COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2557-CR **Cir. Ct. No. 2003CF2476**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH A. DIAZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Joseph A. Diaz appeals from a judgment entered after he pled guilty to possession with intent to deliver a controlled substance (cocaine), and resisting or obstructing an officer, contrary to WIS. STAT.

§§ 961.41(1m)(cm)2. and 946.41(1) (2003-04).[1] He also appeals from an order denying his postconviction motion seeking sentence modification. Diaz claims that the trial court erroneously exercised its discretion because it did not know the aggregate effect of the sentence imposed and failed to give adequate reasons for the length of the sentence imposed. Because the trial court did not erroneously exercise its sentencing discretion, we affirm.

BACKGROUND

¶2 On April 26, 2003, City of Wauwatosa Police Officer Jack Morrison stopped a vehicle, which Diaz was driving, for speeding. Diaz pulled over to the curb and parked the vehicle. He then immediately exited the vehicle and fled from police. When later apprehended, Diaz told officers that he fled because there were drugs in the vehicle. The police located a small white baggie with suspected crack cocaine in it on the right-front passenger seat, and a plastic baggie containing marijuana in the trunk.

¶3 The officers also located Diaz's discarded coat nearby. In the coat pocket, they found several individually wrapped packages of a white chunky substance, later confirmed to be crack cocaine. The total weight of all the cocaine recovered was 6.1 grams.

¶4 Diaz was charged with possession with intent to deliver and obstructing an officer. Diaz was serving the extended supervision portion of a 2001 drug conviction when he was arrested in the instant case. Diaz and the State

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

reached a plea agreement wherein Diaz would plead guilty. In exchange, the State agreed to recommend eighteen months' initial confinement and thirty-six months' extended supervision on the drug charge and a thirty-day concurrent sentence on the obstruction charge.

¶5 The plea agreement also included the State's commitment to ask the court to follow the reincarceration recommendations made in the court memos with respect to the 2001 convictions.[2] The recommendations in the memos were for a total of eighteen months and eight days, broken down as: six months, twenty-five days in one case; four months, eight days in the second case; and seven months, five days in the third case.

¶6 The trial court sentenced Diaz to five years on the drug count, with two years' initial confinement, followed by three years' extended supervision. The trial court imposed a thirty-day sentence for the obstruction charge, concurrent to the drug sentence. However, the current sentence was to be served consecutive to the 2001 sentences.

¶7 On the 2001 sentences, the trial court ordered reconfinement for twelve months on the first case, twelve months on the second case, and six months on the third case. When asked whether the 2001 sentences would be concurrent to each other or consecutive, the trial court indicated it would be whatever was originally imposed.

[2] There was some initial confusion at the sentencing hearing as to what the prosecutor had agreed to with respect to the 2001 crimes. However, that was worked out and is not an issue in this appeal. Therefore, we do not need to discuss it.

¶8 Diaz filed a postconviction motion seeking resentencing. He claimed that the trial court's failure to know whether the 2001 sentences would be served consecutively or concurrently resulted in an erroneous exercise of discretion. He also asserted that the trial court failed to give adequate reasons for the sentence it imposed. The trial court denied the motion. Diaz now appeals.

DISCUSSION

¶9 Diaz claims that the trial court erroneously exercised its sentencing discretion by failing to know the aggregate effect of the sentence with the 2001 convictions and by failing to provide adequate reasons for the length of the sentence imposed in the instant case. Diaz cites ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, in support of his argument. The State responds that ***Gallion*** does not govern this case because Diaz was sentenced before ***Gallion*** was decided. We hold that the trial court did not erroneously exercise its discretion in imposing Diaz's sentence.

¶10 Sentencing is committed to the discretion of the trial court and our review is limited to determining whether the trial court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). A defendant claiming that his or her sentence was unwarranted must "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992). To properly exercise its discretion, a sentencing court must provide a rational and explainable basis for the sentence. ***McCleary***, 49 Wis. 2d at 276. It must specify the objectives of the

sentence on the record which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *See* WIS JI—CRIMINAL SM-34 (1999). It must identify the general objectives of greatest importance, which may vary from case to case. ***Id.***

¶11 In addition to the three primary sentencing factors, other relevant factors that the circuit court may consider include: (1) the defendant's past record of criminal offenses; (2) any history of undesirable behavior patterns; (3) the defendant's personality, character, and social traits; (4) the presentence investigation; (5) the nature of the crime; (6) the degree of the defendant's culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, educational background, and employment record; (9) the defendant's remorse and cooperativeness; (10) the defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. ***Harris v. State***, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977). The trial court need discuss only the relevant factors in each case. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The weight given to each of the relevant factors is within the court's discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991).

