COURT OF APPEALS
DECISION
DATED AND FILED

December 06, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2738-CR **Cir. Ct. No. 2003CF4546**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH L. BINGHAM,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Kenneth L. Bingham appeals from a judgment of conviction entered after he pled guilty to two counts of delivering cocaine (one gram or less), and from an order denying his postconviction motion to modify his sentence. Bingham argues that he is entitled to resentencing because the trial court

focused too much attention on a dismissed criminal charge, rather than on the charges for which Bingham was being sentenced. Because we conclude that the trial court did not erroneously exercise its sentencing discretion, we affirm.

BACKGROUND

¶2 Bingham was charged with two counts of delivering cocaine (one gram or less) and pled guilty pursuant to a plea agreement with the State. Under the agreement, the State recommended total confinement of forty-two months, composed of twenty-one months of initial confinement and twenty-one months of extended supervision. The trial court accepted Bingham's plea, found him guilty and set the matter for sentencing.

¶3 The parties appeared for sentencing. The trial court asked the parties for corrections to the presentence investigation report. The defense noted two minor discrepancies. The trial court then asked for the State's sentencing recommendation.

¶4 The State offered argument in support of its recommendation of a forty-two-month sentence, describing in detail the two offenses for which Bingham was being sentenced. Bingham made two sales of crack cocaine to an undercover officer over a period of two days from a house on North 34th Street. The officer secured a search warrant for the house, which led to the discovery of cocaine base, a digital scale, a stun gun, rounds of ammunition, marijuana and additional corner cuts of cocaine. The State noted that Bingham admitted selling the cocaine, although he maintained that he just happened to be at the house on those occasions and denied living there or selling cocaine there on other occasions. Finally, the State commented on Bingham's prior record, his family relationships

and lack of employment, and urged the trial court to follow the State's recommendation.

¶5 The trial court then asked the State several questions about its recommendation. It asked the State to repeat the specific recommendation for each count, and to clarify the presentence report recommendation. The presentence report recommended an imposed-and-stayed prison sentence of two-to-three years of initial confinement and three-to-five years of extended supervision, and that Bingham be referred to the Felony Drug Offender Alternative to Prison Program (FDOATP). Defense counsel and the State both agreed that the presentence report recommendation was that Bingham be referred to FDOATP for both of the counts.

¶6 Next the trial court asked about an arrest for armed robbery mentioned in the presentence report: "[D]oes the defendant have a substantiated police contact for armed robbery?" Defense counsel noted that it was referenced in the presentence report, and that the charge had been dismissed. The trial court asked whether probable cause had been found, because then the armed robbery would be a substantiated police contact that could be considered at sentencing. The State offered to examine the district attorney's file and a recess was taken.

¶7 The State reviewed the file and reported that the crime at issue involved an armed robbery by two men. The victim was a man who was robbed while standing with two friends; he did not see the men who robbed him. A detective in the area saw two people run away from the scene and Bingham was stopped a short time later. The victim appeared at the preliminary hearing but could not identify Bingham. However, the detective testified and his identification was held to be sufficient to bind Bingham over for trial. The victim's two friends

who saw the crime take place failed to appear at trial. According to the State, the prosecutor then moved to dismiss because the only identification was by the detective from a squad car parked some distance away in the dark. The prosecutor's notes indicated that he did not believe the State could proceed in good faith to prove the crime beyond a reasonable doubt based solely on the detective's testimony.

¶8 The trial court then implied that, based on the State's explanation, it would consider the arrest as it relates to Bingham's character. In response, defense counsel stated, "[w]e're not finished, your Honor, because I have a couple of questions because it's clear that you're going to use this against my client." The parties then proceeded to discuss at length the circumstances of the crime and whether it was likely Bingham was one of the armed robbers. They reviewed the criminal complaint, which indicated that one of the victim's friends had identified Bingham as one of the armed robbers.

¶9 Defense counsel argued that the armed robbery should not be considered a substantiated police contact. Counsel also argued that the appropriate sentence for the two crimes at issue would be to refer Bingham to FDOATP, as the presentence investigator recommended.

¶10 The trial court then stated some corrections, unrelated to the armed robbery, that needed to be made to the presentence report. The trial court continued:

> But I go back to the armed robbery. I think that's a substantiated police contact and the fact that a gun was involved with this defendant is sufficiently substantiated by the statement in the complaint of the victim … [that] identified [Bingham] as the individual who had the black gun…. I think that's substantiated enough that I can consider it at sentencing. Not proof beyond a reasonable

> doubt certainly but enough to take into account in sentencing in determining FDOATP, whether for policy reasons FDOATP would be a good alternative and whether for policy reasons, the Challenge Incarceration Program would be a good alternative.

