

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

**Appeal No. 2004AP1126-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2000CF4235

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT JUNIOR CARR,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Robert Junior Carr appeals from an amended judgment of conviction for possession of cocaine with intent to deliver and an order denying his motion for resentencing or sentence modification. Carr argues that he is entitled to resentencing because the trial court failed to: (1) follow

standards for determining whether the sentence should be concurrent or consecutive to other sentences; (2) demonstrate that it recognized the minimum-custody standard and explain how the sentence complied with that standard; and (3) adequately explain the component parts of the sentence. We reject his arguments and affirm the amended judgment and order.¹

BACKGROUND

¶2 Carr was convicted of possessing less than five grams of cocaine with intent to deliver, second offense, near a school, contrary to WIS. STAT. §§ 961.41(1m)(cm)1., 961.48 and 961.49(1)(b)6. (2000-2001).² The single count stemmed from an August 2000 incident where police found Carr and his ex-girlfriend in an apartment with thirty-eight individually wrapped corner cuts of crack cocaine. With its verdict, the jury rejected Carr's defense that the drugs did not belong to him and that he did not know the drugs were in the apartment.

¶3 A presentence investigation (PSI) was ordered. The PSI report indicated that twenty-year-old Carr had six juvenile adjudications, and a 1997 adult criminal conviction for possession of cocaine with intent to deliver for which Carr was on parole at the time of this offense. The report indicated that the maximum exposure for Carr was fifteen years, with a maximum initial confinement term of eleven years and three months. The PSI author, who had

¹ The Honorable Clare L. Fiorenza presided over the trial and pronounced sentence. The Honorable John Siefert heard the motion for resentencing, after the case was administratively transferred to him.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

supervised Carr for three years, recommended an initial period of confinement of five to seven years, and an extended supervision period of four to five years.

¶4 The State recommended a total sentence of thirteen years, consisting of eight years of initial confinement and five years of extended supervision. In support of this recommendation, the State noted that Carr had not accepted responsibility for the crime. The State also argued that Carr had not performed well when released after previous offenses, noting that Carr had absconded several times while under supervision as a juvenile and had been revoked from probation and parole for his adult offense.

¶5 In his sentencing argument, Carr's attorney recognized that it was unreasonable to ask for probation, but argued that the State's recommendation was excessive. Trial counsel recommended a total sentence of five years, including two years of initial confinement and three years of extended supervision. Trial counsel also asked the trial court to find Carr eligible for the Challenge Incarceration Program.

¶6 Carr addressed the trial court directly. He maintained his innocence, but acknowledged he was in the "wrong place at the wrong time." He asked the court for leniency, noting that he wanted to spend time with his two-year-old son.

¶7 The trial court imposed a total sentence of twelve years, consisting of seven years of initial confinement and five years of extended supervision. The trial court ordered that this sentence be served "consecutive to any other sentence." The trial court also found Carr eligible for the Challenge Incarceration Program.

¶8 Carr moved for sentencing modification or resentencing. The trial court denied the motion without a hearing, concluding that the trial court had not erroneously exercised its discretion. This appeal followed.

DISCUSSION

¶9 Carr argues that the trial court erroneously exercised its discretion because it failed to: (1) follow standards for determining whether the sentence should be concurrent or consecutive to other sentences; (2) demonstrate that it recognized the minimum-custody standard and explain how the sentence complied with that standard; and (3) adequately explain the component parts of the sentence. Carr notes that the Wisconsin Supreme Court recently reemphasized the need to explain sentencing decisions thoroughly. See *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. In *Gallion*, the supreme court reaffirmed the sentencing standards established in *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). See *Gallion*, 270 Wis. 2d 535, ¶¶38. Carr was sentenced before *Gallion* was decided, and the supreme court in *Gallion*, stated that it applied only to “future cases.” *Gallion*, 270 Wis. 2d 535, ¶¶8, 76. In any event, the *Gallion* court did “not make any momentous changes” to Wisconsin sentencing jurisprudence. *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. Therefore, we examine Carr’s sentence against *McCleary* and its progeny.

¶10 Sentencing is committed to the discretion of the trial court and our review is limited to determining whether the trial court erroneously exercised its discretion. *McCleary*, 49 Wis. 2d at 278. A strong public policy exists against interfering with the trial court’s discretion in determining sentences and the trial court is presumed to have acted reasonably. *State v. Wickstrom*, 118 Wis. 2d 339,

354, 348 N.W.2d 183 (Ct. App. 1984). To obtain relief on appeal, the defendant has the burden to “show some unreasonable or unjustified basis in the record for the sentence imposed.” *State v. Borrell*, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992).