A. Failure to Give Adequate Reasons for the Length of Sentence Imposed.

¶12 Diaz's complaint is based on the premise that under ***Gallion***, the trial court was required to provide a better explanation for the sentence imposed, to explain why it deviated from the recommendations of the parties, and to address the minimum custody standard. Although we agree with Diaz that the sentencing

dictates of ***McCleary*** were recently reinvigorated in ***Gallion***, we disagree with Diaz that ***Gallion*** applies a new standard.[3]

¶13 In reviewing the sentencing in this case, we conclude that the trial court did not erroneously exercise its sentencing discretion. The trial court addressed the three primary sentencing factors—the gravity and nature of the offense; the character of the offender, including his rehabilitative needs; and the need to protect the public. *See* ***State v. Setagord***, 211 Wis. 2d 397, 416, 565 N.W.2d 506 (1997).

¶14 The trial court emphasized the seriousness of the offense committed by Diaz and addressed the dangers associated with drugs and drug dealing in our neighborhoods. The trial court noted Diaz's criminal record and rehabilitative needs, noting that Diaz committed the instant crimes only six months after being released from prison. The trial court explained that Diaz needed to be incarcerated in order to rehabilitate himself. The trial court also indicated that the circumstances here dictated the need for a more severe punishment due to the fact that Diaz committed the crimes shortly after being released from his 2001 incarceration.

¶15 Diaz complains that the trial court noted his age and education level, but did not discuss them. The trial court is not required to discuss these secondary

[3] In addition, ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, applies only to "future cases." *See* ***id.***, ¶¶8, 76. It is clear from this pronouncement that the "reinvigoration" of ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), only applies to sentences imposed after April 15, 2004 (the date ***Gallion*** was decided). Diaz was sentenced on October 3, 2003, and therefore ***Gallion*** is inapplicable to him.

factors unless it feels they are particularly relevant to the sentence. Diaz also complains that the trial court did not discuss minimum custody standards. We cannot say that the trial court's failure to discuss minimum custody standards or the sentencing recommendations made by the parties constituted an erroneous exercise of discretion.

¶16 The drug charge in this case carried a maximum potential penalty of fifteen years, with a maximum initial confinement of ten years, followed by a maximum supervision period of five years. Here, the trial court imposed a much shorter sentence than the maximum—a five-year sentence, with two years' initial confinement, followed by three years' extended supervision. The trial court's sentence certainly reflects an inference that the trial court settled on a sentence of minimal incarceration.

B. Aggregate Effect.

¶17 Diaz argues that he is entitled to resentencing because the trial court did not know the aggregate effect of the sentence it imposed. The trial court imposed the sentence in the instant case to be consecutive to the sentences imposed in the 2001 reconfinement offenses. As noted, the trial court determined what term of reconfinement should be imposed on the 2001 cases at the same time it imposed sentence in this case. Diaz complains that the trial court did not know whether the 2001 cases were concurrent or consecutive to each other and therefore did not know the effect that the sentence imposed in the instant case created.

¶18 Diaz contends that the trial court had a responsibility to know the aggregate effect of both the 2001 sentences and the new sentence. He cites

State v. Hall, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41, in support of his argument. We are not persuaded.

¶19 ***Hall*** is distinguishable from the instant case. In ***Hall***, we reversed a set of multiple sentences totaling 304 years because the trial court did not explain why the sentences for a string of robberies (and felony murder) occurring over a period of three months, should be served consecutively. ***Id.***, ¶¶8, 12-18. In ***Hall***, we cited the ABA Standards for Criminal Justice Sentencing, providing that a trial court should ordinarily order multiple sentences to be served concurrently or explain why it did not do so. ***Id.***, ¶14.

¶20 The instant case involves a new offense that is unrelated to Diaz's 2001 offenses for which he was still serving time. The only connection between the two cases is that the new offenses resulted in reconfinement on the old offenses, and the fact that the trial court determined both the new sentence and the reconfinement sentences at the same sentencing hearing. Unlike ***Hall***, this set of circumstances does not require the trial court to determine or explain the aggregate effect that the new sentence would have on the reconfinement sentences. *See* ***State v. Matke***, 2005 WI App 4, ¶18, 278 Wis. 2d 403, 692 N.W.2d 265 ("Neither our conclusions in *Hall* nor the cited ABA Standards have any bearing on a sentence subsequently imposed for a new offense that is unrelated to past offenses for which a defendant may still be serving time.").

¶21 There is a good reason for the ***Matke*** limitation on ***Hall***: if we require the trial court to aggregate the sentence on new offenses committed while on extended supervision for past offenses, criminals would be rewarded for recidivism. Rewarding recidivism is clearly against public policy. Thus, we

conclude that a trial court is not required to aggregate the sentences in circumstances such as those presented in the instant case, even when the new sentence is imposed at the same sentencing hearing as the reconfinement sentences. Accordingly, the trial court did not erroneously exercise its discretion by failing to determine the aggregate effect of Diaz's new sentence with his 2001 cases. Therefore, we affirm.

By the Court.—Judgment and order affirmed.

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