

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 2, 2000

Cornelia G. Clark  
Acting Clerk, Court of Appeals  
of Wisconsin

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**No. 98-3072-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAIRO E. RAMOS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. Jairo E. Ramos appeals from a judgment convicting him of first-degree reckless homicide while armed with a dangerous weapon, and from an order denying his motion for postconviction relief. He argues that his forty-year sentence—only five years less than the maximum—is unduly harsh; and he claims

the circuit court failed to adequately consider the victim's violent and provocative personality and his precipitating role in the offense. Because we conclude that the court did not erroneously exercise its discretion in sentencing Ramos, we affirm the judgment and order.

¶2 Ramos was convicted of killing Ivan DeJesus. Ramos and DeJesus were acquainted with each other through DeJesus's sister, who was Ramos's girlfriend. DeJesus's death was the culmination of a series of events. Knowing that DeJesus had beaten his sister on a prior occasion, Ramos offered to return a gun that she had "borrowed" from DeJesus at some earlier time. When Ramos gave DeJesus the gun, DeJesus became angry and threatened Ramos and his family. On subsequent meetings, DeJesus continued to threaten and swear at Ramos. One evening, when Ramos was picking up DeJesus's sister for a date, DeJesus came home unexpectedly and attacked Ramos, striking him and pushing him down the stairs. At one point he said to Ramos: "I've got something for you! I've got a bullet for you!"

¶3 Several days later, Ramos, who had purchased a gun after his last encounter with DeJesus, met him on the street and asked for the return of a fake identification card he had loaned him on some earlier occasion. According to Ramos, DeJesus swore at him and made a gesture which led Ramos to believe he was reaching for his pocket for a gun. Ramos drew his own gun and fired a single shot towards DeJesus, missing him. Then, when DeJesus appeared to be reaching for his pocket again, Ramos closed his eyes and fired his gun until it was empty, killing DeJesus. Police at the scene found a loaded handgun, with one cartridge in the chamber and the safety off, in DeJesus's pocket.

¶4 Ramos, who had no criminal record, was initially charged with first-degree murder. He eventually pled guilty to a reduced charge of first-degree reckless homicide with a dangerous weapon. DeJesus's parents appeared at the sentencing hearing, expressing their deep personal loss, extolling DeJesus's good character, and urging the court to impose maximum incarceration. Another witness and the prosecuting attorney also spoke in favor of a long sentence. Ramos's mother testified in his behalf, as did his trial attorney. Based on this testimony, and the presentence report prepared for the proceedings, the court sentenced Ramos to forty years in prison.

¶5 In a postconviction motion, Ramos sought resentencing based on his claim that the court had failed to consider DeJesus's character and provocative conduct, the fact that DeJesus was a gang member with prior involvement with firearms and drugs, and DeJesus's past violent acts and propensity for threats. The court denied the motion and Ramos appeals.

¶6 Renewing his arguments on appeal, Ramos claims that, had the court properly considered DeJesus's violent and provocative conduct towards him and DeJesus's past violent acts, his sentence would have been less harsh.

¶7 Sentencing is committed to the sound discretion of the trial court, and our review is limited to determining whether there has been a "clear" misuse of that discretion. *McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). Our limited review of sentencing decisions reflects the strong public policy against interference with the trial court's sentencing discretion: We presume the court acted reasonably, and we assign to the defendant the burden of "show[ing] some unreasonable or unjustified basis in the record for the sentence complained of." *State v. Harris*, 119 Wis. 2d 612, 622-23, 350 N.W.2d 633

(1984). We do so, at least in part, because the trial court “has a great advantage in considering the relevant factors and the defendant’s demeanor.” *State v. Roubik*, 137 Wis. 2d 301, 310, 404 N.W.2d 105 (Ct. App. 1987).