¶11 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court may also consider the following factors:

(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant’s personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant’s culpability; (7) defendant’s demeanor at trial; (8) defendant’s age, educational background and employment record; (9) defendant’s remorse, repentance and cooperativeness; (10) defendant’s need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Id. at 623-24 (internal quotation marks and citation omitted). The weight to be given to each of these factors is within the trial court’s discretion. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶12 Here, at the beginning of its sentencing remarks, the trial court acknowledged that it was required to consider the gravity of the offense, Carr’s character, and the need to protect the community. With respect to the gravity of the offense, the trial court stated that this was a “serious drug offense” that involved thirty-eight corner cuts of crack cocaine.

¶13 The trial court also addressed Carr’s character. It noted that Carr, who was twenty years old at the time of sentencing, had had numerous juvenile

substantiations and an adult conviction for drug possession with intent to deliver. The trial court also recognized that when Carr was given probation for the criminal offense, it was later revoked. In addition, Carr had returned to drug dealing soon after leaving prison; Carr's latest release from prison occurred on July 13, 2000, and this offense occurred on August 10, 2000. The trial court also stated that it did not believe Carr's trial testimony. In addition, after Carr admitted to the trial court that he has a problem with marijuana and alcohol, the trial court noted that Carr needed treatment for these problems.

¶14 Finally, the trial court also addressed the need to protect the public. The trial court stated:

[Y]ou were put on probation for a drug offense in 1997 ... you received two alternatives to revocation. You continued to deal drugs on our streets instead of getting a decent job or a job where you could become a productive member of society. You decided to make quick money and sell the cocaine. That's not going to be tolerated.

I don't know if you ever thought about the impact you had upon people that you were selling to and their families and their children and the neighborhoods where you were selling, sir. I don't think you ever took that into consideration.

¶15 In addition to considering the three primary factors, the trial court also considered the assessment of the PSI report writer, who had been supervising Carr while he was on probation. The trial court noted that the writer had opined that Carr was at "high risk to reoffend" and "has no sense of consequence for his actions and believes he is being treated unfairly when he's held accountable for his actions. He is very entrenched in the gang subculture."

¶16 The trial court offered the following conclusions before pronouncing sentence:

Mr. Carr, I'm taking all the factors, everything listed on the record into consideration. I've listened to what you have said as well as your attorney and [the State]. I believe a significant amount of time is necessary, sir. Unfortunately, with respect to this case, you have drug treatment needs. They clearly need to be in a confined setting. You don't have the ability to get treatment in the community as shown by absconding numerous times while on probation.

¶17 The trial court sentenced Carr to seven years of initial confinement and five years of extended supervision. The trial court also established a variety of conditions for extended supervision. Finally, after giving numerous required warnings about the rules of extended supervision, the trial court indicated that it would make Carr eligible for the Challenge Incarceration Program and stated: "This sentence is consecutive to any other sentence."

¶18 Based on our review of the twenty-six-page sentencing transcript, we conclude that the trial court did not erroneously exercise its discretion. It considered the appropriate factors and imposed a reasonable sentence that was less than the maximum allowed by statute.

¶19 Carr, however, offers three reasons why he believes the trial court erroneously exercised its discretion. First, Carr takes issue with the fact that the trial court did not explain why it was ordering that the current sentence be served consecutive to "any other sentence."³ Carr argues that the trial court erroneously failed to explicitly relate any of the sentencing factors to its decision to order the

³ We observe that although the trial court did not limit its statement to sentences previously imposed, WIS. STAT. § 973.15(2)(a) authorizes sentences consecutive only "to any other sentence imposed at the same time or previously." If Carr commits a crime in the future, a judge sentencing him for that crime could, in the reasonable exercise of his or her discretion, make the sentence for that later crime concurrent or consecutive to Carr's sentence for this case.

present sentence consecutive to, instead of concurrent with, any pre-existing sentences. Carr points to our decision in *State v. Hall*, 2002 WI App 108, 255 Wis.2d 662, 648 N.W.2d 41, where we reversed a set of multiple sentences totaling 304 years because the trial court had not explained why each of the multiple sentences was to be served consecutively. *Id.*, ¶¶8, 12-18. This is not the first time we have rejected an argument based on *Hall*. In *State v. Matke*, 2005 WI App 4, ___ Wis. 2d ___, 692 N.W.2d 265, we likewise rejected a defendant's argument that the trial court failed to adequately explain its decision to order that the instant sentence be consecutive to pre-existing sentences. *See id.*, ¶¶17-20. Our reasoning applies equally here:

The sentences in *Hall*, however, were all imposed at the same time, and they were for “a string of armed robberies” committed during a three-month period, plus a felony-murder committed in conjunction with an attempted robbery. [255 Wis.2d 662], ¶¶2-3. The American Bar Association Standards for Criminal Justice Sentencing that we cited in *Hall*, which *Matke* relies on for the proposition that a court should “ordinarily” order multiple sentences to be served concurrently or explain why it did not do so, apply to multiple sentences imposed at a single sentencing. *See id.*, ¶14. Neither our conclusions in *Hall* nor the cited ABA Standards have any bearing on a sentence subsequently imposed for a new offense that is unrelated to past offenses for which a defendant may still be serving time.

