

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 22, 2005

Cornelia G. Clark
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. 2004AP2814-CR

Cir. Ct. No. 2003CF1962

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRAIG V. CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kraig V. Carter appeals from a judgment entered after he pled guilty to one count of first-degree reckless homicide and two counts of first-degree reckless injury, while armed, as party to a crime, contrary to WIS.

STAT. §§ 940.02(1) and 940.23(1)(a) (2003-04).¹ He also appeals from an order denying his postconviction motion seeking sentence modification. Carter claims the trial court erroneously exercised its sentencing discretion because it failed to adequately explain why either the thirty-two-year sentence or the consecutive nature of the sentences imposed were necessary. Because the trial court did not erroneously exercise its sentencing discretion, we affirm.

BACKGROUND

¶2 On March 24, 2003, at approximately 11:41 p.m., Milwaukee police were dispatched to a “shots fired” complaint at 2815 North 34th Street. When police arrived, they found three individuals on the porch who had been shot: Delores McHenry, Dominic McCline and Keiaries McHenry. Delores McHenry was declared dead at the scene, and the other two victims were transported to the hospital for treatment. Both survived the shooting.

¶3 Keiaries told police that two men, who were walking by the home, stopped in front of the 2815 North 34th Street residence, raised automatic weapons towards the victims, and started shooting.

¶4 Carter was identified as one of the suspects in a line-up and provided a statement to police. He admitted that he was one of the individuals who had been seen by Keiaries. Further investigation revealed that the impetus for the March 24th shooting was an altercation that took place two days earlier at the house next door, where both Carter and his cousin, Chris Elim (the second

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

shooter), were injured. Carter had been struck in the face with a baseball bat. Carter believed that Dominic McCline had been involved in the previous altercation and, when Carter saw him standing on the porch on March 24th, Carter fired shots toward McCline to scare him. Carter then stated he got “excited,” leading to the multiple shots directed at the victims.

¶5 Carter was charged with one count of intentional first-degree homicide and two counts of attempted first-degree intentional homicide. He initially entered not guilty pleas. Subsequently, he agreed to plead guilty to the reduced charges. On February 13, 2004, the court sentenced Carter to twenty-three years (nineteen years’ initial confinement, followed by four years’ extended supervision) on the first count; seven years (five years’ initial confinement, followed by two years’ extended supervision) on the second count; and ten years (eight years’ initial confinement, followed by two years’ extended supervision) on the third count. All sentences were to run consecutively, totaling thirty-two years of initial confinement to be followed by eight years of extended supervision. Judgment was entered.

¶6 Carter filed a postconviction motion seeking sentence modification. The motion was denied by written order. Carter now appeals.

DISCUSSION

¶7 Carter claims that the trial court erroneously exercised its sentencing discretion by failing to adequately explain the need for the thirty-two-year sentence and the need to impose consecutive, rather than concurrent, sentences. Carter 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 control this case because Carter was sentenced before *Gallion* was decided. We hold that

Gallion simply reaffirmed *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), and that the trial court did not erroneously exercise its discretion in imposing Carter's sentence.

¶8 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*, 49 Wis. 2d at 278. 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 vary from case to case. *Id.*

¶9 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 (PSI); (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).

¶10 In reviewing the trial court's sentence, we conclude that it did not erroneously exercise its discretion. Carter's maximum potential sentence was 125 years, bifurcated into eighty-five years' initial confinement and forty years' extended supervision. The State recommended a fifty-year sentence, bifurcated into thirty-five years' initial confinement and fifteen years' extended supervision. The PSI author recommended concurrent sentences, resulting in a total initial confinement period of thirteen to sixteen years, followed by seven to ten years of extended supervision. Carter requested that the trial court follow the sentencing recommendation of the PSI author.

¶11 Instead, the trial court imposed thirty-two years' initial confinement, followed by eight years' extended supervision. In reaching this determination, the trial court addressed the three primary factors. The trial court noted the gravity of the offense, where one victim was killed and the other seriously wounded:

Let's look at what you did to [one of the victims]. Nine gunshot wounds in his left upper arm, his left armpit, two to his left lower arm, one to his left side, one to his right shoulder area in the back, one to his left shoulder area in the back, one to his flank and one to his right knee.

