

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2006

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. 2004AP3347-CR

Cir. Ct. No. 2003CF2749

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REFUGIO NUNEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed and cause remanded with directions.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Refugio Nunez appeals from a judgment sentencing him to three years' initial confinement and four years' extended supervision for being a party to the crime of delivery of a controlled substance.

Nunez also appeals from an order denying his postconviction motion to withdraw his guilty plea and for sentence modification. We reject his claim that he should be allowed to withdraw his plea because the trial court did not inform him that he was not eligible for good-time credit or early release. However, we conclude that the trial court erroneously exercised its discretion at sentencing. We reverse the judgment and order for that reason and remand for resentencing.

¶2 Nunez first contends that his guilty plea was unknowing and involuntary because the trial court failed to inform him that under truth-in-sentencing he was ineligible for parole or good-time credit. That there is no parole or good-time credit earned on a sentence imposed under Wisconsin's truth-in-sentencing law is a collateral consequence of a plea and the trial court need not inform a defendant of that consequence during the plea colloquy. *State v. Plank*, 2005 WI App 109, ¶¶12-17, 282 Wis. 2d 522, 699 N.W.2d 235, *review denied*, 2005 WI 136, ___ Wis. 2d ___, 703 N.W.2d 379. Although Nunez contends the *Plank* decision is wrong, we are bound by that decision to reject Nunez's claim for plea withdrawal.¹ See *Ranft v. Lyons*, 163 Wis. 2d 282, 299-300 n.7, 471 N.W.2d 254 (Ct. App. 1991).

¶3 Nunez makes several attacks on the trial court's exercise of its sentencing discretion. He argues the court failed to consider probation, failed to explain why probation was not appropriate, relied too heavily on the seriousness of the offense as evidenced by the undercover agent's report that Nunez said he could obtain a kilo of cocaine for \$23,500 to \$24,000, failed to consider other

¹ We need not consider Nunez's argument that he was entitled to an evidentiary hearing on his postconviction claim that his plea was unknowing and involuntary.

mitigating factors, and failed to consider and explain the relevant factors in imposing the \$5000 fine. He makes the broad assertion that the sentence is a violation of his constitutional rights to due process.

¶4 Sentencing is left to the discretion of the trial court, and our review is limited to determining whether the trial court erroneously exercised that discretion. *State v. Hall*, 2002 WI App 108, ¶9, 255 Wis. 2d 662, 648 N.W.2d 41. Although there is a strong public policy against interfering with the sentencing discretion of the trial court, an erroneous exercise of discretion might be found if the trial court failed to state on the record the relevant and material factors which influenced the court's decision, relied upon factors which are totally irrelevant or immaterial to the type of decision to be made, or gave too much weight to one factor on the face of other contravening considerations. *Id.* This court's duty is to closely scrutinize the record to ensure that discretion was in fact exercised and that the trial court has set forth the basis for the exercise of its discretion. *State v. Gallion*, 2004 WI 42, ¶4, 270 Wis. 2d 535, 678 N.W.2d 197.

¶5 In order to properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. *Id.*, ¶39. 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. *Id.*, ¶40. It must identify the general objectives of greatest importance, which may vary from case to case. *Id.*, ¶41. The trial court must also describe the facts relevant to the sentencing objectives and explain, in light of these facts, why the particular component parts of the sentence imposed advance the specified objectives. *Id.*, ¶42. Similarly, it must identify the factors that were considered in arriving at the sentence and indicate

how those factors fit the objectives and influence the sentencing decision. *Id.*, ¶43.

