COURT OF APPEALS DECISION DATED AND FILED

December 12, 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. 2006AP787-CR **Cir. Ct. No. 2004CF7263**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY MONTRELL NELLUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and ELSA C. LAMELAS, Judges. *Affirmed*.

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

¶1 PER CURIAM. Henry Montrell Nellum appeals from a judgment entered after he pled guilty to armed robbery with threat of force as party to a

crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (2003-04).[1] He also appeals from an order denying his postconviction motion. Nellum contends the trial court erroneously exercised its sentencing discretion by imposing an excessive sentence and one which was disparate to that of a co-actor. Because the trial court did not erroneously exercise its discretion when it sentenced Nellum, we affirm.

BACKGROUND

¶2 On November 26, 2004, at approximately 9:25 p.m., Andrew Gasek was walking on the sidewalk from his garage to his house, located on the corner of North 68th and West Clarke Streets. He observed three men running up the sidewalk from 68th Street towards him. One of the men had a rifle, which he was holding in a firing position at Gasek. The two other subjects had guns at waist or chest level pointed at Gasek. Two of the men had ski masks on and the third had the hood of his coat up. This individual told Gasek: "Don't look at me." Gasek looked away. Gasek then felt the muzzles of the three guns pressed against him as the subjects surrounded him. The unmasked individual ordered Gasek to give them his money and he complied. The three then ran towards a car parked on the street, which was driven by Glen Eaton.

¶3 The police pulled the car over a short time later and found the three weapons that Gasek described. They also found Nellum and co-actors Eaton, Marvin Smith, and a juvenile, E.B. Nellum was arrested. He told police that Eaton had picked him up and took him to E.B.'s house, where Smith and E.B.

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

were "playing around with guns." The four men sat around for awhile handling the guns and then E.B. asked Nellum if he wanted to "go do something." Nellum looked at Eaton and Eaton stated: "Let's hit it." They then got into Eaton's car and drove back to Nellum's house so he could retrieve an old non-working revolver that he had. Nellum said they then drove around for awhile looking for a victim. When they saw Gasek, they stopped. Nellum, E.B., and Smith got out and robbed Gasek. Eaton stayed behind by the car. When the three returned to the car, Eaton drove them all away from the scene. As noted, they were apprehended by police a short time later.

¶4 Nellum was charged with armed robbery, threat of force as party to a crime, which carries a maximum penalty of forty years in prison and a $100,000 fine. Nellum pled guilty and was sentenced to a ten-year term, consisting of five years of initial confinement followed by five years of extended supervision. Judgment was entered on May 9, 2005.

¶5 On May 14, 2006, Nellum filed a motion for postconviction relief arguing that his sentence should be modified due to mitigating factors and that he was denied equal protection because Eaton received a lesser sentence. The trial court denied the motion. Nellum now appeals from the judgment and order.

DISCUSSION

¶6 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 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, 444 N.W.2d 760 (Ct. App. 1989).

¶7 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, 683, 499 N.W.2d 631 (1993).

¶8 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." ***Krueger***, 119 Wis. 2d at 337-38.

¶9 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. ***Id.*** 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. ***Id.*** at 282. 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.*** Our supreme court recently reaffirmed the sentencing standards established in ***McCleary*** in ***State v. Gallion***, 2004 WI 42, ¶8, 270 Wis. 2d 535, 678 N.W.2d 197.

¶10 Finally, the length of the sentence imposed by a trial court will be disturbed on appeal "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

A. Sentencing Discretion/Mitigating Factors.

¶11 In reviewing the record in the instant case, we conclude that the trial court did not erroneously exercise its discretion. The sentencing transcript reflects that the trial court considered the seriousness of Nellum's offense, as well as his character, past criminal record and the need to protect the public from such criminal behavior.

¶12 The trial court noted that although Nellum's gun was not operable, the two other loaded guns involved in the crime were and someone could have died. The trial court characterized the nature of the crime as "extraordinarily serious." The trial court next addressed Nellum's character—he had a significant criminal history both as a juvenile and as an adult, including "misdemeanor battery offenses, some kind of violence, and … repeated contacts, including some weapons charges as a juvenile." The court observed that these crimes have a negative impact on the community. "It makes neighborhoods less safe. It makes people feel less safe. It makes everyone in the community less free to move about. Because this involved loaded weapons, it has that much greater impact." The trial court also told Nellum that because of the seriousness of the offense and his prior record, some prison sentence was required in order to protect the public. The trial court articulated why it imposed the ten-year sentence:

> The purpose I have in mind is to incapacitate you for some significant period of time, to deter you if possible from ever doing anything close to this again, hopefully providing some level of general deterrence of others, and also to impose fair punishment on behalf of a community that suffers so much from this kind of criminal behavior.
>
> But given your age, given the lack of a prior prison sentence, I will impose what I consider to be the minimum under the circumstances, and that will be five years of initial confinement followed by five years of extended supervision, for a total [] sentence of ten years in prison.

