

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 9, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1529-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMEEH J. PICKENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ

¶1 PER CURIAM. Sameeh Pickens appeals from a judgment convicting him of possession of cocaine with intent to deliver and from an order denying his motion for postconviction relief. He claims the trial court improperly increased the length of his sentence based on his status as an unwed father and failed to give consideration to other mitigating factors. Having reviewed the trial

court's comments in context, we are satisfied that it did not penalize the defendant based on any improper factors, and that its balance of the relevant factors was within the bounds of its discretion. We therefore affirm.

BACKGROUND

¶2 Pickens pleaded guilty to possession of cocaine with intent to deliver after he was arrested with 0.64 grams of packaged cocaine on his person. A psychologist prepared a report for sentencing which indicated that probation would be appropriate because Pickens came from a dysfunctional family, he suffered from anxiety and depression, he lived with and supported his infant daughter, and he appeared remorseful for his conduct. Another memorandum to the court also indicated that probation would be appropriate because Pickens had obtained employment after his arrest and had been taking his responsibilities as a father seriously. The presentence investigation report, however, recommended prison because past supervision programs did not work.

¶3 At the sentencing hearing, the trial court commented on the length of Pickens' juvenile record and his failure to conform his behavior to appropriate standards over any sustained period of time despite prior periods of probation, the selfishness of his asserted justification of the crime as necessary to support his family without recognition of the destruction drugs could cause the people he was selling to, and the fact that there was a gun in the car at the time of the arrest. The court also stated:

Now you're going out fathering children when you're certainly not ready for fatherhood outside of the physical presence. ...

Has there been an adjudication [that you are the father]? Obviously there hasn't. ...

Then that's the other thing. You know, I'm not, you know, against having a relationship with a child which is properly yours and which is properly being given full nurturing, full support and that type of thing, that's part of life. It would be nice if you did it properly; that is, get married so that the child has all full factors of your lineage, of your health situation. People forget about that. Well, all of a sudden they pick up their toothbrush and they move on. Meanwhile all those things still carry on for that child for the rest of their life. They don't know whether or not they're disposed to this type of history and this kind of thing.

Hopefully you'll stay with that and hopefully you'll be adjudicated appropriately to be the father of the child if that's the situation. Perhaps—I don't know if it crossed your mind—you should get married at a time to legitimize the child. All these things. You're not living your life the way you're supposed to. I mean, that's clear from the record.

The trial court then sentenced Pickens to thirty months in prison, fined him \$500 and suspended his driving privileges for six months. Pickens moved for a sentence reduction on the grounds that the trial court had considered an improper factor and failed to consider all of the relevant factors. The trial court denied the motion and Pickens appeals.

STANDARD OF REVIEW

¶4 We review sentencing determinations under the erroneous exercise of discretion standard. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Because the trial court is in the best position to consider the relevant sentencing factors and the demeanor of the defendant, we are reluctant to interfere with its sentencing discretion and we presume that it acted reasonably. *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

ANALYSIS

¶5 The principal factors for the trial court to consider when exercising its sentencing discretion are the gravity of the offense, the character of the offender and the need to protect the public. *See Harris*, 119 Wis. 2d at 623. The trial court should not rely on factors which are “totally irrelevant or immaterial to the type of decision to be made.” *See Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980).

¶6 Pickens claims that the trial court’s mention of his status as an unwed father was an immaterial “view of personal morality” and should not have been considered at sentencing. However, we read the trial court’s comments primarily as an expression of concern for the future well-being of Pickens’ daughter in the event that Pickens failed to formalize his obligations to the child—either through marriage or by a paternity adjudication. Furthermore, we are not convinced that the trial court’s statement that Pickens was not living his life the way he was “supposed to” referred exclusively, or even primarily, to his failure to get married. The court’s reference to “all these things” that were “clear from the record” suggests a summarization of everything it had discussed to that point, including Pickens’ juvenile record. In any event, we are satisfied that the trial court could properly consider, relative to Pickens’ character, the fact that Pickens fathered a child at a time when his only apparent means of support was drug dealing. We do not believe the trial court was increasing the length of Pickens’ sentence because of his status as an unwed father.

¶7 Pickens also maintains the trial court failed to consider that he was only seventeen, that this was his first felony conviction, that there was a relatively small amount of cocaine involved, that he had shown repentance and cooperation,

and that his improved behavior while on bail demonstrated that his rehabilitative needs could be met through probation. We disagree. The trial court's discussion of Pickens' juvenile record shows it was well aware of Pickens' age and the fact that this was his first felony conviction. Its discussion of how Pickens had failed to stay out of trouble while on probation in the past, and its references to his inconsistency in "picking and chosing" when to follow the law, show that it considered whether probation would be appropriate or not. While Pickens was caught with a relatively small amount of drugs, the reports before the court indicated that he had ongoing involvement with cocaine and marijuana.

¶8 In sum, the trial court considered the offense to be serious due to its impact on drug users and their families. It considered Pickens' character to be "immature" and "irresponsible" based on his juvenile record, the fact that the present offense was committed while Pickens was on probation, his gang involvement, and his fathering a child without the means to support her. Finally, it considered the community to be in need of protection from future drug offenses that might be deterred if Pickens were to think about prison before violating the law again. The trial court was fully entitled to give these factors more weight than those Pickens cites on appeal. The trial court could have sentenced Pickens to up to ten years in prison and fined him up to \$500,000. *See* WIS. STAT. § 961.41(1m)(cm)1 (1997-98).¹ The two-and-one-half year sentence and \$500 fine it imposed were well within its discretion on the record before it.

¹ All references in this opinion to the Wisconsin Statutes are to the 1997-98 version.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

