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

2017AP941-CR State of Wisconsin v. Kenneth Louis Wells, Jr.
(L.C. # 2015CF4688)

Before Brennan, P.J., Kessler and Dugan, 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).

Kenneth Louis Wells, Jr., appeals a judgment of conviction and an order denying postconviction relief. He pled guilty to one felony count of theft from person as a party to a crime and one misdemeanor count of impersonating a peace officer. The circuit court imposed four years of initial confinement and three years of extended supervision for the felony and a consecutive nine-month jail sentence for the misdemeanor. On appeal, the sole issue is whether the circuit court erroneously exercised its sentencing discretion. Based upon our review of the

briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

On October 23, 2015, Wells and a co-actor approached a man sitting in a truck. Wells showed a badge and said he was an undercover police officer, then pulled the man out of the vehicle and tried to steal his wallet. Later that day, Wells and a co-actor approached two men sitting in a parked car. Wells again showed a badge and claimed to be a police officer. He and his co-actor took a cell phone and $50 from the victims before they became suspicious and threatened to call the police to confirm the identity of the purported officers. Wells and his co-actor then fled the scene. Wells escaped, but the victims caught his co-actor and held him until police arrived. The co-actor inculpated Wells.

In Milwaukee County case No. 2015CF4688, the State charged Wells in the second incident with a felony count of theft from person as a party to a crime, and a misdemeanor count of impersonating a peace officer. *See* WIS. STAT. §§ 943.20(1)(a) & (3)(e), 939.05, 946.70(1)(a). Wells decided to plead guilty as charged. In exchange, the State dismissed Milwaukee County case No. 2015CF4719, in which the State charged Wells with crimes arising out of the first incident.[2] The State also agreed not to recommend a specific disposition at sentencing.

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

[2] The charging documents filed in Milwaukee County case No. 2015CF4719 are not in the appellate record. It appears from electronic circuit court docket entries in case No. 2015CF4719 that the State charged Wells in that case with crimes that were similar to those charged in Milwaukee County case No. 2015CF4688.

The circuit court accepted Wells's guilty pleas. As a result of the felony conviction, Wells faced maximum penalties of ten years of imprisonment and a $25,000 fine. *See* WIS. STAT. § 939.50(3)(g). The misdemeanor conviction exposed him to maximum penalties of nine months in jail and a $10,000 fine. *See* WIS. STAT. § 939.51(3)(a).

At sentencing, the State described Wells's extensive criminal history, beginning with a 2001 felony theft conviction for which Wells received a prison sentence. Following release from confinement, Wells was charged with ten crimes, ultimately pleading guilty in 2003 to four counts of impersonating a police officer and one count of armed robbery. He received an aggregate sentence of twelve years of initial confinement and eight years of extended supervision. While incarcerated, he was convicted in 2007 of battery by a prisoner and received probation. The State's sentencing remarks placed particular emphasis on the repetitive nature of Wells's criminal activity, and the State opined that the community required protection from a persistent offender such as Wells.

Wells's trial counsel recommended an aggregate concurrent term of three years of imprisonment. In support, trial counsel stated that Wells was forty-one years old and therefore "at a[n] age where ... he's been significantly slowed down." Further, trial counsel advised that Wells was addicted to cocaine and that he had a cancer diagnosis for which he was receiving chemotherapy while in prison. Trial counsel acknowledged that Wells had spent almost all of the previous fourteen years in prison, that his crimes in the instant case led to revocation of his extended supervision for his 2003 convictions, and that he had been ordered reconfined for a period of twenty-nine months as a consequence. Trial counsel said that Wells had "accepted responsibility ... quite readily" for his most recent offenses and believed that "with proper AODA treatment [] he can get out eventually and try to live a productive life."

Wells exercised his right to allocution. He acknowledged that he committed the crimes less than a year after his release from prison, that he "got on drugs and did what [he] did," and that he was sorry.

The circuit court rejected Wells's proposed disposition of three years of concurrent imprisonment. Instead, the circuit court explained that the totality of the sentencing factors required that Wells serve four years of initial confinement and three years of extended supervision for the felony and a consecutive nine-month sentence for the misdemeanor.

Wells filed a postconviction motion alleging that the circuit court erroneously exercised its sentencing discretion. The circuit court rejected the claim in a written order entered without a hearing, and Wells appeals.

Our standard of review is well settled. Sentencing lies within the circuit court's discretion, and a defendant must meet a heavy burden to show that the circuit court erroneously exercised its discretion. *See* ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. 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 (1993).

