COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP1729-CR
2011AP1730-CR

Cir. Ct. Nos. 2009CF5800
2010CF1595

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

STATE OF WISCONSIN

PLAINTIFF-RESPONDENT,

V.

TIMOTHY T. CARTER

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Timothy T. Carter appeals from judgments entered upon his guilty pleas to two counts of armed robbery with threat of force as a party to each crime. He also appeals from orders denying his motions for

postconviction relief. Carter seeks sentence modification, alleging that the circuit court made a racially discriminatory remark at sentencing, deprived him of the effective assistance of his counsel and did not adequately explain or justify its sentencing decisions. We reject his arguments and affirm.

BACKGROUND

¶2 In April 2009, Carter and a co-defendant, Deontaye Lusk, robbed a man sitting with three companions in a parked car. During the robbery, Lusk shot one person and struck another with the barrel of a gun. In July 2009, Carter and Lusk robbed a man in a parking lot. During this robbery, Carter fired a gun into the air, and Lusk then shot and killed the victim. Pursuant to a plea bargain, Carter pled guilty to two counts of armed robbery as a party to a crime.

¶3 Carter faced a maximum sentence of forty years of imprisonment and a $100,000 fine upon each conviction in this case. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c) (2009-10).[1] At sentencing, the State recommended "substantial" time in prison as a global disposition, and Carter recommended an aggregate period of seven years in initial confinement. The circuit court imposed a ten-year term of imprisonment for the first armed robbery, and a consecutive sixteen-year term of imprisonment for the second armed robbery. The circuit court bifurcated the sentences evenly, requiring Carter to serve thirteen years each of initial confinement and extended supervision.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Carter filed a postconviction motion seeking sentence modification. He argued that the circuit court wrongly took his race into account when fashioning the sentences because the circuit court remarked during the sentencing proceeding: "I've been sentencing people now in felony court for two and a half years, and before that in juvenile court for three and a half years. And, frankly, I'm sick of sentencing young African-American males for armed robberies. And now I've got two of them." Carter also challenged his sentences on the ground that the circuit court did not adequately explain the sentencing rationale. The circuit court rejected his claims, and this appeal followed.

DISCUSSION

¶5 Sentencing lies within the circuit court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When exercising sentencing discretion, a circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a broad range of additional factors, including:

> (1) [p]ast 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.

Gallion, 270 Wis. 2d 535, ¶43 & n.11 (citation and quotation marks omitted).

¶6 In this case, Carter alleges that he was sentenced on the basis of his race, because the circuit court said it was "sick of sentencing young African-American males for armed robbery." He seeks sentence modification.

¶7 No dispute exists that a defendant's race is an improper factor for consideration at sentencing. ***State v. Harris***, 2010 WI 79, ¶33, 326 Wis. 2d 685, 786 N.W.2d 409. In ***Harris***, the supreme court confirmed that defendants have "a constitutional due process right not to be sentenced on the basis of race.... [I]mposing a sentence on the basis of race ... is therefore an erroneous exercise of discretion." ***Id.*** (footnote omitted). The ***Harris*** court further determined that a defendant seeking sentencing relief on the ground that the circuit court based a sentence on race has the burden of proving by clear and convincing evidence that the circuit court actually relied on race when imposing sentence. ***Id.***, ¶¶33-34. Accordingly, Carter must show "that it is 'highly probable or reasonably certain' that the circuit court actually relied on race ... when imposing its sentence[s]."[2] *See* ***id.***, ¶35 (citation omitted).

[2] Carter's appellate counsel suggests that the proper test is whether a reasonable observer would conclude that the circuit court's remarks reflect an appearance of bias, an analysis rejected by the supreme court in ***State v. Harris***, 2010 WI 79, ¶¶2-3, 326 Wis. 2d 685, 786 N.W.2d 409. Counsel tells us that, "[a]lthough the ***Harris*** court is said to have rejected the reasonable observer test, subsequently the court of appeals employed the reasonable observer test." Counsel then cites one of this court's unpublished opinions without disclosing that the opinion is a *per curiam* decision. Unpublished *per curiam* opinions of the court of appeals may not be cited as precedent or authority in any court of this state, except to support claims of issue preclusion, claim preclusion, or law of the case. *See* WIS. STAT. RULE 809.23(3)(a)-(b). Counsel's citation satisfies none of those exceptions. Moreover, if appellate counsel believed that the unpublished *per curiam* opinion could be cited, counsel had the obligation to file and serve a copy of the opinion with the appellant's brief. *See* RULE 809.23(3)(c). Counsel did not do so. We caution counsel that she must follow the rules of appellate procedure.

