

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP568-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2006CF6525

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARTIN TERRELL ARRINGTON,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Martin Terrell Arrington appeals from a corrected judgment of conviction for two counts of armed robbery with the threat of force and for possessing a firearm as a felon, and from a postconviction order denying

his resentencing motion.¹ The issue is whether the trial court imposed a lengthier sentence for Arrington's refusal to answer the presentence investigator's questions about his involvement in the present and prior offenses. We conclude that the trial court's consideration of Arrington's negative attitude toward and uncooperativeness with the presentence investigator as consistent with his past behavior and as negatively reflecting on his character was not improper, nor was it punishing Arrington for exercising his Fifth Amendment right against self-incrimination, when considered in the context of the entire record. Therefore, we affirm.

¶2 A jury found Arrington guilty of two counts of armed robbery with the threat of force, as a party to the crime, in violation of WIS. STAT. §§ 943.32(2) and 939.05, and as a felon in possession of a firearm, in violation of WIS. STAT. § 941.29(2)(a), each as a habitual criminal, in violation of WIS. STAT. § 939.62 (2005-06).² For the armed robberies, the trial court imposed two twenty-five-year concurrent sentences, each comprised of fifteen- and ten-year respective periods of initial confinement and extended supervision. For illegally possessing a firearm, the trial court imposed a ten-year concurrent sentence, comprised of five-year periods of initial confinement and extended supervision. Arrington moved for resentencing, claiming that the trial court improperly considered his refusal to cooperate with the presentence investigator as an aggravating factor that increased his sentence. The trial court denied the motion. Arrington appeals.

¹ The Honorable Timothy G. Dugan imposed sentence and entered the corrected judgment of conviction. The Honorable Dennis P. Moroney denied Arrington's postconviction motion.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 The sole issue is whether the trial court, when it imposed sentence, improperly considered what was characterized as Arrington's failure to cooperate with the presentence investigator. In the presentence investigation report, Arrington's failure to cooperate was described as follows:

On 05/07/07, this [presentence investigative] writer attempted to conduct the Presentence Investigation interview with the defendant at the Milwaukee County House of Correction. The defendant set the tone for the interview by defiantly swaggering into ... the interview room with a scowl directed at this writer. This writer explained in detail the purpose of the court-ordered Presentence Interview and stressed the importance of the defendant's cooperation. As this writer began the interview by reading and reviewing the criminal complaint with the defendant, he continuously and rudely interrupted, stating that the criminal complaint was not true, which is why he had a jury trial. This writer informed the defendant that he would be given the opportunity to express any disagreements he had with the criminal complaint and give his version of the offense upon the completion of the reading of the criminal complaint.

Offender Interview: When asked to give his account of the offense, the defendant said, "I received stolen property. I bought it. That's all I have to say."

....

At this point of the interview [while being questioned on his correctional experience and prior offenses], the defendant became very defensive and belligerent, stating, "I just remember this case and being in here. I don't remember all that other stuff you're asking me about. You can write what you want to write. I don't have anything else to say."

When this writer asked the defendant if it was his intention to continue to cooperate with the Presentence Interview, he glared defiantly at this writer and remained silent. This writer explained that a court memo would be submitted to the judge detailing the defendant's non-compliant attitude with the Presentence Interview. Again, the defendant defiantly glared at this writer and mumbled, "Do what you got to do." At this point, the Presentence Interview was terminated.

On 05/08/07, this writer phoned [defense counsel] and informed him of the defendant's non compliant attitude with the Presentence Interview. On 05/08/07, this writer phoned the defendant's mother, Carolyn Arrington, explaining that she would not have the opportunity for input as the defendant did not cooperate with the Presentence Interview....

In light of the above listed information, a Presentence Investigation could not be performed on Marcus Terrell Arrington. Should the court request that a future Presentence Investigation be completed on the defendant, this writer or another Department of Corrections agent would accommodate the court.

Please note that although a formal Presentence Investigation could not be completed with the defendant, this writer did take the opportunity to outline some important information for the court.^{3]}

¶4 Defense counsel addressed the presentence investigator's remarks in his sentencing presentation:

As far as the presentence writer, I discussed this issue with [Arrington] about what happened and – during this interview. She [the presentence investigator] asked – he [Arrington] sat down. It's clear in this that he sat down and began having a conversation with her. I don't know if he swaggered or scowl – she's never met him before. She doesn't know who he is. He just sat in the room. Clearly, he's not happy about being in the position he's in because he asserted he didn't do this. He indicated that, basically, she got confrontational with him like she was having a bad day. She tried to get him to confess. He wouldn't discuss the facts with her about what happened. It became – the confrontation escalated. She indicated that he was going to

³ This court stayed appellate briefing to allow the trial court to rule on the State's motion for authorization to cite to the presentence investigation report in its brief pursuant to *State v. Parent*, 2006 WI 132, ¶49, 298 Wis. 2d 63, 725 N.W.2d 915, to respond to the appellate issue Arrington raised. The trial court granted the motion. *See* WIS. STAT. § 972.15(4) (amended Mar. 28, 2008). This extensive quotation provides the full context of precisely what the trial court considered before it imposed sentence, and avoids any concerns about characterizations or implications that could result from paraphrasing the investigator's impressions of Arrington and her reasons for terminating his interview.

go to prison for a long time, and he would not discuss the facts of the case because he was concerned about the appeal. She then kept prodding him on and was going on, and he indicated if she was going to have this attitude, he didn't have to put up with it.

