

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1703-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BABETTE DAVIS,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Babette E. Davis appeals from judgments of conviction entered after a jury found her guilty of one count of possession with intent to deliver a controlled substance (cocaine) and one count of failure to pay the controlled substance tax, contrary to §§ 161.16(2)(b)(1), 161.41(1m)(cm)(3), 139.87(1)&(2), 139.88(2), 139.89, and 139.95(2), STATS. Davis claims the trial court erroneously exercised its sentencing discretion because it failed to consider the

option of probation and because it placed undue emphasis on one sentencing factor. Because the trial court did not erroneously exercise its discretion in imposing sentence, we affirm.

I. BACKGROUND

Davis was charged with possession of cocaine with intent to deliver after seventeen grams of cocaine, forty-three packets, a pager, and one rock weighing almost fourteen grams were found in her bedroom in her home. The jury convicted Davis and the trial court sentenced her to three years in prison on the possession count and one year in prison on the controlled substance tax count, to run concurrently. Davis now appeals.

II. DISCUSSION

Davis complains only about the sentence. Specifically, she claims the trial court erroneously exercised its sentencing discretion because it indicated its belief that probation should never be an option in any drug cases, and that the trial court concentrated too much on the gravity of the offense factor rather than her character.

The supreme court has recently considered the issue of trial court sentencing:

Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. We recognize a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." This court is reluctant to interfere with a trial court's sentence because the trial court has a great advantage in considering the relevant factors and the demeanor of the defendant. The defendant must show some

unreasonable or unjustifiable basis in the record for the sentence imposed.

The trial court must articulate the basis for the sentence imposed on the facts of record. There should be evidence in the record that discretion was in fact exercised.

The primary factors the trial court must consider in imposing sentence are: (1) the gravity of the offense, (2) the character and rehabilitative needs of the offender, and (3) the need for protection of the public. As part of these primary factors the trial court may consider: The vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance, and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Echols, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640-41 (1993) (citations omitted), *cert. denied*, 114 S. Ct. 246.

From our review of the sentencing transcript, we conclude that the trial court did not erroneously exercise its discretion in imposing sentence. While we agree with Davis that the trial court rejected probation as an alternative to prison time, we do not interpret the trial court's words to convey a rejection of probation as a blanket policy. Rather, the trial court's reference to probation being inappropriate was crafted to the specific facts and circumstances of this case.

In addition, the sentencing transcript demonstrates that the trial court examined each of the three primary factors in imposing sentence:

The court has to consider the background and character of the offender, the nature of the crime and the protection of the community when it sentences Miss Davis or anybody else, her background, that she has no prior record. She's lived in this community for [so]metime. She's receiving several federal grants for herself and her children.

....

Obviously, those are positive things.

....

This case involved a lot of cocaine ... over seventeen grams of cocaine, 43 packets, a pager, one rock of almost fourteen grams itself. Those things are indicative of drug dealing and they're indicative of fairly substantial drug trade.

Finally, the trial court considered the needs of the community, concluding that in this case the elements of deterrence and punishment must be emphasized over rehabilitation. Hence, it is clear that the trial court considered the appropriate sentencing factors. Further, the weight to be given to each factor is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). The fact that the gravity of the offense factor outweighed Davis's positive character factors does not make the trial court's sentence an erroneous exercise of discretion.

By the Court. – Judgments affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

