COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1452-CR **Cir. Ct. No. 2008CF1722**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLESTON ANTONIO BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and RICHARD J. SANKOVITZ, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Charleston Antonio Brown appeals from a judgment convicting him of being a felon in possession of a firearm and possession of cocaine, second or subsequent offense. He also appeals the order

denying his motion for postconviction relief. Brown contends that the circuit court erroneously exercised its sentencing discretion by failing to consider mitigating factors and his character and by failing to link the length of his sentence with sentencing objectives. He further asserts that the circuit court's order requiring him to pay the DNA surcharge should be vacated and that the circuit court erred when it denied his postconviction motion. We reject Brown's arguments and affirm the judgment and order.

I. BACKGROUND

¶2 Brown was arrested on April 3, 2008. At the time of the arrest, he was carrying $1976 in cash; a loaded .38-caliber handgun; 27.86 grams of marijuana; and 6.69 grams of cocaine base. Brown was charged with possession of a firearm by a felon; possession of cocaine, second or subsequent offense; possession of tetrahydrocannabinols (marijuana), second or subsequent offense; and carrying a concealed weapon.

¶3 Brown pled guilty to being a felon in possession of a firearm and to possession of cocaine, second or subsequent offense. After entering a guilty plea, Brown failed to appear for his sentencing hearing.

¶4 The court issued a bench warrant and ordered that Brown's bail be forfeited. Over a year later, Brown was arrested on new charges, including two counts of bail jumping related to the instant case and a felony. This case proceeded to sentencing.

¶5 At the sentencing hearing, in accordance with the terms of the plea agreement, the State agreed to dismiss and read in the counts of possession of tetrahydrocannabinols (marijuana), second or subsequent offense, and carrying a

concealed weapon. In addition, the State agreed to recommend a five-year sentence on the felon in possession of a firearm charge, broken down as two-and-one-half years of initial confinement and two-and-one-half years of extended supervision, and a concurrent three-and-one-half-year sentence on the possession of cocaine charge, broken down as one-and-one-half years of initial confinement and two years of extended supervision with a six-month driver's license suspension. The defense requested a four-year sentence comprised of two years of initial confinement and two years of extended supervision.

¶6 The circuit court heard arguments by the parties as well as a statement by Brown before rendering its sentence. On the felon in possession of a firearm charge, the court imposed a four-year sentence comprised of two-and-one-half years of initial confinement and one-and-one-half years of extended supervision. The court ordered Brown to provide a DNA sample and pay the surcharge but explained to Brown that if he had previously paid the surcharge, "all you have to do is write me a letter, and I will vacate the surcharge from the orders I impose in this case." On the possession of cocaine charge, the court imposed a concurrent sentence of two-and-one-half years comprised of fifteen months of initial confinement and fifteen months of extended supervision.

¶7 Brown filed a motion for postconviction relief requesting that the circuit court modify his sentence and vacate the order requiring him to pay a DNA surcharge. In a written order, the court denied Brown's motion. He now appeals.

II. ANALYSIS

A. Exercise of Sentencing Discretion

¶8 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 the 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, and we do not substitute our preference merely because we might have imposed a different sentence, *see* ***Gallion***, 270 Wis. 2d 535, ¶18.

¶9 In its exercise of discretion, the circuit court is to identify the objectives of its sentence. ***Id.***, ¶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.***

¶10 Brown contends that sentence modification is warranted because: (1) mitigating factors support a lighter sentence; (2) his character was ignored; and (3) the court did not adequately link the sentence to its objectives.

¶11 At the outset, we reject Brown's claim that mitigating factors and his character were not considered. In its sentencing remarks, the circuit court

referenced the fact that Brown cooperated with the police at the scene and took responsibility for his actions by pleading guilty. It explained, however, that Brown's failure to appear at the initial sentencing hearing diminished the effect of these actions. His failure to appear, the court found, said something about Brown's willingness to follow the rules: "If when the going gets tough, it appears you turn the rules to your own interest. That's a sign of someone who is a cheat on the law if the circumstances require [it]." While Brown's brief lists a multitude of facts he believes were relevant, we expect the circuit court to discuss only the factors it deems relevant—not every item counsel can identify. *See* ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993).