The circuit court is required to identify the sentencing objectives, which may "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, 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, 712 N.W.2d 76. The sentencing court may also consider a wide range of other factors relating to the defendant, the offense and the community. *See* ***id.***

When a defendant challenges a sentence, the postconviction proceedings afford the circuit court an additional opportunity to explain the sentencing rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). If the defendant thereafter pursues an appeal, a reviewing court will search the entire record for reasons to sustain the circuit court's exercise of sentencing discretion. ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

Wells asserts that the circuit court erred in his case because, "[a]bove all else, the circuit court failed to concretely identify the specific goals of the sentence as well as how and why those goals would be served by this lengthy sentence." We cannot agree. The circuit court identified punishment and protection of the public as the sentencing goals, stating at sentencing that Wells was "a nuisance to the community" and further explaining in the postconviction order that his "revolting and offensive behavioral pattern ... drove the sentence in this case, not to mention the community's need for protection."

The circuit court also addressed the primary sentencing factors and how they led the circuit court to select the sentences it imposed. The circuit court considered the gravity of the offenses, stating that the crimes were "horrific" and that they were aggravated because, at the time Wells committed them, he was serving a term of extended supervision. Turning to the need to protect the public, the circuit court reminded Wells that he had victimized many people throughout his lifetime and that he failed to "get the message" notwithstanding his significant term of confinement for his prior offenses. As to Wells's character, the circuit court found that

he exhibited an "ongoing pattern of ... taking what's not [his]," and noted that Wells had "tried his hand at impersonating a police officer quite a number of times; on January 9, 2003, on January 17, 2003, and three separate times on January 19, 2003, all of which culminated in a panoply of charges." *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).

The circuit court acknowledged that Wells had accepted responsibility for his most recent crimes, but determined that his remorse did not ameliorate the effect of his repeatedly making "the wrong choices." The circuit court further considered Wells's rehabilitative needs and credited him for "getting ... necessary treatment" while confined. Nevertheless, the circuit court indicated that Wells must continue to address his needs in a structured and confined setting, pointing out that after spending fourteen years in prison, he returned to criminal behavior within approximately nine months of his release from confinement.

Wells complains that the circuit court did not discuss his cancer diagnosis or "give any consideration to defense counsel's recommendation." These complaints do not identify an error. A circuit court has wide discretion to determine the factors that are relevant to the sentencing and the weight to afford those factors. *See* ***State v. Grady***, 2007 WI 81, ¶31, 302 Wis. 2d 80, 734 N.W.2d 364. Nothing presented at sentencing or during the postconviction proceedings demonstrates that the circuit court was required to give greater weight to Wells's health than to the finding that he posed an ongoing danger to the community. As to trial counsel's recommended disposition, a circuit court may use such a recommendation as a "touchstone[]" in the sentencing decision, *see* ***Gallion***, 270 Wis. 2d 535, ¶47, but the circuit court is not required to discuss such a recommendation during the course of sentencing a defendant. To the contrary, a sentencing court engages in "sifting and winnowing" when deciding the matters relevant to the

sentencing decision. *See* ***State v. Bizzle***, 222 Wis. 2d 100, 106, 585 N.W.2d 899 (Ct. App. 1998).

Wells concludes his brief-in-chief with a set of questions, asking: (1) whether "the public require[s] the same amount of incarceration to be 'protected' when the offender in question is an older, cancer-stricken cocaine addict"; and (2) why the circuit court did "not emphasize[] rehabilitation as a more immediate, more practical goal." Consideration and resolution of these questions rests in the circuit court's discretion and, as we have previously reminded the defense bar, "[w]ithout an elaborate system of sentencing grids, like there is in the federal system, no appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion." ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. Thus the circuit court, not this court, determined whether a forty-one year old man who successfully fled from his pursuing victims should be viewed as an "older" person who had been "slowed down" and therefore as a lesser risk to the community. Similarly, it fell to the circuit court, not this court, to decide whether Wells's cocaine addiction was a mitigating factor under the circumstances here. *Cf.* ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992) (circuit court has discretion to determine whether a factor is mitigating or aggravating). In this case, the circuit court emphasized Wells's recidivism, stating that Wells had been released from confinement mere months before "going right back to his former behavior." In the circuit court's view, Wells posed a risk to the community because he failed to conform his conduct to law after spending fourteen years in prison, and "[f]or this, a meaningful sentence was warranted."

In fashioning the disposition, the circuit court made no errors of law and considered appropriate factors. Although the circuit court did not assess the sentencing information in the

manner that Wells would have preferred, that is not an erroneous exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 ("our inquiry is whether discretion was exercised, not whether it could have been exercised differently").

IT IS ORDERED that the judgment and postconviction order are summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals