

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 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. 2010AP1896-CR

Cir. Ct. No. 2009CF4924

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK STEVEN MARKER,

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. Mark Steven Marker appeals the judgment entered on his guilty plea to first-degree recklessly endangering safety, *see* WIS. STAT. § 941.30(1), and the order denying his motion for postconviction relief. Marker

claims that the circuit court erroneously exercised its discretion when it sentenced him. We disagree and affirm.

I. BACKGROUND

¶2 Marker pled guilty to first-degree recklessly endangering safety; in exchange, the State dismissed the “while armed” penalty enhancer. In pleading guilty, Marker agreed that the allegations in the criminal complaint could be used as a factual basis.

¶3 As set forth in the complaint, Marker stabbed the victim, who was a friend, during an argument. A witness relayed to police that Marker had told the victim to leave the residence they were both in and the victim refused. The victim then took off his jacket as if he was getting ready to fight at which point Marker stepped into the kitchen, grabbed a steak knife, and stabbed him.

¶4 At sentencing, the State recommended an unspecified amount of prison time. The defense asked for an imposed and stayed prison sentence and requested that Marker be placed on probation, during which time he could obtain treatment to address his rehabilitation needs. The circuit court ultimately imposed an eight-year sentence broken down as three years’ initial confinement and five years’ extended supervision. In his postconviction motion, Marker argued that the circuit court erroneously exercised its discretion during sentencing and sought sentence modification. The circuit court denied Marker’s postconviction motion without a hearing, and he now appeals.

II. ANALYSIS

¶5 Marker claims the circuit court erroneously exercised its discretion when it sentenced him by failing to properly weigh his culpability and character.

He asserts that the court did not give him enough credit for the fact that both he and the victim had been drinking excessively when this incident occurred and that he became “unwittingly involved.” As it relates to his character, Marker contends that the court was overly critical of his alcoholism. Marker also argues that the circuit court did not explain the objective of the sentence imposed nor did it clearly explain the purpose or goal in choosing the length of his sentence.

¶6 Sentencing is within the circuit court’s discretion, and our review is limited to determining whether it erroneously exercised that discretion. *McCleary v. State*, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971); *see also State v. Gallion*, 2004 WI 42, ¶68, 270 Wis. 2d 535, 569, 678 N.W.2d 197, 212 (“circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision”). A circuit court erroneously exercises its sentencing discretion “only where the sentence 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.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶7 The three primary factors a sentencing court must consider are the gravity of the offense, the defendant’s character, and the need to protect the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The sentencing court may also consider a variety of secondary factors including the defendant’s past record of criminal offenses; history of undesirable behavior patterns; character and social traits; and need for close rehabilitative control. *See id.*, 119 Wis. 2d at 623–624, 350 N.W.2d at 639.

¶8 Marker argues that the circuit court was required to directly explain how its analysis of the sentencing factors translated into a specific number of years of confinement and extended supervision. Marker is not entitled to this degree of specificity.

¶9 A circuit court properly exercises its sentencing discretion when it makes a statement on the record detailing its reasons for “selecting the particular sentence imposed.” *Gallion*, 2004 WI 42, ¶5 n.1, 270 Wis. 2d at 544 n.1, 678 N.W.2d at 201 n.1 (citation omitted). It is not, however:

require[d] ... to provide an explanation for the precise number of years chosen. *McCleary* mandates that the court’s sentencing discretion be exercised on a “rational and explainable basis[,]” and such discretion “must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.”

State v. Taylor, 2006 WI 22, ¶30, 289 Wis. 2d 34, 52, 710 N.W.2d 466, 476 (quoting *McCleary*, 49 Wis. 2d at 276–277, 182 N.W.2d at 519) (second set of brackets in *Taylor*); see also *Gallion*, 2004 WI 42, ¶49, 270 Wis. 2d at 562, 678 N.W.2d at 209 (court must explain general range for sentence imposed). The circuit court’s sentencing comments satisfy this standard.

¶10 During the sentencing hearing, the court questioned Marker regarding his criminal history, which included multiple convictions for disorderly conduct, one of which was amended from a battery charge. The court further noted that Marker had failed probation on four occasions. The court ordered Marker to pay approximately \$7200 in restitution and stated that one of its goals was to punish Marker by sending a message “that you can’t go around stabbing people.” The court also considered the serious nature of the crime, the needs of the community, and Marker’s character.

¶11 In terms of seriousness, the court stated: “You stab somebody in the chest on the left side, every one of us have our heart on the left side. You know, in looking at this stab wound, I don’t know how you missed the guy’s heart; and if you had hit the guy’s heart, he would have been dead.” The court acknowledged that Marker and the victim had been drinking on the night of the incident but nevertheless concluded that the victim and members of the community “have to be protected from people picking up knives and deciding to stab people.”

¶12 The court summed up Marker’s character as “not good.” It referenced Marker’s representation in a letter that Marker would quit drinking but noted that Marker had been drinking since he was nine years old—a fact which Marker, who was fifty-three at the time of sentencing, acknowledged. The court pointed out that Marker had a criminal record dating back to 1982. In arriving at its sentence, the court explained: “So now we’re here. I can’t put you on probation. You’ll fail again. There’s no question about it in my mind. And you failed four times, and this is frankly too serious a crime. You almost killed someone.”

¶13 The court took into account Marker’s significant depression, his insomnia, and the fact that Marker compensated by drinking alcohol—on the night of the stabbing, Marker had a blood alcohol concentration of .294. It wondered aloud why Marker had not kept up with programs that could assist him in his efforts to achieve sobriety before ultimately concluding that prison time was necessary to protect the community.

¶14 The circuit court fully explained Marker’s sentence and the reasons behind it. Although Marker wishes that the circuit court had exercised its discretion differently in assessing his culpability and character and in accounting

for the fact that he was an alcoholic, this does not constitute an erroneous exercise of discretion. See *Ocanas*, 70 Wis. 2d at 185, 233 N.W.2d at 461 (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, 20–21 (1981) (reviewing court’s inquiry is whether discretion was exercised, not whether it could have been exercised differently). In addition, we note that many of the facts presented in Marker’s appellate brief give his version of the events that transpired at the time of the stabbing and that this version differs from the complaint, which served as the factual basis for his guilty plea. In light of the foregoing, Marker’s motion for postconviction relief based on his contention that the circuit court erroneously exercised its sentencing discretion was appropriately denied.

By the Court.—Judgment and order affirmed.

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

