COURT OF APPEALS DECISION DATED AND FILED

January 19, 2005

Cornelia G. Clark
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 Nos. 03-3284-CR
03-3285-CR

Cir. Ct. Nos. 01CF003383
01CF003384

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY E. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: M. JOSEPH DONALD and JOHN SIEFERT, Judges. *Affirmed*.

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

¶1 PER CURIAM. Larry E. Thomas pled guilty to two counts of felony child non-support. The court sentenced Thomas to five years of imprisonment on each count, comprised of two years of initial confinement and

three years of extended supervision, to run consecutively to each other and to any other sentence. The only issue on appeal is whether the circuit court properly exercised its sentencing discretion. We conclude that the sentencing court did so, and accordingly, we affirm.[1]

Facts

¶2 The relevant facts are undisputed. On August 23, 1995, Thomas was adjudicated the father of Caitlyn A., and ordered to pay monthly child support of $125. On July 30, 1996, Thomas was adjudicated the father of Brittany B., and ordered to pay monthly child support of $125. When the presentence investigation report was being prepared in 2003, the support arrearage for Caitlyn A. was $17,851 and the support arrearage for Brittany B. was $13,407. The only support ever paid by Thomas for the two children resulted from a 2002 federal and state tax intercept.

¶3 In addition to the two children who were the subject of these felony non-support criminal complaints, Thomas has fathered four other children. Three of those children were with his current girlfriend, with whom he lived when not incarcerated. His support arrearage for those children was $47,858. His support arrearage for the fourth child was $2,491.[2]

¶4 Thomas was charged with two counts of failure to pay child support, one count for Caitlyn A., and one count for Brittany B. Thomas pled guilty on

[1] Thomas was sentenced by the Honorable M. Joseph Donald. The Honorable John Siefert denied Thomas's postconviction motions.

[2] These support arrearage amounts were set forth in the presentence investigation report. Thomas does not dispute the accuracy of the figures.

February 17, 2003, after having been released from prison on January 21, 2003. Thomas had been convicted of substantial battery on September 7, 1998, and was sentenced to three years of probation and ordered to serve six months in the House of Correction as a condition of probation. After completion of the six-month term, Thomas did not report to his probation agent, and he remained on absconder status from March 1999 until March 2002. After his apprehension, Thomas's probation was revoked, and he was incarcerated on the substantial battery charge until his release in January 2003. The criminal complaints arise from his failure to pay child support from June 2000 until June 2001.

¶5 At the time of the plea, Thomas requested that sentencing be adjourned so that he could obtain employment and "establish a good pattern of making payments." The court granted Thomas's request, and the imposition of sentence was adjourned until May 6, 2003. On that date, Thomas requested a second adjournment, noting that he had just obtained a job one week earlier. The court denied Thomas's request and proceeded to sentencing. On each count, the court imposed a bifurcated sentence of five years, comprised of two years of initial confinement and three years of extended supervision. The court ordered that the sentences run consecutively to each other and to any other sentence.

Discussion

¶6 Sentencing is committed to the discretion of the trial court and our review is limited to determining whether the trial court erroneously exercised its

discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971).[3] This exercise of discretion contemplates a process of reasoning based on facts that are of record or that are reasonably inferred from the record and a conclusion based on a logical rationale founded upon proper legal standards. ***Id.*** at 277. A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (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 (1992).

¶7 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 (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.

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[3] In ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, the supreme court reaffirmed the sentencing standards established in ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). Thomas was sentenced before ***Gallion*** was decided, and the supreme court in ***Gallion***, stated that it applied only to "future cases." ***Gallion***, 270 Wis. 2d 535, ¶¶8, 76. In any event, the ***Gallion*** court did "not make any momentous changes" to Wisconsin sentencing jurisprudence. ***State v. Stenzel***, 2004 WI App 181, ¶9, __ Wis. 2d __, 688 N.W.2d 20. Therefore, we examine Thomas's sentence against ***McCleary*** and its progeny.

Id. at 623-24. The circuit court need discuss only the relevant factors in each case. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The weight given to each of the relevant factors is within the court's discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶8 When we review a sentence, we look to the totality of the court's remarks and the entire record, including any postconviction proceedings. *See* ***State v. Santana***, 220 Wis. 2d 674, 683, 584 N.W.2d 151 (Ct. App. 1998) ("The transcripts of the sentencing hearing as well as several postconviction hearings make an extensive record of the trial court's comments at sentencing and its explanation for what was considered."). Furthermore, if a sentencing court fails to set forth the reasons for the sentences imposed, we will search the record to determine whether, in the exercise of proper discretion, the sentences can be sustained. ***State v. Leighton***, 2000 WI App 156, ¶52, 237 Wis. 2d 709, 616 N.W.2d 126.

