was "out of control." She exhibited no will power. She had turned her back on the responsibilities of a law-abiding citizen. Hence, there was good reason to

place her in a structured environment outside of the community to re-establish her self-control.

¶22 Next, Russell claims the sentence was inconsistent in its objectives: both denying and affirming that it was intended to serve her rehabilitative needs. Russell cites the following remarks of the trial court to support her contention:

> This isn't about Miss Russell and whether she needs to be reformed. This is about whether this community needs protection from people like her.
>
> ….
>
> Miss Russell, the reason I'm sending you to prison is actually not so much to punish you, because I know what the programs are in the women's prison. You're so out of control, it looks like you're actually using cocaine while you were on bail.
>
> ….
>
> This sentence is as much to rehabilitate you, as much as it is to specifically deter you from ever doing something like this again.

¶23 Russell argues that the inconsistency expressed in these sentencing remarks demonstrates an erroneous exercise of discretion. We are not at all convinced. Rather than expressing inconsistency, we conclude that these remarks express cogency and coherence.

¶24 It is clear from a reading of the sentencing transcript that the court realized that Russell too easily succumbed to the ill-motivated importunings of her male companions and at the same time did not have the inner strength of character to seek assistance where she knew she could obtain it. Thus, remaining in a local community setting offered no real assurance of obtaining positive rehabilitative

help and at the same time paying an appropriate penalty. For this reason, the court's resolution was both circumspect and consistent. There was no error.

¶25 Next, Russell claims the trial court erred when it rejected the recommendation of probation conditions set forth in the pre-sentence report. The writer of the report had recommended two consecutive six-month sentences in the House of Correction as a condition of probation.

¶26 In Wisconsin, pre-sentence reports are not required even though sentencing courts are encouraged to utilize the information they provide to craft a personal and appropriate sentence. ***Byas v. State***, 55 Wis. 2d 125, 128-29, 197 N.W.2d 757 (1972). Nevertheless, it is well established that pre-sentence reports are not binding on the sentencing court. ***State v. Killory***, 73 Wis. 2d 400, 409, 243 N.W.2d 475 (1976).

¶27 Russell appears to argue that because the report contained no information about the nature of the social services offered to her while she was previously on probation, the court erroneously exercised its discretion when it discounted the report for not giving "due weight to the fact that Miss Russell has had the benefit of a tremendous amount of probationary services." The record refutes this claim.

¶28 During the course of the colloquy between the court and Russell, Russell told the court that she had benefited from her years on probation. Probation helped her obtain a job on her own. She went to Horizon House on her own, and "start[ed] going to like different programs and stuff like that." When the court asked her when "you got all those support services, even through a probation agent, why didn't you go for help?" she replied "I have no answer." From the contents of this exchange in addition to reasons stated earlier in this opinion, we

conclude there was no erroneous exercise of discretion in rejecting the recommendation of the pre-sentence report.

¶29 Next, Russell claims her sentence is excessive. As a result of this prosecution, Russell faced the possibility of being found guilty of four counts of delivery of cocaine. She reached a plea agreement whereby two of the counts were dismissed and she pled guilty to the remaining two counts. She faced a maximum sentence of fifteen years in prison on each count and a $500,000 fine on each count.

¶30 "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Taking into account the nature and gravity of these offenses, Russell's criminal history and character challenges, we find no basis for the claim that the sentence was excessive.

¶31 Lastly, Russell contends the sentence violated her right to equal protection. We reject this argument for the reasons set forth in the next section of this opinion.

B. Constitutional Violations.

¶32 Russell claims that the sentencing court violated her right to equal protection and her right to privacy and free association. We are not convinced.

Equal Protection

¶33 Russell contends that if she were a man, she would have been allowed to stay in the community to receive treatment and services while on probation, instead of being sent to prison. On that basis, she asserts that her constitutional right to equal protection was violated. We disagree.

¶34 To establish a violation of the equal protection clause, there must be a showing of an intentional, systematic and arbitrary discrimination. ***State ex rel. Murphy v. Voss***, 34 Wis. 2d 501, 510, 149 N.W.2d 595 (1967). The Fourteenth Amendment does not deny states the power to treat different classes of person differently. ***Reed v. Reed***, 404 U.S. 71, 75 (1971). In considering prisoner claims based on sex discrimination, courts have not required identical treatment of female and male prisoners. Instead, courts have required that male and female prisoners be treated "in parity" unless there is a sufficient reason to treat them differently. ***McCoy v. Nevada Dep't of Prisons***, 776 F. Supp. 521, 523 (D. Nev. 1991).

¶35 From our review of the transcript it appears that the court gave particular emphasis to two factors: a need to protect the community and a desire to tailor a rehabilitation program that suited Russell's long-term needs. The court, based upon its experience, believed that the women's prison system had a better drug rehabilitation program than the men's prison system. Russell's needs would be better served in a closed beneficial setting. Russell's past history of recidivism demonstrated that a prison term was necessary. Thus, a short term of incarceration was appropriate under the circumstances. Moreover, there is a total absence of any evidence to indicate that if Russell had been a male, she would have remained in the community. Russell misinterprets the trial court's comments in that regard. We conclude there was no violation of Russell's right to equal protection.

Right to Privacy and Free Association

¶36 Russell claims the conditions of probation imposed by the trial court are unconstitutional for two reasons: (1) they are overly broad, vague and ambiguous and, as a result; (2) they deprive her of her right to privacy and freedom of association. We shall examine each basis of this claim separately.

