

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2007

A. John Voelker
Acting 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. 2005AP1206-CR

Cir. Ct. No. 2004CF987

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMION LEONARD MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Damion Miller entered a no contest plea to a charge of child abuse (recklessly causing harm). The circuit court imposed the maximum three-and-one-half year sentence, with Miller to serve no less than eighteen months in initial confinement and no more than two years on extended

supervision. The sentence was ordered to run consecutively to a sentence Miller had already received for a drug crime. Postconviction, Miller sought re-sentencing or sentence modification, arguing that the circuit court failed to exercise sentencing discretion by failing to give adequate reasons for imposing the maximum penalty. The circuit court denied the motion, and Miller appeals. Based upon our review of the briefs and record, we conclude that the circuit court properly exercised its sentencing discretion. We therefore affirm the judgment of conviction and the postconviction order.

¶2 The relevant facts are undisputed. Miller was watching television with Dena Reismer, when the woman's ten-month-old child began to cry. She went to the kitchen to prepare a bottle for the child. While there, she heard the child begin to cry in an unusual way. Miller brought the child into the kitchen and told Reismer that as he was picking the child up from his crib, the child slipped. Miller told Reismer that he caught the child by the arm.

¶3 Miller and Reismer took the child to the hospital, where doctors determined that the child's arm had been broken. Upon further examination, doctors discovered the child had numerous other injuries, including: a coin lodged in the esophagus; two fractures of the left tibia; a bone injury in the right foot; and two fractured ribs and a third injured rib. Police were called to investigate and Miller initially gave a false name to police. Miller admitted to police that he had caused the broken arm, but he denied causing any of the other injuries. He also admitted that shortly before the injury occurred, he had taken Vicodin, a pain medication that had been prescribed for Reismer. He also admitted that he had smoked marijuana a number of times during the day.

¶4 At the time of the offense, Miller was on extended supervision for a drug offense. Prior to entering his no-contest plea, Miller's supervision on the prior drug offense had been revoked, and he was given an additional eighteen months in prison. At the plea hearing in the instant case, Miller affirmed that he understood the circuit court could impose the maximum three-and-one-half year sentence.

¶5 The presentence investigation report recommended imposition of a consecutive maximum sentence based on Miller's prior juvenile and criminal record, his continued drug use, and his "negative adjustment to probation/parole supervision." The prosecutor recommended a three-year sentence and did not object to the sentence being imposed concurrently with Miller's sentence on the drug crime. The defense agreed with the State's recommendation and noted that Miller had indicated that some of the child's prior injuries occurred when Reismer was living with another man. The circuit court acknowledged that at least one of the child's injuries had been determined to be "older," and defense counsel noted that the record indicated that once "Miller realized an injury had occurred," he accepted responsibility.

¶6 In sentencing Miller to a maximum consecutive sentence, the circuit court acknowledged that it was not possible to know if Miller had inflicted any of the child's injuries other than the broken arm. It set forth the factors it was required to consider,¹ and then stated that probation was not an option because of Miller's prior failure on supervision. The court stated that Miller's admitted drug

¹ See *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987) (primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection)

use prior to the child's injury was "of concern," noting further that it had "no idea whether the effects of the drugs were overlapping or even how these substances, if they were overlapping, would affect you."

¶7 The circuit court then reviewed Miller's criminal history, which included a first-degree sexual assault of a child as a juvenile, two adult charges of possession of cocaine with intent to deliver, and felony bail jumping. It noted that the presentence report indicated that Miller was "not cooperative with the first offender program" as a juvenile, and that there had been "problems" with Miller's extended supervision from prison on the drug charge. It noted that Miller had been given an alternative to revocation and that he had still failed to meet any of the requirements established for that alternative, including finding employment and obtaining drug and alcohol treatment. The circuit court noted that, at the time of the instant offense, Miller's supervisory agent had already requested that Miller be apprehended for his failure to report to the agent.

¶8 The circuit court then imposed the maximum sentence, noting that while a portion of the sentence was punishment for Miller's crime, another portion was to insure that Miller received treatment in an institutional and structured setting for his chronic marijuana use. Specifically, the court told Miller, "You need to be in prison long enough to get some programming," and that it was imposing consecutive sentences to insure that he received drug treatment.

¶9 In his postconviction motion, Miller argued that the circuit court failed to give adequate consideration to the gravity of his offense, which even the State agreed was not aggravated. He maintained that the circuit court's sentencing comments did not support imposition of the maximum sentence. In denying the motion, the circuit court acknowledged that it had not given great weight to the

severity of the crime because Miller's involvement in any of the child's other injuries, if any, was uncertain. Thus, the circuit court indicated that it imposed the maximum sentence based upon Miller's admitted actions toward the child, Miller's use of illegal drugs at the time of the crime and on a daily basis, despite being on supervision. The court noted that it had placed greatest emphasis on Miller's criminal history, his failure to comply with the terms of supervision, and his need for rehabilitation.

¶10 The standard of appellate review is well-settled. The circuit court has great discretion in imposing sentence. *See, e.g., State v. Wickstrom*, 118 Wis. 2d 339, 354-55, 348 N.W.2d 183 (Ct. App. 1984). This court will affirm a sentence imposed by the circuit court if the facts of record indicate that the circuit court "engaged in a process of reasoning based on legally relevant factors." *Id.* at 355 (citations omitted). The primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection. *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). This court will sustain a circuit court's exercise of discretion if the conclusion reached by the circuit court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. *See Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). This court is extremely reluctant to interfere with the circuit court's sentencing discretion given the circuit court's advantage in considering the relevant sentencing factors and the demeanor of the defendant in each case. *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). Even in instances where a sentencing judge fails to properly exercise discretion, this court will "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶11 In *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, the supreme court reaffirmed the *McCleary* sentencing analysis, which cited the importance of the sentencing court’s consideration of “the nature of the offense, the character of the offender, and the protection of the public interest.” *McCleary*, 49 Wis. 2d at 274 (citation omitted). *McCleary* also emphasized the importance of the sentencing court’s exercise of discretion.

It is thus clear that sentencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed.

In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.... [T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.

Id. at 277 (citation omitted).

¶12 *Gallion* requires the trial court to explain the “linkage” between the sentence and the sentencing objectives. *Gallion*, 270 Wis. 2d 535, ¶46. Although the standard of review did not change, “appellate courts are required to more closely scrutinize the record to ensure that ‘discretion was in fact exercised and the basis of that exercise of discretion [is] set forth.’” *Id.*, ¶76 (quoting *McCleary*, 49 Wis. 2d at 277).

¶13 Miller’s arguments to the contrary notwithstanding, the record demonstrates that the circuit court’s sentencing decision more than met these requirements. As we summarized above, the circuit court clearly did not consider the instant crime to be particularly aggravated, but it nonetheless imposed the

maximum sentence based on Miller's criminal history, his inability to comply with the terms of his supervision, his acknowledged continued drug use, and Miller's need for treatment in an institutional setting, something he could not have received if given a lesser sentence.

By the Court.—Judgment and order affirmed.

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

