COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2250-CR **Cir. Ct. No. 2008CF2979**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN N. APPLINGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and CARL ASHLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Nathan N. Applings appeals from the judgment of conviction and from the order denying postconviction relief entered in Milwaukee

County circuit court case No. 2008CF2979.[1] He also purports to challenge reconfinement orders entered in Milwaukee County circuit court case No. 2003CF6880. We reject Applings's challenges to the circuit court's exercise of sentencing discretion in 2008CF2979, and we affirm the judgment and order in that matter. We lack jurisdiction to review the proceedings in 2003CF6880.

BACKGROUND

¶2 On March 18, 2009, Applings pled guilty to one count of possessing cocaine with intent to deliver and one count of possessing THC in Milwaukee County circuit court case No. 2008CF2979.[2] Immediately after Applings entered his pleas, the circuit court conducted a sentencing hearing that was combined with a reconfinement hearing in Milwaukee County circuit court case No. 2003CF6880. The circuit court imposed an aggregate seven-year term of imprisonment in 2008CF2979: for possessing cocaine with intent to deliver, the circuit court imposed four years of initial confinement and three years of extended supervision; for the offense of possessing THC, the circuit court imposed a concurrent sentence of eighteen months of initial confinement and two years of extended supervision. In 2003CF6880, the circuit court ordered Applings reconfined for one year.

[1] The Honorable Rebecca F. Dallett presided over the plea and sentencing hearing and entered the judgment of conviction in 2008CF2979. The Honorable Carl Ashley reviewed and denied the motion seeking postconviction relief in that matter.

[2] Applings's appellate brief contains erroneous descriptions of Applings's conviction for possession of cocaine with intent to deliver. At one point, appellate counsel states that Applings pled guilty to possession of cocaine; at another point, appellate counsel indicates that Applings pled guilty to a "burglary matter." We caution appellate counsel that we expect accuracy and candor in appellate briefs.

¶3 Applings filed a timely notice of intent to pursue postconviction relief in 2008CF2979. On August 12, 2009, Applings, by counsel, filed a postconviction motion asking the circuit court to modify both the sentence imposed in 2008CF2979 and the reconfinement order in 2003CF6880. The circuit court denied the motion, and Applings filed a notice of appeal in 2008CF2979.

DISCUSSION

¶4 In his appellate briefs, Applings challenges the circuit court's decisions in both 2003CF6880 and 2008CF2979. The State asserts that this court lacks jurisdiction to review the orders entered in 2003CF6880. The State is correct. A timely notice of appeal is necessary to confer jurisdiction over an appeal. WIS. STAT. RULE 809.10(1)(e) (2007-08).[3] Here, Applings filed a notice of appeal only in 2008CF2979. That notice is insufficient to confer jurisdiction over an appeal from orders in 2003CF6880.

¶5 Applings argues that he merely failed to include case number 2003CF6880 in the caption of his notice of appeal and that the error is not fatal because an inconsequential error in a notice of appeal does not deprive this court of jurisdiction. *See* WIS. STAT. RULE 809.10(1)(f). The deficiency here, however, is not the lack of a case number, but the lack of a notice of appeal. We cannot construe a notice of appeal filed in one proceeding as two notices of appeal filed in two proceedings.

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

¶6 Moreover, were we to determine that Applings's notice of appeal filed in 2008CF2979 is potentially sufficient to launch an appeal in 2003CF6880, we would nonetheless conclude that we lack jurisdiction over the orders entered in 2003CF6880 because Applings did not file a notice of intent to pursue postconviction relief in that matter.[4] Appellate review of the reconfinement decision in 2003CF6880 is governed by the procedure described in WIS. STAT. RULE 809.30. *See* ***State v. Swiams***, 2004 WI App 217, ¶4, 277 Wis. 2d 400, 690 N.W.2d 452. Under RULE 809.30(2)(a)-(b), a defendant commences the appellate review process by filing a notice of intent to pursue postconviction relief within twenty days of disposition. *See* ***State v. Quackenbush***, 2005 WI App 2, ¶2, 278 Wis. 2d 611, 692 N.W.2d 340. Absent a timely notice of intent, a defendant cannot obtain direct review of a judgment or order under RULE 809.30. *See* ***Quackenbush***, 278 Wis. 2d 611, ¶12. Applings never took the initial step necessary to begin the appellate process in 2003CF6880. Accordingly, we lack jurisdiction in that matter.[5]

