

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 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. 2006AP270-CR

Cir. Ct. No. 2004CF6025

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRIEST LAMAR BOOSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Derriest Lamar Boose appeals from a judgment entered after he pled guilty to one count of second-degree reckless homicide, while armed, and one count of burglary while armed with a dangerous weapon as party to a crime, contrary to WIS. STAT. §§ 940.06(1), 939.63, 943.10(2)(a) and

939.05 (2003-04).¹ Boose claims the trial court erroneously exercised its discretion and failed to follow the dictates of *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Because the trial court did not erroneously exercise its sentencing discretion and did conform to the *Gallion* requisites, we affirm.

BACKGROUND

¶2 On May 23, 2005, Boose pled guilty to the counts referenced above. On July 27, 2005, he was sentenced to twenty-five years on the homicide, consisting of twenty years of initial confinement followed by five years of extended supervision. On the burglary, Boose was sentenced to ten years, consisting of five years of initial confinement followed by five years of extended supervision, consecutive to the homicide sentence. Boose appeals from the judgment, challenging only the sentence.

DISCUSSION

¶3 Boose claims the trial court failed to comply with the sentencing directives in *Gallion*, and therefore erroneously exercised its sentencing discretion. Specifically, Boose contends that the trial court failed to consider his rehabilitative needs, and failed to explain how the imposed extended supervision portion of the sentence “advanced the sentencing objectives.”

¶4 In considering a sentencing challenge, our review is limited. We will uphold the sentence as long as the trial court did not erroneously exercise its

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

discretion. *State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). There is a “strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably.” *Id.* (citation omitted). The primary factors which the trial court must consider at sentencing are the gravity of the offense, the character of the offender, and the need to protect the public. *State v. Smith*, 207 Wis. 2d 258, 281-82 n.14, 558 N.W.2d 379 (1997). The court may also consider a variety of secondary factors including: the defendant’s past record of criminal offenses; the defendant’s history of undesirable behavior patterns; the defendant’s personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant’s crime; the degree of the defendant’s culpability; the defendant’s demeanor at trial; the defendant’s age, educational background and employment record; the defendant’s remorse, repentance or cooperativeness; the defendant’s rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant’s pretrial detention. *State v. Jones*, 151 Wis. 2d 488, 495-96, 444 N.W.2d 760 (Ct. App. 1989).

¶5 The weight to be given to each of the factors is within the trial court’s discretion. *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). After consideration of all of the relevant factors, the sentence may be based on any one of the primary factors. *State v. Krueger*, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). Because the trial court is in the best position to determine the relevant factors in each case, we shall allow the trial court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing it to be unreasonable or unjustifiable. *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶6 The erroneous exercise of discretion might be found “if the trial court failed to state on the record the material factors which influenced its decision, gave too much weight to one factor in the face of other contravening considerations, or relied on irrelevant or immaterial factors.” *State v. Krueger*, 119 Wis. 2d 327, 337-38, 351 N.W.2d 738 (1984).

¶7 The exercise of a sentencing court’s discretion requires a demonstrated process of reasoning based on the facts of the record and a conclusion based on a logical rationale. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The trial court must engage in an explained judicial reasoning process and explain the reasons for its actions. However, even if the trial court fails to adequately set forth its reasons for imposing a particular sentence, the reviewing court will not set aside the sentence for that reason. The reviewing court is “obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.” *Id.* at 282. Our supreme court recently reaffirmed the sentencing standards established in *McCleary* in the *Gallion* decision. *Gallion*, 270 Wis. 2d 535, ¶8.

¶8 In reviewing the record in the instant case, we conclude that the trial court did not erroneously exercise its discretion, nor did it violate the dictates of *Gallion*. The record clearly demonstrates that the trial court considered all three primary factors before sentencing Boose. The trial court addressed the gravity of the offense, commenting about the impact it had on the victim’s family and the fact that it was a senseless homicide committed during an armed burglary for the purpose of stealing drugs. The trial court noted that Boose committed this crime while on drugs—that he and his accomplice broke into a home while armed, and then shot and killed an innocent victim.

¶9 The trial court also considered Boose’s character before imposing sentence, both the positive aspects—that he had been employed, had not been in prison before, that he had accepted responsibility, did “average” in school, and that when not using drugs, he was a good, respectable person. The record also reflects a consideration of the negative aspects of Boose’s character, including his drug use, his criminal record involving guns and concealed weapons, and the fact that Boose was out on bail for a concealed weapons charge when he committed the current crimes.

¶10 The record also reflects that the trial court did address Boose’s rehabilitative needs, noting the definite need for a formal drug treatment program:

Mr. Boose has never been in a formal [drug] treatment program, and maybe he needs it. He stated he’s not addicted to alcohol or marijuana and he can control it. I question that assessment by the defendant. If he could control it, he wouldn’t have been involved with that crime that night and, plus, it’s not isolated.

¶11 Finally, the transcript demonstrates that the trial court considered the need to protect the public: “The community has to be protected. Homicides are just running at a rampant pace in Milwaukee, and it’s because of the combination of access to guns and the use of alcohol. You mix them together, and that’s why we have these homicides. It continues unabated.”

¶12 As is evident from this review, the trial court properly addressed each of the primary sentencing factors before imposing sentence. In addition, contrary to Boose’s contention, the trial court did address his rehabilitative needs. Thus, we conclude that the trial court did not erroneously exercise its discretion in sentencing Boose for these crimes.

¶13 Boose contends in his reply brief that the trial court’s sentencing violated the requisites of *Gallion*. In particular, he asserts that the trial court failed to explain why it imposed a ten-year period of extended supervision time and how that term advanced the sentencing objectives. We are not persuaded. The trial court did explain why extended supervision was necessary to meet the punishment and rehabilitative goals of the sentence—noting both the extremely serious nature of the crimes and the fact that Boose failed when placed on supervision in the past; thus, dictating the need for long-term care and supervision to deal with his drug and alcohol problems.

¶14 Based on this review, we cannot conclude that the dictates of *Gallion* were violated by the trial court when it imposed sentence on Boose. *Gallion* does not require the trial court to specifically explain why ten years of extended supervision was imposed. Rather, it requires an “on-the-record explanation” that “fulfill[s] the *McCleary* mandate that discretion of a sentencing judge be exercised on a ‘rational and explainable basis.’” *Gallion*, 270 Wis. 2d 535, ¶49 (citation omitted). The transcript here reflects that the trial court provided a rational and reasonable explanation for the sentence imposed. In addition to the explanation set forth above, the trial court noted that consecutive sentences were necessary because the homicide and burglary were two separate offenses and, as a result, mandated separate punishment. The trial court also observed that Boose’s combination of drugs and weapons was “deadly” and had Boose not been using drugs, this crime probably would not have happened. Further, although Boose accepted responsibility for the crime, he failed to acknowledge that he has a problem with dependence on drugs and alcohol. Under such circumstances, Boose and the community would benefit from a substantial period of confinement and supervision after release.

¶15 Accordingly, we reject Boose's contentions that the trial court erroneously exercised its sentencing discretion. We affirm the judgment.

By the Court.—Judgment affirmed.

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

