

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 20, 2011

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 Nos. 2009AP2878-CR
2009AP2879-CR**

Cir. Ct. No. 2006CF353

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVIS K. OSINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson, and Reilly, JJ.

¶1 PER CURIAM. Devis S. Osinski appeals from a judgment of conviction and an order denying his motion for sentence modification. Osinski argues to this court that he is entitled to be resentenced because (1) the court did

not properly explain its reasons for the sentence imposed under *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197; (2) a more culpable co-actor received a shorter sentence; and (3) the sentencing court relied on inaccurate information when it sentenced him. We conclude that the circuit court properly exercised its sentencing discretion, and affirm the judgment and order.

¶2 Osinski was charged, along with two other people, in the heroin death of another woman. The State initially charged him with one count of first-degree reckless homicide by administering a controlled substance. WIS. STAT. § 940.02(2)(b) (2009-10).¹ The State later added two counts of delivery of heroin as a party to a crime, and one count of duty to aid a victim. WIS. STAT. §§ 961.41(1)(d)1. and 940.34(2)(a). Osinski also was charged with bail-jumping. WIS. STAT. § 946.49(1)(b). Osinski pled guilty to the new charges and the reckless homicide charge was dismissed and read in. The court sentenced Osinski to a total of eleven years of initial confinement and thirteen years of extended supervision. Osinski filed a motion for sentence modification. The court held a hearing on the motion and denied it.

¶3 Osinski argues first that the circuit court did not properly explain under *Gallion* its reasons for the sentence it imposed, that it did not explain why it imposed consecutive sentences or deviate from the recommendation in the PSI, and it did not acknowledge the assistance Osinski had given to law enforcement. Sentencing lies within the sound discretion of the circuit court, and a strong policy

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

exists against appellate interference with the discretion. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The circuit court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* “The primary considerations in imposing a sentence are the gravity and nature of the offense (including the effect on the victim), the character of the defendant and public safety.” *State v. Carter*, 208 Wis. 2d 142, 156, 560 N.W.2d 256 (1997). The discretion of the sentencing judge must be exercised on a “rational and explainable basis.” *Gallion*, 270 Wis. 2d 535, ¶76 (citation omitted). The weight to be given the various factors is within the circuit court’s discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

In *Gallion*, the supreme court explained:

We are mindful that the exercise of discretion does not lend itself to mathematical precision. The exercise of discretion, by its very nature, is not amenable to such a task. As a result, we do not expect circuit courts to explain, for instance, the difference between sentences of 15 and 17 years. We do expect, however, an explanation for the general range of the sentence imposed. This explanation is not intended to be a semantic trap for circuit courts. It is also not intended to be a call for more “magic words.” Rather, the requirement of an on-the-record explanation will serve to fulfill the *McCleary* mandate² that discretion of a sentencing judge be exercised on a “rational and explainable basis.” *Reiner v. Schlitz*, 49 Wis. 273, 276, 5 N.W. 493 (1880). This will assist appellate courts in determining whether the circuit court properly exercised its discretion.

Gallion, 270 Wis. 2d 535, ¶49. The sentencing court must provide sufficient reasons for its sentence so that a reviewing court is not left to “wonder why” the

² *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

court imposed the sentence that it did. *See State v. Ziegler*, 2006 WI App 49, 289 Wis. 2d 594, ¶33, 712 N.W.2d 76.

¶4 At the sentencing hearing, the court heard statements from the relatives of the woman who died, from Osinski, and from Osinski's mother. The court received sentencing recommendations from the defense, the State, and the presentence investigation report's author. The court then addressed the standard sentencing factors. The court considered Osinski's family background, his lack of a criminal record, as well as his history of addiction. The court stated that the crime was aggravated, that delivery of heroin was serious, and that Osinski had not helped the young woman when he could have saved her life. The court concluded that the public needed protection from Osinski's criminal activity, that Osinski needed protection from himself, and that confinement was necessary to protect the public and to provide Osinski with correctional treatment.

¶5 The court explained that it disagreed with the PSI author's recommendation of concurrent sentences because of the seriousness of the offenses. The court did not specifically acknowledge that Osinski may have assisted law enforcement in other cases. The court, however, was not required to say more than it did. The court imposed a sentence that was within the maximum, and made the sentences consecutive to each other because of the seriousness of the charges. We conclude that the court properly exercised its discretion under *Gallion*, and provided sufficient reasons for the sentence imposed.

¶6 Osinski also argues that his sentence should be reduced because he received a harsher sentence than his more culpable co-actor, Jermal Johnson. Osinski relies on *State v. Ralph*, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990) to support his argument. In that case, the State appealed from the circuit

court's decision to modify Ralph's sentence to make it consistent with a co-actor's sentence. *Id.* at 435-36. The circuit court granted Ralph's motion and reduced his sentence because it wanted Ralph's sentence to be consistent with the other defendant's sentence. *Id.* at 436.

¶7 *Ralph* does not stand for the proposition that a circuit court must reduce a sentence simply because a co-actor received a lesser sentence. "A mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation." *State v. Toliver*, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994).

¶8 We are not convinced that the disparity between the two sentences is improper. Osinski was convicted of three felonies and one misdemeanor count while Johnson was convicted of only one count. As a result, Osinski faced a substantially higher maximum potential sentence than Johnson did. Further, the sentencing court was aware of Johnson's sentence when it sentenced Osinski, and there is no indication that it intended to impose a similar sentence. As we have stated, the court considered the appropriate sentencing factors and imposed a sentence that was within the maximum allowed by law. Osinski is not entitled to be resentenced on this basis.

¶9 Osinski also argues that the court relied on inaccurate information when it sentenced him by concluding that he had caused the heroin death of the woman. "[I]n a motion for resentencing based on a circuit court's alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information." *State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1.

¶10 Specifically, Osinski argues that the court relied on statements that he caused the woman's death by injecting her with heroin, that he caused her death by not calling 911, and that his probation had been revoked in connection with these cases. The first two claims are based on Osinski's claim that the court placed undue emphasis on the comments made by the woman's relatives at sentencing, and by a statement made by the author of the PSI.

¶11 There is nothing in the record, however, to support Osinski's claim that the court relied on inaccurate information. The record does not support Osinski's claim that the court improperly considered the role he played in the woman's death. The court stated at sentencing that the question of whether Osinski "shot-up" the woman had not been resolved. The court, however, was entitled to consider the dismissed and read-in charge of reckless homicide. *See State v. Straszowski*, 2008 WI 65, ¶36, 310 Wis. 2d 259, 750 N.W.2d 835. Further, Osinski pled guilty to one count of failure to aid a victim, and the victim he failed to aid was the woman who died. Osinski admitted that he did not help her. The court was also entitled to consider this charge. While the statements made by the woman's relatives were quite dramatic and were directed at Osinski, the court repeatedly explained to the relatives that they could not harangue the defendant. There is nothing to suggest the court was improperly influenced by these comments. Osinski has not established that the court relied on inaccurate information.

¶12 Osinski also claims that the court inaccurately stated that his probation had been revoked in connection with these cases. Even if this statement was not accurate, there is nothing to suggest that the court relied on the misstatement when it fashioned his sentence. Osinski has not established that he is

entitled to be resentenced because the circuit court relied on inaccurate information.

¶13 For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