¶11 Bingham then addressed the trial court. Following Bingham's elocution, the trial court stated:

> [T]here are three primary factors I am to consider in imposing sentence in this case. Number one, would be the need to protect the public; number two, would be the character of the defendant; and number three, would be the seriousness of the offense. We have the pre-sentence report written to consider FDOATP eligibility and the pre-sentence writer recommended FDOATP for you. But in FDOATP, they don't want people that have a history of violence. I can consider more than convictions, I can consider substantiated police contact, for example, if I found a credible witness and the State produced a credible witness at sentencing that said the defendant was frequently seen carrying a gun, [that is] something I can take into account. If I find that to be credible, it doesn't have to be proved beyond a reasonable doubt. And in this case, I think that the allegations of armed robbery, while certainly not proved beyond a reasonable doubt, are a substantiated police contact that I can take into account in both determining the length of your sentence and in determining whether or not I'm going to put you on FDOATP probation or find you eligible for the Challenge Incarceration Program. I am going to take that into account and be clear. And in taking that into account, I am not going to put you on FDOATP probation. I'm not going to find you eligible for the Challenge Incarceration Program. I may later find you eligible for the Earned Release Program where you might get some drug treatment in prison. I don't know. We'll see what your adaptation to prison is. And taking that substantiated contact into account, I'm going to impose a period of initial confinement here that's going to be nine months longer than is recommended by the State. Okay.
>
> So now, the three factors as I said were the character of the defendant, the seriousness of the offense and the need to protect the public. Okay. Now, the other things that we take into account are the need to protect the public, are [sic] the finding on page two of the pre-sentence report that there was a stun gun there. Okay. On the issue of character of defendant, we find this and take into account the fact that

> there was a digital scale indicating trafficking. Okay. These are factors that I take into account and do take into account in sentencing.
>
> So I'm not going to put you on FDOATP probation as recommended by the agent, and I'm going to impose a slightly longer sentence of initial confinement than recommended by the State.

¶12 The trial court sentenced Bingham to thirty months of initial confinement and thirty months of extended supervision on both counts one and two, to run concurrent to each other. The trial court also addressed fines, costs and warnings about future firearm possession. The trial court then stated:

> So I want to make you further aware, Mr. Bingham, about this gun thing because the gun, both [the] stun gun and also the firearm in the nonconviction for armed robbery disturb me greatly. I need to protect the public from people that have stun guns. I need to protect the public from people who carry handguns….
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> ….
>
> The days of your involvement in drugs—I think the reason I haven't provided a longer sentence is I think you're showing some insight that you want to get away from the drug culture….
>
> ….
>
> And I'm imposing a longer sentence than recommended by the State because you also need to get away from even possession or touching any guns, stun guns, handguns, any other kind of gun. You're making a big mistake if you do.

¶13 Bingham filed a postconviction motion seeking sentence modification or resentencing "on the grounds that the court erroneously exercised its sentencing discretion, when it improperly placed undue emphasis in sentencing Mr. Bingham upon a dismissed armed robbery charge." Bingham did not challenge the trial court's determination that the contact was sufficiently substantiated to be considered at sentencing, or the propriety of relying on the

armed robbery when considering Bingham's character at sentencing. However, Bingham contended that the trial court "placed overwhelming emphasis on this unproven allegation, and that the court sentenced Mr. Bingham not only for the drug offenses he pled guilty to, but for the unproven armed robbery allegation. This was improper." The trial court denied Bingham's motion and this appeal followed.

DISCUSSION

¶14 At issue is whether the trial court erroneously exercised its discretion when it imposed sentence. Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. ***Id.***, ¶18. An erroneous exercise of discretion occurs when a sentence is based on irrelevant or improper factors. ***Id.***, ¶17. To obtain relief on appeal, the defendant has the burden to "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).

¶15 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court may also consider the following factors:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability;

> (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Id. at 623-24 (internal quotations and citation omitted). The weight to be given to each of these factors is within the trial court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶16 A trial court may consider evidence of unproven offenses in determining the character of the defendant and the need for incarceration and rehabilitation. ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990); ***State v. Marhal***, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992).

¶17 Bingham acknowledges that the trial court was entitled to consider evidence of an unproven offense in determining his character and his need for incarceration and rehabilitation. *See* ***McQuay***, 154 Wis. 2d at 126. However, he contends that consideration of the alleged armed robbery "dominated the sentencing proceeding" (emphasis in original). Bingham urges this court to conclude that the trial court erroneously exercised its discretion by relying too greatly on the unproven offense. He relies on ***Rosado v. State***, 70 Wis. 2d 280, 234 N.W.2d 69 (1975), where the Wisconsin Supreme Court concluded that the defendant had been sentenced not only for the crime for which he was convicted, but also for uncharged events that had occurred elsewhere. *See* ***id.*** at 290.

