**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 31, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP2982** **Cir. Ct. No. 2003CF5750**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TERRENCE QUINTELL WASHINGTON,**

**DEFENDANT-APPELLANT.**

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

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

¶1 PER CURIAM. Terrence Quintell Washington appeals from a corrected judgment of conviction for repeatedly sexually assaulting an underage girl, and from a postconviction order denying his motion for sentencing relief. The issue is whether the trial court erroneously exercised its discretion when it

denied his resentencing motion. We conclude that the trial court did not erroneously exercise its sentencing discretion and properly rejected Washington's four proffered "new" factors. Therefore, we affirm.

¶2 Washington was charged with repeated second-degree sexual assaults of the same twelve- and then thirteen-year-old child, in violation of WIS. STAT. § 948.025(1)(b) (amended Feb. 1, 2003). He accepted responsibility and the State proposed a sentencing recommendation of eight or nine years of initial confinement in exchange for Washington's guilty plea. Washington rejected that proposal on the advice of defense counsel who thought that the sentencing recommendation was excessive. Ultimately Washington and the State agreed to a plea bargain in which prison was recommended, but of unspecified duration. The presentence investigator recommended a twenty-year sentence, comprised of twelve- and eight-year respective periods of confinement and extended supervision, and defense counsel proposed a five- to six-year period of confinement (to also include the sentence for a narcotics conviction consolidated with this case). The trial court imposed a thirty-year sentence, comprised of twenty-four- and six-year respective periods of confinement and extended supervision.

¶3 Washington sought sentencing relief.[1] He claimed that the trial court erroneously exercised its sentencing discretion, and he also proffered four allegedly new factors to collectively warrant resentencing. The trial court denied

[1] Specifically, he requested that the trial court reduce his period of confinement, or alternatively that the factors he then proffered as "new" warranted resentencing. On appeal, he seeks resentencing by a trial court judge other than the Honorable Jean W. DiMotto who imposed sentence and denied his postconviction motion.

the motion, focusing on its previous consideration of the proper sentencing factors and its proper exercise of discretion, and rejecting Washington's current attempt to show the excessiveness of the sentence by explaining that it refused to reinstate the State's nonbinding proposal that Washington had previously rejected. Washington appeals, contending that the trial court erroneously exercised its sentencing discretion, and erroneously refused to consider four allegedly new factors to warrant resentencing.

¶4 Washington claims that the trial court erroneously exercised its sentencing discretion. He contends that the trial court's extreme dissatisfaction with the prosecutor's refusal to specify the duration of her confinement recommendation demonstrated its inability to properly exercise its sentencing discretion. He also claims that the trial court did not explain: (1) the linkage between the sentencing objectives and the duration of the sentence imposed as required by ***State v. Gallion***, 2004 WI 42, ¶46, 270 Wis. 2d 535, 678 N.W.2d 197; and (2) why the sentence met the minimum amount of custody necessary to achieve the sentencing considerations ("minimum custody standard").

> ¶5 When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶6 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***State v. Larsen***, 141

Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The trial court's obligation is to consider the primary sentencing factors, and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***id.***, at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶7 Although the trial court expressed its extreme dissatisfaction and frustration with the prosecutor for failing to specify the duration of the State's confinement recommendation, it did so when it accepted Washington's guilty plea, not when it imposed sentence. Our review of the trial court's sentencing remarks demonstrates that its knowledge of sentencing law and its familiarity with the facts of this case more than compensated for its acknowledged inexperience.[2]

¶8 At the outset of its sentencing remarks, the trial court recited the three primary sentencing factors. It addressed the extreme seriousness of this offense, telling Washington:

> [y]ou preyed upon someone you knew was underage. You knew it. You knew it. Before anybody told you her actual age you knew she was underage. You preyed upon her and lived a life of exploitation for your own pleasure without regard to the consequences.
>
> This entire community is hurt by what you've done – this entire community. There's now a baby in this world ….

[2] The trial court, in explaining why it believed that this type of unspecified recommendation was a disservice to the judiciary, also stated that it did not consider it a disservice "to me or this particular court so much in particular, but to courts in general, to judges in general."

> In fact, your reaction when [the victim] told you that was to talk about how you had enough children already, you didn't want any more and to treat her roughly and rudely including even choking her as if your lack of protection was her fault.
>
> You transmitted in all likelihood as well two permanent genital diseases, the most aggravating of the sexually transmitted diseases….
>
> ….
>
> It's also clear [Washington] exploited and aggravated those problems and now [the victim] is without or will soon be without a foster mother who by all appearances was a wonderful foster mother.

