



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

February 13, 2013

To:

Hon. John R. Race
Circuit Court Judge
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Sheila Reiff
Clerk of Circuit Court
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Daniel A. Necci
District Attorney
P.O. Box 1001
Elkhorn, WI 53121-1001

Mark A. Schoenfeldt
Attorney at Law
135 W. Wells St., Ste. 604
Milwaukee, WI 53203

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2012AP1112-CR State of Wisconsin v. Donny H. Beard (L.C. #2011CF284)

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

Donny H. Beard appeals from a judgment of conviction and an order summarily denying his postconviction motion for sentencing relief. Beard argues that the sentencing court erroneously exercised its discretion by drawing improper inferences from the facts of record. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and affirm. *See* WIS. STAT. RULE 809.21 (2011-12).¹

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

This case arises from a traffic stop where Beard was discovered with eight grams of cocaine and fifteen methadone pills. During the encounter, Beard resisted and wrestled with officers and had to be tasered twice. An officer dropped his radio, microphone, and gun magazine during the struggle. Beard was on supervision for another felony drug offense at the time, and in his car police located bottles with temperature strips and warmers. Beard conceded that these objects were designed to produce fake urine samples that would test negative for the presence of drugs.

Beard pled no contest to one count of possession with intent to deliver cocaine in an amount greater than five but less than fifteen grams. The repeater enhancer and three other charged offenses were dismissed and read in. Additionally, the parties agreed that the court should read in a referred but as-yet uncharged offense concerning a false theft report made by Beard to police in an attempt to collect \$6000 in insurance money.

At sentencing, two of Beard's family members spoke on his behalf, referring to him as an "honest" person with "decent values" who "wants to get married and settle down, white picket fence and all." In response, the court brought to their attention Beard's lengthy criminal record, which included twelve convictions, periods of revoked supervision, and time in prison. The court addressed the three primary factors: (1) the gravity of the offense, (2) the character and rehabilitative needs of the offender, and (3) the need for protection of the public. *See State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). Given Beard's prior record and the fact that he was on supervision at the time of this offense, the court rejected probation, concluding that confinement was necessary to protect the public. The court imposed an eight-year bifurcated sentence, with four years of initial confinement and four years of extended supervision, to run concurrent with the revocation sentence Beard was then serving.

Beard asserts that the trial court erroneously exercised its sentencing discretion by drawing two unfair inferences from admittedly accurate facts of record. First, he argues that the trial court improperly drew an inference of flawed character from the fact of his two prior divorces, citing the following sentencing remark:

[W]hile he may have a good job as a carpenter and may be to people he is very intimate with they think he's a good guy but a person with two divorces cannot be considered to be the world's most exemplary family man.

Review of a sentencing decision is limited to determining whether there was an erroneous exercise of discretion. *State v. Harris*, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. “Discretion is erroneously exercised when a sentencing court imposes its sentence based on or in actual reliance upon clearly irrelevant or improper factors.” *Id.* (emphasis omitted). Given the strong public policy against interfering with the sentencing discretion of the circuit court, sentences are afforded a presumption of reasonableness. *Id.* “Accordingly, the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion.” *Id.*

We disagree that the court's “family man” comment illustrates its reliance on an improper inference. The trial court's determination that Beard's character was less than stellar was based not on Beard's prior divorces, but on his lengthy prior record and his recent deceitful acts. The court acknowledged Beard's positive characteristics, such as his education and work history, but was troubled by the recent instances of deception, including the insurance fraud scheme and the urine tampering in order to “con his agent into believing he was not consuming drugs.” The court concluded that these behaviors demonstrated a “real flaw in his character.” When viewed in context, the court's “family man” remark simply indicated that the court considered the family's characterization of Beard to be naïve and unrealistic.

Similarly, we conclude that the trial court did not rely on an improper inference by referring to the “large quantity” of drugs in Beard’s car. Citing to several articles, Beard contends that the total amount of methadone seized, 150 milligrams, constitutes an amount that some patients are prescribed in a single day. The State, on the other hand, points us to different sources describing much lower standard clinical dosages, such as 2.5 milligrams per day. Beard has not carried his heavy burden to establish that the court drew an improper inference when it opined that fifteen 10-milligram methadone pills constitutes a “large quantity.”

Further, the court’s remark was hardly the lynchpin of its sentencing decision. In deeming the offense aggravated, the court determined that it was committed while Beard was on supervision for a felony drug offense and involved an extensive altercation with the police wherein Beard “had to be tasered by the officers who could not control him.” The court noted that Beard was caught with eight grams of cocaine, an amount characterized by the State as consistent with resale, and that “cocaine can and has caused many problems in the community.” These facts, along with the court’s consideration of the read-in offenses, more than justify its discretionary determination that the offense was aggravated.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals