COURT OF APPEALS
DECISION
DATED AND RELEASED

April 8, 1997

NOTICE

No. 96-1584-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WALTER L. WILLIAMS,

Defendant-Appellant.

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

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

CURLEY, J. Walter L. Williams appeals from a judgment of conviction and an order denying his postconviction motion. Williams contends that the trial court erroneously exercised its discretion at sentencing because it gave no reasons for the sentence imposed. The following is the full text of the court's comments when imposing sentence:

> Okay. Well, based upon the totality of the circumstances, those factors the Court must take into consideration, and based upon the Defendant's prior history, the Court is going to impose a sentence in the House of Corrections of 130 days consecutive to anything else the Defendant is now serving.

We conclude that the trial court erroneously exercised its discretion. We affirm the judgment and the order, however, because we determine that the sentence imposed is sustainable by the facts.

It is a well-settled principle of law that the trial court exercises discretion in sentencing, and on appeal, review is limited to determining if discretion was erroneously exercised. ***McCleary v. State,*** 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). Discretion contemplates a logical process of reasoning based on the facts of record and proper legal standards; it is more than simply making a decision. ***Id.*** at 277, 182 N.W.2d at 519. In exercising discretion, the sentencing court considers the gravity of the offense, the character of the offender, and the need to protect the public. ***State v. Larsen,*** 141 Wis.2d 412, 427, 415 N.W.2d 535, 541 (Ct. App. 1987). An erroneous exercise of discretion occurs if the sentencing court fails to state, on the record, the factors influencing the sentence or if too much weight is given to one factor in the face of contravening factors. ***Id.*** at 428, 415 N.W.2d at 542. An erroneous exercise of discretion also occurs when there is no evidence in the record that the trial court undertook a reasonable inquiry and examined the facts when making its decision. ***McCleary***, 49 Wis.2d at 278, 182 N.W.2d at 520.

Here, the trial court's comments at sentencing were inadequate. A statement that the court considered the facts and the proper standards does not provide evidence in the record necessary to establish that the court undertook a reasonable inquiry and an examination of the facts. The record shows that the trial court made a decision; it does not show that the court engaged in a logical process of reasoning to reach that decision.

This conclusion does not end our inquiry, however. We will not set aside a sentence simply because discretion was not exercised or was erroneously exercised. ***Id.*** at 282, 182 N.W.2d at 522. Rather, we search the

record to determine if the sentence is sustainable as a proper discretionary act. ***Id.*** This review does not, as Williams claims, "delve into the trial court's mind to divine what the trial court's unspoken rationale was." Rather, the review determines whether there are facts that would support the sentence had discretion been exercised on the basis of those facts. *See* ***State v. Kirschbaum***, 195 Wis.2d 11, 21, 535 N.W.2d 462, 465 (Ct. App. 1995). Thus, to be successful in an appeal of a sentencing decision, a defendant must show from the record that a sentence is unreasonable, *see* ***State v. Haskins,*** 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987), a burden Williams does not even attempt to meet.

Here, the facts in the record support the sentence. Williams was serving a nine-month sentence for obstructing an officer when he failed to return to the House of Correction after being released for child care. According to his attorney's representations at the sentencing hearing, Williams did not return because he discovered his children were suffering from lead poisoning and he needed to move them. He moved them to Mississippi. Counsel represented that when he was arrested, he was returning to Milwaukee to resolve the matter; however, this occurred eleven months after his escape.

Williams pled guilty to the escape charge and was sentenced immediately. During the sentencing hearing, the prosecutor requested incarceration for five months, consecutive to the prior sentence. The State pointed out that Williams had numerous convictions on traffic and misdemeanor offenses. Defense counsel asked for a three-month consecutive sentence. Considering that the sentence was only ten days more than the defense requested and substantially less than the maximum, that Williams had numerous prior convictions, and that he had left the state and been absent almost a year, this court concludes that the 130-day sentence is easily sustainable by the proper exercise of discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

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SCHUDSON, J. (*concurring*). The majority correctly declares that "the trial court's comments at sentencing were inadequate" and fail to reflect "a logical process of reasoning." Majority slip op. at 3. The majority also accurately identifies why, under the standard of review articulated in ***McCleary v. State***, 49 Wis.2d 263, 182 N.W.2d 512 (1971), we affirm rather than remand for the trial court to conduct a proper sentencing. I write separately, however, to express and further explain the enormous frustration I feel when, again and again, we have little choice but to affirm this trial court's sentencings despite its complete failure to provide statements reflecting any "logical process of reasoning."

Over the years this court has received numerous appeals—and has more appeals pending—of sentences from only one trial judge who consistently couches his sentencing comments in nothing more than references to "the totality of the circumstances" and "factors the court must take into consideration." As the majority has reiterated, such comments do not satisfy legal requirements. Moreover, the frequency with which such appeals arrive—all containing virtually identical language—leaves little doubt that even if the judge actually has considered the *individual* circumstances of each case, he has completely failed to articulate a sentence that could convey reasoning to or inspire confidence from defendants and victims, their friends and families, and the public.

The fact that, under ***McCleary***, this court steps in to search the record and compensate for the trial judge's failures is no consolation. This court, distant in time and place from the sentencing scene, cannot understand the facts, know the nuances, see and hear the defendants and victims, and feel the forces in the courtroom as only a trial judge can. This court cannot recapture the trial judge's unique opportunity to address the defendant, the victim, the friends and families, and the public to provide the moral and legal leadership—the justice—that sentencing, at its best, seeks to assure.

Additionally, although the trial court's brevity may save *its* resources in the short run, such brevity not only reduces confidence in the sentencing process, but also imposes substantial costs on the justice system as well. Postconviction motions to modify sentences drain resources of counsel and trial courts, and are but the prelude to countless appeals that otherwise would not be filed.

Thus, although it seems this court has little choice but again to affirm this trial judge's sentence, we would be little more than acquiescent "enablers" if we failed to admonish this trial judge with additional words of the supreme court in ***McCleary***:

> In all Anglo-American jurisprudence a principal obligation of the judge is to explain the reasons for his actions. His decisions will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined. It is thus apparent that requisite to a prima facie valid sentence is a statement by the trial judge detailing his reasons for selecting the particular sentence imposed.

Id. at 280-81, 182 N.W.2d at 521. Accordingly, I trust the trial court will understand that, once again, affirmance of its bottom line does not connote approval of its process.