¶13 Based on the foregoing, we conclude that the trial court considered the proper sentencing factors, sufficiently explained its rationale and imposed a reasonable sentence. Given the fact that the maximum potential sentence was forty years and Nellum received only one-quarter of that, we cannot conclude that the sentence was excessive. We also note that given the seriousness of the crime,

the weapons involved, and Nellum's criminal history, a ten-year sentence is not "shocking" to public sentiment.

¶14 In addition, we are not persuaded by Nellum's contention that the trial court did not factor in all of the mitigating factors, which Nellum presented, including the death of his mother and the need for him to help with family responsibilities. The trial court was not obligated to base its sentence on these factors. The trial court must consider the primary factors and has the discretion to determine how much weight to assign the factors it considers and whether to consider optional factors at all. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. Moreover, the record reflects that the trial court did consider the mitigating factors Nellum contends were ignored:

> I'm very sorry that your mother passed away, and I struggle with whether that should have any effect on what the sentence is here, and I really don't find that it should have any particular effect. Maybe you started to learn what you ought to have understood before, and that is when you get locked up for a crime part of what makes that punishment is that you are not able to be there for things you ought to be there for. That is part of what makes being locked up such a terrible thing.

Likewise, the trial court also commented on Nellum's employment and personal life and lack of a truly serious prior conviction. Thus, contrary to Nellum's claims, the trial court did consider many of the mitigating factors presented. Based on the foregoing, we conclude that the trial court did not erroneously exercise its sentencing discretion.

B. Disparate Sentence.

¶15 Nellum's second argument is that the sentence imposed on him violated his constitutional rights because co-actor Eaton received a much lesser sentence. We are not persuaded.

¶16 Nellum points out that Eaton received only twelve months in the House of Correction, even though he was convicted of the same offense. He argues that this created a disparity in sentencing. We cannot agree.

¶17 Wisconsin recognizes the importance of "individualized sentencing." ***Gallion***, 270 Wis. 2d 535, ¶48. Defendants are not sentenced to the same punishment simply because they are convicted of the same offenses. Rather, they are "sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy." ***McCleary***, 49 Wis. 2d at 275. Such does not amount to a violation of equal protection. ***Ocanas***, 70 Wis. 2d at 189. As long as the disparity is not arbitrary or based on irrelevant considerations, there is no cognizable equal protection violation. ***Id.*** at 186-87.

¶18 In order to establish that disparity is improper, a defendant must show that the "trial court based its determination upon factors not proper in or irrelevant to sentencing, or was influenced by motives inconsistent with impartiality." ***Jung v. State***, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966). Nellum has failed to make such a showing.

¶19 The same trial court sentenced both Nellum and Eaton and fully explained the reasons for the disparate sentences. The trial court found Nellum "not particularly believable." The trial court also indicated that Nellum's

participation in the crime was more culpable. Nellum actually got out of the car with the other two actors, confronted the victim, and pointed a gun at the victim. In contrast, Eaton remained by the car and did not have any direct contact with the victim or use a weapon against the victim. The trial court also observed a difference in character and prior criminal record. Nellum's past revealed a pattern of violent criminal behavior, whereas Eaton had only one past incident in Illinois, but nothing in Wisconsin. The trial court also noted that Eaton was going to college, whereas Nellum was "drifting in life."

¶20 Based on the foregoing, it is clear that the trial court properly assessed the individual factors pertinent to Nellum and Eaton. The factors were very different between the two and support the trial court's exercise of sentencing discretion and the different sentences imposed. Nellum has not shown that his sentence was based on irrelevant or improper factors. Accordingly, we must reject his contention that the sentence imposed was unconstitutionally disparate.

¶21 Finally, we reject Nellum's contention that the trial court should have used the sentencing guidelines when sentencing Eaton because the trial court used the sentencing guidelines when sentencing Nellum. There is no requirement that the sentencing court look at identical factors and give such factors the same weight when sentencing co-actors. The sentencing court has the discretion to determine how much weight to place on each factor. From our review, we

conclude that the trial court's rationale in each case reflected a proper type of individualized analysis in accord with the dictates of ***Gallion***.[2]

By the Court.—Judgment and order affirmed.

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

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[2] Nellum also contends the trial court erred in denying his postconviction motion. We disagree. Because there is no merit to his claims that the sentencing court erroneously exercised its discretion, it follows that the postconviction court did not err in denying his postconviction motion. We also note that Nellum proffers distinctions in certain factual assertions. For example, he contends that the trial court relied on the information in the record stating that Nellum placed his gun on the victim, whereas Nellum asserts that he stayed ten feet away from the victim. These alleged factual disparities do not alter our decision. The victim reported to the police that he felt three gun barrels placed on his person. Thus, there is evidence in the record to support the trial court's reliance on the facts as recounted in the complaint, rather than Nellum's self-serving statements. Moreover, as noted in the text of this opinion, the trial court did not find Nellum to be credible. Thus, the trial court was not obligated to accept Nellum's version of events over what was reported by the victim.