

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 13, 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. 2010AP1265-CR**

**Cir. Ct. No. 2008CF2445**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTHONY C. O'QUIN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony C. O'Quin appeals from a judgment of conviction entered upon his guilty plea to one count of robbery while using a

dangerous weapon. *See* WIS. STAT. §§ 943.32(1), 939.63(1)(b) (2007-08).<sup>1</sup> He also appeals from an order denying his postconviction motion. He seeks relief from his twelve-year sentence. We reject his claims and affirm.

### **BACKGROUND**

¶2 On May 13, 2008, O'Quin robbed the cashier of a Family Dollar store at gunpoint. He pled guilty to the charge of robbery while using a dangerous weapon. His conviction and sentence for committing that crime directly underlie the instant appeal.

¶3 At the time O'Quin committed the 2008 offense, he was serving two terms of extended supervision stemming from prior convictions, one for robbery with use of force arising in Milwaukee County case No. 2005CF1059, and the other for escape arising in Milwaukee County case No. 2005CF1758. After the State charged O'Quin with robbing the Family Dollar store in Milwaukee County case No. 2008CF2445, his terms of extended supervision were revoked.

¶4 In March 2009, the circuit court conducted a joint reconfinement and sentencing proceeding addressing the three offenses. The circuit court ordered O'Quin reconfined for two years, eleven months, and twenty-nine days for the earlier-arising robbery, and the circuit court ordered O'Quin reconfined for three months and thirty-one days for escape. The circuit court imposed a consecutive twelve-year sentence for robbing the Family Dollar store, bifurcated as seven years of initial confinement and five years of extended supervision.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 In 2010, O’Quin moved the circuit court to modify his twelve-year sentence on the ground that it was unduly harsh in light of the mitigating factors he presented and the reconfinement he must serve. He alternatively sought resentencing on the grounds that the circuit court: (1) failed to consider applicable sentencing guidelines; and (2) sentenced him based on misinformation. In support of the latter claim, he cited a letter dated May 1, 2009, that the Department of Corrections filed in case No. 2005CF1758. Relying on the letter, he contended that the Department of Corrections, not the circuit court, had the authority to determine how much reconfinement time to impose for the escape conviction. He argued that, because the circuit court nonetheless ordered him reconfined for escape, he was “sentenced on the basis of inaccurate information.”<sup>2</sup>

¶6 The circuit court denied relief in a written order entered without a hearing. The circuit court concluded that the sentence is not unduly harsh and that the sentencing guidelines provide no basis for relief because they have been abolished. The circuit court further stated that in May 2009 it vacated the order reconfining O’Quin for escape, and therefore that order did not support a claim for resentencing. O’Quin appeals.

## DISCUSSION

¶7 Sentencing lies within the circuit court’s discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court must consider the primary sentencing factors of “the gravity of the offense, the

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<sup>2</sup> O’Quin did not file a copy of the letter from the Department of Corrections with his postconviction motion, and the letter is not in the record before us. This defect in the record does not affect our resolution of the issues presented.

character of the defendant, and the need to protect the public.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See id.* “When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence.” *State v. Stenzel*, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. We defer to the circuit court’s “great advantage in considering the relevant factors and the demeanor of the defendant.” *See State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶8 O’Quin first claims that his twelve-year sentence is unduly harsh. When a defendant challenges a sentence as unduly harsh, “a court may find an erroneous exercise of 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.’” *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). O’Quin faced statutory maximum penalties of twenty years of imprisonment and a fifty-thousand-dollar fine upon his conviction for robbery while using a dangerous weapon. *See* WIS. STAT. §§ 943.32(1), 939.50(2)(e), 939.63(1)(b). The circuit court imposed a sentence far less than the law allowed. “A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Grindemann*, 255 Wis. 2d 632, ¶31 (brackets omitted).

¶9 Nonetheless, O’Quin argues that “there were several mitigating factors that militated for a less severe sentence.” He explains that he accepted

responsibility by pleading guilty and making a full confession, and he states that his sister describes him as compassionate when he is sober. The circuit court has discretion, however, to select the factors that are significant to the sentencing decision and to determine the weight to assign to each factor. *Stenzel*, 276 Wis. 2d 224, ¶16.

