

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 11, 2012

Diane M. Fremgen
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. 2011AP2345-CR

Cir. Ct. No. 2009CF4682

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK L. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and RICHARD J. SANKOVITZ, Judges. *Affirmed.*

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

¶1 PER CURIAM. Frederick L. Moore appeals from a judgment of conviction entered upon his guilty plea to first-degree sexual assault by use of a dangerous weapon, contrary to WIS. STAT. § 940.225(1)(b). He also appeals an

order denying his postconviction motion.¹ Because the circuit court did not erroneously exercise its sentencing discretion, we affirm.

BACKGROUND

¶2 While he was in prison serving a sentence on another matter, Moore's DNA was matched to semen DNA recovered from a woman who was sexually assaulted. As a result, in October of 2009, the State charged Moore with two counts of first-degree sexual assault, one count of kidnapping, one count of false imprisonment, all by use of a dangerous weapon, and one count of armed robbery. The charges stemmed from an incident that occurred in September of 2008. As set forth in the complaint, Moore's victim was walking home around 9:00 p.m. when she encountered Moore, who, while holding a gun, ordered her to go near some bushes. Moore proceeded to sexually assault and rob her.

¶3 In accordance with the plea agreement, Moore pled guilty to one count of first-degree sexual assault by use of a dangerous weapon. The State agreed to dismiss the other charges against him, which were to be read-in for sentencing purposes.

¶4 At sentencing, the State recommended fifteen years of initial confinement and ten years of extended supervision. The PSI report writer recommended thirteen to fifteen years of initial confinement followed by seven to ten years of extended supervision. Moore asked for ten years of initial confinement followed by fifteen years of extended supervision.

¹ The Honorable Kevin E. Martens imposed sentence and entered the judgment of conviction. The Honorable Richard J. Sankovitz denied the postconviction motion and entered the corresponding order.

¶5 The circuit court discussed the seriousness of Moore’s crimes and their impact on the victim and her family. Referencing the context of the crimes, the circuit court concluded that this was the type of case that “creates a very real fear for people in the community.” The circuit court noted Moore’s lengthy criminal history—including probation revocations—and his tumultuous personal history, as set forth by the prosecutor and Moore’s trial counsel. The circuit court accounted for the fact that Moore accepted responsibility for his conduct by entering a guilty plea, but explicitly rejected Moore’s argument that he was so impaired by drugs and alcohol at the time of the offense that he did not remember committing the crimes. The circuit court acknowledged that Moore, who was twenty-three years old when he was sentenced, had rehabilitative needs and concluded that he was “not at a point where [he] should be written off.” Ultimately, the circuit court followed the State’s recommendation and sentenced Moore to fifteen years of initial confinement followed by ten years of extended supervision.

¶6 Postconviction, Moore argued that the circuit court erroneously exercised its sentencing discretion. The circuit court denied the motion.

DISCUSSION

¶7 Sentencing lies within the circuit court’s discretion, and appellate review is limited to considering whether the circuit court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. “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, 231, 688 N.W.2d 20, 23. 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, 640 (1993).

¶8 The 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.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82. The circuit court may also consider 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, 2004 WI 42, ¶43 & n.11, 270 Wis. 2d at 558 & n.11, 678 N.W.2d at 207 & n.11 (citation and quotation marks omitted). The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. *Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d at 237, 688 N.W.2d at 26.

¶9 On appeal, as he did when he moved for postconviction relief, Moore essentially argues that the circuit court did not view his character, level of culpability, and rehabilitative needs the way Moore views these things and that the circuit court should have weighed the sentencing factors differently (i.e., more favorably to him). We reject all of Moore’s specific arguments that the circuit court should have given greater weight to what he characterizes as mitigating factors. These arguments ignore the applicable law, particularly the law that holds that the weight of sentencing factors is for the circuit court. See *ibid.*

¶10 We likewise reject Moore’s argument that the circuit court held his confessed history of having nearly one hundred sexual partners against him and evidenced personal bias/personal prejudgment on this issue. A review of the sentencing transcript reveals that the circuit court merely mentioned this as one of the negative factors it considered. The extent of the circuit court’s comments in this regard were as follows: “Your sexual history, you indicate you had[,] your own guess[,] a hundred sexual partners starting at the age of 12, an age where you expect a child to be—to be still watching Sponge Bob. We’re dealing with alcohol, drugs and sex. That’s, you know, all that’s a recipe for disaster.”

¶11 In resolving this appeal, we adopt as our own the postconviction court’s reasoning found in its detailed decision denying Moore’s motion for sentence modification. *See* WIS. CT. APP. IOP VI. (5)(a) (May 22, 2012) (“When the [circuit] court’s decision was based upon a written opinion ... of its grounds for decision that adequately express the panel’s view of the law, the panel may incorporate the [circuit] court’s opinion ... or make reference thereto, and affirm on the basis of that opinion.”). We appreciate the postconviction court’s thorough analysis, which includes a chart organizing Moore’s numerous claims and setting forth the specific pages in the sentencing hearing transcript demonstrating their falsity.² The postconviction court concluded that the circuit court properly exercised its sentencing discretion. We agree.

² Counsel challenges the postconviction court’s summary of his claims as set forth in its chart. Moore submits that in his motion for postconviction relief, he argued that the court did not “meaningfully,” “significantly,” or “adequately” consider certain factors presented at sentencing that had great bearing on his rehabilitative needs and character. In his reply brief, he writes: “These qualifying words were intended to convey in plain meaning that the court did indeed consider the factors to some degree. However, appellant maintains that the consideration was not sufficient enough to support the decision.” Moore claims this distinction was missed by the postconviction court, which, in its chart, recast Moore’s claims in terms of the circuit court

(continued)

By the Court.—Judgment and order affirmed.

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

having “ignored” mitigating factors. For our purposes, this is a distinction without a difference; whether Moore argues that that circuit court “ignored” the mitigating factors or whether he argues that the circuit court failed to “meaningfully,” “significantly,” or “adequately” consider them during sentencing, the end result remains the same. As the postconviction court’s decision makes clear, the Record proves otherwise.

