

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2008

David R. Schanker
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. 2007AP2318-CR

Cir. Ct. No. 2006CF3579

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRENCE JERNEAL HERON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Terrence Heron appeals a judgment convicting him of possessing cocaine with intent to deliver, and carrying a concealed weapon. He also appeals an order denying postconviction relief. The issues are whether the

trial court properly exercised its sentencing discretion, and whether the court sentenced him upon inaccurate information. We affirm.

¶2 The complaint alleged that police identified Heron as the man responsible for firing numerous rifle shots into the air on a city street. When officers searched his house with a warrant, they discovered two rifles, one concealed under a mattress, and cocaine packaged for sale. The complaint charged him with possessing a firearm in a school zone and possessing with intent to deliver between one and five grams of cocaine. He subsequently entered guilty pleas to the drug charge and the amended weapons charge.¹

¶3 In sentencing Heron the court primarily considered the damage to the community from dealing drugs and the danger to the community posed by possessing firearms and discharging them in public. The court also noted that Heron was issued a bench warrant for failure to appear at a hearing, “and that calls into question whether or not you would be willing to comply with the rules and be supervised in the community.” In mitigation the court noted that Heron had no criminal record and had participated in programs offered at the Milwaukee County House of Corrections. The court concluded that a prison sentence was necessary to address Heron’s rehabilitative needs in a structured setting and to protect the community. The court imposed two years of initial confinement followed by four years of extended supervision on the drug charge and nine months in jail on the weapons charge, concurrent.

¹ The information was amended to charge Heron with carrying a concealed weapon instead of possession of a firearm in a school zone.

¶4 In a postconviction motion, Heron contended that the trial court erroneously exercised its sentencing discretion by failing to properly consider and weigh the various sentencing factors, and by imposing an excessive sentence in view of those factors. He also contended that the court improperly considered his failure to appear at a hearing and subsequent bench warrant because he was incarcerated when he failed to appear and was therefore blameless for his absence.

¶5 We have a strong policy of deferring to the sentencing court's discretion, and we presume a sentence is reasonable unless the defendant can demonstrate from the record that the court acted unreasonably. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The sentencing court must primarily consider the nature of the offense, the offender's character and the need to protect the public, and may also consider any other relevant factors. *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). The court must also explain the reasons for the particular sentence it imposes, providing a "rational and explainable basis" for it. *State v. Gallion*, 2004 WI 42, ¶¶39, 76, 270 Wis. 2d 535, 678 N.W.2d 197. The "rational and explainable basis" requirement allows this court to ensure that discretion was in fact exercised. *Id.*, ¶76. Additionally, the defendant has a due process right to be sentenced upon correct information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

¶6 The trial court properly exercised its sentencing discretion. It primarily considered the seriousness of dealing cocaine and firing guns in public and the dangerous combination of drugs and guns. These were reasonable and proper factors to consider, and the trial court adequately explained its reliance on them at the sentencing hearing. They justify sentences that require Heron to serve two years of initial confinement, out of a maximum of seven and one-half years, and four years of extended supervision, out of a maximum of five years, with jail

time concurrent. Heron's contention is, essentially, that the court failed to give adequate weight to mitigating factors, such as the fact (noted by the trial court) that Heron had no prior record. However, the sentencing court has discretion to balance the various factors as it sees fit. *State v. Jones*, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989). Here the court could, within that discretion, give relatively little weight to mitigating factors as opposed to the aggravating circumstances of Heron's crimes.

¶7 Heron also contends that the trial court failed to adequately explain the objectives of the sentence. We disagree. The court made it clear that protecting the public was the predominant objective which is, again, a decision within the court's discretion.

¶8 Heron next contends that the court sentenced him upon inaccurate information when it noted that bench warrants had issued after he failed to appear at hearings. Heron only discusses one of two times he was the subject of a bench warrant.² In that instance he failed to appear because he had been jailed. He argues that the court failed to consider that the bench warrant was not his fault, although counsel had so informed the court. However, the court mentioned the bench warrant in the context of questioning whether Heron was a proper candidate for probation. The court could have reasonably treated the fact that Heron was jailed as a negative in considering whether to place him on probation. In any event, if the court has received inaccurate information, the defendant must also show that the sentencing court actually relied on the inaccurate information.

² The other instance, which he does not discuss, occurred when he missed a hearing after he went to the wrong area of the courthouse.

Tiepelman, 291 Wis. 2d 179, ¶26. Here, the court mentioned the warrants only in passing, and Heron has failed to demonstrate that they played any meaningful part in the sentencing decision. The court clearly indicated that the public's protection, and not Heron's character, was the decisive factor in passing sentence.

¶9 Heron raises the same issue in the context of a new factor analysis, with the new factor being his inability to attend the hearing due to his incarceration. However, it is not a new factor because it was known to the trial court at sentencing, even if not acknowledged. Additionally, as noted, Heron has not demonstrated that the warrants were highly relevant to his sentence. *See Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (a new factor is one unknown to the sentencing court but highly relevant to the sentence).

By the Court.—Judgment and order affirmed.

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

