COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2622-CR **Cir. Ct. No. 01 CF 4181**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK SANDLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Derrick Sandles appeals from a judgment of conviction, following his guilty plea, for possession with intent to deliver more than 100 grams of cocaine, contrary to WIS. STAT. § 961.41(1m)(cm)5 (1999-

2000)[1] and from the order denying his postconviction motion. He argues that the circuit court: (1) erred in denying his motion to suppress evidence, which he contends was improperly obtained by a warrantless search of his vehicle; and (2) erroneously exercised discretion in sentencing. We affirm.

I. BACKGROUND

¶2 On August 3, 2001, Milwaukee Police Sergeant Ivory Britton spotted a car that was illegally parked at an angle on the wrong side of the street, partially obstructing traffic. He observed Sandles and another man standing near the car. Driving his marked squad car, Sgt. Britton approached Sandles' car; Sandles got back into his car and sat in the driver's seat. Sgt. Britton activated his emergency lights and siren, parked his squad car, turned off the siren, and then approached Sandles' car on foot.

¶3 According to the criminal complaint, Sgt. Britton stated that "as he approached on foot, [Sandles] exited the auto and quickly walked around the car away from [him]." Because it appeared that Sandles was preparing to flee, Sgt. Britton yelled, "Don't do it." Despite that warning, Sandles fled the scene, leaving his car unlocked with the keys in the ignition. Sgt. Britton called for backup and then questioned the man who had been standing with Sandles. The man confirmed that Sandles had been driving the car.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version. WISCONSIN STAT. § 961.41(1m)(cm)5 provides that if a person is found to be in possession with the intent to distribute "[m]ore than 100 grams [of cocaine], the person shall be fined not more than $500,000 and shall be imprisoned for not less than 10 years nor more than 45 years."

¶4 Milwaukee Police Officer Jutiki Shaw was dispatched to assist Sgt. Britton. Officer Shaw searched Sandles' car and found two plastic Ziploc baggies in the console between the front seats, each baggie containing an off-white chunky substance that the Vice Control Division later determined to be cocaine; the total weight was 139.20 grams. The plastic baggies were taken to the Bureau of Identification and Sandles' fingerprint was found on one of them.

¶5 Sandles moved to suppress the evidence, arguing that the search violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution, and also under Article I, § 11 of the Wisconsin Constitution. At the motion hearing, the circuit court heard testimony from Sgt. Britton and Sandles and ultimately ruled that the evidence would not be excluded. Sandles subsequently pled guilty and the circuit court, denying his request for participation in the boot camp program, sentenced him to twelve years—six years of initial confinement and six years of extended supervision.[2]

II. DISCUSSION

A. Search of Sandles' Car

¶6 Relying on ***State v. Tompkins***, 144 Wis. 2d 116, 423 N.W.2d 823 (1988), Sandles argues that because he was not arrested at the time of the incident and because, he claims, the police did not have probable cause to believe contraband was in the car, the search violated his constitutional rights. The State argues that Sandles did not have a legitimate expectation of privacy in his car after

[2] The Challenge Incarceration Program is often referred to as "boot camp." *See* WIS. STAT. § 302.045.

he fled and, therefore, he did not have standing to challenge the search. We agree with the State.

¶7 The Fourth Amendment to the United States Constitution protects "[t]he rights of the people ... against unreasonable searches and seizures." U.S. CONST. amend. IV. This guarantee prohibits "unreasonable" state-initiated searches. ***Illinois v. Rodriguez***, 497 U.S. 177, 183 (1990). In reviewing a denial of a motion to suppress, this court will uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Knight***, 2000 WI App 16, ¶10, 232 Wis. 2d 305, 606 N.W.2d 291. "Whether those facts satisfy the constitutional requirement of reasonableness is a question of law, which [this court] review[s] de novo." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (1997).

¶8 "The test for determining whether an individual has standing to raise a Fourth Amendment issue examines 'whether the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place.'" ***State v. McCray***, 220 Wis. 2d 705, 710, 583 N.W.2d 668 (Ct. App. 1998) (citation omitted). "The proponent of a motion to suppress bears the burden of establishing the reasonableness of the alleged privacy expectation by a preponderance of the credible evidence." ***Id.*** "[T]o prove that a search or seizure within the meaning of the [F]ourth [A]mendment occurred, a criminal defendant bears the burden of establishing both that he manifested a subjective expectation of privacy that was invaded by government action and that that expectation was legitimate." ***State v. Rewolinski***, 159 Wis. 2d 1, 16, 464 N.W.2d 401 (1990). "The determination of reasonableness is made by reference to the particular circumstances of each individual case, and balances 'the nature and quality of the intrusion … against the importance of the governmental interests alleged to justify

the intrusion.'" ***State v. Henderson***, 2001 WI 97, ¶18, 245 Wis. 2d 345, 629 N.W.2d 613 (citations omitted).