¶8 It is well-established that, in sentencing an offender, the court is to consider three primary factors: (1) the gravity and nature of the offense; (2) the offender’s character; and (3) the public’s need for protection. *State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). In addition, the court may consider a variety of other factors, including: the defendant’s prior record of offenses; his or her age, personality, character and social traits; the viciousness or aggravated nature of the crime and the degree of the defendant’s culpability; his or her demeanor, including remorse, repentance, or cooperation with authorities; the defendant’s—and the victim’s—rehabilitative needs; and the needs and rights of the public. *State v. Thompson*, 172 Wis. 2d 257, 264-65, 493 N.W.2d 729 (Ct. App. 1992). Whether a particular factor or characteristic will be considered an aggravating or mitigating circumstance will depend upon the particular defendant and the particular case, *id.* at 265, and we will not substitute our own sentencing preference for that of the trial court. *McCleary*, 49 Wis. 2d at 281. If the trial court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless it is “so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶9 Ramos maintains that, because the court heard some of DeJesus’s family and friends speak as to DeJesus’s good character, it should have permitted him to present “adverse victim-impact” evidence to rebut those statements—although we note that he has not put forth or described what evidence he has in mind. We needn’t consider that argument—and the lengthy analysis of prior cases

he offers in support of his position—however, because it appears from the record that the circuit court was not only informed as to DeJesus’s violent character and his precipitating role in the offense,<sup>1</sup> but it specifically noted both at sentencing and in its decision on Ramos’s postconviction motion that it had considered DeJesus’s background in sentencing Ramos. In passing sentence, for example, the court stated:

I acknowledge the victim unfortunately is not completely without some involvement. His involvement with guns, his having a weapon on that day, and his violent conduct

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<sup>1</sup> At the plea hearing, the prosecutor explained that the basis for reducing the charge was that

there was an ongoing dispute and/or feud between the victim and the defendant, that the credible evidence suggests that the victim was on numerous occasions the provocator and aggressor in the feud; that on some occasions, the victim indicated that he was not going to forgive the defendant for some ... transgression which we can only determine from the witnesses who have any knowledge of this that apparently the victim’s gun was in the possession of the defendant at some point, and the victim took great offense to the fact that someone had handled and possessed and otherwise had access to his firearm without his knowledge or consent, and this was such an egregious wrong and such an egregious injury to him that the friendship between himself and the victim, referring to Mr. Ramos, the friendship between the victim and Mr. Ramos had to end, according to the victim.

The prosecutor also noted that “the jury would certainly hear that Mr. DeJesus was armed. He did have a firearm in his pocket, and so it is not absolutely incredible that Mr. Ramos was fearful of what would happen if Mr. DeJesus got his gun.”

At the sentencing hearing, the prosecutor again commented on DeJesus’s role in the offense:

I’m led to believe that Mr. DeJesus has such an affinity for this firearm, that the touching of it by another person was so offensive to him that he was willing to break off the relationship with someone who before this incident has been close enough to be a practical member of the family, a de facto member, staying at the home, visiting the home, dating an occupant of the home. And the relationship between Mr. Ramos and Mr. DeJesus was not unlike brothers, but it fell apart in one instance, one incident of the handling of a gun.

towards you certainly played a role in all of this. It doesn't excuse your conduct. It doesn't excuse the ultimate result.

The court was thus aware of DeJesus's violent and provocative character and of the events leading up to the fateful encounter. And it considered these factors in juxtaposition with other aggravating factors on Ramos's part in arriving at its sentence—including the fact that he approached DeJesus when he could have just driven away, that he fired several shots in a residential neighborhood where he could have seriously injured others, and that his actions after the shooting indicated a lack of remorse.

¶10 The court also considered, again as it is required to do, the nature of the offense, Ramos's character, and the interest of the public. The court began by noting the gravity of Ramos's crime, noting that "there are no greater crimes than taking the life of another individual," and stating: "We can't give back the life of the victim to this family, to his brothers, or sister, mother, family, and they will go through their lives now having lost a member of their family." The court also noted that all this was "a tragedy" to Ramos's family as well, in that they will be losing their son to prison for a considerable period of time. The court went on to explain, however, that it considered Ramos's offense to be a particularly "aggravated" homicide:

It is an aggravated situation not only because you killed the victim in this case, but you endangered other lives. That Ms. Rivas was in her home with her child, and there are other houses in that area, and we've seen and experienced throughout our community unfortunately the impact of innocent people sitting in their homes that are supposed to be very safe places for them, and bullets intended or directed at others pass through into those dwellings injuring them and killing them, and they're wholly unrelated.

