

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 21, 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.

Nos. 99-2495-CR & 99-2496-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CLEATUS L. MARNEY, JR.,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: DOMINIC S. AMATO and JEFFREY A. KREMERS, Judges.¹ *Affirmed.*

¶1 CURLEY, J.² Cleatus Marney appeals the judgments of conviction for two counts of possession of a controlled substance, cocaine, contrary to WIS.

¹ Judge Amato accepted the guilty pleas and sentenced Marney. Judge Kremers denied the postconviction motions.

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

STAT. §§ 961.16(2)(b)1 and 961.41(3g)(c),³ and the orders denying his postconviction motion to modify his sentences.⁴ Marney contends that the trial court erroneously exercised its discretion when it sentenced him because the trial court placed too much emphasis on one factor and failed to consider the other primary factors at sentencing. After independently reviewing the record, this court is satisfied that the trial court considered the primary factors and that the trial court properly exercised its discretion. This court affirms.

I. BACKGROUND.

¶2 Marney was charged on February 2, 1996, with one count of misdemeanor possession of controlled substance, cocaine. Later, on September 27, 1996, Marney was charged with another count of misdemeanor possession of a controlled substance, cocaine, and bail jumping. The controlled substance in the earlier charge was found in two baggies concealed in Marney's pocket. The later charge stems from the observations of two undercover police officers who, while approaching Marney, saw him reach into his pants pocket and throw away a plastic bag containing cocaine. In exchange for the dismissal of the bail jumping charge, and a sentencing recommendation from the State of a jail term of unspecified length, Marney plead guilty to both charges on April 1, 1999. Sentencing proceeded immediately after the acceptance of the guilty pleas. The trial court sentenced Marney to the maximum term of one year in the County Jail

³ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

⁴ The two cases were issued separately and, upon this court's own motion, the two cases are ordered consolidated for appeal purposes. This court notes that one of the judgments contains a statutory reference to WIS. STAT. § 161.41(3). This statute has been renumbered to those referenced earlier.

on both counts to be served consecutively. Following his sentence, Marney brought a motion seeking a modification of his sentence, which was denied.

II. ANALYSIS.

¶3 As a preliminary matter, the State argues that this court has no jurisdiction over this appeal because Marney brought his motion to modify sentence under WIS. STAT. § 973.19. The State notes that, under this statute, “the defendant waives his or her right to file an appeal or postconviction motion under s. 809.30(2).” Marney concedes that his postconviction motion improperly references both WIS. STAT. § 973.19 and WIS. STAT. § 809.30(2), but he claims that it was his intent to proceed under § 809.30(2). In order to resolve this dispute, this court must construe the relevant statutes. Statutory construction presents a question of law that this court decides *de novo*. See *State v. Martinez*, 210 Wis. 2d 396, 404, 563 N.W.2d 922 (1997).

¶4 A review of the record confirms that Marney’s motion seeking a modification of sentence inappropriately refers to both statutes. The statutes set forth two mutually exclusive procedures for obtaining postconviction relief for alleged sentencing errors. This court concludes that it was Marney’s intent to seek postconviction relief under WIS. STAT. § 809.30, and not WIS. STAT. § 973.19, for the following reasons. First, a provision in § 973.19(1)(a) contains the following time limit: “within 90 days after the sentence or order is entered, [Marney must] move the court to modify the sentence.” Here, the sentence was handed down on April 1, 1999, and Marney’s motion seeking post conviction relief is file stamped August 31, 1999—a period outside the mandated ninety days. Second, the procedure under § 973.19(1)(a) is permitted only if the person “has not requested the preparation of transcripts under WIS. STAT. § 809.30(2).” Marney requested

transcripts and filed them with the court prior to the hearing of the motion. This court, after construing the conflicting statutory references, concludes that it was Marney's intent to utilize the procedure set out in § 809.30. Thus, this court will proceed to entertain the appeal.

¶5 Marney argues that the trial court erroneously exercised its discretion at sentencing because it failed to consider all the required factors and, instead, improperly considered only the fact that the arresting officer believed Marney to be a drug dealer. The State has not responded to Marney's argument. Its reply brief is devoted solely to the procedural question.⁵ Nevertheless, this court, extrapolating from the holding in *Rudolph v. State*, 78 Wis. 2d 435, 447, 254 N.W.2d 471 (1977), that the appellate court must conduct an independent review of the record before overturning a conviction when the State confesses error, has examined the record. After doing so, the court is satisfied that the trial court properly exercised its discretion when it sentenced Marney to two consecutive sentences.

¶6 Sentencing decisions are left to the sound discretion of the circuit court and this court's review of a sentencing decision is limited to determining whether the circuit court erroneously exercised its discretion. *See State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). An appellate court recognizes a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." *Id.* at 622. This court is reluctant to interfere with the sentence the

⁵ The State is cautioned against relying solely on a perceived procedural bar when responding to an appellant's argument in its brief. The better practice is to point out the procedural impediment and to also address the appellant's substantive arguments.

circuit court has imposed, for the circuit court is in the best position to consider the relevant factors and the demeanor of the defendant. See *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993) (citing *Harris*, 119 Wis. 2d at 622). However, “[a] discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law.” *State v. Canedy*, 161 Wis. 2d 565, 579-80, 469 N.W.2d 163 (1991). At the very least, the sentencing court must consider the following three primary factors: (1) the gravity and nature of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need to protect the public. See *Echols*, 175 Wis. 2d at 682.

¶7 Here, while the trial court’s comments are brief, they are adequate. During the course of sentencing Marney for two counts of possession of cocaine, the trial court was advised by one of the investigating officers, while under oath, that the officer believed Marney to be a drug dealer. The trial court was also apprised of Marney’s previous felony conviction. The trial court, in its sentencing remarks, commented that people who deal in drugs “caus[e] the cancer to spread and end up victimizing more people and get[ting] them hooked on drugs.” The trial court also commented on Marney’s several outstanding bench warrants for these charges, and the fact that he had been charged with a new offense of battery. The trial court also told Marney that the sentences’ intent was to deter Marney from future criminal conduct, and its purpose was also to not unduly depreciate the seriousness of the offenses.

¶8 Contrary to Marney’s contentions, the trial court did not “give undue and almost overwhelming weight to a single factor.” The trial court articulated that it believed the offenses to be serious; thus, it addressed the first factor, “the gravity and nature of the offense.” The trial court also commented that Marney

had taken little responsibility for his actions by failing to appear in court, and that he was only present after having been arrested for a new offense. These remarks directly impact on the second factor, Marney's "character and rehabilitative needs." Finally, the trial court stated that Marney's actions as a possible drug dealer posed a serious threat to the public. Thus, the trial court addressed the final factor, "the need to protect the public." The trial court properly considered the three primary factors. Consequently, this court denies Marney's request that the case be remanded for resentencing.

By the Court.—Judgments and orders affirmed.

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

