

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 19, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

No. 97-2452-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

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STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TAMARA NORWOOD-THOMAS,

DEFENDANT-APPELLANT.

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and LAURENCE C. GRAM, JR., Judges. *Affirmed.*

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

PER CURIAM. Tamara Norwood-Thomas appeals from a judgment entered after a jury convicted her of possession with intent to deliver a controlled substance (cocaine) within 1,000 feet of a school, obstructing or resisting an officer, and failure to pay the controlled substance tax, contrary to

§§ 161.16(2)(b)(1), 161.41(1m)(cm)4, 161.49(1) & (2)(a), 946.41(1), 139.87(1) and (2), 139.88(2), 139.89, and 139.95(2). She also appeals from an order denying her postconviction motion. Norwood-Thomas claims: (1) the evidence was insufficient to support the intent to deliver element of the possession with intent charge; (2) she received ineffective assistance of trial counsel; (3) her right to a fair trial and due process were violated because the drug tax stamp charge was not severed from the possession charge; (4) the trial court erred in denying her trial counsel's request for an adjournment; and (5) the trial court erroneously exercised its discretion by imposing an excessive sentence. Because there is sufficient evidence to support the conviction, because she received effective assistance of trial counsel, because she waived the right to assert that the charges should have been severed, because the trial court did not err in denying the adjournment request, and because the trial court did not erroneously exercise its sentencing discretion, we affirm.<sup>1</sup>

## I. BACKGROUND

On December 18, 1995, police were called to Norwood-Thomas's residence to investigate a shooting that had occurred there. Norwood-Thomas attempted to leave the residence with a rolled-up jacket under her arms. The police asked to see the jacket and she refused. A struggle ensued. The police then handcuffed Norwood-Thomas and discovered 27.671 grams of cocaine powder and 24.34 grams of rock cocaine in a pocket of the jacket. Norwood-Thomas was charged with the crimes noted above, and the case was tried to a jury.

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<sup>1</sup> Based on *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997), however, her conviction for failure to pay the controlled substance tax, together with the 12 month concurrent sentence for that charge, are vacated.

The jury returned a guilty verdict on all three charges. Her postconviction motion was denied. She now appeals.

*A. Insufficiency of the Evidence Claim.*

Norwood-Thomas claims there is insufficient evidence to support the conviction for possession with intent to deliver. Specifically, she claims the record lacks any evidence to support the “with intent to deliver” element of this crime. She asserts that the large quantity of drugs alone is insufficient to conclude that she intended to deliver the cocaine, rather than retain it for personal consumption. We reject her contention.

In reviewing a challenge to the sufficiency of the evidence, we:

may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

*State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). Under this standard of review, we conclude that the record is sufficient to uphold the conviction.

There was testimony from a police detective that the amount of cocaine discovered would indicate an intent to distribute because the large amount was way in excess of anything typically seen for personal use. The detective testified that the amount discovered here would translate to 520 individual doses of cocaine. In addition to this testimony, the record contains additional

circumstantial evidence from which a jury could reasonably conclude that Norwood-Thomas possessed the cocaine with the intent to deliver. First, the cocaine was packaged in two separate forms, each approximating the one-ounce wholesale amount. Second, the crack cocaine was in “chunky” form and, therefore, not ready for use without breaking it down further. Third, there was no paraphernalia associated with drug use discovered in the residence. Thus, the jury could infer that the absence of any implements to facilitate personal use demonstrated that Norwood-Thomas intended to sell, rather than consume, the cocaine.

This circumstantial evidence, together with the large amount of cocaine involved, is sufficient to support the “intent to deliver” element of the crime charged.

*B. Ineffective Assistance of Counsel Claim.*

Next, Norwood-Thomas claims her trial counsel provided ineffective assistance. Specifically, she contends that trial counsel: failed to file a motion seeking suppression of the evidence; failed to advise her regarding the lesser-included instruction for simple possession; and failed to call character witnesses. She argues that the numerous errors amount to cumulative prejudice. We reject each contention, *seriatim*.

To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that counsel’s errors were prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See id.* at 697.

Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. *See id.* at 634, 369 N.W.2d at 714. The ultimate conclusion, however, of whether the conduct resulted in a violation of a defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. *See State v. Harvey*, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987).

