

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2007

A. John Voelker
Acting 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 Nos. 2006AP1827-CR
2006AP1828-CR**

**Cir. Ct. Nos. 2004CF4278
2004CF5894**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN R. CALDWELL, SR.,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kevin R. Caldwell, Sr. appeals from judgments entered after he pled guilty to two counts of burglary and one count of operating a motor vehicle without the owner's consent, party to a crime, contrary to WIS. STAT. §§ 943.10(1)(a), 943.23(3) and 939.05 (2001-02). Caldwell also appeals

from an order denying his postconviction motion, which sought sentence modification. Caldwell contends the trial court erroneously exercised its discretion by imposing an unduly harsh sentence. Because the trial court considered the proper sentencing factors and the sentence imposed was not shocking to public sentiment, we affirm.

BACKGROUND

¶2 On July 21, 2004, at approximately 12:40 a.m., Caldwell entered the residence of Bruce Winters, who was asleep at the time. Winters awoke and saw Caldwell sneaking up the stairway to the second floor of the residence. Winters tackled Caldwell and held him down until police arrived. Winters did not give permission or consent to Caldwell to enter the residence.

¶3 On September 13, 2004, Caldwell, without permission or consent, entered the garage of victim Richard Rogers and removed items of property, which were found in a gray 2003 pickup truck parked outside the garage. The 2003 pickup truck turned out to belong to Kent Dulkstra, who stated that the truck was taken without his permission or consent.

¶4 Bridgett Bero also advised police that a 1993 white Ford pickup truck was taken without permission or consent from her place of employment on September 13, 2004. Caldwell was apprehended in New Berlin driving the 1993 Ford truck the day after it was taken.

¶5 Based on these facts, Caldwell was arrested and charged with burglary for the July 21st incident and burglary and two counts of operating a motor vehicle without the owner's consent for the September incidents. Caldwell agreed to plead guilty to the two counts of burglary and no contest to one count of

operation of a motor vehicle without consent. The second count of operating a motor vehicle count was dismissed, but read in for purposes of sentencing.

¶6 At the sentencing hearing, the State requested a sentence of four years' imprisonment. The defense submitted a psychological evaluation by Dr. Brian A. Stress to explain the context for Caldwell's criminal actions. Defense counsel requested a sentence of two years' confinement, concurrent to a Waukesha County sentence Caldwell was currently serving.

¶7 The trial court, concerned about Caldwell's lengthy criminal history, sentenced Caldwell to five and one-half years on the first burglary count, consisting of two and one-half years' initial confinement followed by three years' extended supervision, consecutive to any other sentence. On the second burglary count, the court imposed five and one-half years, consisting of two and one-half years' initial confinement, followed by three years' extended supervision, consecutive to the other burglary sentence. On the operating without consent count, the court sentenced Caldwell to three and one-half years, consisting of one and one-half years' confinement, followed by two years' extended supervision, consecutive to the two other sentences. Judgments were entered.

¶8 Caldwell filed a postconviction motion seeking sentence modification. He claimed that the sentence imposed was unduly harsh and the trial court failed to take into account the psychological evaluation. The trial court denied the motion:

The defendant maintains that the sentences were excessive, particularly due to their consecutive nature, and that the court did not give adequate consideration to Dr. Stress's psychological evaluation. The court did, in fact, review Dr. Stress's evaluation, but there is nothing in the report that would have caused the court to impose lesser sentences given the defendant's prior record.

Based on the defendant's prior record and his involvement in other offenses after being charged in the first case ... the court determined that the first sentencing objective was the need for community protection. This objective is not altered by Dr. Stress's report. The second and third sentencing objectives were punishment and deterrence, given that the defendant has continued to commit crime after crime. The fourth sentencing objective was rehabilitation for the defendant's drug and alcohol problems.

Caldwell now appeals.

DISCUSSION

¶9 Caldwell claims on appeal that the trial court erroneously exercised its sentencing discretion by imposing an unduly harsh sentence. He asserts that the sentence was too long and unduly harsh because the court "did not place sufficient weight on the defendant's psychological evaluation The contents of this evaluation identify numerous issues surrounding Mr. Caldwell's mental health which mitigate both the seriousness of Mr. Caldwell's crimes and his prior criminal record." In reviewing a sentencing determination, our standard is deferential.

¶10 When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of 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." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶11 The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984).

The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. *State v. Jones*, 151 Wis. 2d 488, 495-96, 444 N.W.2d 760 (Ct. App. 1989).

¶12 The weight to be given to each of the factors is within the trial court's discretion. *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). After consideration of all the relevant factors, the sentence may be based on any one of the primary factors. *State v. Krueger*, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). Because the trial court is in the best position to determine the relevant factors in each case, we shall allow the trial court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing it to be unreasonable or unjustifiable. *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶13 In reviewing the record in this case, we conclude that the trial court did not erroneously exercise its discretion. It considered each of the primary factors, placing the most weight on the need to protect the public. In doing so, it was concerned by Caldwell's lengthy criminal history and his demonstrated lack of ability to learn from his past mistakes. Clearly, the trial court considered the appropriate factors and the weight given to each of the primary factors was appropriate.

¶14 Caldwell contends that the sentence is too long and should not be consecutive. We are not convinced that the sentences imposed were unduly harsh.

¶15 Caldwell faced a potential maximum sentence on each burglary count of twelve and one-half years. He received a sentence of less than half of the maximum. The sentence imposed was not “shocking to public sentiment.” Caldwell had a lengthy criminal history, had many opportunities to become a law-abiding citizen, and could have learned from past mistakes. Moreover, as the trial court noted, Caldwell broke into a citizen’s home in the middle of the night. He broke into another citizen’s garage to steal items inside. He used vehicles he had taken without consent to commit his crimes. The community needs to be protected from this type of criminal activity. The sentences imposed will also give Caldwell an opportunity to rehabilitate himself from his addictions. Given the facts and circumstances here, the sentences the trial court imposed were reasonable, not unduly harsh.

¶16 As to whether the sentences should have been concurrent rather than consecutive, that is left to the discretion of the court. *State v. La Tender*, 86 Wis. 2d 410, 432, 273 N.W.2d 260 (1979). It is entirely reasonable to impose consecutive sentences for separate counts involving different victims at different times and locations. *State v. Hamm*, 146 Wis. 2d 130, 157, 430 N.W.2d 584 (Ct. App. 1988). Here, each burglary was a separate crime, involving different victims at different times. Thus, the consecutive sentences imposed on the burglary counts are reasonable. With respect to the operation of a motor vehicle count, although this crime occurred on the same date, it is a separate crime from the burglary and involves a separate victim. Thus, making the sentence on this count consecutive does not constitute an erroneous exercise of discretion.

¶17 Finally, Caldwell contends that the trial court should have given greater weight to the psychological evaluation. We are not convinced. The trial court noted that it did consider the psychological evaluation submitted to it, but did not see anything in the report which would require further mitigation of the sentences. The trial court is in a much better position to assess the appropriate weight to give to the competing factors. From our review, the weight afforded by the sentencing court here did not constitute an erroneous exercise of discretion. Accordingly, we affirm the judgments and order.

By the Court.—Judgments and order affirmed.

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

