

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 23, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

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**Appeal No. 2010AP918-CR**

**Cir. Ct. No. 2009CF790**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRENT J. DALE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Brent J. Dale appeals the judgment convicting him of armed robbery and burglary and the order denying his postconviction motion for sentence modification. He argues that the circuit court erroneously exercised its sentencing discretion when it improperly relied on his refusal to waive his

constitutional right against self-incrimination. Because we conclude that Dale did not properly invoke his right against self-incrimination and because the circuit court properly exercised its discretion in sentencing him, we affirm.

## I. BACKGROUND

¶2 The amended criminal complaint alleged that on December 31, 2008, Dale used a BB gun to rob an individual who was locking up a Milwaukee store. After hitting the victim in the head with the gun, Dale took a bag containing the victim's personal information. He then proceeded to locate and burglarize the victim's home. Dale subsequently pled guilty to one count of armed robbery and one count of burglary.

¶3 The case proceeded to sentencing. The State recommended a sentence of eight to twelve years of initial confinement followed by five years of extended supervision on the armed robbery charge, with a concurrent sentence on the burglary charge. During the hearing, the prosecutor noted: "I would also like to point out there was a large amount of stuff taken that perhaps suggests there may have been a co-actor. To date we have not been given information about a co-actor." Dale's counsel recommended a sentence of five years of initial confinement and a long period of extended supervision, "possibly as long as 10 years."

¶4 In arriving at its sentence, the circuit court inquired as to whether anyone else was involved in the crimes, and Dale took sole responsibility:

[THE COURT:] [The victim] indicates there were two individuals involved with the armed robbery. With the amount of items taken from the burglary it would seem that there could have been easily more than just Mr. Dale, particularly with his situation.

Mr. Dale, you want to tell us if anyone else was involved?

THE DEFENDANT: No, it's all my wrong-doing. It's all my doings.

¶5 The circuit court went on to impose consecutive sentences totaling twenty-two years: a fifteen-year sentence on the armed robbery charge, bifurcated as twelve years of initial confinement and three years of extended supervision; and a seven-year sentence on the burglary charge, bifurcated as five years of initial confinement and two years of extended supervision.

¶6 Dale filed a postconviction motion requesting a new sentencing hearing. He argued that the court relied on an improper factor at sentencing: Dale's refusal to name accomplices. The circuit court denied the motion, and this appeal follows.

## II. ANALYSIS

¶7 On appeal, Dale claims that his acceptance of sole responsibility for the crimes in response to the circuit court's inquiry regarding whether anyone else was involved was actually a "refus[al] to give any names." He asserts that this amounted to an exercise of his constitutional right against self-incrimination. Dale argues that the circuit court erroneously exercised its sentencing discretion when it improperly relied on the fact that he exercised this constitutional right and seeks a new sentencing hearing.

¶8 "The right against self-incrimination is a fundamental right guaranteed by both art. I, sec. 8, Wis. Const., and by the U.S. Const., amend. V, which is made applicable to the states by reason of the due process clause of the [F]ourteenth [A]mendment.'" *State v. Marks*, 194 Wis. 2d 79, 89, 533 N.W.2d

730 (1995) (citation omitted). “The privilege may be invoked whenever ‘a witness has a real and appreciable apprehension that the information requested could be used against him in a criminal proceeding.’” *Id.* (citation omitted).

¶9 According to Dale, the circuit court’s question—“Mr. Dale, you want to tell us if anyone else was involved?”—was an attempt to gather information about further crimes that Dale may have committed. Dale submits that “[h]e knew about potential accomplices to the armed robbery and the burglary, and if he gave information about it, there was a real and appreciable fear that such information could be used against him and lead to further charges and further loss of liberty.” Dale argues that when he refused to admit that others were involved, the court punished him by exceeding the recommendations of both the State and defense counsel. We are not convinced.

¶10 At the outset, we note that “[t]he privilege against self-incrimination is generally not self-executing. When a witness chooses not to remain silent in the face of questioning, ‘his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so.’” *State v. Brockdorf*, 2006 WI 76, ¶16, 291 Wis. 2d 635, 717 N.W.2d 657 (citations omitted). Furthermore, “neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. ‘[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely.’” *Brogan v. United States*, 522 U.S. 398, 404 (1998).

¶11 Thus, even if we accept Dale’s contention that the court’s inquiry was an attempt to gather information about further crimes that Dale himself may have committed, we conclude that Dale failed to invoke his right against self-

incrimination. During the sentencing hearing, Dale did not respond to the court's inquiry with a refusal to name accomplices or silence; instead, he responded by unequivocally taking sole responsibility for the crimes. The State points out the problem presented by Dale's argument that he invoked his right against self-incrimination: Judges are left "to decipher whether anything a defendant says is actually a coded Fifth Amendment invocation, even when the defendant's response is the exact opposite—a wholly self-incriminatory statement." Under these circumstances, we cannot deem Dale's response to the circuit court's inquiry to be a valid invocation of his Fifth Amendment right against self-incrimination. Indeed, his response was inculpatory. As a result, the circuit court cannot be said to have improperly considered such an invocation in arriving at Dale's sentence.

¶12 Moreover, there is nothing in the record to support Dale's contention that the circuit court punished him for not naming accomplices. In its order denying Dale's postconviction motion, the circuit court had an opportunity to explain that it took Dale's statement that he acted alone at its face and sentenced him accordingly:

During its rendition of sentence, the court considered the possibility that there could have been more than one person involved in the burglary and asked the defendant if anyone else was involved. The defendant responded, "No, it's all my wrong-doing. It's all my doings." The court accepted the defendant's statement and sentenced him as the sole actor in these offenses taking into consideration the aggravated nature of his crimes, the impact on his victim, his character and rehabilitative needs, including his background and prior record, and the need for public protection. The court considered the parties' recommendations but determined that a longer sentence was necessary to adequately address the defendant's long-standing drug problem and to protect the community from further criminal activity. No part of the sentence was designed to punish the defendant for not identifying possible accomplices to his crimes. Rather, the sentence

was tailored to meet the court's specific sentencing objectives as set forth in the record.

(Record citation omitted.) See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The circuit court has an additional opportunity to explain its sentence when challenged by postconviction motion.).

¶13 Sentencing is within the discretion of the trial court, and our review is limited to determining whether the circuit court erroneously exercised that discretion. *McCleary v. State*, 49 Wis. 2d 263, 277-78, 182 N.W.2d 512 (1971). Where the exercise of discretion has been demonstrated, appellate courts follow “a consistent and strong policy against interference with the discretion of the trial court in passing sentence.” *State v. Gallion*, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted).

¶14 Our examination of the record leads this court to the conclusion that the circuit court articulated its reasons for imposing sentence, considered proper factors and exercised proper judicial discretion. There is no evidence that the circuit court sentenced Dale based on his refusal to name accomplices.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