#### 1. Suppression Motion.

Norwood-Thomas first contends that trial counsel should have pursued a motion to suppress. She claims that the police lacked any legal justification for seizing and searching her jacket and, therefore, a suppression motion would have been successful. The record, however, refutes her contentions. At the postconviction motion hearing, trial counsel testified that he did not bring a suppression motion because he felt it would have "no chance of success." Trial counsel's strategic decision was reasonable based on the facts and circumstances present here.

The investigating officers both testified that Norwood-Thomas was attempting to exit the residence with a rolled-up jacket in her arms. The officers were concerned that the jacket may contain evidence relative to the shooting or may contain a weapon. They stated that this appeared suspicious, and testified that when they asked her to turn over the jacket, Norwood-Thomas refused. The officers testified that a struggle ensued and Norwood-Thomas obstructed or resisted the officers. She was handcuffed before the officers were able to get the

jacket away from her. Under this factual scenario, the search of the jacket was incident to Norwood-Thomas's arrest for obstructing the officers in their investigation of the shooting incident.

The officers had probable cause to arrest Norwood-Thomas for obstructing the investigation because they possessed facts sufficient to conclude or suspect that she committed, or was in the process of committing, an offense. *See State v. Richardson*, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990). Norwood-Thomas's behavior was suspicious. She was attempting to slip out the back door of the residence with a rolled-up jacket. This behavior gave the officers probable cause to arrest her for obstruction. When she was questioned, she responded by protesting that the officers could not have the jacket and did not actually turn the jacket over. It was forcibly removed from her arms. Thus, the search of the jacket was incident to a lawful arrest. Accordingly, any suppression motion would not have succeeded and trial counsel was not ineffective for failing to pursue such motion.

## 2. Lesser-Included Offense.

Next, Norwood-Thomas argues that her trial counsel was ineffective because he failed to adequately advise her regarding the lesser-included offense of simple possession. She claims that if trial counsel had explained to her that simple possession would mean conviction of a misdemeanor rather than a felony, she would have requested that the instruction be given. We are not persuaded.

Neither the prosecutor nor defense counsel requested that the lesser-included offense instruction be given. The trial court, however, specifically asked whether the defense wanted to have the jury instructed on simple possession of cocaine. Both defense counsel and Norwood-Thomas replied that no such

instruction was requested. At the postconviction hearing, defense counsel said that the reason for this was that Norwood-Thomas had made it very clear that she “would not find acceptable any conviction for any drug-related offense, and she was adamant in that.” He also testified that he had discussed the possibility of seeking a lesser-included offense instruction with his client. Norwood-Thomas testified that although she indicated she did not want the lesser-included instruction given, she did not truly understand the meaning of “lesser-included.” She also testified that trial counsel never explained to her that simple possession was a misdemeanor. The trial court resolved the factual dispute in favor of defense counsel, in part based on the trial court’s direct inquiry to Norwood-Thomas regarding the instruction and her response that the instruction was not being requested.

Under these facts and circumstances, we conclude that Norwood-Thomas expressly and personally waived the giving of this instruction. The trial court found defense counsel’s testimony that he had discussed the lesser-included instruction with Norwood-Thomas to be more credible than Norwood-Thomas’s denial that any discussion had taken place. We defer to the trial court’s credibility determinations. Accordingly, we reject her contention that trial counsel was ineffective with respect to advice relative to requesting a lesser-included instruction on simple possession.

### 3. Character Witnesses.

Norwood-Thomas also claims trial counsel was ineffective because he failed to call any character witnesses on her behalf. We reject her claim, concluding that even if character witnesses would have been called, it would not have affected the outcome.

General opinion testimony asserting that Norwood-Thomas had a reputation for truthfulness would not have had a reasonable probability of persuading the jury to believe Norwood-Thomas's claim that the cocaine was not hers. She asserted that she had simply discovered the cocaine in her coat pocket and was trying to sneak it out of the house because she panicked. This reaction, however, does not bode well for a "truthful" person. Further, Norwood-Thomas admitted that she had worn the jacket only two to three hours before discovering the cocaine and that no one else had been in the house in the interim. In light of Norwood-Thomas's actions and testimony, any general character testimony on her behalf would not have altered the outcome.