¶12 Additionally, Brown argues that the circuit court did not link the length of his sentence to the sentencing factors and objectives. The amount of necessary explanation varies from case to case. ***Gallion***, 270 Wis. 2d 535, ¶39. "On appeal, we will 'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***Lechner***, 217 Wis. 2d at 419 (quoting ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971)). The exercise of discretion does not lend itself to "mathematical precision," nor do we require the recitation of "'magic words.'" ***Gallion***, 270 Wis. 2d 535, ¶49.

¶13 Our review of the record satisfies us that the circuit court properly exercised its sentencing discretion. The court's comments reflect objectives of protecting the community and punishing Brown. The circuit court considered the severity of Brown's offenses, concluding that they were worse than average:

> You were involved in drug running, and it was armed drug running, and that's just a recipe for disaster. You put the gun on you because you knew people rip off people who are running drugs, either to get the drugs, or to get the cash. And you put that gun on your person because

> you intended to use it if somebody was going to try to take your drugs from you or your money from you.
>
> That's how so many of the shootings in our city start. That's how so many shootings start and somebody who doesn't deserve to get shot ends up getting hurt—bystanders, people who come on to the scene and try to stop it. It even puts the police at risk of being shot.

The court also commented on the large amount of drugs Brown was carrying at the time of his arrest.

¶14 The circuit court found that Brown had not learned his lesson despite having prior drug-related convictions. The court stated:

> The fact that you were willing at this point in your life with these old convictions to resort to the easy money rather than to get a job tells me that there is still a substantial chance of you going out and committing a crime if the circumstances were tough enough.
>
> It makes a difference to me that you have been convicted of drug crimes before. You're the person who is supposed to have learned from this lesson, and you haven't, and that makes me wonder about the chance of you committing another crime.

¶15 In its written order denying Brown's postconviction motion, the circuit court elaborated on the reasoning behind its decision to sentence Brown to an initial confinement period of two-and-one-half years rather than the two-year term Brown proposed. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The circuit court has an additional opportunity to explain its sentence when challenged by postconviction motion.). The court explained that the need to punish Brown for armed drug running was the factor that drove its sentencing calculus and that, in this regard, the two-year term proposed by Brown was insufficient given where he fell in the range of sentences imposed on others convicted of being a felon in possession of a firearm. The court held fast to its

initial determination that a two-and-one-half-year term of initial confinement was appropriate, offering that such a term balanced the above-average severity of Brown's crimes with the average likelihood that Brown would reoffend. In setting forth its rationale, the court acknowledged positive mitigating factors and character traits but concluded that they were not as powerful a determinant of the likelihood that Brown would reoffend as were the factors it had discussed on the record during the sentencing hearing.

¶16 The circuit court's sentencing remarks coupled with the explanation set forth in its written order denying Brown's motion for postconviction relief more than adequately explain the factors underlying its sentencing decision. The court properly exercised its discretion in sentencing Brown.

B. Imposition of DNA Surcharge

¶17 Brown argues that the circuit court's order requiring him to pay the DNA surcharge should be vacated because "[t]he offenses did not relate to any crime where his DNA would be or had been needed" and because he was previously ordered to provide a DNA sample in an unrelated case. As such, he contends that there was no need for him to provide a subsequent sample and pay the attendant surcharge.

¶18 At issue then is whether the trial court erroneously exercised its discretion when it imposed the DNA surcharge. We considered this same issue in ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, and concluded that reversal was required because the record did "not reflect a sufficient exercise of discretion to support the surcharge." *See* ***id.***, ¶4. ***Cherry***

recognized that if a defendant is convicted of a felony that does not involve one of the sex crimes identified in WIS. STAT. § 973.046(1r) (2009-10)[1], then it is within the circuit court's discretion to order the defendant to pay the $250 DNA surcharge. *See* ***Cherry***, 312 Wis. 2d 203, ¶5 (citing WIS. STAT. § 973.046(1g)). In order to properly exercise that discretion, a circuit court must "set forth on the record the reasoning underlying its exercise of discretion." ***Id.***, ¶7.