¶9 On appeal, Thomas contends that the court failed to consider "essential sentencing factors," and therefore, did not adequately explain its sentence. Thomas acknowledges that the court considered the gravity of the offense and his character. Thomas contends, however, that the court did not meaningfully explain why the need to protect the public would be furthered by his sentence.

¶10 In its sentencing remarks, the court first recognized that it was required to consider the gravity of the offense, Thomas's character and the need to protect the community. The court stated that it had reviewed the presentence

investigation report and considered the parties' sentencing arguments, Thomas's allocution and the statement of the mother of Brittany B. The court also referred to statements made during the plea hearing, when the mothers of both children addressed the court.

¶11 The court considered the gravity of the offense. The court addressed the impact of Thomas's conduct on the children, noting that they have been deprived both of financial and material support and of the emotional support and parental bond that children deserve. The court stated that the "children have been nothing more than essentially an inconvenience to you, something that you have managed to ignore for a very long period of time."

¶12 On appeal, Thomas is critical of the court's failure to address, as an independent factor, the need to protect the public, and points to that failure as indicia of an erroneous exercise of sentencing discretion. He also argues that the court's sentencing remarks do not reflect any consideration of the various mitigating factors urged by Thomas. We reject Thomas's argument. A sentencing court is required only to address the factors it deems relevant, ***Echols***, 175 Wis. 2d at 683, and the weight given to the factors is within the court's discretion, ***J.E.B.***, 161 Wis. 2d at 662. Moreover, in the context of the crime of failure to pay child support, the impact on the children is closely related to the impact on the community as a whole. *See* ***State v. Oakley***, 2001 WI 103, ¶¶9-10, 245 Wis. 2d 447, 629 N.W.2d 200. Therefore, a consideration of the need to protect the community is implicit in a consideration of the impact of the crime on the children.

¶13 The court discussed Thomas's character. The court noted that Thomas was asking for a chance to support the children but Thomas "really [has

not] done anything thus far" in terms of supporting them. The court stated that "it really doesn't matter whether you're confined or not. They're still receiving nothing." Indeed, the time period underlying the criminal complaints was a twelve-month period when Thomas was not incarcerated.

¶14 The court summarized its sentencing rationale as follows:

> Given the extensive prior record that you have and extensive lack of payment history, this Court finds that confinement is necessary to address the extensive treatment needs that you have, to ensure that you really do understand how serious these matters are.

The record shows that the court considered relevant factors. The court's emphasis on Thomas's history of non-support, his prior record, and the need for treatment in a confined setting was proper. The court expressly stated that Thomas should be incarcerated for a period of time long enough to persuade him to change his behavior. The court identified the various factors that it considered. Thomas's disagreement with the relevance of those factors or the weight given them by the court does not constitute an erroneous exercise of sentencing discretion.

¶15 Thomas also contends that the sentencing court erroneously exercised its discretion by imposing consecutive sentences. Similar to his broad challenge to the sentence, Thomas argues that the court did not adequately explain its decision to impose consecutive sentences.

¶16 Whether to impose a consecutive, as opposed to a concurrent, sentence is committed to the sound discretion of the trial court. ***State v. Ramuta***, 2003 WI App 80, ¶24, 261 Wis. 2d 784, 661 N.W.2d 483. "In sentencing a defendant to consecutive sentences, the trial court must provide sufficient justification for such sentences and apply the same factors concerning the length

of a sentence to its determination of whether sentences should be served concurrently or consecutively." ***State v. Hall***, 2002 WI App 108, ¶8, 255 Wis. 2d 662, 648 N.W.2d 41.

¶17 As detailed above, the court considered and weighed proper sentencing factors when imposing the sentences. The children who Thomas did not support are not members of a single household. Therefore, while Thomas's conduct may be similar as to each child, they are separate victims, and the imposition of consecutive sentences was appropriate. *See* ***State v. LaTender***, 86 Wis. 2d 410, 434, 273 N.W.2d 260 (1979).

¶18 Thomas's attack on the sentence as excessive also fails. A sentence is excessive only if it is "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 (1975). For the reasons set forth above, the sentence does not meet that standard.

By the Court.— Judgments and orders affirmed.

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