COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1152-CR **Cir. Ct. No. 01CF000901**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES E. CARTHAGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Charles Carthage appeals sentences on two counts of false imprisonment, contrary to WIS. STAT. § 940.30,[1] one count of violation of a

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

domestic abuse injunction, contrary to WIS. STAT. § 813.12(8), and one count of endangering safety by use of a dangerous weapon, contrary to WIS. STAT. § 941.20(1)(c). The circuit court sentenced him to the maximum terms of imprisonment on both false imprisonment counts: five years' imprisonment comprised of two years' initial confinement followed by three years' extended supervision, to be served consecutively. Carthage argues a new standard of review should be adopted that enables us to review the justice and appropriateness of sentences. He also claims the circuit court erroneously exercised its discretion because it did not explain its reasons for imposing the maximum, consecutive bifurcated sentences for these counts. Finally, Carthage argues his sentences are excessive. We affirm.

BACKGROUND

¶2 On October 8, 2001, Carthage violated a domestic abuse restraining order by going to his ex-girlfriend's (Mary Saldana) apartment complex. One of the building's tenants, Tracy Cornelius, opened her front door to check her mail and unexpectedly saw Carthage standing outside her door. Carthage then forced his way into Cornelius's apartment by brandishing a firearm and directed her to Saldana's back door. He forced Cornelius to knock on Saldana's door and announce herself. When Saldana opened the door, Carthage pushed Cornelius into the apartment. Saldana saw Carthage had a gun. Carthage asked if anyone else was in the apartment, and Saldana answered that her roommate, Stephanie Kumber, was sleeping in a bedroom. Carthage apparently blamed Kumber for the end of his relationship with Saldana. Carthage went into Kumber's bedroom, pointed the gun at her head, told her to get up, and pushed her onto a couch in the room where Saldana and Cornelius were located.

¶3 Carthage then used his gun to direct all three women downstairs into the apartment's basement bedroom. While he pointed the gun at Kumber and Saldana, he told Saldana to bind and gag Kumber and Cornelius. Saldana complied, and Carthage and Saldana then went upstairs to talk. Carthage still wielded the firearm, and Saldana cried, fearing for her safety. While Carthage and Saldana were talking, Kumber and Cornelius managed to free themselves from the restraints. Carthage heard noises from the basement and ran downstairs, but Kumber and Cornelius had already fled the apartment out a back door. When Carthage ran downstairs, Saldana also fled the apartment through the front door. The police were contacted and they arrested Carthage shortly thereafter.

¶4 The State charged Carthage with three counts of false imprisonment, three counts of endangering safety by use of a dangerous weapon, one count of violating a domestic abuse injunction, one count of kidnapping, and one count of armed burglary. Pursuant to a plea agreement, Carthage pled no contest to two counts of false imprisonment, one count of endangering safety by use of a dangerous weapon, and one count of violating a domestic abuse injunction. The rest of the charges were dismissed but read into the record at sentencing.

¶5 The circuit court eventually sentenced Carthage to a ten-year term of imprisonment, comprised of two years' initial confinement followed by three years' extended supervision on each of the false imprisonment charges to be served consecutively. Regarding the endangering safety by use of a dangerous weapon and the violation of a domestic abuse injunction, the court sentenced Carthage to nine months in jail on each count to be served concurrently with the other sentences. Carthage appeals.

DISCUSSION

¶6 Sentencing is a discretionary decision left to the circuit court. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). We will not disturb a sentence unless there has been an erroneous exercise of discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). A circuit court properly exercises its discretion if it applies the proper legal standards to the facts of record, or to facts that can reasonably be inferred from the record, using a logical rationale. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). "We are reluctant to interfere with the sentence the circuit court has imposed, for the circuit court is in the best position to consider the relevant factors and the demeanor of the defendant." ***Spears***, 227 Wis. 2d at 506. Accordingly, this court begins with the presumption that the circuit court acted reasonably in imposing the sentence. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998).

¶7 The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the need for protection of the public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The trial court may attach varying weight to each factor, ***State v. Larsen***, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987), and may base its sentence on any one or more of the three primary factors after all have been considered. ***Spears***, 227 Wis. 2d at 507-08.

