COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1236-CR **Cir. Ct. No. 2008CF3523**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL RALPH MADDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Michael Ralph Madden appeals from a judgment of conviction and an order denying his postconviction motion seeking sentence modification. Madden argues that his sentence should be reduced because a presentence investigation report was not prepared and as a result, the circuit court

did not properly account for his mental health issues and other sentencing factors. We disagree and affirm.

BACKGROUND

¶2 Madden was charged with two counts of armed robbery with a reasonable belief that he used a threat of force, Class C Felonies. *See* WIS. STAT. § 943.32(1)(b), (2) (2007-08).[1] One of the counts was later amended to robbery with the threat of force, a Class E Felony. *See* § 943.32(1)(b). The complaint alleged that Madden robbed two banks shortly after being released from prison—with one of the robberies occurring the same day as his release.

¶3 Madden initially pled not guilty by reason of mental disease or defect. The evaluating doctor, however, found that Madden's mental state at the time of the crimes would not support that plea.

¶4 Madden subsequently pled guilty to two counts of robbery with the threat of force and the matter proceeded to sentencing. On each count, the circuit court imposed terms of imprisonment consisting of five years of initial confinement and five years of extended supervision. The sentences were ordered to run consecutively to each other and to any other sentence Madden was serving at the time.

¶5 On December 17, 2009, ten months after his sentencing hearing, Madden filed a postconviction motion seeking sentence modification on grounds that the court did not have the benefit of a presentence investigation report, and as

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

such, was not fully aware of the extent of his mental health problems. The circuit court denied Madden's motion after concluding that it was conclusory as to what additional information a presentence investigation report would have provided.

¶6 On February 24, 2010, Madden filed a brief in support of his prior motion seeking sentence modification. With his brief, Madden submitted various psychiatric evaluations from 2003 and 2005 setting forth mental health diagnoses of which, he claimed, the circuit court was not fully informed. He argued that his mental health history, as detailed in the evaluations, presented a new factor warranting sentence modification. The circuit court denied Madden's motion, and this appeal follows.

ANALYSIS

A. Timeliness/New Factor

¶7 At the outset, we address the State's contention that Madden's motion for sentence modification was untimely.

¶8 There are two ways for a defendant to seek sentence modification. ***State v. Noll***, 2002 WI App 273, ¶9, 258 Wis. 2d 573, 653 N.W.2d 895. "First, a defendant can file a motion under WIS. STAT. § 973.19, which permits a defendant 'to move for modification of his sentence as a matter of right.'" ***Noll***, 258 Wis. 2d 573, ¶9 (citation omitted). Section 973.19 sets forth specific timing requirements depending on whether sentence modification is the sole issue, *see* § 973.19(1)(a), (5), or whether the "defendant desires a full blown appeal with modification of sentence as one issue," *see* ***State v. Norwood***, 161 Wis. 2d 676, 681, 468 N.W.2d 741 (Ct. App. 1991); § 973.19(1)(b).

¶9 The second route a defendant may take to seek sentence modification is to submit a motion requesting that the circuit court exercise its inherent authority to modify a sentence based on new factors. ***Noll***, 258 Wis. 2d 573, ¶11. This route is not governed by a time limitation. ***Id.***, ¶12.

¶10 Madden does not refute the State's argument that he failed to timely file his motion pursuant to WIS. STAT. § 973.19. Instead, he seeks to establish a new factor. In his reply brief, Madden asserts that his appellate counsel did not received the mental health records indicating that Madden had multiple mental health diagnoses of which the court was not fully informed until *after* his initial motion seeking postconviction relief was denied.[2]

¶11 A "'new factor' refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). Additionally, the new factor "must be an event or development [that] frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). The defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***State v. Koeppen***, 2000 WI App 121, ¶33, 237 Wis. 2d 418, 614 N.W.2d 530. We review *de novo* whether a new factor exists. ***State v. Trujillo***, 2005 WI 45, ¶11, 279 Wis. 2d 712, 694 N.W.2d 933.

[2] We note that in his opening brief, Madden seemingly conceded that the mental health records were not a new factor.