¶8 In postconviction proceedings here, the circuit court rejected arguments that it based Carter's sentences on race, stating that "the context of [the] entire sentencing decision shows that the defendant's race in no way contributed to the sentence the court imposed in these cases." Rather, the circuit court found that its remark was "merely an expression of [the court's] frustration based upon its years of experience of sentencing defendants for armed robberies."

¶9 We will not disturb a circuit court's findings of fact unless they are clearly erroneous and unsupported by the record. ***State v. Yakes***, 226 Wis. 2d 425, 430, 595 N.W.2d 108 (Ct. App. 1999). Here, we are obliged "to review the sentencing transcript as a whole, and to review potentially inappropriate comments in context." *See* ***Harris***, 326 Wis. 2d 685, ¶45. We turn to that task.

¶10 The circuit court discussed the gravity of the offenses. The circuit court accepted Carter's contention that the first armed robbery was a spontaneous "crime of opportunity," and that only Lusk carried a gun, but the circuit court viewed Carter's role as a gunman in the second offense as an aggravating factor. Moreover, the circuit court expressed consternation that Carter continued to associate with Lusk after discovering "what Lusk is like," and that Carter wrote a letter to Lusk after the two men were arrested. The circuit court determined that Carter's decision not to end the relationship with Lusk was an additional aggravating factor in the case.

¶11 The circuit court next made the remark that Carter challenges on appeal: "I've been sentencing people now in felony court for two and a half years, and before that in juvenile court for three and a half years. And, frankly, I'm sick of sentencing young African-American males for armed robberies. And now I've got two of them."

¶12 The circuit court went on to consider Carter's character. The circuit court observed that, after Carter participated in the July 2009 armed robbery that left another person dead, he continued to break the law and was "busted for possession of pot again in August of 2009." The circuit court also reviewed in detail Carter's lengthy juvenile record and noted that he had "been on probation twice as an adult and both times [had been] revoked." *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).

¶13 The circuit court went on to discuss many additional matters that it believed shed light on Carter's character. The circuit court considered that Carter: (1) never finished high school or obtained a high school equivalency degree; (2) failed to obtain any employment after 2004; (3) offered nothing to show if or how he provided support for his two children; and (4) had "money to smoke a blunt a day." The circuit court concluded: "[y]our character's not good. Is this the worst I've ever seen? No. But it's not good."

¶14 The circuit court addressed the need to protect the public:

> [f]rankly, the community demands that people like me protect them in my sentencing, and that's one of the things I have to consider. And in [a] lot of armed robberies I told young men, "[y]ou're lucky somebody wasn't killed in that armed robbery, because you'd be responsible for that because you participated in it." And now I've got one for somebody who was killed. And you have to bear some responsibility for the fact that a father and a husband was taken away.

¶15 Additionally, the circuit court identified appropriate sentencing goals. *See* ***Gallion***, 270 Wis. 2d 535, ¶40 (circuit court must "specify the objectives of the sentence on the record"). The circuit court explained that it intended to punish Carter for his actions, to address his rehabilitative needs, and to

deter others by sending a message "to everybody else in the community that [the crimes he committed] … will not and cannot be tolerated."

¶16 Within this context, Carter challenges his sentences as derived from "preconceived notions about [] Carter's race." He asserts that the circuit court's remark that it was "sick of sentencing young African-American males for armed robberies" demonstrates improper reliance on his race and "incorporates racial views." We cannot agree.

¶17 The sentencing transcript as a whole supports the circuit court's finding that the remark at issue here was a frustrated but superfluous outburst, distinct from the factors that the circuit court considered when fashioning Carter's sentences. The record shows that the circuit court based its sentences on the gravity of the offenses, Carter's character, and the community's need for protection. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. The record also shows that the circuit court assessed those factors by identifying relevant facts and circumstances of the crimes and of Carter's personal history. The detailed and extensive discussion of those appropriate facts and circumstances does not suggest a high probability or a reasonable certainty that the sentencing rationale included consideration of Carter's race. *See* ***Harris***, 326 Wis. 2d 685, ¶35. Moreover, the sentences imposed were far below the maximum allowed by law and thus do not raise the specter that Carter received an unduly harsh penalty improperly motivated by racial animus. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. The isolated reference to African-American males is therefore not a compelling basis for rejecting the circuit court's finding that race was irrelevant to the sentencing decisions. *See* ***Harris***, 326 Wis. 2d 685, ¶57. Thus, Carter did not meet his burden of proving that the circuit court relied on his race when sentencing him.

