

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2012

Diane M. Fremgen
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. 2011AP1196-CR

Cir. Ct. No. 2009CF5413

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NOEL J. FAYNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Noel J. Fayne appeals from a judgment of conviction, entered upon his guilty plea, on one count of second-degree reckless homicide and one count of armed robbery. Fayne also appeals from an order denying his postconviction motion for sentence modification. Fayne argues that

the circuit court erroneously exercised its discretion when it failed to properly weigh his lack of a prior record and when it based his sentence on an “uncorroborated” version of events. We reject Fayne’s arguments and affirm.

BACKGROUND

¶2 The criminal complaint alleged that in July 2009, Fayne committed an armed robbery of a cellular phone store. He was identified on November 4, 2009, by a fingerprint taken from the scene. The complaint also alleged that on or about November 19, 2009, Fayne committed an unrelated first-degree reckless homicide with a dangerous weapon when he killed his neighbor, Clifton Anderson. Anderson had lent Fayne a cell phone and went to Fayne’s apartment to retrieve it. After Anderson left, Fayne noted his wallet was missing and suspected Anderson had taken it. An extended argument ensued, culminating in a struggle over a shotgun that Fayne brought to Anderson’s apartment. The dispute ended when Anderson was killed by a shotgun blast to the head that fractured his skull and two vertebrae and pierced both his carotid artery and jugular vein. The complaint included statements from Fayne and from Anderson’s brother, Marcus, about the circumstances of the dispute and the struggle.¹

¶3 Pursuant to a plea agreement, Fayne agreed to enter a guilty plea to the armed robbery and to an amended charge of second-degree reckless homicide with a dangerous weapon, with the State recommending “substantial and lengthy” prison time but leaving the exact amount up to the circuit court. Ultimately, the circuit court imposed five years’ initial confinement and five years’ extended

¹ Marcus’s name is also spelled “Marques” in the record; we use Marcus for consistency.

supervision for the robbery and fourteen years' initial confinement and six years' extended supervision for the homicide, to be served consecutively.

¶4 Fayne filed a postconviction motion, alleging that his sentence was unduly harsh and unconscionable. He also claimed that the circuit court had sentenced him on erroneous information when it determined that Marcus's version of events, as set out in the complaint, was more credible than Fayne's even though Marcus never testified. The circuit court denied the motion without a hearing.

DISCUSSION

I. Whether the sentence was unduly harsh and unconscionable.

¶5 Sentencing is committed to the circuit court's discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has a burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. See *State v. Lechner*, 217 Wis. 2d 392, 481, 576 N.W.2d 912 (1998). We start with a presumption that the circuit court acted reasonably, and we do not interfere with a sentence if discretion was properly exercised. See *id.* at 418-19. We will not substitute our judgment for the circuit court's judgment merely because we might have issued a different sentence. See *State v. Brown*, 2006 WI 131, ¶19, 298 Wis. 2d 37, 725 N.W.2d 262.

¶6 In its exercise of discretion, the circuit court is to identify the objectives of its sentence, including but not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Gallion*, 270 Wis. 2d 535, ¶40. In determining the sentencing objectives, we expect the court to consider a variety of factors, including the gravity of the

offense, the character of the defendant, and the need to protect the public. *See State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the circuit court’s discretion. *Id.* The amount of necessary explanation of a sentence varies from case to case. *Gallion*, 270 Wis. 2d 535, ¶39.

¶7 Fayne contends that the circuit court failed “to give proper weight to [his] nonexistent prior criminal record.... The sentence imposed on Fayne is gross and unnecessary in light of his previous record. Fayne should be afforded concurrent sentences for his convictions.” He complains that the sentences should not be consecutive and that “[t]he public does not need 20 years of protection from a regularly law abiding citizen. A first time offender should not receive such a substantial sentence.”