Matke, 692 N.W.2d 265, ¶18.

¶20 Here, the trial court did not explicitly relate the sentencing factors to its decision to make the instant sentence consecutive to any pre-existing sentences. However, read in context, we conclude that the trial court offered more than adequate reasons for the total sentence imposed. The trial court noted Carr's significant juvenile history, his failure to take advantage of probation for his first drug offense, and his current drug and alcohol treatment needs. Each of these

factors justifies the sentence imposed, including the trial court’s decision to make this sentence consecutive to any pre-existing sentences. Thus, even if the trial court arguably should have offered more justification for its decision to make the instant sentence consecutive, we nonetheless conclude that the trial court did not erroneously exercise its discretion because the facts of record support the decision. *See Hall*, 255 Wis. 2d 662, ¶19 (“[W]e are obligated to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.”) (quoting *McCleary*, 49 Wis. 2d at 282).

¶21 Moreover, we note that even if the trial court had wanted to consider in detail how the instant sentence would relate to Carr’s existing sentence, the trial court could not have done so with certainty, because at the time of sentencing, it was not clear whether Carr would be revoked for his only pre-existing sentence. The parties and the trial court specifically discussed the fact that the Department of Corrections may decide not to revoke Carr. Carr’s counsel observed: “[s]ometimes they wait to see what the [new] sentence is. If they feel the sentence is appropriate, they just drop the revocation....” Thus, any attempt to craft a sentence that took into account time Carr would be serving on his previous conviction would have been based on speculation. In summary, we are satisfied that the trial court correctly exercised its sentencing discretion with respect to ordering that the sentence be served consecutive to any pre-existing sentence.

¶22 Carr’s second argument is that the trial court failed to explain how the sentence imposed complied with the minimum-custody standard articulated in *McCleary*. *McCleary* held: “it would have been appropriate for the trial judge to make a statement indicating why a near-maximum sentence conformed to the sentencing standards of the American Bar Association [] *i.e.*, that the custody imposed was the minimum consistent with the protection of the public, the gravity

of the offense, and the rehabilitative needs of the defendant.” 49 Wis. 2d at 284 n.3. Relying on this statement, Carr argues that in “failing to discuss durations, failing to discuss the link between facts and factors and durations, failing to reference shorter durations, and failing to address the minimum-custody standard, the sentencing court provided an insufficient explanation for its use of judicial power.” We disagree.

¶23 Although Carr states that he “does not fault the sentencing court for failing to use the magic words ‘minimum-custody standard,’” it appears that magic words are precisely what he is seeking. The trial court explicitly stated that “a significant amount of time” was necessary, in part because of Carr’s drug treatment needs, which the trial court said must be dealt with “in a confined setting.” The trial court also noted that Carr had absconded when placed on probation in the past, and that it accepted the opinion of the pre-sentence investigation writer that Carr was at “high risk to reoffend” and “has no sense of consequence for his actions and believes he is being treated unfairly when he’s held accountable for his actions.” Although the trial court did not explicitly state, “I believe seven years of initial confinement will best meet Carr’s needs,” the trial court indicated its reasons for imposing the sentence selected. Given the lengthy discussion of the appropriate sentencing factors and the trial court’s explanation of the sentence, we cannot agree with Carr that the trial court erroneously exercised its discretion.

¶24 Finally, Carr argues that the trial court “failed to adequately explain the component parts of the sentence.” He contends that the trial court failed to “explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives.” See *Gallion*, 270 Wis. 2d 535, ¶42. He explains that, based on the transcript, one cannot “discern from the

record why seven years, consecutive, versus, *e.g.*, four years, concurrent, was the minimum necessary confinement.” Once again, we disagree that the trial court failed to adequately explain its sentence.

¶25 The trial court emphasized Carr’s past failures on probation and parole, his high risk to reoffend, and his treatment needs. The trial court also noted that this was a serious drug offense, and that Carr does not seem to consider the impact of drugs on society. The trial court crafted a sentence that provides for a “significant” period of initial confinement, and extended supervision that provides drug treatment. With respect to the latter, the trial court noted: “I would hope that you would get intensive drug treatment while you’re in prison and, if you don’t, you’re going to get it while you’re on the street....” The trial court ordered weekly drug tests for the first year on extended supervision, and monthly after that. In summary, the sentence was clearly designed to protect society from a high-risk offender and offer Carr opportunities for rehabilitation. We discern no erroneous exercise of discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

