

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 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. 2006AP2712-CR

STATE OF WISCONSIN

Cir. Ct. Nos. 2001CF658
2001CF2217

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NIKOLA POTKONJAK,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: DANIEL L. KONKOL and TIMOTHY M. WITKOWIAK, Judges. *Affirmed.*

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

¶1 PER CURIAM. Nikola Potkonjak appeals from judgments and orders entered after he pled guilty to eight counts in two separate cases:¹ (1)

¹ The two separate cases were consolidated by the trial court.

possession with intent to deliver a controlled substance (marijuana), more than 2500 grams; (2) possession with intent to deliver a controlled substance (non-narcotic); (3) felony bail jumping; (4) fleeing an officer; (5) delivery of a controlled substance (marijuana), more than 2500 grams; (6) delivery of a controlled substance (non-narcotic); (7) delivery of a controlled substance (cocaine), more than 100 grams; and (8) possession with intent to deliver a controlled substance (cocaine), more than 100 grams. Potkonjak argues that the trial court erroneously exercised its sentencing discretion by imposing an excessive sentence. Because the record reflects that the trial court considered the proper sentencing factors and reached a reasonable decision, we affirm.

BACKGROUND

¶2 On October 9, 2000, Potkonjak was arrested for selling marijuana to a police informant on July 6, 2000, and for selling cocaine to the same informant on September 6, 2000. During a search of his home, the police discovered one-half pound of marijuana, 150 grams of cocaine and \$1703.00. As a result, Potkonjak was charged with four felony drug charges in the first case. While he was out on bail in that case, police received information that Potkonjak would be delivering ten pounds of marijuana and ecstasy to a location near 76th Street and Oklahoma Avenue in Milwaukee. When the police attempted to stop Potkonjak's vehicle in that area, Potkonjak led the police on a high speed chase before he was eventually apprehended. The police recovered ecstasy and marijuana during a search of Potkonjak and his vehicle. He was then charged with two counts of possession with intent to deliver, fleeing an officer and felony bail jumping.

¶3 On October 29, 2001, Potkonjak pled guilty to all eight counts. At sentencing, the State recommended that Potkonjak receive a term of initial

confinement between twelve and fifteen years, and left the term of the extended supervision portion of the sentence up to the trial court. The presentence report recommended a sentence of ten years, consisting of two years initial confinement followed by eight years of extended supervision. Defense counsel asked the court to follow the recommendation of the presentence report.

¶4 The trial court sentenced Potkonjak to a total of twenty-nine years' initial confinement, followed by twenty-three years of extended supervision. Judgment was entered. On April 11, 2005, Potkonjak filed a postconviction motion seeking sentence modification and plea withdrawal. On May 23, 2005, the trial court granted the motion for sentence modification, but denied the motion for plea withdrawal. A sentence modification hearing was held on July 12, 2005. At the conclusion of the hearing, the trial court modified the sentence by changing the sentence in count three to run concurrent to all the other sentences. The practical effect of the modification was that Potkonjak's term of initial confinement was now twenty-three years and his extended supervision was now eighteen years. Potkonjak now appeals.

DISCUSSION

¶5 The only issue in this appeal is whether the trial court erroneously exercised its sentencing discretion. Potkonjak claims the sentence was excessive. 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).

¶6 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, 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, 444 N.W.2d 760 (Ct. App. 1989). 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).

¶7 Based on our review, we cannot conclude that the trial court erroneously exercised its sentencing discretion. The trial court addressed each of the required sentencing factors. First, it looked at the gravity of the offense—noting that they were all very serious. All of the counts were felonies, six of the eight were drug related and involved substantial amounts of drugs. One of the non-drug related felonies was fleeing an officer, which involved a high-speed chase through a residential area. The other non-drug related felony was bail jumping. While Potkonjak was out on bail and supposedly assisting law enforcement, he continued to be involved in drug dealing activities. The court

also found the crimes to be “very serious” because there were eight separate counts, which added up to a total potential fine of \$1.2 million and up to 110 years in prison. The trial court noted that the only case it has dealt with that carried more potential imprisonment were homicide cases.

