

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 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 No. 2010AP1590-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF364

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. REEVES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
STEPHEN E. EHLKE, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ David A. Reeves challenges his sentence on a conviction for obstructing an officer, contrary to WIS. STAT. § 946.41(1)

¹ This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

(2009-10). Reeves contends that the trial court failed to adequately articulate the reasons for his sentence and considered improper factors at sentencing. He also argues his sentence was unduly harsh. We affirm.

BACKGROUND

¶2 Reeves was charged with carrying a concealed weapon, possession of a firearm by a felon, and obstructing an officer following a traffic stop of a vehicle in which he was a passenger. Reeves moved to suppress the gun that gave rise to the weapons charges. After a hearing, the gun was suppressed under *Gant*² and the weapons charges were later dismissed. Reeves pled no contest to the obstructing charge and a judgment of conviction was entered against him by Dane County Circuit Court Judge Stuart Schwartz.

¶3 Reeves appeared for sentencing before the circuit court, Judge Steven Ebert presiding. The court heard argument from the prosecutor and defense counsel, and a statement from Reeves. The court then set forth its reasons for the sentence, which are discussed later in this opinion, and sentenced Reeves to the maximum incarceration period of nine months on the obstruction charge to be served consecutively with a three-month sentence on a separate judgment of conviction for operating after revocation. Reeves moved for resentencing, alleging that the court erroneously exercised its sentencing discretion. The circuit court denied the motion, and Reeves appeals.

² *Arizona v. Gant*, 129 S. Ct. 1710, 1716-19 (2009) (search of the passenger compartment of a vehicle incident to a recent occupant's arrest reasonable only if arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest).

DISCUSSION

¶4 We review sentencing decisions under the erroneous exercise of discretion standard. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Sentencing decisions are afforded a presumption of reasonability consistent with our strong public policy against interference with the circuit court’s discretion. *State v. Harris*, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409.

¶5 A proper exercise of sentencing discretion mandates a rational and explainable basis for the sentence. *Gallion*, 270 Wis. 2d 535, ¶76 (citation omitted). This requires circuit courts to specify the objectives of the sentence on the record. *See id.*, ¶40 (objectives of sentencing are public safety, punishment, rehabilitation and deterrence). At a minimum, there are three primary factors that a court must consider in arriving at a sentence: “the gravity of the offense, the character of the defendant, and the need to protect the public.” *Harris*, 326 Wis. 2d 612, ¶28. Courts “must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives.” *Id.*, ¶29. Basing a sentence upon clearly irrelevant or improper factors constitutes an erroneous exercise of discretion. *Gallion*, 270 Wis. 2d 535, ¶17.

¶6 Reeves contends that the circuit court, while listing the general objectives of sentencing, failed to articulate a rational and explainable basis for his sentence. The court’s explanation of the sentence “was a mere 296 words,” which Reeves suggests was especially problematic because the sentencing judge was not involved in prior proceedings in this case. He also argues the court’s explanation relied too much on incorporation of the State’s arguments.

¶7 Based on our review of the sentencing transcript, we conclude the court’s explanation, while brief, set forth a rational and explainable basis for the sentence, and thereby satisfied the requirements of *Gallion*. After reciting the objectives of sentencing, and the three primary sentencing factors, the court applied the circumstances of Reeves’ case to the factors. The court found that Reeves’ “fairly extensive prior criminal record,” including a felony conviction, reflected poorly upon his character. Discussing the suppressed weapon, the court determined Reeves’ possession of a weapon at the time of the arrest was considered “in terms of the protection of the public.” The court observed Reeves had “[a] history of having a disorderly conduct with a weapon, ... battery convictions ... [and] criminal damage to property,” and determined that “all involved some degree of violence, obviously the potentiality of violence.” The court also noted Reeves’ prior obstructing convictions.

¶8 The court declared that neither of Reeves’ explanations for why he lied to the officer about his identity—he thought he had an outstanding warrant, and the mother of his child was nine months pregnant and he did not want to miss the birth—mitigated against the seriousness of his offense. “Lying to the police about your identity isn’t mitigated simply because you think you have a warrant out for you.... I don’t give any credit for impregnating somebody that you’re not married to. That simply shows a lack of values on your part, failure to take responsibility.”

¶9 The court concluded its explanation by explicitly incorporating the State’s arguments: “So all in all, I think the State made a good argument for a nine month sentence on the obstructing, and that’s the sentence I’m imposing.” Among the State’s arguments at sentencing were that: Reeves’ DNA was found on the gun and a witness saw Reeves pull the gun out of his waistband and place it

under the seat, indicating Reeves' possession of the gun; his possession of the gun was a motive for Reeves' lying about his identity, given his exposure for felon in possession of a firearm charges; Reeves had a long criminal history, which the State detailed over two transcript pages; and, finally, the maximum sentence of nine months was appropriate given his prior convictions for obstructing.

¶10 While Reeves takes issue with the court's incorporation of the State's arguments at sentencing, we observe that *Gallion* encourages courts to use the attorneys' sentencing recommendations as "touchstones" in its reasoning. *Gallion*, 270 Wis. 2d 535, ¶47. "Because we recognize the difficulty in providing a reasoned explanation in isolation, we encourage circuit courts to refer to information provided by others." *Id.* Here, the transcript shows that the court provided several on-the-record reasons for the sentence and linked them to sentencing objectives, and its incorporation of the State's arguments buttressed its reasoning. We therefore reject Reeves' contention that the court relied too heavily on incorporation of the State's arguments at sentencing.

¶11 Reeves next argues the court relied on improper factors in determining his sentence. Specifically, he argues the court improperly relied on Reeves' status as an unwed father, and the suppressed gun. An improper sentencing factor is one that is totally irrelevant or immaterial to the sentencing decision. *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980). The defendant has the burden of showing that the sentence was based on clearly irrelevant or improper factors. *Gallion*, 270 Wis. 2d 535, ¶72 (citations omitted).

¶12 Assuming it would have been improper for the court to rely on Reeves' status as an unwed parent in determining his sentence, we conclude Reeves failed to show that the sentence was based on this or other improper

factors. Read in context, the court’s statement regarding Reeves’ status as an unwed father was not offered as an affirmative reason for the maximum sentence, but as a rejection of Reeves’ request that the birth of his child be viewed as a mitigating factor. With regard to the court’s reliance on Reeves’ possession of the gun in fashioning a sentence, it is well-established that evidence suppressed at trial may be considered at sentencing. *See State v. Rush*, 147 Wis. 2d 225, 229-30, 432 N.W.2d 688 (Ct. App. 1988) (concluding that application of the exclusionary rule at sentencing would not provide incentive for illegal searches and seizures, but would unduly restrict trial court’s broad range of evidence in determining a sentence). Accordingly, we conclude the sentence was not based on improper factors.

¶13 Finally, Reeves argues that his sentence was unduly harsh because he only lied to officers about his name and date of birth and did not flee or physically resist. A sentence is unduly harsh when it is “so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Given Reeves’ long criminal history, including prior convictions for obstructing, and other factors noted by the court at sentencing, we conclude that the sentence was not unduly harsh within the meaning of *Ocanas*.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

