

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP662-CR

Cir. Ct. No. 2009CF152

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONNELL D. FITZPATRICK,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Lonnell D. Fitzpatrick appeals from a judgment of conviction entered upon his guilty pleas to two counts of second-degree sexual assault of a child. He also appeals from an order denying his motion for postconviction relief. The only issue is whether the circuit court erroneously

exercised its discretion by imposing consecutive rather than concurrent sentences for the two offenses. We reject Fitzpatrick's arguments and affirm the judgment and order.

I.

¶2 According to the criminal complaint, Fitzpatrick and a companion approached two fifteen-year-old girls, E.S. and B.A., outside of a convenience store. Fitzpatrick took B.A.'s cell phone from her hands, then refused to return it unless he received money or sexual favors from the girls. E.S. and B.A. followed Fitzpatrick to a wooded area across the street from the store. There, Fitzpatrick forcibly engaged E.S. in both mouth-to-penis sexual intercourse and an act of penis-to-vagina sexual intercourse.

¶3 Pursuant to a plea bargain, Fitzpatrick pled guilty to two counts of second-degree sexual assault of a child. In exchange, the State agreed to recommend prison terms without specifying recommended lengths for the periods of incarceration. The State also moved to dismiss penalty enhancers alleging that he committed the offenses as a habitual criminal and to dismiss four other felony charges arising out of the incident.

¶4 At sentencing, the circuit court considered the State's request for prison terms of unspecified length and Fitzpatrick's request for concurrent ten-year sentences. The circuit court also considered a presentence investigation report that included a recommendation for consecutive eighteen-year sentences. The circuit court concluded that prison terms were appropriate, and it imposed two consecutive twenty-two year sentences, each bifurcated as twelve years of initial confinement and ten years of extended supervision. The circuit court denied Fitzpatrick's motion for resentencing relief, and he appeals.

II.

¶5 Fitzpatrick contends that the circuit court erroneously exercised its sentencing discretion by imposing consecutive sentences. Our standard of review is well-settled. Sentencing lies within the circuit court’s discretion, and appellate review is limited to considering whether discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. “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, 231, 688 N.W.2d 20, 23.

¶6 To properly exercise sentencing discretion, the circuit court must consider three primary sentencing factors, namely, “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, 606, 712 N.W.2d 76, 82. In addition to these primary factors, the circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See Gallion*, 2004 WI 42, ¶43 & n.11, 270 Wis. 2d at 558 & n.11, 678 N.W.2d at 207 & n.11.

¶7 The circuit court must specify the sentencing objectives on the Record. *Id.*, 2004 WI 42, ¶40, 270 Wis. 2d at 556, 678 N.W.2d at 207. “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.” *Id.*, 2004 WI 42, ¶40, 270 Wis. 2d at 556–557, 678 N.W.2d at 207. Further, the circuit court must indicate how the sentencing factors it considered “fit the objectives and influence the [sentencing] decision.” *Id.*, 2004 WI 42, ¶43, 270 Wis. 2d at 558, 678 N.W.2d at 207.

¶8 Fitzpatrick complains that the circuit court erred because it “failed to apply the three primary sentencing factors to its determination of whether to impose concurrent or consecutive sentences.” Fitzpatrick misunderstands the circuit court’s obligations. “A [circuit] court properly exercises its discretion in imposing consecutive or concurrent sentences by considering the same factors as it applies in determining sentence length.” *State v. Berggren*, 2009 WI App 82, ¶46, 320 Wis. 2d 209, 239, 769 N.W.2d 110, 124. The circuit court has no obligation to explain separately why it chose consecutive sentences or to justify why it did not impose concurrent dispositions. *See id.*, 2009 WI App 82, ¶45, 320 Wis. 2d at 239, 769 N.W.2d at 124.