[4] Because Applings did not properly commence an appeal from the orders in 2003CF6880, the clerk of circuit court did not transmit the record of that case to the clerk of the court of appeals. *Cf.* WIS. STAT. RULE 809.30(2)(k) (clerk of circuit court transmits to this court the record on appeal). Nonetheless, we may take judicial notice of Milwaukee County circuit court files. *See* ***Teacher Ret. Sys. of Texas v. Badger XVI Ltd. P'ship***, 205 Wis. 2d 532, 540 n.3, 556 N.W.2d 415 (Ct. App. 1996). The circuit court files reflect that Applings did not file a notice of intent to pursue postconviction relief in 2003CF6880.

[5] We note that Applings's appellate counsel appears to be a stranger to 2003CF6880. The state public defender appoints postconviction and appellate counsel for an eligible person after the person files a notice of intent to pursue postconviction relief that requests public defender representation. WIS. STAT. RULE 809.30(2)(c) & (e). The materials available to this court do not reflect that the public defender appointed appellate counsel in 2003CF6880, perhaps because Applings did not file a notice of intent to pursue postconviction relief in that matter. The order appointing counsel provided to this court on Applings's behalf reflects an appointment of counsel only in 2008CF2979.

¶7 We turn to Applings's contention that the circuit court erred when it imposed sentence in 2008CF2979. Our standard of review is well settled. Sentencing lies within the circuit court's discretion, and our review is limited to considering whether discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. We defer to the circuit court's "great advantage in considering the relevant factors and the demeanor of the defendant." *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶8 The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** Additionally, the circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

¶9 Applings begins his challenge to the sentencing proceeding by contending that mitigating factors support lighter sentences. This contention provides no basis for relief. Our task is to determine whether the circuit court properly exercised its discretion, not whether discretion might have been exercised differently. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶10 Applings next asserts that the circuit court "provided no meaningful sentencing rationale." In Applings's view, the circuit court did not tailor its discussion of the seriousness of the offenses and the protection of the public to the specifics of his case, and the circuit court did not consider his character "or other facts in the record, such as his life, employment, education, and nature and gravity of past offenses." We cannot agree.

¶11 The circuit court explained that the offenses were "very serious," emphasizing that Applings "put [drugs] in the community so other people can get addicted and commit crimes and neglect their families and go to prison." Further, the court viewed Applings's conduct as aggravated because he continued to sell cocaine after conquering his own desire to use it.

¶12 The circuit court discussed Applings's character, commending Applings for his honesty. Further, the circuit court acknowledged that Applings had vocational skills, that he had "made good use of [his] time in custody," and that he had secured "a good job after coming out of prison." The circuit court viewed these positive factors as substantially outweighed by the evidence that he continued to commit drug offenses and "mak[e] these bad choices." The circuit court also took into account Applings's criminal record, pointing out that he had "three prior adult convictions for the same type of [drug] cases." Applings's substantial prior record is further evidence of his character. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56.

¶13 The circuit court discussed its "real concern ... with the need to protect the public" and opined that Applings was "endangering the community." The circuit court reminded Applings that "the community has an interest in not having drugs be sold, certainly not crack cocaine."

¶14 The circuit court selected community safety as the primary sentencing objective. The circuit court identified a "great need" to protect the public because "we can't trust [Applings] to be out of custody." The circuit court observed that "when [Applings is] out, [Applings is] selling drugs." Accordingly, the circuit court imposed an aggregate seven-year term of imprisonment.