¶18 ***Rosado*** involved a conviction for one count of sexual intercourse with a child. The defendant, age thirty-three, dated a fifteen-year-old child. ***Id.*** at

282-83. In November 1972, he had sexual intercourse with the child in Milwaukee, which led to the single criminal charge. ***Id.*** at 283. In the course of accepting Rosado's plea and sentencing him, the trial court learned that in December 1972, Rosado and the child went to Puerto Rico for five months, and that Rosado returned to Wisconsin without her, leaving her stranded. ***Id.*** at 284. The child's mother paid for a plane ticket home and Rosado was arrested in May 1973. ***Id.*** at 283-84.

¶19 The trial court in ***Rosado*** imposed a fourteen-year sentence. ***Id.*** at 289-90. The Wisconsin Supreme Court concluded that the trial court's comments suggested that the trial court had directly punished Rosado for the events in Puerto Rico. ***Id.*** at 290. The court explained:

> To punish the defendant for incidents occurring in Puerto Rico is beyond the power of a Wisconsin trial court, no matter how horrible the trial court may have considered these incidents.
>
> Evidence about the Puerto Rican incidents was relative to the question of the defendant's character, and so was admissible at the sentencing hearing. However, it is one thing to consider this trip as one factor relevant to deciding the appropriate sentence for the crime of which the defendant was convicted, and quite a different thing to regard the Puerto Rican affair as a separate crime or series of crimes for which the defendant is punishable by a Wisconsin court. Yet the only reasonable inference one can make from the record is that the defendant was sentenced, not only for the crime of which he was convicted, but for the events which occurred in Puerto Rico. The record of the December 14th and the December 17th hearings was largely taken up with this Puerto Rican incident. Very little was said about the crime charged. When the trial court first pronounced sentence on December 14th, it said it was sentencing the defendant for his "course of conduct," which can only refer to the Puerto Rican affair, as well as the single event which occurred in Milwaukee. Likewise, when the sentence was pronounced the second time on December 17th, the court stated that it was sentencing Rosado "on the basis of everything that I

> have heard here," and yet all that the court had heard on December 17th was about the Puerto Rican incident, and not about the act of intercourse in Milwaukee, which was the only act for which defendant could be directly punished by a Wisconsin court.

Id. at 290-91.

¶20 We have examined the sentencing transcript and conclude, unlike the court in ***Rosado***, that the trial court did not erroneously exercise its discretion when it sentenced Bingham. Although the trial court spent considerable time obtaining and examining the district attorney's file on the dismissed armed robbery charge, this examination was substantially in response to defendant's volunteered statement, delivered through counsel, that the dismissal was because the police caught the wrong man.[1] Once the trial court concluded that the armed robbery was a substantiated contact that could be considered at sentencing—a determination Bingham does not challenge on appeal—the trial court considered, but did not place undue emphasis on, the armed robbery. This was an appropriate consideration. *See* ***McQuay***, 154 Wis. 2d at 126; ***Harris***, 119 Wis. 2d at 623.

¶21 The trial court explicitly stated that it was considering the armed robbery, and the fact that it involved violence, as it related to Bingham's character and his eligibility for FDOATP. The trial court acknowledged that the

[1] The transcript of the sentencing hearing demonstrates that perhaps as much as half of the sentencing hearing was spent investigating and discussing the dismissed charge, and hearing argument from defense counsel as to why the trial court's intention to consider the dismissed charge was erroneous. The trial court placed substantial emphasis on Bingham's involvement in a matter not before it as a charged offense, and which the State had chosen not to take to trial. We note that the trial court had ample basis in the record, independent of the investigation of the dismissed charged, to support the sentence imposed. The trial court might consider whether, when the record already supports the sentence, such detailed excursions into collateral material have the unintended consequence of diluting respect for the administration of justice by creating the *appearance* of punishment for uncharged offenses.

substantiated contact was one reason it was imposing a greater period of initial confinement than that recommended by the State. However, unlike in ***Rosado***, the sentencing transcript does not lead to the clear and convincing inference that the additional eighteen months (including nine months of initial confinement and nine months of extended supervision) was specifically a sentence for the dismissed armed robbery. The trial court considered other significant facts related to the charged crimes, including presence of the digital scale and the stun gun, in weighing Bingham's character and the need to protect the community.

¶22 While the trial court could have spent more time discussing each of the factors the parties emphasized during their sentencing arguments, we are convinced that the trial court considered the appropriate sentencing factors, *see* ***Harris***, 119 Wis. 2d at 623, and imposed a sentence for the charged crimes, not for the armed robbery. Bingham had four prior convictions for marijuana possession and two prior convictions for battery, had not been employed since 2001 and had a significant history of drug use. Indeed, even defense counsel acknowledged that Bingham "has AODA issues and needs treatment for that." These facts, combined with the recovery of a digital scale, substantial quantities of marijuana and cocaine base, and a stun gun, are all factors the trial court properly considered. The trial court sentenced Bingham to a total of five years on each count, which is half of the maximum available sentence and only eighteen months longer on each count than was recommended by the State. We discern no erroneous exercise of discretion.

By the Court—Judgment and order affirmed.

Not recommended for publication in the official reports.