

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2009

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. 2009AP975-CR

Cir. Ct. No. 2006CF3290

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAN JAVIER RAMIREZ,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Adan Javier Ramirez appeals from a judgment of conviction entered upon his guilty plea to the charge of possession with intent to deliver more than 1000 but less than 2500 grams of marijuana. See WIS. STAT.

§§ 961.01(14), 961.14(4)(t), 961.41(1m)(h)3. (2003-04).¹ He also appeals from an order denying his postconviction motion. The only issue is whether the circuit court erroneously exercised its sentencing discretion by rejecting probation and imposing a five-year term of imprisonment. We reject Ramirez's arguments and affirm.

BACKGROUND

¶2 City of Milwaukee police received information from a confidential informant that Ramirez had a large quantity of marijuana in his vehicle. Police obtained Ramirez's permission to search his vehicle and found 1800 grams of marijuana in the trunk. On June 27, 2006, the State filed a complaint in Milwaukee County charging Ramirez with one count of possession with intent to deliver more than 1000 but less than 2500 grams of marijuana. *See id.* Ramirez was subsequently served by mail with a summons ordering him to appear in court on August 15, 2006. Ramirez failed to appear, and the circuit court issued a bench warrant for his arrest.

¶3 Ramirez was eventually arrested in Monroe County, where the State charged him on October 6, 2006, with possession with intent to deliver fifty grams of cocaine. On October 11, 2006, Ramirez appeared before a Milwaukee County court commissioner to answer the charge of possession with intent to deliver marijuana. Ramirez contested the Milwaukee County charge for some time, but in March 2008, he pled guilty. The court ordered preparation of a presentence investigation report (PSI).

¹ All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 At sentencing, Ramirez urged the circuit court to impose probation as recommended in the PSI. The circuit court, however, explained that it could not agree with the recommendation for probation in light of the Monroe County offenses.² In the course of its explanation, the circuit court referred to the Monroe County offenses as “a direct violation of [Ramirez’s] bail.”

¶5 The parties clarified for the circuit court that Ramirez did not post bail in Milwaukee County after his arrest in June 2006, and consequently he was not out on bail when he was arrested in Monroe County. The circuit court then pronounced sentence and imposed a five-year term of imprisonment, bifurcated as two years of initial confinement and three years of extended supervision.

¶6 Ramirez filed a motion for postconviction relief from his sentence. The circuit court vacated a DNA surcharge imposed pursuant to WIS. STAT. § 973.046(1g), and otherwise denied the motion. This appeal followed.

DISCUSSION

¶7 Sentencing lies within the circuit court’s discretion, and our review is limited to considering whether discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. “When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence.” *State v. Stenzel*, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. We

² No charging documents from Monroe County are in the record. In briefs submitted to this court, the parties discuss a single felony charge of possession with intent to deliver cocaine filed against Ramirez in Monroe County. The PSI reflects, however, that Ramirez was ultimately convicted of two offenses in Monroe County: possession of cocaine and possession of marijuana. Ramirez stated at sentencing that the information in the PSI was correct.

defer to the circuit court's "great advantage in considering the relevant factors and the demeanor of the defendant." *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶8 The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See id.* Additionally, the court must "explain the 'linkage' between the sentence and the sentencing objectives." *State v. Odom*, 2006 WI App 145, ¶10, 294 Wis. 2d 844, 720 N.W.2d 695. The circuit court is not required, however, to include any "magic words" when explaining its sentence. *See Gallion*, 270 Wis. 2d 535, ¶49. The circuit court may discuss sentencing considerations without naming them. *See Odom*, 294 Wis. 2d 844, ¶25.

¶9 The sentence imposed should represent the minimum amount of custody that is "consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *Gallion*, 270 Wis. 2d 535, ¶44 (citation omitted). The circuit court therefore should consider probation as the first alternative, but the court may reject probation and impose a term of imprisonment if the court concludes that confinement is necessary to protect the public. *See id.*

¶10 Here, Ramirez contends that the circuit court inadequately justified its decision to reject probation. His position is based on two separate components of the court's sentencing remarks. The court stated early in its discussion that "what's most concerning is [Ramirez's] foolish actions after being released by the

court and committing another drug offense in another county.” Later, the court discussed the recommendation for probation contained in the PSI and stated:

In looking at this case, I would have been right with the PSI writer had [Ramirez] not committed these additional offenses. I, too, am rather shocked at the – at what happened in the other county with the quantity of cocaine that we’re talking about and – but – and that’s a direct violation of his bail.

¶11 In Ramirez’s view, the circuit court’s remarks show that the court rejected probation because the court erroneously believed that Ramirez committed offenses in Monroe County while out on bail in the instant case. Building on that theory, Ramirez asserts that the court gave no reason for rejecting probation upon learning that he was not on bail when he committed offenses in Monroe County. We reject Ramirez’s position because we do not agree with his characterization of the circuit court’s statements.

¶12 The circuit court explained that it could not agree with the recommendation for probation reflected in the PSI because Ramirez “committed these additional offenses” after his arrest in Milwaukee County. Although the court initially misunderstood the reason that Ramirez was out of custody when he was arrested in Monroe County, Ramirez’s bail status was not the focus of the court’s discussion. Rather, the court was “most concern[ed]” about Ramirez’s “foolish actions,” namely, committing new offenses in Monroe County after his release from custody following an arrest in Milwaukee County.

¶13 Moreover, the circuit court’s additional sentencing remarks further explained the court’s reasons for rejecting probation: “[p]robation clearly based on [Ramirez’s] activities is not appropriate. He’s been on probation before. He violated that probation.” Thus, the circuit court concluded that Ramirez was a

repeat offender who had squandered the opportunity to reform when he was previously supervised in the community. The circuit court fully explained why it rejected probation in this matter.

¶14 Ramirez also complains that the circuit court failed to explain either the term of imprisonment imposed or the sentencing objective. Again, we disagree. The circuit court discussed the gravity of the offense, noting that 1800 grams of marijuana is “rather substantial.” The court determined that the offense was aggravated because Ramirez’s child was in the back seat of Ramirez’s vehicle when police found marijuana in the vehicle’s trunk. The court considered Ramirez’s character. The court recognized Ramirez’s cooperation with law enforcement and his acceptance of responsibility, but the court also noted his prior criminal record, which included burglary, multiple batteries as a habitual offender, and resisting an officer. *See State v. Fisher*, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). The court considered protection of the public. The court observed with particular concern that Ramirez committed an offense in one county after he was released following arrest in another county. The court also noted Ramirez’s “prior involvement with gangs.” Further, the court stated that Ramirez failed on probation and then committed new offenses that “spread[] drugs in our community,” and the court concluded that it must therefore impose a prison sentence rather than probation in the instant case. Thus, the court linked rejection of probation to the goal of protecting the public, an appropriate sentencing objective. *See Gallion*, 270 Wis. 2d 535, ¶40.

¶15 We do not require the circuit court to explain a sentence with mathematical precision. *See id.*, ¶49. Moreover, we recognize that the amount of explanation needed varies from case to case. *Id.*, ¶39. Here, the court discussed

the sentencing factors it considered and the reasoning underlying its sentencing decision. Although the court might have provided lengthier or more detailed comments, it did all that the law requires. *See id.*

By the Court.—Judgment and order affirmed.

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