The drive-by shootings, the cross fires, are a great danger throughout our community, and those people who live in those neighborhoods where these weapons are being

used are entitled to have a safe neighborhood. Somewhere where their children can be out on the streets and they don't have to fear for the bullets on the streets and they don't have to fear for the bullets that go whizzing past. So, this isn't an isolated circumstance in which your use of the weapon was directed merely towards a single individual, and so I consider it to be not only a homicide, but an aggravated homicide.

¶11 Then, considering Ramos's character, the court stated:

[I]s this so uncharacteristic of you? One of the things I consider is your general character, as I mentioned. There are comments that you did go out to Colorado, that you got into trouble out there. They were misdemeanors. That I believe is – it was the statement of your mother that you were hanging around with the wrong group as you got thrown out of your brother's home because of disputes between your brother and his wife, and that you were homeless at the time, but you then began hanging around with the wrong group. The fact that you engaged in the conduct, the fact that you went back to the group as it was described in Colorado in the nature of taking revenge on the person who took the radio reflects that character, that this is not unusual.

You did buy a weapon. If there wasn't a gun, this wouldn't have happened. If you'd have stayed away from the victim, this wouldn't have happened. I acknowledge the victim unfortunately is not completely without some involvement. His involvement in guns, his having a weapon on that day, and his violent conduct towards you certainly played a role in all of this. It doesn't excuse your conduct. It doesn't excuse the ultimate result.

And the fact of the matter is that your mother commented that she was pleased that you were associating with the victim's sister because – and again reflecting into your background – that this group of people were so much better than those you had been hanging out with, and at least your statement is that the victim's sister was the one who took the victim's gun. And what was she going to do with the gun? Scare some girls, the sisters of an ex-boyfriend. So guns were not something new and different from your life and in the activities of those you were associating with.

¶12 Finally, the court stated as follows with respect to the interest of the public at large:

Not only does this charge involve the taking of a life, it also has a great impact upon the community because of the nature of the crime. It was the use and involvement of guns that led and resulted in this death, and those guns are a major problem throughout our community. And Ms. Rivas made her statements as a member of the community. A community that is being victimized by the use of guns.

¶13 Ramos’s sentence was a product of the court’s informed discretion, and he has not persuaded us that any error occurred in the proceedings, or that the court’s exercise of discretion was in any way erroneous.<sup>2</sup>

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

Not recommended for publication in the official reports.

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<sup>2</sup> At one point in his brief, Ramos refers us to our decision in *State v. Spears*, 220 Wis. 2d 720, 585 N.W.2d 161 (Ct. App.1998) (*Spears I*), and to the supreme court’s decision on review, *State v. Spears*, 227 Wis. 2d 495, 596 N.W.2d 375 (1999) (*Spears II*). We said in *Spears I* that a victim’s criminal record is relevant at sentencing for two reasons: (a) to rebut the “good character” evidence put forth by the victim’s relatives at the sentencing hearing; and (b) as supporting the defendant’s version of the crime. *Spears I*, 220 Wis. 2d at 728 (and n. 6). On review, the supreme court decided the issue only on the latter point, specifically stating in an introductory footnote that it was declining to consider whether the victim’s criminal record “was relevant to rebut ‘good’ character evidence with evidence of the victim’s ‘bad’ character....” *Spears II*, 227 Wis. 2d at 499, n.1.

Ramos says that the *Spears* cases control here, entitling him to put on evidence of DeJesus’s bad character at sentencing. Unlike the situation in *Spears*, however, the court in this case didn’t keep any evidence out at Ramos’s sentencing. As indicated, the court had evidence of DeJesus’s aggressive and provocative conduct before it—and it mentioned this conduct in its sentencing remarks. And we hold that, on that record, the court did not erroneously exercise its discretion in sentencing Ramos. Ramos’s peripheral reliance on the *Spears* cases is unavailing.