¶19 ***Cherry*** recognized that although WIS. STAT. § 973.046(1g) gives a circuit court discretion to impose the DNA surcharge, the statute does not set forth factors for the circuit court to use in exercising that discretion. *See* ***Cherry***, 312 Wis. 2d 203, ¶8. Notwithstanding, ***Cherry*** declined to "attempt to provide a definite list of factors for the [circuit] courts to consider in assessing whether to impose the DNA surcharge" so as not to limit the factors the circuit court could consider. ***Id.***, ¶10.

¶20 With these legal standards in mind, we consider the circuit court's exercise of discretion in this case. We first note, however, that the fact that Brown may have previously provided a DNA sample is of no consequence. *See* ***State v. Jones***, 2004 WI App 212, ¶5, 277 Wis. 2d 234, 689 N.W.2d 917 (WISCONSIN STAT. § 973.047, which obligates the circuit court to require convicted felons to provide DNA specimens, "makes no exception for persons who have already submitted DNA samples.").

¶21 The circuit court imposed a DNA surcharge when it sentenced Brown finding that it was warranted in light of Brown's record and the severity of

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the offenses. In doing so, the court explained to Brown that if he had previously paid the surcharge, "all you have to do is write me a letter, and I will vacate the surcharge from the orders I impose in this case."[2] In its order denying Brown's postconviction motion, the court further explained:

> As I reviewed the transcript of my sentencing remarks, and particularly the passage regarding the imposition of the DNA surcharge on Mr. Brown, two thoughts occurred to me: First, I did give reasons why I imposed the surcharge ("Given your record and the severity of this [offense], I will order that you pay the DNA surcharge"), but, second, my comments were clipped, as though we were in a rush to complete the hearing, perhaps because of the congestion of the calendar, or the time of day.
>
> I believe Mr. Brown would benefit from a more detailed explanation for why he must pay the DNA surcharge than I gave on the record when I sentenced him. I believe it to be a proper exercise of the court's discretion to impose the DNA surcharge in a case where there is a greater likelihood than usual for the State to need to use the DNA to detect or deter future crimes. In a case in which a defendant has built up a felony record or has committed an offense that is more serious than the typical felony, there is a greater likelihood of the State having to use the defendant's DNA to detect another crime, or merely to use the defendant's DNA to deter the defendant from committing further crimes. In Mr. Brown's case, these circumstances are present, and accordingly, I believe it appropriate to require him to pay for taking and keeping his DNA specimen.

(Record citation omitted.)

¶22 As noted, ***Cherry*** does not set forth a definitive list of factors that courts must consider when deciding whether to impose DNA surcharges; rather, a

[2] Contrary to the representations in his brief, Brown never offered proof that he paid the surcharge.

court can consider "any other factors [it] finds pertinent." ***Id.***, 312 Wis. 2d 203, ¶10. Under the circumstances presented and in light of Brown's felony record, we conclude it was acceptable for the court to account for the greater likelihood that the State would need to use Brown's DNA to detect or deter future crimes.

¶23 Brown asserts that the circuit court, in its postconviction order, imposed stricter conditions and a higher burden on Brown than it did initially when all that was requested was a letter proving that Brown had previously paid the surcharge. He submits that the new conditions amount to a new sentencing rationale, for which he needed to be present. We disagree. The court simply was providing additional explanation as it is entitled to do. *See* ***Fuerst***, 181 Wis. 2d at 915.

¶24 In this case, the circuit court considered case-specific facts and arguments in determining an appropriate sentence for Brown, which included imposing the DNA surcharge.

C. Denial of Postconviction Motion

¶25 Brown last asserts that the circuit court improperly denied his postconviction motion because he "identified the misuses of discretion entitling him to a reduction in sentence" and further identified several aspects of the court's sentencing decision that were contrary to established legal principles. For the reasons set forth above, there was no basis for granting Brown's postconviction motion for sentence modification; consequently, there is no reason for this court to reverse.

By the Court.—Judgment and order affirmed.

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