¶9 On appeal, Sandles does not challenge any of the factual findings the circuit court made at the suppression hearing. The circuit court found, in part:

> [Sandles] got out of the car. Officer Britton pulled up behind him. The defendant got back in the car briefly, got out and stood a few feet away from the car as the officer approached. Officer Britton could tell that the defendant was thinking about running and told him not to do it. The defendant then took off running and fled the scene[.]
>
> ….
>
> [W]hen the defendant took off, he left the keys in the ignition, and I find that the car was left unlocked, and, again, based on those facts, I'm satisfied there's absolutely no reasonable expectation of privacy.

We agree.

¶10 In ***State v. Roberts***, 196 Wis. 2d 445, 538 N.W.2d 825 (Ct. App. 1995), the defendant, Roberts, left his unlocked car and fled on foot from a police officer who was approaching his car. ***Id.*** at 450. The police officer searched Roberts' car and found marijuana. ***Id.*** at 450-51. Denying Roberts' challenge to the search of his car, the circuit court concluded that "the vehicle search was lawful because, had Roberts remained on the scene and submitted to arrest, a warrantless search of the vehicle would have been permissible." ***Id.*** at 453-54. On appeal, we concluded, "Roberts did not have a reasonable expectation of privacy in his automobile after he fled the scene and therefore the search of the

automobile did not violate his right under the federal and state constitutions to be free from unreasonable searches."[3] ***Id.***

¶11 Similarly, when Sandles fled, leaving his illegally parked car unlocked with the keys in the ignition, he lost any reasonable expectation of privacy that he might have had in the car. Thus, he did not have standing to challenge the search of his vehicle and, therefore, the circuit court's denial of his motion to suppress was proper.

B. Circuit Court's Sentencing Discretion

¶12 Sandles argues that the circuit court: (1) placed "undue weight and consideration [on] … the gravity of the offense, and minimal if any consideration [on] the other factors"; (2) "completely overlooked any discussion as to why the community would require protection from [him], and instead addressed why the community needed protection from illegal drugs as a whole"; and (3) "essentially pre-empted [him] from eligibility in the [boot camp] program without a consideration of the eligibility factors enumerated by statute." We disagree.

¶13 We will not disturb a sentence imposed by a circuit court unless the court erroneously exercised discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457 (1975). We will find an erroneous exercise of discretion "only where

[3] Sandles contends that he had a reasonable expectation of privacy in his car because he was not arrested prior to his flight. He argues that ***State v. Roberts***, 196 Wis. 2d 445, 538 N.W.2d 825 (Ct. App. 1995), can be distinguished from the instant case because, in ***Roberts***, this court "premised its ultimate finding of no expectation of privacy after fleeing the scene, on an uncontested finding that the defendant had been placed under arrest." He is incorrect. We premised our conclusion on the fact that Roberts left his car unlocked when he fled and, as we explained, society is not prepared to accept as objectively reasonable an expectation of privacy in a car under such circumstances. ***Id.*** at 456.

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." ***Id.*** at 185. A strong public policy exists against interfering with the circuit court's discretion in determining sentences, *see* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984), and the circuit court "is presumed to have acted reasonably." ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). To obtain relief on appeal, a defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992). The three primary factors that a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.[4] ***Sarabia***, 118 Wis. 2d at 673; ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984).

¶14 In his brief to this court, Sandles first concedes, "The trial court clearly indicated a consideration of [the three primary] factors on the record." He then back-steps and argues that the court "at least noted in passing" the three primary factors but placed undue weight on the first factor and gave minimal consideration to the other factors. He also argues that the court "completely overlooked any discussion as to [the third factor], and instead addressed why the community needed protection from illegal drugs as a whole." We disagree.

[4] The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989).

¶15 The record reveals that the circuit court carefully considered the third factor—the need to protect the public. The court explained: "When I look at the overall effects on the community, in some respects 139 grams [of cocaine], this was enough to give 1,392 people their next fix and keep them going until their next one." Describing Sandles' threat to the public, the court specified that his drug dealing caused "harms [sic] to the community and to the children and the neighborhoods of the community in ways just as great, in some ways greater," than committing armed robbery.

¶16 The record clearly shows that the circuit court also carefully considered the other two primary factors prior to imposing sentence. Sandles' contention that the circuit court placed "undue weight and consideration [on] … the gravity of the offense," therefore, fails. ***State v. Spears***, 227 Wis. 2d 495, 507-08, 596 N.W.2d 375 (1999) ("Imposition of a sentence may be based on one or more of the three primary factors after all relevant factors have been considered.").

