

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 10, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP290-CR

Cir. Ct. No. 2004CF4258

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLEN BUCKNER, III,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Allen Buckner, III appeals from a corrected judgment of conviction for reckless homicide and armed robbery, and from a postconviction order denying his sentence modification motion. The issue is whether the trial court erroneously exercised its discretion in imposing a sentence

that: (1) was twice as long as that recommended by the presentence investigator; (2) allegedly exceeded the minimum amount of custody necessary to achieve the sentencing considerations (“minimum custody standard”); and (3) was allegedly unduly harsh and excessive. We conclude that the trial court properly exercised its sentencing discretion and explained why it was unimpressed with the presentence investigator’s recommendation. We further conclude that the trial court’s sentencing remarks demonstrated why the sentence met the minimum custody standard and was not unduly harsh and excessive. Therefore, we affirm.

¶2 Incident to a plea bargain, Buckner pled guilty to first-degree reckless homicide while armed, in violation of WIS. STAT. §§ 940.02(1) (2003-04) and 939.63 (amended Feb. 1, 2003), and attempted armed robbery, in violation of WIS. STAT. §§ 943.32(2) (amended Feb. 1, 2003) and 939.32 (amended Feb. 1, 2003), each as a party to the crime, pursuant to WIS. STAT. § 939.05 (2003-04). In exchange for his guilty pleas, the State recommended a forty-five-year sentence for the homicide, comprised of periods of initial confinement and extended supervision in the respective ranges of thirty- to thirty-five years, and ten to fifteen years, and for the attempted armed robbery, a recommendation of a fifteen-year sentence, comprised of ten- and five-year respective periods of initial confinement and extended supervision, both to run concurrent to each other but consecutive to a reconfinement period Buckner was also serving. The presentence investigator recommended a sentence for the homicide in the range of twenty to twenty-six years, comprised of periods of initial confinement and extended supervision in the respective ranges of thirteen to sixteen years and seven to ten years, and a sixteen- to eighteen-year sentence for the attempted armed robbery, comprised of respective periods of initial confinement and extended supervision of nine to ten years and seven to eight years. For the homicide, the trial court imposed a forty-

five-year sentence, comprised of thirty-five- and ten-year respective periods of initial confinement and extended supervision. For the attempted armed robbery, the trial court imposed a fifteen-year sentence, comprised of ten- and five-year respective periods of initial confinement and extended supervision. The sentences were imposed concurrently to each other and to a two-year reconfinement period. Buckner moved for sentence modification, which the trial court denied. Buckner appeals.

¶3 Buckner contends that the trial court erroneously exercised its sentencing discretion in: (1) ignoring the presentence investigator's recommendation; (2) failing to explain how its sentence met the minimum custody standard; and (3) imposing an unduly harsh and excessive sentence. We disagree.

¶4 When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶5 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court assigns to each factor is a discretionary determination. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The trial court should also explain how the confinement term was the minimum amount of custody necessary to achieve the sentencing considerations ("minimum custody standard"). See *State v.*

Gallion, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court’s obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. See *Larsen*, 141 Wis. 2d at 426-28.

¶6 The trial court considered the primary sentencing factors. It characterized the homicide and the attempted armed robbery as violent, and expressly considered “the aggravated nature of this crime,” and the fact that “[Buckner or] any other defendant has absolutely no right to go armed in the community and to take the life of another citizen.” It considered Buckner’s character. “[The trial court was] sorry for ... Mr. Buckner. [The trial court was] sorry for what has gone in [his] life that brought [him] to this point.” It credited Buckner for accepting responsibility and pleading guilty; it believed that he was remorseful. It was mindful, however, that Buckner’s conduct on that fateful night “was [his] voluntary choice. [He was] only a few months out of prison.” It also considered its obligation to impose punishment and its responsibility to protect the community. It further viewed its purpose to deter others. These excerpts from the trial court’s sentencing remarks demonstrate that it properly exercised its discretion in considering the primary sentencing factors.

¶7 Buckner contends that the trial court erroneously exercised its discretion by imposing a sentence that was twice as long as that recommended by the presentence investigator. Preliminarily, Buckner acknowledges that the trial court is not bound by any of the sentencing recommendations. See *State v. Bizzle*, 222 Wis. 2d 100, 105-06 n.2, 585 N.W.2d 899 (Ct. App. 1998). Nevertheless, he complains that a sentence twice the length of the recommendation evidences unreasonableness. We disagree. First, the sentence imposed was substantially similar to that which Buckner agreed to incident to his plea bargain. Second, the

trial court explained why it was unimpressed with the presentence investigator's report: "[the trial court] felt that this particular presentence was not incredibly useful in terms of its insight and the information the presentence writer had on the identity and characteristics of [the victim]..." That explanation evinces its exercise of sentencing discretion.

¶8 Buckner's next criticism is that the trial court failed to explain how its sentence met the minimum custody standard. This criticism is belied by the record. The trial court explained that Buckner's four previous convictions, including the recent prison sentence for which he was released to supervision shortly before committing these offenses, were not sufficient to deter him from serious criminal behavior. The trial court continued:

your recent background, demonstrates ... that the short prison sentence obviously wasn't sufficient to work a change in your patterns. Extended supervision was not providing enough structure for you. There are not a lot of things that [the trial court] can look to to determine what it's going [to] take to make you safe in the community. All [the trial court] can look at is the past, how you responded to the opportunities that you were given.

Although Buckner disagreed with its explanation, the trial court satisfied its obligation to explain why its sentence met the minimum custody standard. *See Gallion*, 270 Wis. 2d 535, ¶23.

¶9 Buckner also challenges his sentence as unduly harsh and excessive. A sentence is unduly harsh when it 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*, 70 Wis. 2d at 185. "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.” *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶10 The sentence was not unduly harsh and excessive. First, imposing an aggregate sentence of forty-five years for reckless homicide and attempted armed robbery of a concededly innocent victim that an intoxicated Buckner decided to rob one evening is not disproportionate, nor does it “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ocanas*, 70 Wis. 2d at 185. Second, the sentence is substantially similar to that to which Buckner agreed by accepting the State’s plea bargain. Third, these offenses carry an aggregate maximum potential penalty of eighty-five years.¹ A forty-five-year sentence for offenses carrying an aggregate total sentence of eighty-five years is well within the limits of the maximum potential sentence, and is not unduly harsh and excessive. *See Daniels*, 117 Wis. 2d at 22. The trial court properly exercised its sentencing discretion; its sentence was not unduly harsh and excessive. *See Giebel*, 198 Wis. 2d at 220.

By the Court.—Judgment and order affirmed.

¹ First-degree reckless homicide is a Class B felony, carrying a sixty-year maximum potential penalty. *See* WIS. STAT. §§ 940.02(1) (2003-04); 939.50(3)(b) (2003-04). Buckner was armed, carrying an additional five-year potential penalty. *See* WIS. STAT. § 939.63(1)(b) (amended Feb. 1, 2003). Armed robbery is a Class C felony, carrying a forty-year maximum potential penalty. *See* WIS. STAT. §§ 943.32(2) (amended Feb. 1, 2003); 939.50(3)(c) (amended Feb. 1, 2003). As an attempted (as opposed to a completed) crime, the maximum potential penalty is reduced by half or twenty years. *See* WIS. STAT. § 939.32(1g)(a) (amended Feb. 1, 2003).

This opinion will not be published. *See* WIS. STAT.
RULE 809.23(1)(b)5. (2005-06).