¶10 In this case, the circuit court acknowledged that O’Quin has family members who love him and admire his past accomplishments, but it placed greater weight on the gravity of his offense, noting the fear and anxiety experienced by the cashier who “didn’t know whether she would live or die.” The circuit court also discussed his character, emphasizing his “extensive prior record” of narcotics offenses, thefts, and robberies. See *State v. Fisher*, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). Further, the circuit court found that O’Quin posed a danger to the community because he “feels [he has] nothing to lose” and is “focused on getting whatever it is that [he] wants.” The circuit court was not obligated to find that the mitigating factors identified by O’Quin were key components of the sentencing decision. See *Stenzel*, 276 Wis. 2d 224, ¶16.

¶11 O’Quin complains that a consecutive sentence was not warranted in light of the reconfinement time he must serve. The circuit court, however, has discretion to determine whether a consecutive sentence is necessary. *State v. LaTender*, 86 Wis. 2d 410, 432, 273 N.W.2d 260 (1979). Here, the circuit court explained that O’Quin committed a new offense that was “separate and distinct” from his prior offenses and that the offenses “involved separate victims.” The circuit court concluded that imposing a concurrent sentence “would unduly depreciate the serious nature” of O’Quin’s most recent robbery. The circuit court articulated an appropriate rationale for imposing a consecutive sentence and thus

properly exercised its discretion. *See State v. Berggren*, 2009 WI App 82, ¶46, 320 Wis. 2d 209, 769 N.W.2d 110.

¶12 O’Quin’s arguments for sentence modification lacked merit. The circuit court properly denied relief.

¶13 We turn to O’Quin’s claims for resentencing. O’Quin asserts that the circuit court erred by failing to consider the applicable sentencing guidelines for robbery as required by WIS. STAT. § 973.017(2)(a). The legislature, however, repealed § 973.017(2)(a) after the sentencing proceeding in this case. *See* 2009 Wis. Act 28, §§ 3386m, 9400. Governing Wisconsin authority holds that the repeal applies retroactively. *See State v. Barfell*, 2010 WI App 61, ¶14, 324 Wis. 2d 374, 782 N.W.2d 437. We are bound by *Barfell*. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Accordingly, O’Quin is not entitled to a new sentencing hearing at which the circuit court considers the sentencing guidelines. *See Barfell*, 324 Wis. 2d 374, ¶14. The issue is therefore moot. *See id.*, ¶9.

¶14 O’Quin last contends that he should be resentenced because “the sentencing court was using inaccurate information at his sentencing,” namely, “the mistaken assumption by the sentencing court” that it could reconfine him for escape. We are not persuaded.

¶15 A defendant “has a due process right ‘to be sentenced on the basis of true and correct information’ pertaining to ‘the offense and the circumstances of its commission ... and the defendant’s personality, social circumstances and general pattern of behavior.’” *Barfell*, 324 Wis. 2d 374, ¶7 (quoting *State v. Slogoski*, 2001 WI App 112, ¶7, 244 Wis. 2d 49, 629 N.W.2d 50) (two sets of quotation marks omitted, ellipsis in *Slogoski*). Any erroneous assumption held by

the circuit court regarding its authority to reconfine O’Quin for escape is unrelated to his offense of robbery while using a dangerous weapon, the circumstances in which he committed that robbery, or his personality, social circumstances, and behavior patterns. *See Barfell*, 324 Wis. 2d 374, ¶7. Thus, O’Quin does not identify any arguably inaccurate information that requires resentencing.

¶16 O’Quin also argues that the circuit court “did not parse out any individual reasons for imposing the reconfinement [for escape].” This complaint about alleged shortcomings in the reconfinement process does not demonstrate any error in the sentence selected for committing robbery while using a dangerous weapon. To the extent that O’Quin implies that the circuit court erred by considering his escape conviction when imposing a sentence for robbery, he is mistaken. A sentencing court may take into account the defendant’s criminal history and undesirable behavior pattern. *See Ziegler*, 289 Wis. 2d 594, ¶23.

¶17 We conclude that O’Quin offers no basis for relief from his sentence. Accordingly, we affirm.

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

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