¶37 Russell claims the rules of probation imposed upon her are unreasonable, vague and ambiguous, because "the rule prohibits boyfriends, then prohibits visiting at certain hours, then prohibits association with felons, then with those convicted of any kind of drug offense." She argues that no one clear and concise rule is promulgated that puts Russell on notice as to what is expected of her and what could be grounds for revocation of probation. This contention is based in part on an apparent contradiction between the content of the judgment roll and the oral sentencing statement of the court.

¶38 In addressing this broad challenge, we initially observe that fundamental to preserving an issue for appeal is either objecting before the trial court of the matter objectionable and/or raising the issue in a postconviction motion. ***State v. Meyer***, 150 Wis. 2d 603, 606, 442 N.W.2d 483 (Ct. App. 1989). From our search of the record, neither path for the preservation of error was followed. Thus, we deem this proposed basis for error as waived.

¶39 Russell next claims that the imposed rules of probation deprived her of privacy and free association. The imposition of rules for probation is within the sentencing court's discretion. ***State v. Nienhardt***, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995). We have declared that "[c]onditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." ***Krebs v. Schwarz***, 212 Wis.

2d 127, 131, 568 N.W.2d 26 (Ct. App. 1997) (citation omitted). The conditions of probation need not be related to the crime of conviction in order to withstand constitutional scrutiny. ***State v. Miller***, 175 Wis. 2d 204, 208-10, 499 N.W.2d 215 (Ct. App. 1993). When examining whether a condition of probation is reasonable and appropriate, it is necessary to determine if it serves the dual goals of probation, i.e., the rehabilitation of the offender and protection of the community. ***State v. Beiersdorf***, 208 Wis. 2d 492, 502, 561 N.W.2d 749 (Ct. App. 1997). Thus, the key question to be addressed is whether the imposed conditions are related to rehabilitation and protection of the community. The record supports an affirmative response.

¶40 The record clearly demonstrates two basic reasons why the trial court's conditions of probation were rationally related to the purpose of rehabilitation. First, Russell claimed her criminal history was directly linked to influence by her boyfriends, both past and present. Based on this information, it was reasonable for the trial court to conclude that despite her age of thirty-four years, her social life had to be restricted. The conditions imposed did not forbid normal, healthy and circumspect male-female relationships. Rather, self-discipline was lacking and had to be reestablished. What better way to impress upon Russell the importance of character in choosing her male associates than to impose conditions of identification and restrictions on associations.

¶41 Second, the court quite reasonably determined that Russell did not perceive that she was being used for improper purposes. To correct this state of affairs, it therefore imposed as a condition of probation, the requirement that she complete a program for women who are victimized by men. Thus, from a circumspect review of the sentencing transcript, it is evident that the court was clearly tailoring conditions for Russell's desired rehabilitation.

¶42 It is obvious that the identification requirements and the association restrictions were intended to reduce the likelihood that she would once again involve herself in criminal activity brought about by involvement with criminally motivated male companions. This intended result unquestionably was designed to provide protection to the community.

¶43 Part and parcel of the challenge to the appropriateness of the conditions of probation is Russell's claim that the trial court erroneous exercised its discretion by imposing 1,000 hours of community service. The propriety of this condition for probation is also tested by how reasonably it is related to rehabilitation and the protection of the community. ***Nienhardt***, 196 Wis. 2d at 167. Here there is no doubt, there is a rational relationship.

¶44 Central to the court's sentencing conclusion was the court's well-reasoned belief that Russell lacked that measure of self-esteem so necessary to "just say no." Contrary to Russell's assertion that the community service requirement would have adverse effects upon her medical condition, there was no requirement imposed that prevented her from doing office work; e.g., for a community based non-profit organization in the general community in which she lived. Thus, she could give back what she inferentially had taken away, and in doing so, create a good feeling about herself leading to the restoration of the all important trait of self-esteem.

¶45 As noted earlier in this opinion, the court expressed great concern about the effects of cocaine trafficking in neighborhoods. The record is replete with its observations and need not be further explicated. Russell's conduct fit into the same mold. The amount of 1,000 hours to be dedicated to the community served to protect the community's interest in that the fulfillment of this

requirement would diminish or eliminate the amount of available free time that conceivably would be inclined to the very same type of activities that caused her conviction. Because the imposition of 1,000 hours for community service is rationally related to both rehabilitative purposes and contributes to protection of the public, the trial court did not erroneously exercise its discretion.

¶46 In sum, the conditions of probation by the sentencing court neither violated any constitutional rights of Russell nor demonstrated an erroneous exercise of discretion.

C. Postconviction Relief.

¶47 As a final ground for appeal, Russell contends that the trial court failed to exercise appropriate discretion when it denied her motion for postconviction relief. As the bases for this final claim Russell posits that her incarceration denied her equal protection; her community service condition of probation was unreasonable; the identification and association reporting requirement denied her her right to privacy; the court's reasons for her sentence disposition were inconsistent and contradictory; and finally, that the trial court inadequately articulated its reasons for rejecting the pre-sentence recommendation.

¶48 We have analyzed each of these claimed bases for court error earlier in the opinion, and have sequentially rejected the same. Therefore, there is nothing further for this court to address. In sum, zero plus zero still equals zero. ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

By the Court.—Judgment and order affirmed.

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