¶9 Here, the circuit court thoroughly discussed the sentencing factors it considered relevant. It found that the offenses were “extremely serious,” noting that Fitzpatrick committed the two sexual assaults in a public place and that the assaults victimized not only E.S. but also “B.[A]., who was forced to watch her friend assaulted.” In considering character, the circuit court took into account that Fitzpatrick had twenty-five prior criminal convictions, including “various domestic abuse, assault cases, assaults with injury, domestic abuse assault, [and] violation of a no contact” order. *See State v. Fisher*, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 449, 702 N.W.2d 56, 64 (extensive criminal record is evidence of character). Fitzpatrick’s history of violent crime persuaded the circuit court that he “lack[s] ... respect for authority” and “for the rights of others.” Turning to the need to protect the public, the circuit court stated that Fitzpatrick “acted on [his] impulses without any regard for the consequences.” The circuit court observed that he committed the offenses while on probation and therefore the circuit court concluded that supervision is “not a sufficient deterrent.” The circuit court further observed that Fitzpatrick previously served short periods of incarceration and that

those short sentences were also “not a sufficient deterrent.” The circuit court found that Fitzpatrick “present[s] a severe risk to the community.”

¶10 The circuit court considered a variety of additional factors. It noted that, despite evidence of past employment, Fitzpatrick owed \$30,000 in child support for his five children, that he never completed high school, and that at times he had “earn[ed] a living by dealing in drugs.” The circuit court also considered evidence of Fitzpatrick’s alcohol and drug abuse and determined that he had “severe treatment needs best addressed in a secure setting.”

¶11 The circuit court identified protection of the community as one sentencing goal. In the circuit court’s view, Fitzpatrick requires “long-term treatment in an institution to address [his] treatment needs,” and he presents “a high risk to the community” until he addresses those needs. The circuit court also determined that the sentences must be sufficient to punish Fitzpatrick, reminding him again that the offenses were serious and had a harmful impact on both E.S. and B.A.

¶12 The Record reflects that the circuit court discussed relevant factors and identified appropriate sentencing objectives. In light of those considerations, the circuit court rejected Fitzpatrick’s request for concurrent sentences, explaining that “these are two separate offenses with respect to this victim. There is no reason these sentences should be concurrent.” We reject as meritless Fitzpatrick’s contention that the circuit court failed to consider proper factors when imposing consecutive sentences.

¶13 Fitzpatrick further complains, however, that the circuit court “applied a presumption of consecutive sentences ... merely because there were two different sexual acts.” In support, he fastens on to the circuit court’s statement at

sentencing that “there is no reason the sentences should be concurrent” and the circuit court’s later statement when denying postconviction relief that “the particularly egregious and debasing behavior in assaulting the victim in public, not once but twice, mandated consecutive sentences.” These remarks, he contends, reflect the circuit court’s erroneous “assum[ption] that because there were two different assaults ... the sentences must be served consecutively unless there was a reason that [they] should be served concurrently.”

¶14 Fitzpatrick misconstrues the Record. The circuit court’s use of an imperative does not suggest a belief that consecutive sentences were presumptively required. Rather, the circuit court’s words expressed its view that consecutive sentences were essential to meet the goals of public protection and punishment, given the facts of the crimes and Fitzpatrick’s extensive criminal history, treatment needs, and high risk of reoffending. While Fitzpatrick may be disappointed that the circuit court did not reach a different conclusion, we are satisfied that the circuit court’s remarks reflect an appropriate exercise of discretion. *See Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20–21 (1981) (our inquiry is whether circuit court exercised discretion, not whether discretion could have been exercised differently).

¶15 Finally, we reject Fitzpatrick’s contention that the circuit court’s decision to impose consecutive sentences is improper because it does not comport with the ABA Standards for Criminal Justice – Sentence § 18.6.5(c)(1)–(ii) (3rd ed. 1994). Those standards do not govern sentencing decisions in Wisconsin. *See State v. Paske*, 163 Wis. 2d 52, 67–68, 471 N.W.2d 55, 61 (1991).

By the Court.—Judgment and order affirmed.

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

