



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 II

July 17, 2019

To:

Hon. Robert J. Wirtz
Circuit Court Judge
Fond du Lac County Courthouse
160 S. Macy St.
Fond du Lac, WI 54935

Anne Christenson Murphy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 S. Macy St.
Fond du Lac, WI 54935

Eric Toney
District Attorney
Fond du Lac County
160 S. Macy St.
Fond du Lac, WI 54935

Thomas Brady Aquino
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

2018AP1920-CR State of Wisconsin v. Richard D. Gray (L.C. #2016CF417)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Richard D. Gray appeals from a judgment of conviction for one count of burglary of a building or dwelling and three counts of misdemeanor theft, all as a repeater, and from the denial of his postconviction motion for resentencing. Gray argues that the circuit court erroneously exercised its discretion at sentencing by giving too much weight to the protection of the public sentencing factor, failing to consider Gray's rehabilitative needs, and relying on facts not in the

record. 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 (2017-18).¹ We affirm.

While on extended supervision in 2016, Gray went on a daylong crime spree. He broke into a home, stole electronics and a small safe, stole a backpack from a parked car, asked a woman for help then stole her purse, and shoplifted a number of items from a local convenience store, all culminating in his arrest while driving a stolen vehicle filled with the stolen items. Gray was identified in surveillance video and confessed to the crimes. The State charged Gray with seven criminal counts, including burglary, misdemeanor theft, misdemeanor retail theft, criminal damage to property, and concealing stolen property.

Subsequent to his arrest, Gray began to exhibit concerning mental health behaviors and was transferred to the Wisconsin Resource Center. Gray initially entered a plea of not guilty by reason of mental disease or defect, but a psychological examination determined that the evidence did not support an NGI plea. Gray ultimately pled no contest to felony burglary and three counts of misdemeanor theft, with the remaining charges dismissed and read in. Pursuant to the plea agreement, the State agreed to jointly recommend ten years of imprisonment, comprised of two years' initial confinement (IC) and eight years' extended supervision (ES) to be served consecutively with the time he was serving due to the previous ES violation.²

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² At the time of these crimes, Gray was on ES for two counts of burglary committed in Milwaukee County in 2013. Gray's ES was ultimately revoked, and at the time of sentencing he was serving his sentence after revocation to conclude June 21, 2021.

The circuit court sentenced Gray to seven years' IC and three years' ES on the burglary charge and to six months on each of the three theft charges to be served consecutive to each other, the burglary charge, and his revocation sentence. At sentencing, the court highlighted the seriousness of the crimes, Gray's past drug abuse and previous offenses, his mental health issues, and the need to protect the public from repeat behavior. Gray moved for postconviction relief seeking a new sentencing hearing, which the circuit court denied.³ Gray appeals.

“It is a well-settled principle of law that a circuit court exercises discretion at sentencing.” *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. “[W]e will sustain discretionary acts if we find the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.” *State v. Firebaugh*, 2011 WI App 154, ¶5, 337 Wis. 2d 670, 807 N.W.2d 245. Importantly, “[s]entencing decisions are afforded a presumption of reasonability consistent with our strong public policy against interference with the circuit court’s discretion.” *State v. Harris*, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. When we review a circuit court’s exercise of discretion, we ask whether the circuit court soundly exercised discretion, not whether we may have exercised discretion differently. *State v. Prineas*, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206.

The circuit court must consider three factors in fashioning its sentence: the gravity of the offense, the character of the defendant, and the need to protect the public. *Harris*, 326 Wis. 2d 685, ¶28. However, the court possesses “considerable discretion as to the weight to be assigned

³ Gray also sought eligibility for the Substance Abuse Program. The court granted Gray’s request and ordered the judgment of conviction modified to reflect eligibility for the programming.

to each factor.” *Id.* Gray argues that the circuit court erred by giving too much weight to the public protection factor, not taking Gray’s rehabilitative needs into consideration, and relying on facts that were not part of the record. We disagree.

We conclude that Gray failed to establish that the circuit court erroneously exercised its sentencing discretion. As stated above, the trial court has considerable discretion in the weight given to each factor. Here, the court found that the need to protect the public was the significant factor, while addressing all three factors in formulating its sentence. The court noted the serious nature of the crimes and the impact it had on the victims’ security, stressed Gray’s habitual criminal nature and the fact that Gray committed the offenses while on supervision, and noted that a prior prison term and extended supervision did not “protect the public from what’s now very repetitive behavior.” Additionally, the court considered Gray’s “significant mental health issues, together with and coupled with the fact that there were issues going on in your life and you resorted to using, or abusing, or were on prescription drugs to the extent that your mind was altered in some way.” The court ultimately determined that because Gray committed these offenses while on extended supervision—which speaks to his rehabilitative prospects—greater confinement would be necessary to adequately protect the public. We see no error.

Gray further argues that the circuit court failed to explain why it chose the particular length of custody and whether it was the minimum sentence necessary to protect the public. *See Gallion*, 270 Wis. 2d 535, ¶44. Gray does not, however, claim that the sentence was overly harsh or unconscionable, and we note that the sentence was within the applicable maximums. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Finally, Gray argues that the court relied on facts outside of the record by weighing his previous convictions in its analysis. We find this to be unpersuasive as Gray’s two previous convictions were for burglary—a fact

which he admitted at sentencing and which was relevant as it was the same offense charged. We conclude that the sentencing court properly exercised its discretion.

Upon the foregoing reasons,

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.

Sheila T. Reiff
Clerk of Court of Appeals