¶17 Finally, Sandles contends that the circuit court "pre-empted [him] from eligibility in the [boot camp] program without a consideration of the eligibility factors enumerated by statute because it felt that the legislature would not have wanted a person convicted of the crime for which [he] was convicted to be eligible because it was a serious crime." He argues that because the crime for which he was convicted is not excluded under WIS. STAT. § 302.045(2)(c), the circuit court's "logical and legal process … was incorrect" and was, therefore, "an abuse of discretion." We disagree.

¶18 "Truth-In-Sentencing"[5] requires the circuit court to determine a convicted defendant's eligibility for boot camp in lieu of the confinement portion of the sentence. *See* WIS. STAT. § 973.01(1) and (3m). Boot camp is an alternative to the confinement portion of a sentence; it must be completed within 180 days, at which time the offender becomes eligible for parole or extended supervision. *See* WIS. STAT. § 302.045(1), (3) and (3m).

¶19 WISCONSIN STAT. § 302.045(2) provides:

> (2) …. the department may place any inmate in the challenge incarceration program if the inmate meets all of the following criteria:
>
> (a) The inmate volunteers to participate in the program.
>
> (b) The inmate has not attained the age of 30, as of the date the inmate will begin participating in the program.
>
> (c) The inmate is incarcerated regarding a violation other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.08 or 948.095.
>
> (cm) If the inmate is serving a bifurcated sentence imposed under s. 973.01, the sentencing court decided under 973.01(3m) that the inmate is eligible for the challenge incarceration program.
>
> (d) The department determines, during assessment and evaluation, that the inmate has a substance abuse problem.
>
> (e) The department determines that the inmate has no psychological, physical or medical limitations that would preclude participation in the program.

[5] "The term 'truth-in-sentencing' is short hand for the sentencing revisions enacted in 1998 that are applicable to felonies committed on or after December 31, 1999, *see* 1997 Wis. Act 283, § 419, creating WIS. STAT. § 973.01." ***State v. Champion***, 2002 WI App 267, ¶1 n.1, 258 Wis. 2d 781, 654 N.W.2d 242.

WIS. STAT. § 302.045(2). WISCONSIN STAT. § 973.01(3m) provides, in pertinent part: "When imposing a bifurcated sentence … the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible for [boot camp] … during the term of confinement in prison portion of the bifurcated sentence." WIS. STAT. § 973.01(3m). Thus, whether a defendant is eligible for boot camp is a matter of circuit court discretion. ***State v. Steele***, 2001 WI App 160, ¶9, 246 Wis. 2d 744, 632 N.W.2d 112 (the statutory phrase "sentencing discretion" regarding a convicted offender's eligibility for boot camp has the same meaning it has in imposing sentence). On appeal, our inquiry is whether discretion was exercised, not whether it could have been exercised differently. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶20 Here, the circuit court extensively discussed whether Sandles would be appropriate for boot camp. The court also explained why it found no basis for deviating from the presumptive minimum sentence of ten years under WIS. STAT. § 961.41(1m)(cm)5 and, therefore, why boot camp would not be allowed. The court concluded:

> Mr. Sandles, I've hesitated here not about whether you should go to prison or whether that should be for a substantial period of time. The answers to those questions aren't easy but I think they're relatively clear, in light of the presumptive minimum sentence that's been established by law.
>
> I hesitated here over the issue of the [boot camp] program, which in light of the minimum required sentence here is perhaps the most important thing that I have to address today and that has been the source of the princip[a]l hesitation here.
>
> I am unable to make the findings that would be required to go below the minimum sentence. The legislature has made it clear and has expressed the community concern about cocaine by establishing a 10[-] year minimum sentence. I'm not certain whether the

> legislature's primary goal here was to protect the community from you and the chance that you might take this risk again or whether the primary intent is to try to achieve general deterrence to deter other people by punishing the individuals who commit these crimes or both. I'm sure it was some of both and the bottom line is that I think it would undermine that effort to sentence you to less.
>
> I can see no reason and no basis to find that [it would] somehow benefit the community to give you an earlier chance. Maybe if you got a complete pass and didn't commit another crime, the community would benefit. But there's no way to know that you're going to do that and the community would give up something substantial and that's the effort to let people know that there are harsh consequences for any kind of cocaine dealing, particularly large scale cocaine dealing. So there has to be at least a 10[-]year minimum sentence in this case.

¶21 Prior to imposing sentence, the circuit court considered the three primary factors; gravity of the offense, character of the defendant, and the need to protect the public. "[A]s part of the exercise of its sentencing discretion," *see* WIS. STAT. § 973.01(3m), the court also considered the presumptive minimum sentence of ten years according to WIS. STAT. § 961.41(1m)(cm)5 and concluded that Sandles was not appropriate for boot camp. Thus, we conclude the circuit court reasonably exercised discretion in sentencing Sandles.

By the Court.—Judgment and order affirmed.

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