COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1834-CR **Cir. Ct. No. 02CF000306**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLASS POTTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Douglass Potter appeals from a judgment entered after he pled guilty to substantial battery with the intent to cause bodily harm, and from an order denying his postconviction motion. *See* WIS. STAT. § 940.19(2)

(2001–02).[1] Potter claims that the trial court erroneously exercised its sentencing discretion when it: (1) allegedly failed to consider a mitigating sentencing factor; (2) declined to modify his sentence based on a subsequent legislative reduction in the maximum sentence for his crime; and (3) assessed a DNA surcharge. We affirm.

I.

¶2 Douglass Potter was charged with substantial battery for hitting Steven Prochaska in the face with a tire iron. According to the complaint, Susan Rosenow drove Potter and Prochaska to Potter's car so that Prochaska could help Potter change a flat tire. Rosenow told the police that Potter was "drunk" and Prochaska "had been drinking." While Rosenow was waiting for the men to change the tire, she saw Potter hit Prochaska in the face with a tire iron. Prochaska received medical treatment for an abscessed tooth that became infected as a result of the battery and a broken jaw.

¶3 Potter pled guilty in exchange for the State's recommendation of four years of probation, with an imposed and stayed sentence of two years of confinement and three years of extended supervision. The trial court sentenced him to five years in prison, with two years of confinement and three years of extended supervision. This was the statutory maximum for Potter's crime when he committed it.

¶4 The trial court also imposed, among other things, the condition that Potter submit a DNA sample and pay all DNA costs and surcharges. Potter's

[1] All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

lawyer told the court that Potter had already submitted a DNA sample in a prior case, and that the fee had been waived. The trial court noted that Potter did not have to provide a DNA sample if he had already done so. The judgment of conviction ordered Potter to pay a DNA surcharge of $250.

¶5 Potter filed a postconviction motion under WIS. STAT. RULE 809.30 to vacate the DNA surcharge and modify his sentence. The trial court denied both requests.

II.

¶6 Potter first alleges that the trial court erroneously exercised its sentencing discretion, because it did not give any weight to his acceptance of responsibility. He complains that the trial court virtually "ignored" this factor "without explanation." We disagree.

¶7 Sentencing is committed to the discretion of the trial court, and appellate review is limited to determining whether the trial court erroneously exercised its discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991). We will find an erroneous exercise of 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). A strong public policy exists against interfering with the trial court's discretion in determining sentences, and "[t]he trial court is presumed to have acted reasonably." ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, the defendant has the burden to

"show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶8 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The court may also consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639 (quoted source omitted). The weight to be given to each of these factors is within the trial court's discretion. ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461.

¶9 An examination of the record shows that the trial court considered the appropriate factors and properly exercised its discretion in weighing them. First, the trial court considered the gravity of the offense, noting that "[t]he crime [was] vicious, needless, foolish and caused significant injury." Second, it assessed Potter's character, recognizing that Potter admitted that he had an alcohol problem and that he had accepted responsibility for the crime: "I appreciate that you acknowledge that you're an alcoholic, and *I appreciate that you did plead guilty here and acknowledge[d] your responsibility*." (Emphasis added.) Third, it considered Potter's criminal record of approximately seventeen adult convictions, his "significant violence problem," and his poor record on probation: "I'm

particularly distressed to see your track record on probation…. What I see is that you've been given multiple opportunities on probation, and you have blown them all or practically all of them." Finally, the trial court considered the need to protect the public. It noted that Potter represented a threat to the safety of the community and concluded that it could not "trust [Potter] not to drink, nor [could it] trust [Potter] under community supervision to follow through on alcohol treatment given [his] track record so far."

¶10 The trial court further explained in its written decision and order denying Potter's motion for sentence modification that, while it had acknowledged Potter's acceptance of responsibility, it did not give this factor "substantial weight" because the other sentencing factors outweighed it:

> In this instance, the court acknowledged that the defendant had accepted responsibility for his crime. However, the other sentencing considerations so outweighed this factor that the court could not assign any substantial weight to it. The defendant presented with an abysmal prior record, including approximately seventeen adult convictions and multiple failures on probation. These convictions included other crimes of violence. In addition, the defendant was a self-acknowledged alcoholic but had failed to follow through with any of the opportunities he had been given to address this problem.

