



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

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To:

Hon. Lamont K. Jacobson
Circuit Court Judge
500 Forest St.
Wausau, WI 54403

Sarah Burgundy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Shirley Lang
Clerk of Circuit Court
Marathon County Courthouse
500 Forest St.
Wausau, WI 54403

Theresa Wetzsteon
District Attorney
500 Forest Street
Wausau, WI 54403-5554

Frederick A. Bechtold
Attorney At Law, LLC
490 Colby St.
Taylors Falls, MN 55084

You are hereby notified that the Court has entered the following opinion and order:

2017AP1271-CR State v. Tommie R. Rothenberger (L. C. No. 2014CF875)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Tommie Rothenberger appeals a judgment of conviction for felony escape and an order denying his motion for postconviction relief. Rothenberger argues the circuit court erroneously exercised its discretion by imposing the maximum sentence, which he contends was excessive.

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹

Rothenberger was incarcerated in Marathon County on convictions for fourth-degree sexual assault, battery by a prisoner, and a sex offender registry violation. Rothenberger was allowed Huber privileges to attend classes at Northcentral Technical College. On September 26, 2014, Rothenberger failed to return to the jail at the designated time. He was apprehended three days later. Rothenberger told the presentence investigation (PSI) author he absconded because he was “sick of jail” and because he wanted to “work off time being a trustee” but the jail would not let him because he had battered another inmate. During Rothenberger’s absence, he was with his girlfriend at her parents’ house in Oxford, Wisconsin, and he spent a day in Wisconsin Dells.

Rothenberger was charged with felony escape contrary to WIS. STAT. § 946.42(3)(a). He pled no contest pursuant to a plea agreement, under which the parties were free to argue at sentencing. The circuit court ordered a PSI report, which, despite Rothenberger’s young age, revealed a significant juvenile and adult criminal record, including two probation revocations, as well as Rothenberger’s failure to accept responsibility for most of those offenses. The PSI author recommended a one-year sentence to be served in the Marathon County Jail with Huber privileges. The State requested a five-year sentence consisting of two years’ initial confinement and three years’ extended supervision, while the defense recommended two years’ probation with a three-year prison sentence imposed and stayed.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The circuit court began its sentencing remarks by recognizing Rothenberger's escape offense, while an affront to the judicial system, was not a violent or assaultive offense. However, the court found this mitigating factor was outweighed by Rothenberger's "lengthy" criminal history. The court focused on his adult offenses, which consisted of the following: (1) a 2008 sexual assault of his four-year-old female cousin; (2) a pair of battery convictions in 2012, both involving strangulation, for which Rothenberger was placed on probation; (3) his revocation from probation for, among other things, having sexual contact with one juvenile and for taking a photograph of his penis with another juvenile's cell phone; (4) his 2014 conviction for the battery of another inmate, with another count of strangulation dismissed and read in; and (5) his 2014 conviction for failing to comply with sex offender registry requirements. The court also noted other instances of poor conduct that had not led to criminal convictions, as well as Rothenberger's apparent failure to accomplish anything in treatment despite being given a "mind-boggling number of treatment options."

In addition to Rothenberger's criminal offenses, the circuit court emphasized his negative personality characteristics. The court read directly from the PSI, which stated Rothenberger had "a history of doing whatever it takes to get what he wants and to control situations. He is superficially charming, personable, and skilled at convincing others of his reality," and he "will hold onto his perception of reality, even when given contradicting evidences from multiple sources." The court noted Rothenberger had failed to take responsibility for his various offenses, he frequently engaged in "blame-shift[ing]," and he had told the PSI author that his juvenile record "is all set up on me." The court found the "most telling and most insightful" statement in the PSI regarding Rothenberger's character was his response to being asked why he had had so

many sexual partners: “I was homeless, if you dick a girl down, she will take care of you, they were not all the prettiest, but you do what you have to do.”

