COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP3303-CR **Cir. Ct. No. 2002CF4690**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. CONNERS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Pursuant to a plea bargain, Jeffrey L. Conners pled guilty to possessing less than five grams of cocaine with intent to deliver. The circuit court imposed a sixty-four-month prison sentence, with Conners to serve a minimum of thirty-four months in initial confinement and a maximum of thirty

months on extended supervision. In a postconviction motion, Conners sought resentencing or sentence modification, arguing that the circuit court undermined his plea bargain by imposing a sentence beyond the disposition recommended by the State. Conners also argued that the court erroneously exercised discretion by failing to provide an adequate explanation for the sentence it imposed. The circuit court denied the motion, and Conners appeals. We conclude that the circuit court properly exercised its sentencing discretion, and we therefore affirm the judgment of conviction and postconviction order.

¶2 The facts underlying the criminal complaint are largely undisputed. Milwaukee police received a tip that drugs were being sold from a Milwaukee apartment, and they went to investigate. Conners answered the door of the apartment, and police asked Conners and his girlfriend if they could enter and search the residence. Conners and the woman consented. The police, with Conners' assistance, found marijuana, cocaine, and a handgun and ammunition. After he was arrested, Conners revealed to police additional cocaine that he had stored in his buttocks. Upon questioning, Conners indicated that he used most of his cocaine himself, but that he sold enough to "keep his habit going."

¶3 In exchange for a guilty plea from Conners, the State agreed to recommend a forty-two-month prison sentence, with initial confinement of eighteen months. At sentencing, the State complied with the plea bargain. Defense counsel recommended probation for Conners with sixty-to-ninety days of incarceration as condition time. The presentence investigation report (PSI) writer recommended a thirty-six month prison sentence, with Conners to serve eighteen months in initial confinement.

¶4 The circuit court imposed a sixty-four-month sentence on Conners, ordering thirty-four months in initial confinement. In doing so, it first noted the primary factors for a sentencing court to consider: the gravity of the offense, the character of the offender, and the public's need for protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The court stated that Conners was an "admitted small time armed drug dealer." Although noting that classification did not "take into account [Conners'] whole character … it certainly takes into account the negative side … for which you're being punished." The court noted that the amount of marijuana found on Conners was "small," but that the amount of cocaine in Conners' possession was slightly "more than average." The court also noted that Conners had a "loaded gun, ammunition, a razor blade with the residue, and cash." The circuit court reasoned that these accessories of the drug trade indicated Conners was positioned "towards the bottom end of the economic chain" for drug dealers.

¶5 The circuit court then noted the devastating effect drug-dealing has had on Milwaukee, with the end result being blighted neighborhoods "where people don't want to live or work." The circuit court pointed out that drug activities like Conners' were "contributing to that." The court stated that Conners would have to be punished for his part in the "denigration" of the city. The court, however, recognized Conners' cooperation with authorities, and it also noted that Conners was "selling [drugs] in part to feed [his] own use." The circuit court stated that it considered such activity to be "higher intermediate, although not at the highest end of the intermediate scale."

¶6 Again noting Conners' cooperation, the circuit court commented on Conners' character, pointing out that Conners: was thirty-four years old, had dropped out of high school "early on," had "no real employment history," and had

"been using controlled substances on a consistent basis for ten years." The circuit court noted, however, that since his arrest, Conners had begun pursuing a GED and had gotten a job. While stating that Conners appeared to be "making better decisions," the court noted that it had apparently taken his arrest to force Conners to make those decisions. The circuit court stated: "How you react to this sentence is going to be the measure of you, if you use this as an opportunity to improve yourself or whether or not you just throw up your hands and go back to your old lifestyle."

¶7 The circuit court then pointed out that Conners had five prior convictions, all for retail theft, and that his character appeared to be "tending towards poor." Concluding its comments, the circuit court summarized:

> The need to protect the community here is high intermediate. Ten years of drug use, a large amount of drug use per day, a marijuana and cocaine user. Years of marijuana use, Mr. Conners, may have just dulled your ambition, altered your decision-making. With regard to the amorality argument in the PSI, that doesn't have much, if any traction with me at all….
>
> What concerns me most, Mr. Conners, is the combination of drugs and weapons, no employment, and use yourself. It's a recipe for one of two things. It's said often, but it's true. Prison or death. If you want to be there for your children, if you want to be there for [your girlfriend], you've got to completely get yourself out of this lifestyle. That's not going to happen through just a probation disposition in the Court's opinion, not when there are weapons involved, not when there's the amount of cocaine involved here.
>
> Now, warehousing Mr. Conners for a long period of time just to get him out of the community also doesn't appear to be the best solution here. The punishment must … fit the crime. That means here [that] the Court does believe a prison term is necessary, although not the longest possible prison term. Mr. Conner[s] does show some good signs, especially better decision-making in the last few months.

