

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 04, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2004AP2397-CR

Cir. Ct. No. 00CF1184

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ORBBIE WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DI MOTTO and MICHAEL B. BRENNAN, Judges. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Orbbie Williams appeals from the judgment of conviction and the order denying his motion for postconviction relief. Williams argues that the circuit court erred when it resentenced him because it did not

consider the change in the primary sentencing factors between the time he was sentenced and resentenced, that the court did not explain why the sentence it imposed was necessary, and because the sentence was unduly harsh. Because we conclude that the circuit court did not err, we affirm the judgment and order of the circuit court.

¶2 This is the second time this appeal has been before us. In 2000, Williams pled guilty to one count of sexual assault of a child. The court sentenced him to seven years of initial confinement and seven years of extended supervision. During the sentencing hearing, the circuit court several times characterized the assault as a “gang rape.” Williams filed a motion for resentencing. Williams alleged that his counsel had been ineffective for failing to investigate the circumstances of the assault, and that he had been prejudiced because the circuit court relied on the victim’s version of the events and ignored Williams’s contention that the sexual conduct was consensual. The circuit court denied the motion without a hearing, and Williams appealed.

¶3 On appeal, we reversed and remanded the case to the circuit court for an evidentiary hearing on the motion for postconviction relief. We concluded that Williams had alleged sufficient facts in his motion concerning the victim’s behavior at the time of the assault to undermine the sentencing court’s finding that the assault had been a gang-type rape. We concluded that the circuit court should have held a hearing on Williams’s postconviction motion. On remand, the parties agreed to go ahead with resentencing. The circuit court held the resentencing hearing in 2003. The court then sentenced Williams to six and one-half years of initial confinement and six years of extended supervision. Williams again filed a motion for resentencing, arguing that the circuit court did not comply with the requirements of *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197,

and that the court did not consider the changes in the primary sentencing factors since the time of Williams's initial sentencing hearing. The circuit court denied that motion without a hearing, and Williams once again appeals.

¶4 Williams argues that resentencing again is required because the court that resentenced him did not adequately consider the changes in the primary sentencing factors between the time of the initial sentencing hearing and the resentencing, that the court did not comply with the *Gallion* requirements, and that the sentence imposed was unduly harsh. We disagree.

¶5 Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The discretion of the sentencing judge must be exercised on a “rational and explainable basis.” *Gallion*, 270 Wis. 2d 535, ¶76 (citation omitted).

¶6 In *Gallion*, the supreme court stated that judges must explain the reasons for the particular sentence they impose. *Id.*, ¶39. “How much explanation is necessary, of course, will vary from case to case.” *Id.* The court went on: “In short, we require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives.” *Id.*, ¶46. The court went on the state that it did not require mathematical precision. *Id.*, ¶49. “We do expect, however, an explanation for the general range of the

sentence imposed. This explanation is not intended to be a semantic trap for circuit courts. It is also not intended to be a call for more ‘magic words.’” *Id.* The court concluded: “The rule of law suffers when the sentencing judge’s discretion is unguided and unchecked. The rationale for sentencing decisions must be made knowable and subject to review.” *Id.*, ¶51.

¶7 As the State points out in its brief, *Gallion* was decided after Williams was resentenced. Even so, we conclude that the circuit court fully complied with its requirements. When resentencing, the circuit court thoroughly addressed each of the three primary sentencing factors and explained its reasons for the sentence imposed. The court first considered the offense. The court acknowledged that the victim and the defendant offered conflicting versions about the amount of force the defendant used during the assault. The court noted the difference in age between the defendant and the victim and the physical, emotional, and mental injuries the victim had suffered. The court also considered the location of the assault, and vulnerability of the victim because she had consumed alcohol and marijuana. The court found that while the assault was not consensual it was also “in large part not forcible.”

¶8 The court next considered Williams’s character. The court addressed Williams’ history and stated that he had been making “bad decisions ... all along.” The court further noted that he had absconded while the case was pending and was surrounding himself with the wrong people. The court also noted that Williams had a serious marijuana problem and that he used marijuana to answer any problem in his life. The court looked at Williams’s prior record and found that he was someone “who had real difficulty staying out of trouble.” The court considered his past gang affiliations and somewhat “spotty” employment history. The court then addressed whether punishment had

previously deterred Williams and how he had previously adjusted to incarceration. The court noted that punishment had not deterred him and that he had taken a number of classes when he had been incarcerated.

¶9 The court next addressed the need to protect the community. The court stated: “[G]iven the nature and number of Mr. Williams’s previous convictions, given the horrible criminal behavior in this case by the objective facts, and given the finding that the Court has made with regard to force, given Mr. Williams’s previous daily and deep drug use, the Court concludes that Mr. Williams presents a high risk to the community.” The court further considered that Williams was “in a different circumstance now than he was at the original sentencing date.” The court then imposed a sentence that was eighteen months shorter than the sentence originally imposed.

¶10 Based on this record, we conclude that the circuit court complied with the *Gallion* requirements. Further, the court acknowledged the change in circumstances between the time of sentencing and resentencing, and reduced Williams’s overall sentence somewhat. Given the court’s thorough explanation for its sentence and given that the sentence was within the maximum allowed by law, we cannot conclude that the sentence imposed was unduly harsh. Consequently, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