¶6 Here the trial court found that Nunez's crime was serious since it involved the sale of twenty-seven grams of cocaine. From the undercover agent's report that Nunez indicated he could obtain a kilo of cocaine,² the court concluded that Nunez was a big time drug dealer and allowed his tavern to be used for drug dealing. The court expounded on the evils of drug dealing and the impact it has on the families of people who become addicted to cocaine. The court noted that one way to fight against drug trafficking was to make sure it was not profitable. Although the court recognized that Nunez had no prior criminal record, it found that Nunez's actions, particularly his statement that he could obtain a kilo of cocaine, demonstrated bad character and a willingness to deal drugs for profit. The court then imposed the seven-year bifurcated term and a \$5000 fine. Stating that Nunez has the financial ability to do so, the court also required Nunez to contribute the \$6710 seized by police to a crime prevention organization.

¶7 We first observe that the trial court failed to address why probation was not an appropriate sentence. *Gallion* reaffirmed that because the sentence imposed shall "call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant," the sentencing court should consider probation as the first alternative. *Id.*, ¶44 (citation omitted). The basic framework

² When questioned by the trial court at sentencing about this statement, Nunez could not recall what he said during the drug transaction. In response to the trial court's examination, the undercover agent testified that when he asked Nunez for a kilo of cocaine, Nunez stated he would have to ask his friend but he believed the cost would be \$23,500 or \$24,000.

a sentencing court utilizes for its process of reasoning includes the proviso that if probation is rejected, the reasons why should be indicated. *See id.*, ¶40 n.9. Although the reasons for rejecting probation may be considered to be the same as the reasons for the sentence imposed, *see Anderson v. State*, 76 Wis. 2d 361, 366, 251 N.W.2d 768, the trial court's failure to explain why probation was rejected is troubling in this case because the presentence investigation report (PSI) recommended an imposed but stayed sentence in favor of probation and the rationale for the sentence is incomplete.

¶8 The trial court's sentencing rationale rests on the seriousness of the offense. It is the only expressed consideration. Although the seriousness of the offense may be the sole criterion, *see Bastian v. State*, 54 Wis. 2d 240, 246, 194 N.W.2d 687 (1972) (a substantial sentence may be imposed to emphasize the seriousness of the crime), it cannot negate consideration of a defendant's personal characteristics. Nunez had no prior criminal record, had stable family relationships, maintained employment, operated his own tavern, and was a naturalized American citizen. The PSI indicated that Nunez was a low risk to reoffend. The trial court failed to address any of these mitigating factors. Further, the trial court failed to explain why the sentence advanced its implicit objective of attacking drug trafficking. In short, we are left to wonder why the particular sentence was imposed.

¶9 Finally, the trial court did not make an explanation for the fine or contribution to the crime prevention organization. In imposing a fine, the court should consider the financial resources of the defendant and the burden that payment of a fine will impose, with due regard to his or her other obligations, the ability of the defendant to pay a fine on an installment basis, and whether there are particular reasons which make a fine appropriate as a deterrent to the offense

involved or appropriate as a corrective measure for the particular defendant. *State v. Iglesias*, 185 Wis. 2d 117, 130, 517 N.W.2d 175. All the court said was that it wanted to make drug dealing unprofitable. The court did not consider the PSI's statement that Nunez's crime had a ripple effect in the economic plight of his family. The court had a duty to make a determination on the issue of Nunez's ability to pay the fine because Nunez raised the issue in his postconviction motion. *See id.* at 129; *State v. Kuechler*, 2003 WI App 245, ¶13, 268 Wis. 2d 192, 673 N.W.2d 335. The record is inadequate on the issue and should be remanded to determine whether Nunez is able to pay the fine. *See Kuechler*, 268 Wis. 2d 192, ¶14. The same is true with respect to the required contribution to the crime prevention organization because the trial court is statutorily required to make a determination of the defendant's ability to pay. *See* WIS. STAT. §§ 814.76(3), 973.06(1)(f)1. (2003-04).

¶10 We conclude that Nunez is not entitled to withdraw his guilty plea. However, we reverse the judgment of conviction and the order denying Nunez's postconviction motion and remand for resentencing. Resentencing shall encompass all aspects of the sentence: the term of confinement, the imposition of the fine, and the contribution to the crime prevention organization.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