(Record reference omitted.) The trial court concluded that the maximum sentence was warranted in this case "based upon its consideration of the relevant sentencing factors in this case and the threat the defendant presented to the community since previous supervision and incarceration had f[a]iled to conform his behavior."

¶11 As can be seen from the trial court's extensive remarks, both at the sentencing hearing and in its written decision, the trial court fully explained the sentence and the factors on which it relied.

¶12 Next, Potter claims that the trial court had the inherent authority to modify his sentence, because the maximum penalty for substantial battery was reduced after he was sentenced. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657, 659 (Ct. App. 1990) (trial court has authority to modify a sentence, even though a new factor is not presented, if the sentence is unduly harsh). He contends that his sentence should be reduced "in fairness … [due to] what we now know about the maximum penalty intended by the legislature." Again, we disagree.

¶13 When Potter committed the offense, the original truth-in-sentencing penalty provisions were in effect. Under those provisions, substantial battery was a Class E felony with a maximum possible penalty of five years in prison. *See* WIS. STAT. §§ 940.19(2), 939.50(3)(e). Effective February 1, 2003, the legislature revised the truth-in-sentencing provisions of the Wisconsin statutes by enacting 2001 Wis. Act 109. Substantial battery was reclassified as a Class I felony with a maximum penalty of three years and six months in prison. *See* WIS. STAT. §§ 940.19(2), 939.50(3)(i) (2003).

¶14 The trial court denied this claim because it concluded, among other things, that the new penalty classifications were not retroactive. We agree. *See* ***State v. Torres***, 2003 WI App 199, 267 Wis. 2d 213, 670 N.W.2d 400, *review denied*, 2004 WI 1, ___ Wis. 2d ___, 673 N.W.2d 693 (No. 03-0233-CR).

¶15 ***Torres*** rejected the claim that a reduction in the maximum penalty for an offense was a new factor for two reasons. First, it determined that the proper procedure for requesting sentence modification on this basis was to file a motion under WIS. STAT. § 973.195, not WIS. STAT. RULE 809.30. ***Torres***, 267 Wis. 2d 213, ¶9 ("WISCONSIN STAT. § 973.195 reflects the legislature's intent to

create a separate and specific statutory procedure for requesting a sentence reduction that should be used in place of WIS. STAT. [RULE] 809.30."). Second, ***Torres*** held that "there is no mandatory retroactive application of the [2003] lower penalty." ***Id.***, ¶12. It noted that if the legislature had intended the new penalty structure to be retroactive, it "could have directed the courts to always retroactively apply the new 2003 penalties. It did not." ***Id.*** Although ***Torres*** analyzed a new-factor claim, the essential issue both here and there is the same—whether the new truth-in-sentencing penalties present a valid basis for sentence modification. Under ***Torres***, they do not. Thus, like Torres, if Potter wishes to petition the trial court for a change in his sentence based on a reduction in the maximum penalty for his crime, he must do so under § 973.195. ***Torres***, 267 Wis. 2d 213, ¶9. Moreover, the sentence imposed on Potter was not "harsh," for which sentence modification would be appropriate; his crime was vicious and his criminal record atrocious.

¶16 Finally, Potter alleges that the sentencing court did not have the jurisdiction to assess a DNA surcharge, because no DNA sample was collected in connection with this case. Potter's claim requires us to interpret the DNA surcharge statute, WIS. STAT. § 973.046. The interpretation of a statute is a question of law that we review *de novo*. ***State v. Peters***, 2003 WI 88, ¶13, 263 Wis. 2d 475, 665 N.W.2d 171. We interpret the statute to discern the legislature's intent. ***State v. Setagord***, 211 Wis. 2d 397, 406, 565 N.W.2d 506, 509 (1997). We first read the plain language of the statute. ***Id.*** If the language unambiguously and clearly sets forth the legislative intent, we apply the statute to the facts and do not look beyond the plain language. ***Id.***