The trial court also observed that Carter's response to the baseball bat incident was way out of proportion. Carter's decision to repay his broken nose with a shooting

spree that left a woman dead was a serious crime, for which he should be held accountable.

¶12 The trial court also addressed Carter's character, noting his difficulties with his mother and his childhood, his acknowledgement of his anger management issues, his attempt to empathize with the victims and his attempt to continue his education and employment. The trial court also noted, however, his past criminal conduct, his involvement with a gang, his tendency to get into physical fights, and his lack of judgment.

¶13 Finally, the trial court considered the need to protect the public, and the need to punish those who kill other people to protect the community, balanced against the need to provide Carter with some hope of returning to the community after serving his time.

¶14 After engaging in this analysis, the trial court imposed a sentence much shorter than the maximum, slightly shorter than what the State recommended, but almost double the length recommended by the PSI author. Carter's complaint is that the trial court did not specifically explain why a thirty-two year initial confinement period was required. The trial court is not required to provide such specificity as long as it provides an explanation for the general range of the sentence imposed. *Gallion*, 270 Wis. 2d 535, ¶49. Our review demonstrates that the trial court provided such explanation when it addressed each of the primary factors and imposed a sentence of less than one-third of the potential maximum exposure.

¶15 Carter also complained that the trial court never set forth an explanation as to why the court did not accept the recommendation of the PSI author. Again, such an explanation is not required as long as proper sentencing

discretion is exercised. *See State v. Johnson*, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990). We conclude that the trial court did not erroneously exercise its discretion when it imposed the thirty-two-year initial confinement sentence.

¶16 Finally, Carter argues that the sentence imposed should have been concurrent, rather than consecutive. He contends that the trial court failed to offer a sufficient explanation for the consecutive nature of the sentence. We reject his argument. The decision whether to impose a consecutive or a concurrent sentence is committed to the sound discretion of the trial court. *State v. Ramuta*, 2003 WI App 80, ¶24, 261 Wis. 2d 784, 661 N.W.2d 483. “In sentencing a defendant to consecutive sentences, the trial court must provide sufficient justification for such sentences and apply the same factors concerning the length of a sentence to its determination of whether sentences should be served concurrently or consecutively.” *State v. Hall*, 2002 WI App 108, ¶8, 255 Wis. 2d 662, 648 N.W.2d 41. Based on our review, we conclude that the trial court considered the proper sentencing factors, afforded sufficient weight to each, and reached a reasonable determination. Although we acknowledge Carter’s objection to the trial court’s general statement expressing opposition to a concurrent sentence in every case, we are not convinced that that statement violated Carter’s right to an individualized sentencing.

¶17 The crimes here involved three different victims, with three different outcomes: one victim was shot to death, the second was shot nine separate times and suffered serious injury, and the third was shot in the leg, suffering a less serious injury. The trial court’s statement opposing concurrent sentences expressed a concern that a consecutive sentence was required in this case so as not to diminish the fact that Carter’s actions involved three separate crimes. The victims were shot at close range, and resulted in three separate offenses,

warranting punishment for each. We conclude that the trial court did not erroneously exercise its discretion in determining that the circumstances in this case warranted a consecutive sentence. *See State v. Larsen*, 141 Wis. 2d 412, 416, 426-28, 415 N.W.2d 535 (Ct. App. 1987).

¶18 We also reject Carter’s contention that the sentence imposed here violated the dictates of *Gallion*. As noted, *Gallion* simply reaffirmed *McCleary*. Further, *Gallion* only applies to cases whose sentencing occurred after it was decided on April 15, 2004. *Gallion*, 270 Wis. 2d 535, ¶8. Carter was sentenced on February 13, 2004, and therefore *Gallion* does not apply to his sentencing.

¶19 Based on the foregoing, we conclude that the trial court did not erroneously exercise its discretion when it imposed the sentence in this case. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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

