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

**December 19, 2006**

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



**Appeal No. 2005AP3008** **Cir. Ct. No. 2001CF6**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PHENG LOR,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Pheng Lor, pro se, appeals an order denying his WIS. STAT. § 974.06[1] motion for postconviction relief. Lor seeks resentencing,

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

claiming (1) the court violated his First Amendment rights by considering his alleged gang association at sentencing; and (2) the court's comments at sentencing show bias. We reject these arguments and affirm the order.

## BACKGROUND

¶2 Lor was convicted upon his ***Alford***[2] pleas of armed robbery, felony theft, armed burglary, criminal damage to property, substantial battery, false imprisonment and operating a motor vehicle without the owner's consent. The charges stemmed from a home invasion in which Lor and three associates tied up Abraham and Yer Vang and their seven-year-old son, beat and kicked Abraham, and stole gold, jewelry, cash and a van. The court imposed a total of twelve years' initial confinement and twelve years' extended supervision on the seven counts. Lor did not ultimately pursue a direct appeal pursuant to WIS. STAT. RULE 809.30. His WIS. STAT. § 974.06 motion for postconviction relief was denied and this appeal follows.

## DISCUSSION

¶3 Lor argues the circuit court erroneously exercised its sentencing discretion by considering an improper factor—specifically, evidence of Lor's gang association. Sentencing lies within the discretion of the circuit court. ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***id.*** There is a strong public policy against interfering with the

[2] An ***Alford*** plea is a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. ***State ex rel. Jacobus v. State***, 208 Wis. 2d 35, 54, 559 N.W.2d 900 (1997); *see also* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. ***Id.*** at 681-82.

¶4 If the record contains evidence that the circuit court properly exercised its discretion, we must affirm. *See* ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988). "To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record." ***Cooper***, 117 Wis. 2d at 40.

¶5 The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court, and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶6 Lor intimates that because the State did not establish a link between Lor's gang association and the crimes charged, the trial court impermissibly enhanced his sentence based on that association. In other words, Lor claims he was "demonized" and punished on the basis of his gang association, in violation of his "First Amendment right of association." We are not persuaded.

¶7 Citing ***Dawson v. Delaware***, 503 U.S. 159 (1992), Lor contends that consideration at sentencing of protected First Amendment speech is

constitutionally impermissible. The ***Dawson*** Court addressed whether, in context of a capital sentencing proceeding, the First Amendment prohibited the introduction of the fact that the defendant was a member of the Aryan Brotherhood where this evidence had no relevance to the issues being decided. ***Id.*** at 160. The Court specifically rejected Dawson's broad contention that the Constitution forbids the consideration at sentencing of any evidence concerning First Amendment protected activities. The Court observed that a sentencing court "has always been free to consider a wide range of relevant material" and that the Constitution "does not erect a per se barrier to the admission of evidence" of First Amendment-protected activities. ***Id.*** at 164-65.

¶8 Here, Lor's association with a group that advocates the commission of criminal acts relates to Lor's future endangerment to society. *See* ***id.*** at 166. Thus, the trial court's reference to Lor's gang association was a relevant factor in assessing his character, *see* ***Triplett v. State***, 51 Wis. 2d 549, 552, 187 N.W.2d 318 (1971), and the need to protect the community from criminal activity. Moreover, Lor's position at sentencing was that he was a "good kid" who simply fell in with the "wrong crowd." Just as Lor had the right to introduce any sort of relevant mitigating evidence at sentencing, the State was entitled to rebut that evidence by exploring Lor's association with the "wrong crowd." *See,* e.*g.*, ***Payne v. Tennessee***, 501 U.S. 808, 825 (1991).

¶9 Lor additionally claims that the court's comments at sentencing evince racial bias. Whether a judge was a neutral and detached magistrate is a question of constitutional fact we review independently. ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). The presumption against bias must be overcome with a preponderance of evidence. ***Id.*** at 415. Both subjective and objective factors come into play. *See* ***id.*** Here, the record gives no indication

that the judge believed he was biased, thus ending our inquiry into the subjective test.

¶10 Under the objective test, one must demonstrate that he or she was treated unfairly and that the judge was actually biased. ***Id.*** at 416. To support his claim, Lor cites a number of statements out of context. First, Lor takes issue with the court's reference to Lor becoming part of "our society." The court stated:

> I'm required to look at, on the one hand, the nature of the crime and the gravity of the offense. I'm on the other hand, to look at the character of the defendant and what the needs of the defendant are, knowing that no matter what this Court does here today, realistically Mr. Lor will again become part of our society and, therefore, I'm required to consider what needs to be done before that can happen.

In context, the court's reference to "our society" does not imply an exclusion of Lor, as a person of Hmong ancestry, from society as a whole. Rather, the court's use of the phrase "our society" referred to the society of non-incarcerated persons that Lor will rejoin when he is released from incarceration.

¶11 Next, Lor challenges the court's discussion of the seriousness of the offense in "this area, this town." The court stated:

> When we look at this crime here for this area, this town, this is an extremely serious offense. It would be an extremely serious offense anywhere. This town is not used to – is not accustomed to and will not accept such a pre-planned, violent crime. And it was premeditated; it was pre-planned. I mean, it was like a bunch of boy Scouts going to gather up their tools and equipment to go on a camping trip but in this case, they were going to buy ties and to organize their weapons before they do a home invasion. So there is no question that this is extremely serious and the gravity of the offense is severe.

Contrary to Lor's argument, the court's comments reflect its consideration of a proper sentencing factor—namely, gravity of the offense. As the State notes,

having a "small-town perspective" on crime does not equate to racial bias. Moreover, the court noted that this crime would have been a serious offense anywhere. We discern no error.

¶12 Lor also challenges the court's use of the term "boy." Specifically, the court stated:

> As a child, as I got the impression, for whatever reason you started out on a very normal course. You had an incident in junior high that you probably could have gotten past; I don't know exactly what the circumstances were of that. But I do note that at age – whatever age you would be in tenth grade – you said you quit to have fun. Well, boy isn't this fun? You're on your way to prison at age 18.

Lor appears to interpret the court's use of "boy" as a racial epithet. Viewed in context, however, the court was reacting with some sarcasm to Lor's statement that he dropped out of school to have fun. The statement does not evince racial bias on the part of the sentencing court.

¶13 Lor additionally challenges the court's use of the term "terrorist" to describe Lor. Use of this term was nothing more than a reference to the terror Lor and his accomplices inflicted upon the victims. To the extent Lor challenges the court's reference to "cultural differences," the court was merely sharing its perception of comments made by Lor's victim, who had indicated: "These people, if they live in my country – well, back at home – they would all be killed." The court acknowledged the cultural differences and commented:

> I hear [the victim] speak of his culture where you would be executed for having stolen. This is not what happens in the United States. I'm sure that all cultures have their approach to this, but we are a nation of freedoms; to some extent we are a nation of second chances. There isn't a second chance if someone is executed for having stolen something at the age of 16 or 17 years of age.

Lor fails to establish how the court's recognition of this difference evinces racial bias.

¶14 Finally, with respect to Lor's gang affiliation, the court made the following comments: "You certainly have gang affiliations and if you lie with dogs you get fleas." The court further indicated: "I do draw some distinction between gang activities and what happens between gangs and what happens between individuals and the civilian population." As noted above, reference to Lor's gang affiliation was relevant to both his character and the need to protect the public. Lor has therefore failed to provide any evidence that the judge was biased.

¶15 Because the record establishes that the trial court's sentence was based on the proper factors and supported by the record, we affirm the order denying Lor's motion for postconviction relief.

*By the Court.*—Order affirmed.

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