So I think there's two sides to every story and you've heard his side. But it is clear from the report that it wasn't like he sat down there and immediately got up and then indicated he didn't want to talk to her. He actually came in, sat down, and conversed with her. She wasn't happy, [is] what happened.

Arrington exercised his right of allocution; he never mentioned the presentence investigation interview. His entire allocution was: "The guns were – were not found on me. I was never identified. I received stolen property. I'm just in a – I was just caught in a bad situation at a bad time."

¶5 The trial court's obligation is to consider the primary sentencing factors (the gravity of the offense, the character of the offender, and the need for public protection), and to exercise its discretion in imposing a reasoned and reasonable sentence. See *State v. Larsen*, 141 Wis. 2d 412, 426-28, 415 N.W.2d 535 (Ct. App. 1987). The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶6 The trial court considered each of the primary sentencing factors. Defense counsel expressed his concern that Arrington should not be punished for asserting his innocence in a jury trial. In response to that concern, the trial court acknowledged that:

The matter did proceed to trial. And every defendant has the constitutional right to require that the State prove its case beyond a reasonable doubt. This court would never punish someone for exercising their constitutional right.

I did preside over the trial....

The defendant did decide to testify. He did under oath, the Court finds, perjure himself. He was not truthful. His story was completely inconsistent and unbelievable.... [The trial court then recounted Arrington's trial testimony on his version of these incidents.]

....

As indicated, the Court finds his testimony to be wholly incredible and that he perjured himself under oath. That's a factor for the Court to consider because it reflects upon his character, who he is, that he'd be willing to do that.

¶7 The trial court then considered the gravity of the offenses and the need to protect the public, explaining in detail, how the facts of these incidents related to the sentencing factors. The trial court then considered Arrington's character. It commented on his prior record, both as a juvenile and as an adult. It then recounted that Arrington had been placed on probation or extended supervision on multiple occasions; two occasions ended in revocation, and the most recent occasion ended in Arrington committing the crimes in this case "a couple months later." The trial court said that Arrington had not "received a message that there is a consequence when [he] continue[s] to commit crimes. The punishment component that [he] served earlier wasn't enough to convince [him] to continue to turn [his] life around." It then recited his needs – substance abuse, educational and job training – that the trial court concluded "need to be addressed in a structured, confined setting, as well as [reorienting his] criminal thinking."

¶8 The trial court then outlined how Arrington:

tr[ied] to intimidate through a third party the witnesses and convince them not to come to court for the purposes of the trial. And, again, that reflects upon [Arrington's] character.

The fact that [he] wouldn't cooperate with the presentence writer – the whole idea of that presentence is to

give the Court a full, complete background about who [the defendant is], and [his] attitude during that with the presentence writer is consistent with the fact that [he had] been revoked while on supervision in the past. [Arrington] do[es]n't feel that [he] ha[s] to comply.

That clearly compels and requires that [Arrington] be confined. To not do so would unduly depreciate the seriousness of the offenses. And there is a strong need to protect the community from [his] conduct.

Considering all of those factors and circumstances and, also, the sentencing guidelines for the armed robbery charge, the Court is going to sentence [Arrington] to prison.

¶9 Arrington contends that the trial court punished him for his refusal to cooperate with the presentence investigator. He cites his constitutional right against self-incrimination, contending that his refusals to respond were limited to questions about his current and prior offenses. See *Mitchell v. United States*, 526 U.S. 314, 327 (1999).

¶10 The trial court was fully aware of the differing views of what occurred at the presentence interview. It had the investigator's view in the report itself, and defense counsel explained how the investigator misunderstood Arrington's refusals to answer, and misinterpreted his conduct and comments without "know[ing] who he is."

¶11 The trial court, however, "kn[e]w who [Arrington wa]s." It began its remarks by expressing its familiarity with the case generally and Arrington specifically because it had presided over the jury trial. The trial court commented on the individual witnesses and its assessment of their credibility. It then explained why it found Arrington's "testimony to be wholly incredible and [found] that [Arrington] perjured himself," reasoning that Arrington's perjurious testimony was reflective of his character. It later commented on other negative

aspects of Arrington's character, such as his prior record and his previous failures while on probation and extended supervision. After its thorough consideration of the primary sentencing factors, the trial court then mentioned Arrington's conduct at the presentence interview, and connected his "attitude" at that interview to his inability to adjust to supervision in previous situations.

¶12 Arrington then moved for postconviction relief, claiming that the trial court punished him for his failure to cooperate with the presentence investigator. In denying the motion, the trial court explained, citing to the sentencing transcript that it had considered Arrington's "negative display[s] of character and attitude for purposes of sentencing, which it was legally entitled to do."

¶13 The trial court considered numerous examples of Arrington's character. The presentence investigator's description was but one example, and defense counsel told the trial court Arrington's side of the story before sentence was imposed. The trial court extensively considered each of the primary sentencing factors. Its brief remark about Arrington's failure to cooperate with the presentence investigator as consistent with his other behavior was not a focal point of its sentencing rationale. The trial court specifically explained that it considered Arrington's failure to cooperate with the presentence investigator as reflective of his character and consistent with his other conduct. It did not impose a harsher sentence to punish Arrington for exercising his Fifth Amendment right to remain silent, as addressed in *Mitchell*. See *Mitchell*, 526 U.S. at 316-17. In fact, Arrington did not remain silent. It was his attitude, not his words or his periodic silence, that was problematic. The trial court explained this distinction.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

