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**DISTRICT I/IV**

May 17, 2013

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You are hereby notified that the Court has entered the following opinion and order:

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2012AP700-CR

State of Wisconsin v. Dwila Rivers (L.C. # 2011CF1713)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Dwila Rivers appeals a judgment of conviction and an order denying her postconviction motion for sentence modification. Rivers contends that the circuit court erroneously exercised its sentencing discretion. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).<sup>1</sup> We summarily affirm.

Rivers pled guilty to four counts of robbery with use of force, as party to a crime. The court sentenced Rivers to a total of two years of initial confinement and three years of extended supervision. Rivers moved for sentence modification, arguing that the circuit court erroneously exercised its discretion at sentencing.<sup>2</sup> The court denied the motion.<sup>3</sup>

A circuit court must explain its reasons for imposing a particular sentence on the record. *State v. Hall*, 2002 WI App 108, ¶¶9-18, 255 Wis. 2d 662, 648 N.W.2d 41. The court must consider the three primary sentencing factors: “(1) the gravity and nature of the offense, including the effect on the victim, (2) the character and rehabilitative needs of the offender, and (3) the need to protect the public.” *Id.*, ¶7 (citation omitted). Relevant considerations include but are not limited to: the defendant’s criminal history; the defendant’s personality, character, and social traits; the nature of the offense; the degree of the defendant’s culpability; the defendant’s age and educational background; and the defendant’s remorse or cooperativeness. *Id.* “Sentences are to be individualized to meet the facts of the particular case and the characteristics of the individual defendant.” *State v. Holloway*, 202 Wis. 2d 694, 699-700, 551 N.W.2d 841 (Ct. App. 1996).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> Rivers also moved to vacate the DNA surcharge imposed by the circuit court. The circuit court vacated the DNA surcharge, and that issue is not before us in this appeal.

<sup>3</sup> The Honorable Robert Hawley presided over sentencing. The Honorable J.D. Watts presided over the postconviction motion proceedings.

A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. *State v. Ramuta*, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. A circuit court may have erroneously exercised its sentencing discretion if it “failed to state on the record the material factors which influenced its decision or if it gave too much weight to one factor in the face of other contravening considerations.” *State v. Larsen*, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987).

Rivers contends that the circuit court erroneously exercised its sentencing discretion by failing to consider mitigating factors that supported the defense request for an imposed and stayed sentence with conditional jail time. Specifically, Rivers contends that the circuit court failed to consider that Rivers: (1) was only seventeen years old at the time of the robberies and had no prior criminal history; (2) completed her high school degree while incarcerated pending sentencing and hoped to further her education; (3) was cooperative with police and expressed remorse for her crimes; (4) had a supportive family and was involved in positive activities in her community; and (5) was less physically violent toward the victims than her co-defendant. She argues that the court focused on the seriousness of the offense and the impact on the victims to the exclusion of other legitimate considerations. Rivers also contends that the court failed to provide any genuine analysis of what weight it gave to the sentencing objectives and factors it considered. She argues that the court failed to provide an individualized sentencing determination for her because it imposed on her the same sentence it imposed on Rivers' co-defendant, Latrise Jarrell, without comparing the levels of culpability between them. We reject these contentions, and conclude that the court properly exercised its sentencing discretion in this case.

The sentencing court considered circumstances relevant to the primary sentencing factors. As to the nature of the offense and its effect on the victims, the court noted the robberies were “thought out” rather than impulsive, and stated: “I am sick to my stomach, absolutely sick. Couple of young girls driving around, looking for some other evidently, vulnerable females, out there working, who are using pepper spray and violence, kicking them in the stomach, grabbing their possessions and then running away.” The court also referenced the fear experienced by the victims and the lasting effect that would have on them. As to the need to protect the public, the court noted that Rivers and Jarrell had gone on a “10-day crime spree ... terrorizing the community.” As to Rivers’ character and rehabilitative needs, the court noted that Rivers had a history of doing good work in her community, and said: “[I]t sounds like you have some potential. You want to pay back society.” The court also said that it was going to follow the State’s recommendation, which it believed had taken into account Rivers’ young age, lack of criminal history, and education. The court noted that Rivers’ family had come to court to support her. We conclude that the court considered the standard sentencing factors, relying on the facts in the record to reach a reasonable sentence.<sup>4</sup>

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<sup>4</sup> Rivers raises several arguments for the first time in her reply brief. In general, we will not consider arguments raised for the first time in a reply brief. See *Schaeffer v. State Pers. Comm’n*, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). In any event, we reject those arguments on the merits.

First, Rivers argues that the court’s belief that a different district attorney’s office would have recommended a harsher sentence was an improper factor for the court to consider. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (“When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion.”). We do not agree with Rivers that the court relied on an improper factor by noting that the State’s sentencing recommendation in this case was more lenient than recommendations the court had seen for similar offenses in a different county. The court was noting the seriousness of the offenses and the potential punishments involved.

(continued)

Additionally, we are not persuaded by Rivers' argument that the court erroneously exercised its discretion by failing to credit Rivers for having allegedly been less physically violent toward the victims than Jarrell. Rivers points out that while the facts alleged in the complaint indicate that both she and Jarrell used pepper spray on the victims, it is alleged that only Jarrell struck the victims. However, the court noted that the robberies were conducted by Rivers and Jarrell together, and that the robberies were preplanned. We are not persuaded that the court was required to impose a lesser sentence on Rivers based on the suggestion in the complaint that Jarrell committed more acts of physical violence toward the victims during the preplanned robberies the two committed together.

Next, Rivers contends that her requested sentence of probation with conditional jail time was the minimum sentence required to meet the primary sentencing objectives in this case, and thus the court erroneously exercised its discretion by imposing a harsher sentence. *See State v. Borrell*, 167 Wis. 2d 749, 764, 482 N.W.2d 883 (1992) (“The sentence imposed in each case should recognize the minimum amount of custody or confinement that is consistent with the need to protect the public, the gravity of the offense and the rehabilitative needs of the convicted defendant.”). However, the circuit court specifically considered probation and rejected that

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Next, Rivers contends that the court erroneously stated that Rivers' community service was limited to seven years earlier and that Rivers had a history of drug dealing. We do not agree with Rivers' assessment of the court's statements. The court stated: “I guess you were doing some good work—that was 7 years ago—writing articles and doing all this community service work.” That reference was to a statement by defense counsel that, at age eleven, Rivers wrote an article about her community involvement that was published in *The Milwaukee Times*. The court did not state that Rivers had done nothing of value for the community or others since that time. As noted above, the court acknowledged the evidence of Rivers' positive traits and her potential. The court also stated that it hoped its sentence “serve[d] as a long message to [Rivers] that any other transgressions into the art of entrepreneurship of [purse snatching], of strong armed robbery, of dealing drugs,” would have serious consequences. We do not read this statement as an indication the court believed Rivers had a history of dealing drugs. Rather, the court was cautioning Rivers not to engage in any future illegal conduct.

option as insufficient in light of the primary sentencing factors. The court stated, “I think it would be a travesty to put you on probation. It would be a slap in the face to the members of this community and to particularly these four victims, absolutely.” As we have explained, the court properly considered the standard sentencing objectives and factors, and imposed a reasonable sentence. Accordingly, we have no basis to disturb the court’s exercise of its sentencing discretion.

Finally, Rivers argues that the circuit court erred by denying her postconviction motion for sentence modification, asserting that she was entitled to sentence modification because the sentencing court erroneously exercised its sentencing discretion. Because we have determined that the circuit court properly exercised its sentencing discretion, we reject this argument.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*