> My summary analys[i]s of this case is that this is … a higher intermediate severity. Character is poor, although not the worst. Need to protect the community is high intermediate because of the nature, level, and depth of the addiction, the presence of the weapon, the years of the marijuana use. On the good side I do take into account the taking of responsibility by the guilty plea and the recent enrollment in school and getting a job.

The circuit court then imposed the prison sentence outlined above.

¶8 Conners sought postconviction sentence modification or resentencing, arguing that: (1) by failing to follow the State's recommendation, the circuit court undermined the plea bargaining process; (2) the circuit court violated the plea agreement by failing to consider the sentencing recommendations from the State and from the defense; and (3) the circuit court failed to exercise sentencing discretion when it did not consider with any specificity the parties' sentencing recommendations or the recommendations of the PSI writer. The circuit court rejected each of these contentions, and Conners now appeals. He argues that the circuit court failed to exercise sentencing discretion because it exceeded the prosecutor's recommendation without expressly considering it. He contends that the sentencing court also failed to satisfy the requirements of ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. He also repeats his argument that by failing to address the parties' recommendations, the circuit court undermined the plea-bargaining process.

¶9 The standard of appellate review is well-settled. The circuit court has great discretion in imposing sentence. *See*, *e.g.*, ***State v. Wickstrom***, 118 Wis. 2d 339, 354-55, 348 N.W.2d 183 (Ct. App. 1984). This court will affirm a sentence imposed by the circuit court if the facts of record indicate that the circuit court "engaged in a process of reasoning based on legally relevant factors." *See* ***id***. at 355 (citations omitted). The primary factors for the sentencing court to

consider are the gravity of the offense, the character of the offender, and the public's need for protection. ***Larsen***, 141 Wis. 2d at 427. This court will sustain a circuit court's exercise of discretion if the conclusion reached by the circuit court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). This court is extremely reluctant to interfere with the circuit court's sentencing discretion given the circuit court's advantage in considering the relevant sentencing factors and the demeanor of the defendant in each case. *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). Even in instances where a sentencing judge fails to properly exercise discretion, this court will "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶10 In ***Gallion***, the supreme court reaffirmed the ***McCleary*** sentencing analysis, which cited the importance of the sentencing court's consideration of "the nature of the offense, the character of the offender, and the protection of the public interest." ***McCleary,*** 49 Wis. 2d at 274 (citation omitted). ***McCleary*** also emphasized the importance of the sentencing court's exercise of discretion.

> It is thus clear that sentencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed.
>
> In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards…. [T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.

Id. at 277 (citation omitted).

¶11 ***Gallion*** requires the trial court to explain the "linkage" between the sentence and the sentencing objectives. ***Gallion***, 270 Wis. 2d 535, ¶46. Although the standard of review did not change, "appellate courts are required to more closely scrutinize the record to ensure that 'discretion was in fact exercised and the basis of that exercise of discretion [is] set forth.'" ***Id.***, ¶76 (quoting ***McCleary***, 49 Wis. 2d at 277).

¶12 Contrary to Conners' contention, the ***Gallion*** standard requiring more elaborate and specific sentencing remarks technically does not apply to this case.[1] We are satisfied, however, that the circuit court's sentencing remarks meet that standard nonetheless. The circuit court discussed the main ***McCleary*** factors and specifically applied them to the facts of this case. The circuit court indicated that it considered Conners' crime to be quite serious, and it explained why with considerable precision. It specifically explained why it did not consider probation to be appropriate, and it also explained why it considered a sentence longer than those recommended by the State and the PSI writer to be necessary. The circuit court did not engage in the "more mechanical form of sentencing" rejected by ***Gallion*** – that is, simply enunciating the primary sentencing factors, discussing the facts, and imposing sentence. Rather, the circuit court explained why it considered necessary a lengthier sentence than the one recommended by the State, the PSI writer, or the defense.

[1] Conners was sentenced twelve months prior to the release of ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d. The supreme court indicated that ***Gallion*** applied to future cases only. ***Id.***, ¶8.

¶13 Conners' complaints that the circuit court erroneously exercised sentencing discretion and undermined the plea bargain when it failed to consider the PSI and the parties' sentencing recommendations specifically are equally meritless. The circuit informed Conners at the plea hearing that it was not obligated to follow the terms of the plea bargain and could impose the maximum sentence. The record clearly demonstrates that the circuit court read the PSI and heard the recommendations of both parties prior to imposing sentence. The circuit court's sentencing remarks reference the recommendations of the PSI, the prosecutor, and Conners' defense. ***Gallion*** specifically eschews the kind of "mathematical precision" advocated by Conners; rather, ***Gallion*** anticipates "an explanation for the general range of the sentence imposed," which is precisely what the circuit court did here with considerable clarity. 270 Wis. 2d 535, ¶49.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).