Thus, we reject this claim on the basis that failure to call character witnesses was not prejudicial.

*C. Severance.*

Norwood-Thomas next claims that not severing the drug tax charge from the possession charge violated her right to a fair trial. We reject this claim because Norwood-Thomas failed to seek severance of the two charges. Accordingly, she waived her right to assert this contention on appeal. *See State v. McBride*, 187 Wis.2d 409, 420, 523 N.W.2d 106, 111 (Ct. App. 1994).

*D. Adjournment.*

Norwood-Thomas next claims the trial court erred in denying her request for adjournment. We reject this claim.

The record reflects that trial counsel moved for an adjournment the day before trial, claiming that he was not prepared to try the case. His lack of preparation stemmed from Norwood-Thomas's failure to respond to his attempts



to contact her to prepare the case. Trial counsel also stated that a short adjournment was required in order to give him an opportunity to locate a witness. The trial court denied the adjournment ruling that the reason for counsel's lack of preparation was Norwood-Thomas's failure to assist in the preparation of the defense. The trial court ruled that her actions did not constitute a reason to postpone the case. The trial court also noted that the defense would have another day to attempt to locate the missing witness because the State would present its case first.

The decision whether to grant or deny an adjournment request is left to the trial court's discretion and will not be reversed on appeal absent an erroneous exercise of discretion. *See State v. Wollman*, 86 Wis.2d 459, 468, 273 N.W.2d 225, 230 (1979). In considering the request, the trial court should consider the totality of the circumstances, including the length of the delay requested, whether the lead counsel has an associate prepared to try the case, whether other continuances had been requested, the convenience of the parties and the court, and whether the delay seems to be for a legitimate purpose. *See id.* at 470, 273 N.W.2d at 231.

Applying these factors to the facts of this case results in our conclusion that the trial court did not erroneously exercise its discretion in denying the motion to adjourn. The request came on the day before trial without substantial justification. The only reason for the request was Norwood-Thomas's failure to communicate with counsel. Further, the case was not complex and there has been no showing that the missing witness would have somehow benefited the defense. Under these circumstances, the trial court did not erroneously exercise its discretion in denying an adjournment.

*E. Sentencing.*

Finally, Norwood-Thomas claims the trial court erroneously exercised its sentencing discretion by placing too much weight on the amount of drugs involved and imposing an excessive sentence. We reject her claim.

Sentencing is left to the discretion of the trial court and will not be reversed absent an erroneous exercise of discretion. See *State v. Patino*, 177 Wis.2d 348, 384, 502 N.W.2d 601, 615-16 (Ct. App. 1993). A trial court considers three primary factors when imposing sentence: the gravity of the offense, the character of the offender, and the need to protect the public. See *id.* at 385, 502 N.W.2d at 616.

From our review of the sentencing transcript, it is clear that the trial court considered the three primary factors when imposing sentence. The trial court considered Norwood-Thomas's positive character noting she was living a "prosocial life," and had a positive educational and employment history. The trial court also addressed the severity of the crime and protection factors when observing the substantial quantity of drugs involved and the location within 1,000 feet of a school.

Norwood-Thomas argues that the trial court gave too much weight to the quantity of drugs involved. The sentencing transcript does reflect that, in considering the severity of this crime, the trial court placed substantial weight on the fact that the quantity of drugs involved was very large. The weight to be afforded each factor, however, is left to the discretion of the trial court. See *State v. Larsen*, 141 Wis.2d 412, 428, 415 N.W.2d 535, 542 (Ct. App. 1987). Here, it is clear that the trial court did not focus only on the severity factor, but considered all of the proper factors in imposing sentence. When the trial court

exercises its discretion based on the proper factors, we will not reverse the sentence unless 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, 461 (1975). Norwood-Thomas claims that in light of her positive character, the trial court should have imposed probation as her sentence. Instead, she was sentenced to the minimum sentence of five years in prison. This sentence was not excessive. Norwood-Thomas faced a potential prison term of thirty-five years. Her positive character persuaded the trial court to impose the minimum. Probation was not an option as the trial court specifically found probation would not be an appropriate sentence in this case. The trial court did not erroneously exercise its sentencing discretion.

*By the Court.*—Judgment and order affirmed.

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