¶12 In its order denying Madden's motion, the circuit court explained that it was aware of Madden's mental health history—at sentencing, Madden's counsel advised the court that Madden had been diagnosed with schizo-affective disorder and mood disorder at the age of twenty-two and had been on medication ever since.[3] In addition, at the time of Madden's sentencing, the court had reviewed the evaluating doctor's report that was prepared in conjunction with Madden's plea of not guilty by reason of mental disease or defect. In his report, the doctor indicated that Madden knew right from wrong, even though he may have been suffering from a mental disease at the time of the robberies. Moreover, we note that Madden would have been aware of his mental health issues and could have brought the hospitalizations and psychiatric evaluations in 2003 and 2005, of which he claims the court was not aware, to the court's attention. Based on the foregoing, the circuit court properly concluded that although the additional reports may have revealed more about the nature of Madden's mental illness, they did not constitute a new factor warranting sentencing modification.

B. Exercise of Sentencing Discretion

¶13 Even if Madden's motion had been timely filed, we nevertheless conclude that the circuit court properly exercised its discretion in sentencing him. In reviewing a circuit court's exercise of its sentencing discretion, our standard of review requires us to "start with the presumption that the circuit court acted reasonably." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We have a duty to uphold a sentence on appeal if "from the facts of record it is

[3] Madden was forty-seven years old at the time of sentencing.

sustainable as a proper discretionary act." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶14 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.*** The sentencing court must identify the sentencing objectives on the record and explain how the sentence imposed advances those objectives. ***State v. Gallion***, 2004 WI 42, ¶¶40, 42, 270 Wis. 2d 535, 678 N.W.2d 197. We recognize, however, that the amount of explanation required for a sentencing decision varies from case to case. ***Id.***, ¶39.

¶15 The circuit court complied with its obligations here. In sentencing Madden, the court noted that he had used money from the robberies to purchase drugs and alcohol and that one of the robberies was committed on the same day he was released from prison. The court considered the crimes to be serious and noted that an employee at one of the banks Madden robbed believed Madden had a taser gun. It factored in the effect of the crimes on victims, indicating that these were people who were "just doing their jobs" and that as a result of Madden's actions, one of the victims has trouble sleeping, difficulty focusing, and feels nervous when unknown customers enter the building. In terms of the need to protect the public, the court stated that people need to know that when they are at their job, they are safe. The court found that it would unduly depreciate the seriousness of the offenses if it did not impose consecutive sentences. It referenced Madden's lengthy criminal record and the way the crimes had progressed over the years in terms of severity. The court acknowledged Madden's mental health and drug problems, but found that Madden was "using them as a crutch." The court did,

however, give Madden credit for his remorse and for taking responsibility for the crimes. It did not erroneously exercise its sentencing discretion.

¶16 Madden argues the circuit court insufficiently accounted for his mental health by not having a presentence investigation report prepared. As persuasive authority, Madden relies on a program requiring trial judges to order AIM (Assess, Inform, Measure) Reports in Milwaukee County for the purpose of providing information to the court in advance of sentencing. *See* 2007 Wis. Act 20, § 9101(4)(a). Madden concedes that the program was not in effect at the time of his sentencing and that it does not apply to Class E Felonies. Notwithstanding, Madden directs our attention to the program as support for his argument that without a presentence investigation report, the sentencing judge did not have an accurate picture of him at the time of his sentencing. We are not convinced.

¶17 First, a sentencing court has no obligation to order a presentence investigation report, and the decision to order one is discretionary. ***State v. Jackson***, 187 Wis. 2d 431, 439, 523 N.W.2d 126 (Ct. App. 1994); *see also* WIS. STAT. § 972.15(1) ("After a conviction the court *may* order a presentence investigation….") (emphasis added). We see no error in the court's decision not to request one here. Although Madden wishes that the circuit court would have exercised its discretion differently and placed more emphasis on his mental health history, this does not constitute an erroneous exercise of discretion. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (explaining that the weight attributed to sentencing factors is a discretionary determination to be made by the sentencing court); ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (reviewing court's inquiry is whether discretion was exercised, not whether it could have been exercised differently).

¶18 We also reject Madden's contention that the sentence was unduly harsh. A sentence is unduly harsh when it '"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.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Here, the penalty imposed on each charge was within the permissible range set by statute and thus is neither shocking nor disproportionate to the offense. *See* WIS. STAT. §§ 943.32(1)(b); 939.50(3)(e); 973.01(2)(b)5.

C. Ineffective Assistance

¶19 To the extent Madden is arguing he received ineffective assistance of counsel because his attorney failed to request a presentence investigation report, his claim fails. "'To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice.'" ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). To prove prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** (internal quotation marks and citation omitted). Madden cannot show prejudice. Even if the circuit court had been presented with an expanded version of Madden's mental health history in the form of a presentence investigation report, he has not shown that there was a reasonable probability that he would have received a different sentence.

By the Court.—Judgment and order affirmed.

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