¶18 On appeal, Carter asserts for the first time that the circuit court's reference to sentencing African-American males deprived him of the effective assistance of counsel. Because Carter did not present this issue to the circuit court, we will not address it. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (we do not address issues raised for the first time on appeal).

¶19 Carter next contends that the circuit court did not adequately consider his character. This argument is belied by the record. We have already reviewed the circuit court's extensive consideration of Carter's character. He believes, however, that the circuit court should have assessed this sentencing factor by giving weight to matters such as his supportive family and his religious upbringing. The circuit court, however, elected to emphasize other considerations. It committed no error by doing so. Circuit courts have broad discretion in selecting and weighing the relevant sentencing factors. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶20 Carter also argues that "culpability should fit prominently in the sentencing scheme." He implies that the circuit court drew no distinction between his role in the offenses and Lusk's role. This argument too is without support in the record. The circuit court told Carter: "Lusk bears most of the responsibility. He was the instrument that [shot and killed the victim]. But you were there. And you actively participated; and therefore, you must bear some responsibility, and I have to consider that in my sentencing."[3] Although Carter may have hoped that

[3] The record reflects that Lusk was sentenced earlier than Carter and by a different circuit court judge. According to Carter's trial counsel, Lusk received a life sentence.

the circuit court would assess his culpability in a more favorable way, our inquiry is whether the circuit court exercised its discretion, not whether discretion could have been exercised differently. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶21 Carter next complains that the circuit court failed to explain the specific reasons that he received an aggregate of thirteen years in initial confinement. We disagree. The circuit court's discussion of the sentencing factors and goals fully explained the bases for the sentences imposed. "[T]he exercise of discretion does not lend itself to mathematical precision." ***Gallion***, 270 Wis. 2d 535, ¶49. Therefore, the circuit court is not "require[d] ... to provide an explanation for the precise number of years chosen." ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466. Rather, "the court's sentencing discretion must 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.'" ***Id.*** (citation omitted, brackets in ***Taylor***). The circuit court's sentencing remarks satisfied this standard.

¶22 Equally unavailing is Carter's complaint that the circuit court did not state why the sentencing goals "could not be accomplished through shorter confinement time." The circuit court "need not explain why it did not impose a lesser sentence." ***State v. Davis***, 2005 WI App 98, ¶26, 281 Wis. 2d 118, 698 N.W.2d 823.

¶23 Carter argues next that the circuit court wrongly denied him eligibility to participate in the challenge incarceration program and the earned release program.[4] In determining eligibility for these programs, the sentencing court first must determine whether the offender meets preliminary statutory criteria. *See* WIS. STAT. §§ 302.045(2)(cm), 302.05(3)(a)2. If the offender meets the criteria, the circuit court then must exercise its discretion to determine whether the offender is eligible for either or both programs. *See* WIS. STAT. § 973.01(3g)-(3m).

¶24 Carter begins his challenge by contending that the circuit court did not make preliminary findings as to whether he met the statutory criteria for participation in the challenge incarceration and earned release programs. In fact, the circuit court implicitly found that Carter did meet the statutory criteria, because it went on to consider whether he should be eligible for program participation. *See* ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552 (when circuit court does not make express findings, we assume it made implicit findings in a manner supporting its decision).

¶25 As to Carter's complaint that the circuit court erred by finding him ineligible to participate in the challenge incarceration and earned release programs, we disagree. A circuit court exercises sentencing discretion when it determines eligibility for these programs. *See* WIS. STAT. §§ 973.01(3g)-(3m); *see also* ***State v. Owens***, 2006 WI App 75, ¶6, 291 Wis. 2d 229, 713 N.W.2d 187.

[4] The challenge incarceration program and the earned release program are both treatment programs that, upon successful completion, permit an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(3m)(b)1., 302.05(3)(c)2.a.

Here, the circuit court explained that Carter was ineligible "because of the serious nature of the crime, and frankly, because [his] record ... indicates that [he is] a risk to re-offend." Thus, the circuit court considered relevant sentencing factors—gravity of the offense and the need to protect the public—in determining ineligibility. Indeed, gravity of the offense alone is a consideration sufficient to justify the circuit court in excluding a defendant from participation in the programs. *See* ***State v. Steele***, 2001 WI App 160, ¶11, 246 Wis. 2d 744, 632 N.W.2d 112.

¶26 Last, Carter contends that the circuit court erred by denying his postconviction motion for relief from his sentences. Because Carter did not demonstrate that he is entitled to relief, this claim must fail.

By the Court.—Judgments and orders affirmed.

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