COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1379-CR **Cir. Ct. No. 00-CF-185**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID BURBA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County: LARRY L. JESKE, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. David Burba appeals an amended judgment sentencing him to three years of initial confinement to be followed by eighteen months of extended supervision on a conviction for possession of THC with intent

to deliver.[1] Burba contends he is entitled to resentencing because the initial sentencing court failed to discuss the severity of his offense and the reasons it was declaring him ineligible for the challenge incarceration program. Having reviewed the record, however, we are satisfied that (1) the initial sentencing court adequately explained its reasons for imposing the maximum period of imprisonment, and (2) the postconviction court properly remedied any error in the challenge incarceration eligibility determination by amending the judgment. Accordingly, we affirm.

BACKGROUND

¶2 Burba entered a no contest plea to one count of possession of THC with intent to deliver after police found a tin with about two ounces of marijuana in his jacket pocket during a consensual search. Burba admitted that he was planning to sell the marijuana on his brother's behalf. The State dropped a repeater allegation and dismissed and read in an additional bail jumping count in exchange for the plea.

¶3 At the sentencing hearing, Judge Charles Heath noted that Burba had four juvenile adjudications and eight adult convictions, with two additional cases pending against him in other counties, showing a pattern of criminal conduct going back to 1989. He stated that probation hadn't worked, and that incarceration was necessary "to let [Burba] know that there's a penalty to pay if you're going to violate the law, and to protect society." Judge Heath concluded

[1] Although the notice of appeal refers to the initial judgment and the postconviction order, we conclude that the amended judgment is actually the final appealable document in the record, and that it properly brings the initial judgment and postconviction order before us.

that "[t]his offense, coupled with [Burba's] past record," justified a four-and-a-half-year sentence. When defense counsel inquired about the challenge incarceration program, the court indicated without further discussion that Burba was not eligible.

¶4 Burba filed a postconviction motion seeking resentencing on the grounds that the court had failed to consider the severity of the offense or to explain why it concluded Burba was ineligible for the challenge incarceration program. Because Judge Heath had retired, Judge Larry Jeske heard the motion. Judge Jeske concluded Judge Heath had adequately explained the length of the imposed sentence, but had failed to adequately explain why Burba was ineligible for the challenge incarceration program. Rather than setting the matter for resentencing as Burba requested, Judge Jeske amended the judgment of conviction to state that Burba was eligible for the challenge incarceration program.

¶5 Burba appeals, renewing his claim that Judge Heath failed to consider the severity of the offense, and asserting that resentencing is the proper remedy for Judge Heath's failure to adequately explain why it determined he was ineligible for the challenge incarceration program.

DISCUSSION

¶6 When exercising sentencing discretion, the trial court should consider such factors as the gravity of the offense, the character of the offender and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The trial court misuses its discretion by ignoring a relevant factor or considering an improper factor. ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). However, the sentencing court may determine what weight to give to competing factors. ***Ocanas v. State***, 70 Wis. 2d

179, 185, 233 N.W.2d 457 (1975). Moreover, because the trial court is in the best position to consider the relevant sentencing factors and the demeanor of the defendant, we are reluctant to interfere with its sentencing discretion and we presume that it acted reasonably. ***Harris***, 119 Wis. 2d at 622. To overcome the presumption, the defendant "must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

¶7 Burba contends that the trial court ignored several facts relevant to the severity of the offense—namely, that the amount of marijuana involved here was small, that Burba was sleeping in his car rather than being disruptive when approached by police, and that the police would likely have been unable to establish intent to sell without Burba's own statement, not to mention his consent to the search. While it is true that the trial court did not explicitly comment on these particular facts, they had been argued, and it may be inferred that the trial court had them in mind when it referred to "this offense." In context, we are persuaded that the trial court's emphasis on Burba's past record merely shows that it was giving more weight to Burba's character and likelihood to reoffend than to the severity, or non-severity, of the instant offense. There is nothing improper about such an evaluation, and we see nothing else in the record which would overcome the presumption that the trial court acted reasonably in determining the length of Burba's sentence.

¶8 Burba also argues that the eligibility determination for the challenge incarceration program was an integral part of his sentence, and, therefore, that any misuse of discretion in making that determination should invalidate the entire

sentence and entitle him to be resentenced. We disagree. WISCONSIN STAT. § 302.045(2) (2001-02)[2] gives the Department of Corrections the ultimate authority over whether to place an eligible offender into the challenge incarceration program. Therefore, even if the trial court determines that an offender is eligible for the program, it still must determine the appropriate length of sentence for an offender in the event that the offender is not placed in the program. Under that scheme, the eligibility determination cannot be said to be an integral part of the determination of the appropriate length of a sentence. We conclude that an amended judgment designating that Burba was eligible for the challenge incarceration program properly remedied any erroneous exercise of discretion the trial court may have made in that regard.

By the Court.—Judgment affirmed.

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

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.