The circuit court also stressed that the public needed protection from Rothenberger. The court stated, “[L]ooking at your record, you have assaulted ... toddlers, you’ve assaulted ... fellow inmates, you have assaulted people who are your age, you’ve used people, the female sex partners you’ve had for purposes of [‘]dicking them down[’] so they’ll give you money and a place to stay.” The court stated Rothenberger was “getting really good at the game,” he was “incredibly deceitful” and “incredibly manipulative,” and he was “predatory” and used people for his own purposes while rebuffing authority. The court ultimately sentenced Rothenberger to the maximum sentence, three years’ initial confinement and three years’ extended supervision. *See* WIS. STAT. §§ 946.42(3)(a); 939.50(2)(h); 973.01(2)(b)8. & (2)(d)5.

Rothenberger filed a motion for sentence modification, asserting his sentence was both “harsh or unconscionable” and disproportionate to the offense committed. Rothenberger noted his escape was “a simple Huber walk away,” did not involve the use or threat of force, did not result in any damage or destruction of property, and was not accomplished by a bribe. Rothenberger acknowledged the sentence was “driven largely by the court’s assessment of his ‘dangerous’ character and a corresponding need to protect the public,” but Rothenberger did not dispute any of the facts underlying the circuit court’s observations about these factors. Rather, he asserted that, “even taking his character into account, a maximum sentence of six years of imprisonment ... is grossly disproportionate to the offense” for which he was being sentenced.

At the motion hearing, Rothenberger’s postconviction counsel stated he was not going to try to convince the circuit court it had Rothenberger’s character wrong, and he conceded

Rothenberger’s character justified a “weightier sentence than that kind of crime would ordinarily entail.” However, counsel argued the aggravating factors concerning the offense were practically nonexistent, and he urged the circuit court to modify the sentence to comport with the State’s five-year recommendation. The court denied the motion, concluding it had considered the proper factors and appropriately assigned weight to each relevant sentencing factor. “Perhaps the pitcher wasn’t quite full regarding the severity of the offense,” the court remarked, “but regarding the character of the offender and rehabilitative needs, it was overflowing.”

On appeal, Rothenberger argues the circuit court erroneously exercised its discretion by imposing an excessive sentence. A judge has discretion to determine the length of a sentence within the permissible range set by statute. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A circuit court erroneously exercises this 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.” *Id.* Rothenberger argues that, even considering his poor character, the gravity of his offense “was simply not great enough to justify a maximum sentence,” and he urges us to adopt the rule “that character alone cannot justify a maximum sentence.”

We summarily reject Rothenberger’s excessive sentence challenge. A sentencing court must consider three primary factors—the gravity of the offense, the character of the defendant, and the need to protect the public. *State v. Davis*, 2005 WI App 98, ¶13, 281 Wis. 2d 118, 698 N.W.2d 823. The court may also consider a number of secondary factors, including the defendant’s criminal record, his or her personality and social traits, and the need for close rehabilitative control. *Id.*, ¶14. The weight to be given to each factor is a matter for the sentencing court’s discretion. *Id.*, ¶13 (citing *Ocanas*, 70 Wis. 2d at 185). The circuit court here

considered the proper factors and could reasonably conclude that a defendant with Rothenberger's criminal profile and behavior warranted the maximum sentence even if the nature of his escape was perhaps less aggravated than some other defendant's.

We also decline Rothenberger's invitation to reshape the contours of Wisconsin's longstanding sentencing law. This court does not possess the authority to overrule *Davis* and other Wisconsin law to hold that a maximum sentence cannot be based on character considerations alone. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Moreover, in advancing such a rule Rothenberger ignores that his individualized sentence was designed to protect the public and to address his clear rehabilitative needs. Rothenberger's argument also ignores the fact that his dangerous, self-serving behavior was not a generalized consideration but rather manifested in the very crime for which he was sentenced. Namely, Rothenberger walked away on Huber release and did not turn himself in, largely because he believed that his convictions or the rules imposed on him were invalid, he was the victim of his own crimes, and he was immune to consequences for his actions. These were appropriate aggravating factors for a sentencing court to consider.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals