

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1175-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. COMEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

VERGERONT, J.¹ David Comey appeals a sentence imposed upon revocation of probation and the order denying his motion for a modification of that sentence. On April 24, 1996, Comey entered pleas of no contest to five counts of

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

failure to file state income tax returns contrary to § 71.83(2)(a), STATS., with two of the counts enhanced for habitual criminality.² The court withheld sentence and placed him on probation for three years on each count, concurrent. Comey's probation was subsequently revoked for being outside the state without permission and because of a charge of shoplifting, which was dismissed as part of a plea agreement relating to another shoplifting charge. On July 2, 1997, the trial court imposed a sentence of five months on each of the five counts, consecutive, with credit for days served. Comey filed a motion for a reduction of his sentence. The court denied the motion, concluding he had not demonstrated a new factor and the sentences were not unduly harsh or unconscionable.

On appeal Comey contends his sentence was unduly harsh and he was subject to double jeopardy when he was convicted and sentenced on the five charges to which he pleaded no contest. We reject each contention and affirm.

Sentencing is within the discretion of the trial court, and our review is limited to determining whether the trial court properly exercised its discretion. *McCleary v. State*, 49 Wis.2d 263, 276-77, 182 N.W.2d 512, 519-20 (1971). Because of the trial court's advantageous position, we presume that the sentence is reasonable, and the burden is upon the defendant to show that there is some unreasonable or unjustifiable basis for the sentence. *Elias v. State*, 93 Wis.2d 278, 282, 286 N.W.2d 559, 560 (1980).

The primary factors a court must consider in fashioning a sentence are the gravity of the offense, the character of the offender, and the need for public

² The complaint charged eleven counts of failure to file personal income tax returns, five as a repeater.

protection. *McCleary*, 49 Wis.2d at 274-76, 182 N.W.2d at 518-19. As part of these factors, the court may consider, among other things: the defendant's criminal record; a history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; 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 rights of the public; and the length of pretrial detention. *State v. Iglesias*, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994). The court may also consider other unproven offenses, as they are evidence of a pattern of behavior and implicate the defendant's character. *Elias*, 93 Wis.2d at 284, 286 N.W.2d at 562.

Although all of the three primary factors must be considered, the sentence may be based upon any one or more of the factors. *Anderson v. State*, 76 Wis.2d 361, 366-68, 251 N.W.2d 768, 771-72 (1977). The trial court determines how much weight to give each factor. *State v. Spears*, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988).

We conclude that the trial court properly exercised its discretion in sentencing Comey on July 2, 1997. The prosecutor provided the court with this information. Comey was a graduate of Northwestern University with a degree in engineering. He had inherited a lot of money in the form of stocks which had increased in value. After a dispute with the Wisconsin Department of Revenue over the payment of sales tax by a small corporation with which he was involved, he stopped paying personal income tax sometime in 1977. He was previously convicted of two counts of filing fraudulent sales tax returns for vehicles and two counts of failure to file personal income tax returns. When he was placed on probation for

those offenses, the court made it clear to Comey that he had to file state and federal income tax returns. Prior to those convictions, between 1988 and 1992, Comey transferred \$951,000 into Swiss bank accounts, which DOR cannot trace. Comey had another prior conviction, in 1994 or 1995, for taking a copy of the statutes on C.D. Rom from the Office of the Revisor of Statutes without paying for it. He also had a criminal conviction for disorderly conduct in 1986. The prosecutor stated that he did not think Comey was going to change—both county jail and probation had been tried. He argued that Comey had to be punished to show other citizens that it was necessary to pay taxes. The prosecutor asked for two years in the state prison on each of the two repeater counts, and four months on each of the other three counts, all consecutive.

Comey, appearing pro se, also addressed the court. In response to the court's question, he explained that his probation was revoked for leaving the state and for shoplifting, and that the shoplifting charge was later dismissed as part of a plea bargain in which he paid a \$100 fine for a prior shoplifting charge and returned the merchandise. Comey then explained that he was an inventor and he needed to protect the privacy of his inventions. He did not want to file returns showing his legitimate deductions for research expenses, so he set up a system with a corporation to avoid having to file returns. Comey stated that the IRS conducted an investigation, instigated by opponents when he ran for political office, and concluded he had a valid system, but the Wisconsin Department of Revenue took a different view based on false stories told by his local opponents. He also accused DOR employees of filing false affidavits. Comey maintained he had legally managed to have no tax liability. Comey presented the court with a memorandum presenting his views in detail, which the court read.

The prosecutor disputed Comey's statement that the IRS had exonerated him, stating that he had been able to verify only that the IRS was not going to actively pursue charges but were leaving that to the State. He also added that Comey served jail time for failure to pay the fines and court costs in the prior criminal convictions.

After hearing these presentations, the court stated that it had reviewed the transcript of the April 24, 1996 hearing, at which it had presided, and it summarized its thinking at that time. In withholding sentence and placing Comey on probation at that time, the court decided probation was necessary because Comey's comments indicated to the court that he did not think he had done anything wrong, and the court felt it was necessary to impress upon him that he had. The court repeated its view, expressed at that earlier proceeding, that Comey had an obligation to file returns with the Wisconsin Department of Revenue, whether or not they showed any taxes were due, and Comey's views on the tax system were irrelevant. The court acknowledged that one of the conditions of the plea negotiation that resulted in the no contest pleas to the five counts was that Comey tender tax returns at that time, which he had done. The court also considered it significant that the basis for the current probation revocation was not related to the filing of tax returns.

The court stated that it was going to determine a sentence by looking at the offenses at the time the plea was entered and based on the assumption that there had not been a continuation of the conduct for which Comey had been convicted. However, the court also stated that since probation had been revoked, it now had to consider the appropriate sentence for the five offenses and in its view incarceration, rather than simply more probation, was warranted. The court observed that the maximum penalty on the five counts was eight years and three

months of incarceration, but it felt that a prison sentence would carry out only the punitive function of sentencing, and it doubted if Comey could survive in a prison environment. The court sentenced Comey to five months in the Dane County Jail on each of the five counts, consecutive, with credit for 154 days of incarceration.³

We conclude the trial court properly exercised its discretion in sentencing Comey. It considered the seriousness of the offenses, the need for punishment as a deterrent, Comey's history of prior offenses, his compliance at and since the plea hearing, and his explanations for his offenses at both the plea hearing and this hearing. The court did not accept the prosecutor's recommendation for prison time and did consider that Comey had discontinued the offending conduct. The court's sentence was well below the maximum penalty and the prosecutor's recommendation. It was not unduly harsh and is not unconscionable.

Comey also argues that the convictions on the five counts violated his right to double jeopardy because he had already been punished for those charges in that they were taken into account by the court that sentenced him on prior convictions in 1995. The failure to file returns that formed the factual basis for the five counts to which he pleaded no contest in this action were, Comey states, the basis for the revocation of his probation on the prior convictions, and

³ The court also addressed and rejected Comey's written argument that he had not been adequately represented at the hearing when he entered the no contest pleas to the five counts. The court stated that Comey could not, after not appealing from the conviction entered based on those pleas or abandoning the appeal, seek to vacate those pleas in the context of sentencing after probation revocation.

the court considered those failures in imposing sentences of jail time for his prior offenses after probation revocation.⁴

As the trial court correctly noted when Comey attempted to raise this and other challenges to his no contest pleas at the July 2, 1997 hearing, Comey may not raise challenges to the entry of his pleas in the context of sentencing after revocation of probation that was imposed upon a conviction resulting from those pleas. *See State v. Tobey*, 200 Wis.2d 781, 784, 548 N.W.2d 95, 96 (Ct. App. 1996). If he wished to do so, it was incumbent upon him to appeal those convictions in a timely fashion. Not having done so, the only issue properly before the trial court and this court is the propriety of the sentence after revocation. We have already concluded that the trial court properly exercised its discretion in the sentences it imposed on July 2, 1997, after probation revocation.

By the Court.—Judgment and order affirmed

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

⁴ The prior convictions are the two counts of failure to file a personal income tax return and two counts of filing false sales tax returns that the prosecutor referred to at the July 2, 1997 sentencing. On May 26, 1993, Comey was sentenced to four months' incarceration on one count of failing to file his personal income tax return; on the other three counts he was placed on probation and sentence was withheld. The result of a resentencing of those three counts on February 1, 1994, (after the court vacated its original sentence on those three counts) was also probation with sentence withheld. After Comey failed to file tax returns in violation of the conditions of his probation, his probation was revoked and he appeared before the court for sentencing on those three counts on June 7, 1995. In his arguments to the court at that sentencing, the prosecutor referred to the eleven-count complaint then pending in another branch, which is the complaint filed in this action. The court sentenced Comey to consecutive periods in the county jail of ninety days, thirty days and thirty days on the three counts.

