

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 27, 1996

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

NOTICE

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

No. 95-3601-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ABRAHAM H. SALAZAR,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Abraham H. Salazar appeals from a judgment convicting him of conspiracy to deliver and possession of tetrahydrocannabinol (THC) with intent to deliver within 1000 feet of a school in an amount exceeding 25 grams and from an order denying his motion for postconviction relief. On appeal, he challenges the introduction of a photograph of his alleged drug supplier and the severity of his sentence. We reject both challenges and affirm.

Salazar was charged with one count of conspiracy to deliver THC, possessing more than 25 grams of THC with intent to deliver within 1000 feet of a school and conspiracy to deliver cocaine.¹ Salazar lived with Diana Schindler and James Basler and shared a bedroom with their infant. During a search of the residence, officers found marijuana and cocaine. A quantity of marijuana was found in a laundry basket located in Salazar's room. Officers also seized items from the rest of the house normally associated with the packaging, processing and selling of controlled substances. The officers also found \$4700 in cash, \$1500 of which was found in a suit coat hanging in Salazar's bedroom closet. An officer testified that the amount of marijuana and money found in Salazar's bedroom indicated that he possessed marijuana for distribution, not for personal use.

Salazar filed a motion in limine to prevent the use of any photographs other than fifteen photographs defense counsel viewed prior to trial. The prosecutor responded that counsel had had an opportunity to review all of the pictures and that the photographic evidence would consist of fifteen pictures on a contact sheet. Defense counsel stated that he believed these would be the only photographs offered into evidence. The prosecutor responded that those were the only photographs of which he was aware.

At the outset of Schindler's testimony, the State offered Exhibit 15, a photograph of Salazar's alleged drug supplier. Defense counsel objected to Exhibit 15 on the grounds that he had specifically moved the trial court to determine which photographs would be admissible at trial, he was told that the fifteen photographs were the only photographs which would be used, and he was not told that Exhibit 15, an additional photograph, would be used. Defense counsel admitted seeing Exhibit 15 when he saw the rest of the pictures. The prosecutor stated that he reviewed the photographs with defense counsel the previous Friday, defense counsel saw the photograph offered as Exhibit 15 and was told that the State would likely offer that picture into evidence. The prosecutor did not realize that Exhibit 15 was not in the group of photographs discussed in the context of Salazar's motion in limine. The court ruled that defense counsel saw the photograph the previous Friday and therefore there was no surprise.

¹ Salazar was acquitted of the cocaine-related count.

Schindler testified that Salazar and Basler sold marijuana from the home. Schindler identified the individual in Exhibit 15 as Salazar's drug supplier and stated that he was the only individual from whom Salazar and Basler received drugs. Another witness, Kenneth Root, testified that the individual depicted in Exhibit 15 had visited the Basler-Schindler residence, and he observed Basler, Salazar and another give money to him. Another witness, Andrew Palomino, identified the individual in Exhibit 15 but never saw him deliver drugs or receive money from anyone in the Basler-Schindler household. Other witnesses were unable to identify the individual in Exhibit 15.

The admission of evidence is within the trial court's discretion. *State v. Lindh*, 161 Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991). We will uphold the exercise of discretion if there is a reasonable basis for the trial court's determination. *Id.* at 349, 468 N.W.2d at 176.

The outcome of Salazar's motion in limine was an apparent understanding between the parties that fifteen photographs were the only photographs the prosecutor intended to offer into evidence. The trial court never actually ruled on Salazar's motion. When Exhibit 15, the picture of the alleged drug supplier, became an issue, the trial court was required to rule on its admissibility. The court made an implicit finding that there was no surprise to the defense.

Salazar protests the use of the photograph to support the State's contention that he was involved in a drug conspiracy. Mark Anderson of the Manitowoc County Metro Drug Unit testified that Basler said his drug supplier was Mexican. Anderson testified that after the search warrant was executed, officers monitored the Basler-Schindler residence to see if the supplier would appear. The individual in Exhibit 15 appeared, and when his vehicle was stopped, officers found a note with Salazar's name on it and a phone number for Salazar's brother.

We conclude that the photograph was proper evidence of the existence of an alleged drug dealer and a conspiracy and was not particularly prejudicial to Salazar. Two witnesses identified the individual in the photograph and described conduct from which the jury could infer a drug conspiracy: the delivery of drugs on one occasion and the receipt of money

from the recipient(s) of the drug delivery on another. The testimony linked the events to a photograph of an involved party. Furthermore, the trial court's finding that defense counsel was not surprised by Exhibit 15 is not clearly erroneous. We conclude that the trial court had a reasonable basis for admitting Exhibit 15 into evidence and did not misuse its discretion.

Salazar claims that his sentence is unduly harsh because the court imposed the presumptive minimum three-year term after suggesting that a lesser jail term would have been more appropriate. The court imposed the minimum sentence of three years on count two (intent to deliver within 1000 feet of a school) and a consecutive period of eighteen months of probation on count one (conspiracy to deliver a controlled substance).

Section 161.438, STATS.,² makes the minimum sentence under ch. 161, STATS., a presumptive minimum sentence. The court may impose a sentence less than the presumptive minimum or may impose probation only if the court finds "that the best interests of the community will be served and the public will not be harmed and if it places its reasons on the record." *Id.*

In his postconviction motion, Salazar argued that he should have received probation instead of a three-year sentence for possession of THC with intent to deliver. He argued that there were factors which would have allowed the trial court to place him on probation rather than imposing the presumptive minimum sentence and that the court imposed the presumptive minimum only because the statute directs it. The court rejected Salazar's arguments. He renews them on appeal.

At the sentencing hearing, Salazar argued for probation, pointing to his lack of prior significant criminal activity and claiming that probation would not put the community at risk. In its sentencing remarks, the court noted that Salazar continued to deny involvement in the crimes for which he was convicted and that the evidence most strongly supported the conviction for possession with intent to deliver. The court acknowledged the requirement of a

² Section 161.438, STATS., was renumbered, effective July 9, 1996. See 1995-96 Wis. Act 448, § 270. It is now designated § 961.438, STATS.

presumptive minimum sentence unless the court could satisfy itself that the interests of the community would be served and the public not harmed by placing Salazar on probation. The court found that Salazar, a convicted felon who continues to deny criminal conduct, is not a good candidate for probation because it is highly likely that Salazar will again sell drugs. The court found that Salazar had not maintained steady employment and had quit several jobs. The court stated: "If this was a straight sentencing with no presumptive minimum, probably the court would be putting Mr. Salazar on probation with a long jail term, but that is not the case. We have a presumptive minimum and the court cannot make the findings necessary to put him on probation for the reasons stated."

Salazar argues that the last remark indicates an erroneous belief that the court's only alternative to the presumptive minimum sentence was probation. He argues that § 161.438, STATS., permits the court to impose a sentence less than the presumptive minimum or place a defendant on probation if the best interests of the community will be served and the public would not be harmed.

Salazar's argument takes the trial court's sentencing remark out of context. The trial court was responding to Salazar's request for probation, not a request for a lesser sentence. The trial court examined Salazar's character, the gravity of the offense and the need to protect the public, appropriate factors in sentencing, *see State v. Paske*, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991), and determined that probation was not appropriate. The weight to be accorded these sentencing factors is for the sentencing court to determine in its discretion. *See State v. Spears*, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988). Salazar did not persuade the trial court that anything other than the presumptive minimum would be in the public's best interests. We discern no misuse of discretion in declining to place Salazar on probation or imposing less than the presumptive minimum sentence.

By the Court.— Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.