

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 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. 2006AP550-CR

Cir. Ct. No. 2004CF204

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHON E. FALLIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jonathan Fallis appeals a judgment of conviction sentencing him to three years of initial confinement, followed by two years of

extended supervision, and an order denying his motion for postconviction relief.¹ He argues the circuit court erroneously exercised its discretion in sentencing him. We disagree and affirm the judgment and order.

FACTS

¶2 According to the criminal complaint, Fallis paid one of his co-workers, Sam Whitney, \$100 to “put a good scare into” seventy-six-year-old Faye Melka. Fallis and Melka were next door neighbors in a trailer park. They were involved in a dispute over the noise Melka’s grandchildren made when they came to visit.

¶3 Whitney and two accomplices ransacked Melka’s home. They spray painted graffiti on her home, shed, and car, dumped out the contents of her dresser, and spread food from the refrigerator throughout the house. All told, they caused over \$10,000 in damage. According to the presentence investigation (PSI) writer, Melka reported significant stress and anxiety as a result of the incident, and lost over seventy pounds as a result.

¶4 Fallis was charged with four counts: burglary, misdemeanor theft, criminal damage to property, and graffiti, all as party to a crime. As part of a plea agreement, he pled no contest to burglary, and the other three charges were dismissed and read in.

¶5 The PSI writer, district attorney, and defense counsel all recommended Fallis receive probation with a year in jail as a condition of

¹ Fallis’s first name is spelled “Jonathan” and “Jonathon” in different parts of the record. “Jonathan” is the spelling used in the appellate caption.

probation. The circuit court instead sentenced Fallis to five years in the Wisconsin prison system, three in confinement and two on extended supervision. Fallis filed two motions for reconsideration of the sentence. The circuit court denied both motions.

DISCUSSION

¶6 A circuit court’s sentencing decision will be upheld on appeal unless the court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 546, 678 N.W.2d 197. A court properly exercises its sentencing discretion when it provides a “rational and explainable basis” for the sentence. *Id.*, ¶39. In order to do so, the court must (1) specify its objectives for the sentence; (2) identify which objectives are of greatest importance in the case at hand; (3) describe the facts relevant to those objectives; and (4) explain how the sentence’s component parts promote the sentencing objectives given. *Id.*, ¶¶39-46.

¶7 The court is to impose the minimum sentence that is consistent with the court’s sentencing objectives. *Id.*, ¶44. This means the court is to consider probation as a first alternative. *Id.* However, the court is free to impose a prison sentence if probation would be inconsistent with the seriousness of the offense, among other reasons. *Id.*

¶8 In this case, the court began by identifying the four objectives of its sentence: protection of the community, punishment, rehabilitation, and deterrence of others. The court then identified a number of specific factors relevant to its decision, starting with the seriousness of the offense and moving on to Fallis’s character and the needs of society. The court found the offense to be aggravated based on the extensive damage, the fact that the victim was elderly, and the fact

that the crime was precipitated by such a minor dispute. The court noted that Fallis had no criminal record and a steady work history, and concluded that his character was a mitigating factor and that he posed a low risk to society. The court then summed up as follows:

I think there needs to be a deterrent effect of this. I just think every now and then somebody crosses the line so far that for there not to be a serious penalty just sends so wrong of a message to the community that you just can't justify anything else.

....

To think that you could be living in a mobile home court and you are not going to hear other people just boggles my mind. And for you to go to this extent to hire somebody to do damage and to do this graffiti to her home is just—it's almost inconceivable that somebody would do something like this. ... And it all starts with you, Mr. Fallis. If you wouldn't have got this ball rolling, none of us would be here today.

....

Like I say, the complete and utter lack of any kind of empathy for a fellow human being, I've never seen it like I'm seeing it in this case. It's absolutely horrendous. And the punishment is going to be equally horrendous.

¶9 Fallis first argues the court never explained why probation was not appropriate.² He notes that the court never mentioned probation in its explanation of the sentence, and argues that therefore the court never considered probation as a first alternative as required under *Gallion*. See *Gallion*, 270 Wis. 2d 535, ¶44.

¶10 Fallis reads too much into *Gallion*. *Gallion* expressly stated that its test was not a “magic words” requirement or a trap for circuit courts. See *Gallion*,

² In his argument, Fallis relies on *State v. Nunez*, No. 2004AP3347-CR, unpublished slip op. (Wis. Ct. App. March 15, 2006). Citation to unpublished opinions is a violation of WIS. STAT. RULE 809.23(3) (2003-04).

¶49. Rather, it was a requirement that the link between a crime and its penalty be explicit and easily understood. *Id.*, ¶¶46, 49. Here, the transcript makes clear exactly why the court believed probation was not appropriate: the “complete and utter lack of any kind of empathy” demonstrated in the commission of the crime, and the court’s belief that “for there not to be a serious penalty just sends so wrong of a message to the community that you just can’t justify anything else.” The lack of the magic word “probation” is not dispositive.

¶11 Fallis next argues that the court’s focus on the severity of the crime was impermissible. He concedes that after considering the relevant factors, the court may choose which are most important and base its sentence in whole or in part on that factor. *See State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20 (*Gallion* did not limit circuit courts’ discretion to determine the weight given to various sentencing factors). He argues that even so, the court erred when the court “became upset at [Fallis] and failed to consider all of the relevant sentencing factors, and focused only on an emotional desire to punish [Fallis] and his co-defendant.”

¶12 Contrary to Fallis’s argument, the court did in fact consider both aggravating and mitigating factors, including Fallis’s lack of a prior record and other mitigating factors related to his character. The court acted within its discretion when it concluded the overriding factors in this case were the severity of the offense and the need to “send a message” that this crime would not be tolerated.

By the Court—Judgment and order affirmed.

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