¶8 The secondary factors a sentencing court may consider include: the vicious or aggravated nature of the crime; the results of a presentence investigation; the degree of the defendant's culpability; the length of pretrial detention; the defendant's criminal record, history of undesirable behavior patterns, demeanor at trial, age, educational background, employment record,

personality, character and social traits; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; and the rights of the public. ***Harris***, 119 Wis. 2d at 623-24. The sentencing court does not have to address each of these factors. ***Spears***, 227 Wis. 2d at 507.

¶9 Carthage argues our review of sentences should be broader than the erroneous exercise of discretion standard, particularly because the truth-in-sentencing law removes the safeguard of parole authority. Carthage directs us to ***State v. Tuttle***, 21 Wis. 2d 147, 151, 124 N.W.2d 9 (1963), where the supreme court held that it has the discretionary power to reverse a sentence when it appears from the record "that it is probable that justice has for any reason miscarried." ***Id.***; *see also* ***McCleary v. State***, 49 Wis. 2d 263, 273, 182 N.W.2d 512 (1971). Carthage also points us toward WIS. STAT. § 752.35,[2] where the legislature provided the court of appeals the same discretionary power of reversal. From this power, he claims we should independently review sentences to analyze their appropriateness and ensure they comport with principles of justice. However, we recently affirmed the erroneous exercise of discretion standard of review for

[2] WISCONSIN STAT. § 752.35 states:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

examining sentencing decisions under truth-in-sentencing. ***State v. Gallion***, 2002 WI App 265, ¶¶11-16, 258 Wis. 2d 473, 654 N.W.2d 446.

¶10 Moreover, Carthage overlooks the fact that appellate courts' power of discretionary reversal should be used reluctantly and only in exceptional cases. *See* ***Garcia v. State***, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976). Generally speaking, we will exercise this power only when the integrity of the administration of criminal justice is called into question. *See* ***id.*** at 655-56. This power was not meant to afford us the opportunity to usurp the sentencing discretion of the circuit courts in all cases on the theory that we are in a better position to dispense justice. Be that as it may, if in a particular case we elect to exercise our discretionary power of reversal in the interest of justice, we must first determine the propriety of the circuit court's decision on the basis of whether it erroneously exercised its discretion. *See* ***State v. McConnohie***, 113 Wis. 2d 362, 368, 334 N.W.2d 903 (1983).

¶11 Here, the circuit court properly exercised its discretion. The court considered the gravity of the offense, the character of the offender, and the need for protection of the public. These are the appropriate factors. *See* ***Sarabia***, 118 Wis. 2d at 673. The circuit court's decision ultimately rested on the gravity of the offense. It concluded Carthage required the maximum sentence because of the seriousness of the offense and that the circumstances surrounding the offense were aggravated because he was armed and under a domestic abuse injunction. This was an appropriate exercise of discretion. *See* ***Spears***, 227 Wis. 2d at 507-08.

¶12 Carthage suggests the circuit court erroneously exercised its discretion because it failed to explain its reasons for imposing the maximum, consecutive bifurcated sentences. He claims ***McCleary*** requires the sentencing

court to state its "reasons why a lengthy, near-maximum sentence was appropriate." ***McCleary***, 49 Wis. 2d at 282. Even if ***McCleary*** places an additional burden on the sentencing court when it imposes a maximum sentence, it was complied with here. In ***McCleary***, the supreme court concluded the legislature intended maximum sentences to be reserved only for the more aggravated violations of the statutes. ***Id.*** at 275. The circuit court in this case found the circumstances of the crime to be seriously aggravated because Carthage was under a domestic abuse injunction filed by Saldana and committed these crimes while armed. The court explained this finding to Carthage and these were the details upon which it sentenced Carthage to the maximum term of imprisonment.

¶13 Finally, Carthage claims the sentences are excessive under all of the circumstances of the case. Carthage argues a single bifurcated sentence with consecutive probation, or probation with a lengthy period of conditional jail time, would be a more appropriate sentence because it constitutes the least degree of custody consistent with the goals of sentencing. *See* ***id.*** at 276. A sentence is excessive if it so "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." ***Ocanas***, 70 Wis. 2d at 185. Given the circumstances of the case, the sentence is not so unusual or disproportionate so as to shock public sentiment.

¶14 Having determined that the circuit court did not erroneously exercise its discretion, and that the sentence does not shock public sentiment, we nonetheless decline Carthage's request to reverse the circuit court's imposition of the maximum consecutive bifurcated sentences based upon our discretionary power of reversal. Under the facts of this case, we cannot say justice has

miscarried; consequently, exercise of our discretionary power of reversal is not warranted. Carthage's sentence stands.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.