¶9 The trial court then addressed Washington's character, commenting that

> this [wa]s the worst presentence investigation [the trial court] ha[s] ever read on anyone ever – the worst and your attorneys have done a good job [at sentencing with this type of character information]….
>
> You were on probation, were on supervision at the time you committed this crime. You've been out of prison two months. Your prison record is horrible.
>
> You can't even control yourself there. You have a prior record involving violence, involving a marijuana possession. Your first sexual experience is you quote, unquote, wanted to see how sex was was [sic] with your four-year-old cousin while you were watching a movie and you decided that you would have sex with her.
>
> You've never been employed.
>
> ….
>
> Your idea of how to deal with your sexual needs isn't to genuinely have a girlfriend and get married. No, it's to just when you feel sexually aroused, go out and get sex.
>
> ….

> You appear not to have internal controls. You live a life of hedonism, a pleasure life – get high, sell rocks and get your rocks off as the street expression would be.

¶10 Incident to its discussion of Washington's character, the trial court also addressed the need to protect the public and the minimum custody standard. It characterized Washington

> as having a sociopathic quality as do[] [his] actions in the crime itself so that [the trial court is] not convinced that at age 30 [he] will be less a threat to this community and to the children and teenagers in this community.
>
> [The trial court] think[s] we [the community] will need protection from [Washington] longer than that because … [he] ha[s] a high risk of reoffending in every respect whether it's a sex crime, a drug crime or a crime of violence.

¶11 Washington seeks a specificity in sentencing that the law does not require. The trial court is not obliged to explain the reason it imposed the precise amount of confinement it did, as long as it explains its reasons for the total sentence. *See* ***McCleary v. State***, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1971); ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483 ("no appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion"). We conclude that the trial court amply exercised its sentencing discretion, by considering the primary sentencing factors and providing the reasons for its sentence.[3]

[3] Washington also challenges the sentence on the basis of ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, however ***Gallion*** does not apply to sentences imposed before it was decided. *See* ***State v. Trigueros***, 2005 WI App 112, ¶4 n.1, 282 Wis. 2d 445, 701 N.W.2d 54 (citing ***Gallion***, 270 Wis. 2d 535, ¶76). Thus, ***Gallion*** does not apply to Washington's sentence.

¶12 In addition to his challenge to the trial court's exercise of discretion, Washington also sought resentencing, proffering four new factors: (1) his limited intellect; (2) the sexually permissive environment in which he was raised (rendering underage sexual relations as the norm); (3) his immaturity; and (4) the State's original (albeit unaccepted) sentencing recommendation of eight to nine years of initial confinement.

¶13 To obtain sentence modification, Washington must first prove, by clear and convincing evidence, the existence of a new factor. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). A new factor is

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

***Id.*** at 8 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). "[A] 'new factor' [also] must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing – something which strikes at the very purpose for the sentence selected by the trial court." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). This court independently reviews the trial court's determination of "[w]hether a fact or set of facts constitutes a new factor." *See* ***Franklin***, 148 Wis. 2d at 8.

¶14 Washington has not clearly and convincingly shown that his limited intellect, the sexually permissive environment in which he was raised, or his immaturity "frustrates the purpose of the original sentence." ***Michels***, 150 Wis. 2d at 99. Nor does he claim that any of those three factors prevented him from knowing that repeated sexual relations with a twelve- (and later thirteen-) year-old

girl was against the law. None of those factors frustrates the purpose of the trial court's sentence.

¶15 Washington has also not clearly and convincingly shown that his rejection (for whatever reason) of the State's original proposal, recommending an eight- or nine-year period of confinement, is a new factor warranting resentencing. Most importantly, the trial court is not bound by any sentencing recommendations, and Washington was so advised during his guilty plea colloquy. *See* ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990). The trial court also explained that it was not convinced that confining Washington until he was thirty years old (consistent with the State's original sentencing recommendation), would be sufficient to protect "the children and teenagers in this community."

¶16 Washington contends the first three factors he proffered, coupled with the trial court's acknowledged inexperience in these particular matters, and a resulting sentence that was practically three times an experienced prosecutor's contemplated recommendation, collectively constitute a new sentencing factor because the sentence imposed "was neither reasonable or fair." We disagree. We previously explained how the trial court's competence in the applicable law and its familiarity with the facts of this particular case overcame any feared inexperience in these matters. Combining individual factors that are not "new" does not construct a "new" collective factor. Stated otherwise, "[a]dding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

*By the Court.*—Judgment and order affirmed.

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