¶15 Applings complains that the circuit court "did not explain how the particular length of prison [sentence] chosen was needed to meet the [sentencing] objectives." The circuit court is not required to state with specificity how the factors it considered "translated into a specific number of years." *See* ***id.***, at ¶¶21-22. Rather, the circuit court must discuss the relevant factors in a way that explains "a rational basis for the 'general range' [of the sentence] it imposed." ***State v. Klubertanz***, 2006 WI App 71, ¶21, 291 Wis. 2d 751, 713 N.W.2d 116 (citation omitted). The court fulfilled its obligations here.

¶16 Applings next contends that the circuit court erred by declaring him ineligible for the Earned Release Program. *See* WIS. STAT. §§ 302.05 and 973.01(3g). We disagree.

¶17 The Earned Release Program "is a substance abuse program administered by the Department of Corrections. An inmate serving the confinement portion of a bifurcated sentence who successfully completes the [program] will have his or her remaining confinement period converted to extended supervision." ***State v. Owens***, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 713 N.W.2d 187 (citation and footnote omitted). Statutory criteria in WIS. STAT. § 302.05 dictate whether an inmate can be admitted to the Earned Release Program, but the circuit court determines whether a particular inmate should be eligible to participate. *See* ***State v. Johnson***, 2007 WI App 41, ¶14, 299 Wis. 2d

785, 730 N.W.2d 661. "[A]n E[arned] R[elease] P[rogram] eligibility decision is part of the court's exercise of sentencing discretion." ***Owens***, 291 Wis. 2d 229, ¶9.

¶18 Applings complains that the circuit court failed to fulfill its obligation to make a threshold determination of his statutory eligibility for the Earned Release Program. He supports his contention that the circuit court has such an obligation with a citation to ***State v. Steele***, 2001 WI App 160, 246 Wis. 2d 744, 632 N.W.2d 112. ***Steele*** discusses the circuit court's obligations when determining a person's eligibility for the Challenge Incarceration Program under WIS. STAT. §§ 302.045(2) and 973.01(3m). ***Steele***, 246 Wis. 2d 744, ¶8. Applings does not explain why ***Steele*** is relevant here, and we decline to construct an argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review an issue that is inadequately briefed).

¶19 Instead, we conclude that the circuit court must assess a defendant's eligibility for the Earned Release Program pursuant to the standards articulated in ***Owens***, 291 Wis. 2d 229. There, we explained: "while the [circuit] court must state whether the defendant is eligible or ineligible for the program, we do not read the statute to require completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the E[arned] R[elease] P[rogram] determination." ***Id.***, ¶9.

¶20 The circuit court's sentencing remarks amply support its discretionary decision to declare Applings ineligible for the Earned Release Program with its accompanying potential for a reduced period of confinement. The circuit court emphasized that Applings could not be trusted to obey the law when he is not in custody and stated that "this is his fourth offense of this nature,

so I don't think [the program] is appropriate." Thus, the circuit court's decision furthered the goal of protecting the public from Applings's recidivist behavior, an entirely appropriate sentencing consideration. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

¶21 Applings next contends that the circuit court erred by failing to consider applicable sentencing guidelines. The issue is moot. WISCONSIN STAT. § 973.017(2)(a), which required the sentencing court to consider applicable sentencing guidelines, was repealed effective July 1, 2009. 2009 Wis. Act 28, ss. 3386m & 9400. Although the circuit court imposed sentence in this matter on March 18, 2009, before the repeal of § 973.017(2)(a), we apply the repeal retroactively. *See* ***State v. Barfell***, 2010 WI App 61, ¶14, 324 Wis. 2d 374, 782 N.W.2d 437. Applings therefore is not entitled to any relief for the circuit court's failure to consider sentencing guidelines. *See* ***id.***

¶22 Last, Applings asserts that the circuit court erroneously exercised its discretion by denying his motion for sentence modification. The claim is meritless. "We review a motion for sentence modification by determining whether the sentencing court erroneously exercised its discretion in sentencing the defendant." ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 653 N.W.2d 895. We have already determined that the circuit court properly exercised its sentencing discretion. Accordingly, the circuit court did not err by denying Applings's 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.