

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 23, 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. 2010AP1103-CR**

**Cir. Ct. No. 2009CF609**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SAMUEL KATHERINE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Samuel Katherine appeals from a judgment of conviction, entered upon his guilty plea, of one count of burglary to a building or dwelling. He also appeals from an order denying his motion for resentencing.

Katherine contends that the circuit court erroneously exercised its sentencing discretion. We reject this argument and affirm the judgment and order.

¶2 Katherine was arrested after police responded to a call about a suspicious person walking with a flat-screen television. While investigating, an officer noticed a television covered by a blanket behind two city trash carts in an alley. Footprints in the fresh snow led police to Katherine. Later that day police took a burglary report—a television was reported missing and a partial footprint at the scene appeared to match Katherine’s boots. In addition, when police found Katherine, he had a screwdriver that matched pry marks around the victim’s door.

¶3 Katherine was charged with burglary. In exchange for his guilty plea, the State agreed to leave the length of the sentence up to the circuit court. Katherine conceded at sentencing that he should receive some prison time, arguing for no more than three years’ initial confinement. The court sentenced Katherine to four years’ initial confinement and four years’ extended supervision out of a maximum possible twelve years and six months’ incarceration.

¶4 Katherine moved for postconviction relief, arguing that mitigating factors justified a lower sentence, the court failed to properly consider his character, and the court failed to adequately explain its sentence. The court denied the motion. Katherine appeals, reiterating the arguments in his postconviction motion and claiming the court’s denial of his motion is too conclusory.

¶5 Sentencing is committed to the circuit court’s discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has a burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. *See State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with a presumption that the circuit court

acted reasonably. *Id.* We do not interfere with a sentence if discretion was properly exercised. *See id.* at 418-19.

¶6 In its exercise of discretion, the circuit court is to identify the objectives of its sentence. *Gallion*, 270 Wis. 2d 535, ¶40. These objectives include but are not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Id.* In determining the sentencing objectives, we expect the court to consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the circuit court's discretion. *Id.*

¶7 Katherine contends that sentence modification is warranted because (1) mitigating factors support a lighter sentence but were not properly incorporated; (2) his character was not considered; (3) the court did not explain the length of the sentence or acknowledge the parties' recommendations; and (4) the court did not adequately link the sentence to sentencing objectives.

¶8 We reject outright the notion that the court failed to consider mitigating factors or Katherine's character. While he asserts that the circuit court "was overly harsh in its criticisms and unclear to what extent any positive attributes influenced the sentence" and that the court "refused to view Mr. Katherine's character in a positive light[,]," the record does not bear out these claims.

¶9 Katherine's prior record includes sixteen convictions going back to 1986 or 1989. Seven of the convictions are felonies, including burglaries in 1999 and 2002. In light of this record, the circuit court told Katherine, "there's every

argument here that says to lock you up and throw away the key. The community would be a lot safer.” However, the court made note of Katherine’s professed revelation that he finally recognized his need to be off drugs, his realization he needs a plan for when he gets out of prison, and the fact that he had expressed remorse and apologized to the victim. It commented, “I will give you some credit for that .... Again, I think that there is room here for the argument that you get the maximum, but I do think that there is some of those other factors that I’ve indicated that can temper that a bit.” When the sentencing is viewed in its entirety, it is evident that the court considered the mitigating factors it deemed appropriate, as well as Katherine’s character. It is likewise evident that those factors and positive character traits saved Katherine from a maximum sentence.

¶10 We also reject the notion that the court failed to consider the parties’ sentence recommendations. On appeal, Katherine asserts that “[a]ll parties suggested a lenient disposition that emphasized rehabilitation over punishment.” However, this characterization of the record borders dangerously on being outright false.

¶11 The State made no specific recommendation on length and, therefore, it neither requested a lenient nor a harsh disposition. It argued that “prison is appropriate in this case. The defendant has been to prison before. And I think as a punishment factor should go to prison again.” The victim asked the court to consider whether Katherine had ever had any positive result from rehabilitation, and to “try to run with that[,]” but also commented that he did not want Katherine out on the street, looking for the next opportunity to commit a crime. Only Katherine made any specific recommendation for disposition, seeking initial confinement of no more than thirty-six months.

¶12 Katherine further complains that the circuit court failed to explain the length of the sentence it imposed. However, the court told Katherine that “I think you have to know that as you come back into court again and again, you are not going to be getting lighter sentences .... You got four years [of initial confinement and two years’ extended supervision] for your last burglary. I certainly don’t think you should be getting less at this point.”<sup>1</sup> This comment specifically explains the basis for the sentence length.

¶13 Katherine also complains that the circuit court allowed the protection objective to supersede rehabilitation efforts.<sup>2</sup> However, the court emphasized a need to protect the public and to deter Katherine from future criminal exploits, while still accounting for his rehabilitative needs. The court explained, “You have problems. You have to work on those problems. But if you can’t take care of those problems, the public shouldn’t suffer because of it.” Thus, the court imposed a sentence slightly above what Katherine himself thought appropriate, and with slightly more supervision time than previously received, to balance all three objectives.

¶14 Katherine’s sentence is the product of a proper exercise of discretion. Accordingly, there was no basis for granting the postconviction motion

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<sup>1</sup> Counsel, who cited this portion of the transcript while claiming the court did not explain the length of the sentence, vexes this court with her technique, utilized more than once in the appellant’s brief, of claiming the court has erroneously exercised its sentencing discretion while simultaneously quoting portions of the transcript that directly undermine her arguments.

<sup>2</sup> Katherine also notes that the court rejected probation in the interest of the community’s need for protection. If there is an argument that the court improperly rejected probation, we note that Katherine himself acknowledged that probation was inappropriate in light of his record.

for resentencing, however brief the court's reasoning, and there is no reason for this court to reverse the judgment or order.

*By the Court.*—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