¶17 WISCONSIN STAT. § 973.046 provides, as relevant:

> **Deoxyribonucleic acid analysis surcharge. (1g)** Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court may impose a deoxyribonucleic acid analysis surcharge of $250.
>
> **(1r)** If a court imposes a sentence or places a person on probation for a violation of s. 940.225 [sexual assault], 948.02 (1) or (2) [sexual assault of a child] or 948.025 [repeated acts of sexual assault of the same child], the court shall impose a deoxyribonucleic acid analysis surcharge of $250.

In this case, the trial court determined that it had the authority to impose a DNA surcharge because the relevant portion of the statute, § 973.046(1g), "does not require that a DNA sample be taken before a surcharge may be assessed in connection with the same case." We agree. The language of the statute plainly states that the only condition for ordering a DNA surcharge is the entry of a judgment in a felony case. There is nothing in § 973.046(1g) that explicitly requires that a DNA sample must be taken before the trial court can assess a DNA surcharge.

¶18 Nonetheless, Potter argues that WIS. STAT. § 973.046 should be read in conjunction with the DNA analysis requirements statute, WIS. STAT. § 973.047. Section 973.047 provides, as relevant:

> **Deoxyribonucleic acid analysis requirements. (1f)** If a court imposes a sentence or places a person on probation for a felony conviction, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

Potter contends that these statutes, when read together, require the court to order a DNA sample be taken before it can impose a DNA surcharge. We disagree.

¶19 The cases that Potter cites to support his argument, ***State v. Ward***, 228 Wis. 2d 301, 596 N.W.2d 887 (Ct. App. 1999), and ***State v. Trepanier***, 204 Wis. 2d 505, 555 N.W.2d 394 (Ct. App. 1996), are no longer controlling in this case, because they rely on prior versions of WIS. STAT. § 973.046 and WIS. STAT. § 973.047. When these cases were decided, section 973.046 (1997–98) provided, as relevant:

> **Deoxyribonucleic acid analysis surcharge. (1)** If a court imposes a sentence or places a person on probation under any of the following circumstances, the court shall impose a deoxyribonucleic acid analysis surcharge of $250:
>
> (a) The person violated s. 940.225 or 948.02 (1) or (2).
>
> (b) *The court required the person to provide a biological specimen under s. 973.047 (1).*

(Emphasis added). Section 973.047 (1997–98) provided, as relevant:

> **Deoxyribonucleic acid analysis requirements. (1)** (a) If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02 (1) or (2) or 948.025, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.
>
> (b) Except as provide in par. (a), if a court imposes a sentence or places a person on probation for any violation under ch. 940, 944, or 948 or ss. 943.01 to 943.15, the court may require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

As we can see from the text of these statutes, § 973.046 expressly referred to § 973.047(1). Indeed, this is the reason that ***Trepanier*** construed these statutes together. *See* ***Trepanier***, 204 Wis. 2d at 508, 555 N.W.2d at 396; *see also* ***Ward***, 228 Wis. 2d at 311, 596 N.W.2d at 892. These statutes were amended, however, before Potter committed his crime. *See* 1999 Wis. Act 9, §§ 3202, 9458. As we

have seen, the current version of § 973.046 no longer refers to and is not related to § 973.047. Therefore, the trial court properly imposed a DNA surcharge in this case.[2]

By the Court.—Judgment and order affirmed.

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

[2] The trial court also denied Potter's postconviction motion under the rationale that "[w]hile the defendant's current submissions show that he is paying the DNA surcharge *in this case* out of prison funds, he has not shown that he previously paid a DNA surcharge. Under this circumstance, the court will not vacate the DNA surcharge." (Emphasis in original.) Potter claims that the trial court cannot require him to pay for a sample from a prior case as a sentencing condition this case. As we have seen, the trial court was able to impose a DNA surcharge in this case regardless of if or when Potter gave a DNA sample. Thus, we do not address this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).