COURT OF APPEALS
DECISION
DATED AND RELEASED

March 5, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1625-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE GARCIA,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

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

PER CURIAM. George Lee Garcia appeals from that portion of a final judgment in which the trial court sentenced Garcia to two years incarceration after revoking his probation that was imposed following his conviction of being a felon in possession of a firearm, contrary to § 941.29(2), STATS. He also appeals from the trial court's order denying his motion for modification of his sentence. On appeal, Garcia claims: (1) that his sentence

should be modified because it was defective; (2) that his sentence should be modified because it was unduly harsh; and (3) that he is entitled to have his sentence modified pursuant to § 752.35, STATS., the discretionary reversal statute. We affirm.

On January 31, 1994, Garcia pled guilty to being a felon in possession of a firearm, contrary to § 941.29(2), STATS. Upon the plea, he was placed on probation for two years, with the requirement that he enter a chemical dependency program. On July 21, 1994, Garcia was charged with two counts of possession of a controlled substance, contrary to §§ 161.16(2)(b)(1), 161.41(3m), 161.48, and 161.14(4)(j), STATS. On August 30, 1994, Garcia was convicted of these charges. Sentencing was set for November 1, 1994.

During his probationary period for the firearms offense, Garcia failed to report to or contact his probation agent regarding his whereabouts. He also violated the conditions of his probation by leaving his chemical dependency treatment center without permission. On September 15, 1994, Garcia was arrested and held on a warrant for violating the conditions of his probation. On October 3, 1994, Garcia's probation was revoked.

On November 1, 1994, Garcia was sentenced on the drug convictions. He received twenty months incarceration on Count I. On Count II, Garcia was sentenced to a stayed term of one year and was placed on probation for three years.

On November 11, 1994, Garcia was sentenced to two years incarceration on the felon-in-possession-of-a-firearm charge, following the revocation of his probation, to be served consecutive to both of the sentences for the drug violations. Garcia's motions to pursue postconviction relief and to modify the sentence were denied.

First, Garcia argues that the sentence following the revocation of his probation, which was made consecutive to the stayed sentence on Count II of the drug violation, is defective because, he contends, a sentencing court may not impose a sentence that is consecutive to one that is not currently being

served. He relies on ***Cresci v. State***, 89 Wis.2d 495, 501-502, 278 N.W.2d 850, 853 (1979). ***Cresci*** interpreted § 973.15(1), STATS., which then provided:

> The court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent or that it shall commence at the expiration of any other sentence; and if the defendant is then serving a sentence; the present sentence may provide that it shall commence at the expiration of the previous sentence.

In 1981, however, the legislature revised § 973.15, STATS., to read as follows:

> **(2)** (a) Except as provided in par. (b), the court may impose as many sentences as there are convictions and *may provide that any such sentence be concurrent with or consecutive to any other sentence imposed* at the same time or previously.

As the above indicates, there is a clear legislative mandate for the imposition of consecutive sentences in this case. Garcia's contentions are without merit.

Next, Garcia argues that the sentence he received was unduly harsh. When reviewing a claim that a sentence is too harsh, an appellate court first determines if the trial court properly exercised its discretion by examining the following three factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public, and then determines whether the sentence was excessive and unduly harsh. ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984); ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). Review is tempered by a strong policy against interfering with the sentencing discretion of the trial court. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). "It is presumed that the trial court acted reasonably and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence." ***Harris v. State***, 75 Wis.2d 513, 518, 250 N.W.2d 7, 10 (1977). A misuse of sentencing discretion "will be found 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).

After considering the three main sentencing factors, the trial court noted Garcia's problems with substance abuse and his refusal to get help. The trial court also discussed the seriousness of the offenses. The trial court further stated that it had originally given Garcia probation but that he did not cooperate with the rules of probation. The trial court also recognized its obligation to protect the public. The trial court properly exercised its discretion arriving at the sentencing. We further conclude that the sentence imposed was not "unduly harsh or excessive." *See* ***State v. Daniels***, 117 Wis.2d 19, 22, 343 N.W.2d 411, 417-418 (Ct. App. 1983) ("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.").

Finally, Garcia argues that this court should modify his sentences to run concurrently, using our authority for discretionary reversal pursuant to § 752.35, STATS. This request is addressed to our sound discretion. ***State v. Bembenek***, 111 Wis.2d 617, 638, 331 N.W.2d 616, 627 (Ct. App. 1983). Our discretionary power to reverse is to be used sparingly and with circumspect. *See* ***id.***, 111 Wis.2d at 638–639, 331 N.W.2d at 627. Under the facts of this case, exercise of that discretionary power is not warranted.

By the Court.—Judgment and order affirmed.

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