¶8 Second, the trial court looked at Potkonjak’s character. It noted his prior record, which included an aggravated battery in 1996, where Potkonjak was given two years’ probation. The probation sentence, however, did not “have sufficient impact to keep him” from committing more crimes. Potkonjak also had a 1999 conviction for disorderly conduct/resisting arrest for which he spent some time in the Milwaukee County House of Correction. The trial court discussed Potkonjak’s cooperation with police, where he was permitted to be released from custody to help the police attempt to clean up the drug problems in the community. However, his cooperation was mitigated by the fact that although he was providing the police information, he was also providing information to the drug dealers. He was doing business as a drug dealer when he was supposed to be helping the police.

¶9 The trial court also found that Potkonjak’s fleeing from police reflected poorly on his character. His decision to flee put the public at risk because residential areas are not expecting that type of activity. The trial court also discussed the positive aspects of Potkonjak’s character, including his earning a GED, cooperation with police, and good behavior in prison. The court found, nevertheless, that these positive factors were outweighed by the substantial amount of drug dealing involved here.

¶10 Third, the trial court addressed the need to protect the public: “the public has an absolute right to be protected from this type of conduct ..., very

viscous conduct against the community.” The court discussed the effect drugs in general have on the community and the types of violent behaviors drugs can fuel.²

¶11 The trial court then went on to address the sentencing recommendations of the State and the presentence report, explaining that both recommendations gave too much credit for Potkonjak’s cooperation and “substantially underweigh[ed] the very serious conduct which Mr. Potkonjak ha[d] engaged himself.”

¶12 Based on the foregoing, we cannot conclude that the trial court erroneously exercised its discretion. It adequately addressed each of the three primary sentencing factors, explained why it was not following the sentencing recommendation made by the State and the presentence report and reached a reasonable conclusion. This court acknowledges Potkonjak’s position that his sentence was much longer than that imposed in other drug cases, but each drug case is different. Potkonjak acted as though he was above the law, was involved with large amounts of drugs, and continued dealing even after he was arrested and charged. Further, he acted in reckless disregard of the rights of the public when he fled from police in a high speed chase. Potkonjak chose to commit eight serious felonies. His remorse after the fact, although commendable, does not excuse his criminal conduct. As the trial court pointed out, Potkonjak faced a total potential sentence of 110 years’ imprisonment. He received much, much less than that.

² Potkonjak argues that the trial court erred in discussing how drug dealing leads to other crimes because “nothing in the record confirms any homicides, armed robberies, [or] burglaries were committed to obtain any substances Mr. Potkonjak was involved with.” We are not convinced. The transcript reflects that the trial court discussed generally the adverse impact substantial drug-dealing has on the community and the inherent evils that surround it. The trial court did not at any point suggest that there had been a specific homicide or armed robbery associated with Potkonjak’s drug dealing.

Accordingly, the sentence imposed is not shocking to public sentiment, and therefore, not excessive. *Ocanas*, 70 Wis. 2d at 185.

¶13 We are also not persuaded by Potkonjak’s general attack on appellate review of sentencing determinations. The structure of the criminal justice system is such that our review is deferential to the trial court. There is “a consistent and strong policy against interference with the discretion of the trial court in passing sentence.” *State v. Paske*, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991) (citing *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. *Harris*, 119 Wis. 2d at 622. Furthermore, “the trial court is presumed to have acted reasonably, and the burden is on the appellant to ‘show some unreasonable or unjustifiable basis in the record for the sentence complained of.’” *State v. Thompson*, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992) (citation omitted). It is not the role of this court to determine what sentence it believes to be appropriate. Rather, our role is to make sure the trial court considered the proper factors, adequately explained its reasoning and reached a reasonable determination. Our review demonstrates that the trial court specifically and fairly considered each of the required primary sentencing factors, it adequately explained its reasoning with respect to each factor, it explained why it was not following the sentencing recommendations made by the parties, and it reached a reasonable determination. Accordingly, we affirm.

By the Court.—Judgments and orders affirmed.

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