¶8 Fayne shows no objectively unreasonable basis for his sentences. In setting the sentence length, the circuit court attempted to impress upon Fayne the riskiness of his actions by informing him that a similar armed robbery at a check-cashing store had resulted in one dead perpetrator and a second one injured and serving decades of time. Additionally, it was Fayne who had escalated the dispute with his neighbor by returning to the neighbor’s apartment with a gun, and it could not be overlooked that death was the result. As such, the circuit court placed an emphasis on community protection in light of the seriousness of the offenses. We also observe that the sentence for the homicide was not imposed on a first-time offender: it was imposed on a second-time offender who had committed a separate armed robbery four months prior.

¶9 The circuit court did consider several mitigating factors, including Fayne’s lack of a record, acceptance of responsibility, cooperativeness, and

genuine remorse. Nevertheless, the circuit court concluded that a substantial consecutive sentence was necessary in light of the facts and the separateness of the two crimes.

¶10 The maximum possible sentence Fayne could have received was seventy years' imprisonment. The sentence totaling thirty years' imprisonment is well within the range authorized by law and therefore is presumptively neither harsh nor unconscionable. *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. That Fayne believes the weight of the sentencing factors should have been allocated differently or the objectives prioritized differently does not mean the circuit court erroneously exercised its discretion.

II. Whether the circuit court relied on inaccurate information.

¶11 Fayne also complains that the circuit court sentenced him on inaccurate information by commenting that a particular injury to the victim was “consistent with the version of events” that Marcus recited to police. Fayne complains that the circuit court’s “over-reliance on an uncorroborated version of the facts is an abuse of discretion because it puts too much weight on the ‘gravity of the offense.’” The circuit court rejected this notion because Fayne did not demonstrate that Marcus’s statement to police was inaccurate except by Fayne’s own contention that the facts were different.

¶12 “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. “Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo.” *Id.* A defendant who seeks resentencing because the circuit court used inaccurate

information must show that the information was inaccurate and that the circuit court actually relied upon the inaccurate information at sentencing. *Id.*, ¶26.

¶13 Fayne does not identify in his appellate briefs what Marcus’s version of events was, much less which parts of that version are purportedly erroneous. We therefore discern the dispute to be as follows. Marcus told police that when Fayne arrived with his shotgun and stuck the barrel into the apartment—after Fayne had already left the scene once—Anderson grabbed the barrel with his right hand while holding a pistol in his left hand. The struggle began and Anderson may have fired the pistol once or twice. Fayne then regained control of the shotgun, pointed it at Anderson, and shot. In contrast, Fayne told police that Anderson had both hands on the shotgun and that both of them were holding it, struggling, when it went off and killed Anderson. Fayne thus appears to claim an inaccuracy relating to his degree of culpability for Anderson’s death.

¶14 We agree with the circuit court that Fayne has not shown Marcus’s statement to be objectively inaccurate. Indeed, the criminal complaint states that the medical examiner noted that Anderson had a bullet wound to his foot that was inconsistent with a shotgun wound, suggesting that Marcus’s statement is not uncorroborated.

¶15 Irrespective of the accuracy of either version, though, Fayne demonstrates no reliance, much less “over-reliance,” on Marcus’s statements by the circuit court. Rather, the circuit court’s sentencing comments actually reflect the very opposite of Fayne’s appellate argument: that is, the circuit court appears to have recognized the factual discrepancies and concluded that it did not need to rely on either version to craft a sentence.

The fact that [Clifton] Anderson apparently has the bullet wound to the foot is more consistent, I think, ... with the version of events that the brother, Marcus, spins out and—I don't think there was any mention of that.

Whether or not [Fayne's] wallet was really taken, again, [Fayne's] the only individual who reports that. I have no real way to know one way or the other whether that indeed happened or not. Everybody agrees that there was apparently some conflict initially with you and the victim ... and then from there, again, there's, I think, different pictures painted as to maybe what started, who initially discharged the firearm, and the matter escalates.

I don't think, and again, *really probably in the end doesn't really require much finding by me....* I really do again have some questions as to your version of events, but again *either way, there's really no question* that ultimately you armed yourself with a shotgun, and you're not acting in a defensive way, you're actually, again, acting in an aggressive way by going up to the upstairs apartment.

(Emphasis added.) There is no basis for resentencing under *Tiepelman*.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

