

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 2011

A. John Voelker
Acting 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. 2010AP986-CR

Cir. Ct. No. 2009CF2270

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH NEAL, JR.,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Kenneth Neal, Jr., appeals from a judgment of conviction entered upon his guilty pleas to two felonies. He also appeals from an

order denying his motion for postconviction relief. The issues are whether the circuit court: (1) improperly exercised its sentencing discretion; and (2) erroneously refused to vacate a DNA surcharge. We affirm.

BACKGROUND

¶2 Neal approached a parked car occupied by a man and a little girl. Neal pointed a gun at the people in the car and demanded money. After the man gave Neal approximately \$300, Neal fired his gun into the vehicle and fled the scene. The State charged Neal with five crimes stemming from the incident. The parties then entered into a plea bargain, and Neal pled guilty to two crimes: robbery with threat of force, and endangering safety by use of a firearm.

¶3 The circuit court imposed a nine-year term of imprisonment for the robbery conviction, bifurcated as six years of initial confinement and three years of extended supervision. The circuit court imposed a concurrent six-year term of imprisonment for endangering safety by use of a firearm, bifurcated as three years each of initial confinement and extended supervision. Additionally, the circuit court directed Neal to provide a DNA sample and ordered that he pay a DNA surcharge if he had not paid such a surcharge in connection with any prior conviction.

¶4 Neal filed a *pro se* motion to vacate the DNA surcharge on the ground that he had previously provided a DNA sample. The circuit court denied the motion, stating that Neal must supply proof that he previously paid a DNA surcharge to support a motion vacating the surcharge imposed in the instant case. Next, Neal's postconviction counsel filed a motion for sentence modification, seeking both reduced prison sentences and relief from the DNA surcharge. The

circuit court determined that neither claim was supported by the record, and this appeal followed.

DISCUSSION

¶5 Sentencing lies within the sound discretion of the circuit court. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence “has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue.” *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998).

¶6 The circuit court must consider the primary sentencing factors of “the gravity of the offense, the character of the defendant, and the need to protect the public.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See Gallion*, 270 Wis. 2d 535, ¶43 & n.11. Additionally, the circuit court must “specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Id.*, ¶40.

¶7 Neal first contends that “mitigating factors support a lighter sentence and were not explained by the court.” His contention does not identify an error. The circuit court has discretion to determine both the factors that it believes are relevant to sentencing and the weight to assign to each relevant factor. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶8 Neal next contends that the circuit court “did not meaningfully evaluate or consider the character of the offender.” We disagree. The circuit court

observed that Neal displayed “very very poor judgment.” Nonetheless, the circuit court praised Neal for coming forward to plead guilty, and the circuit court recognized that Neal’s remorse separated him from other armed robbers “who are so selfish that they can’t even see how terrorized they have left their victims.” The circuit court believed from Neal’s statements that “it’s beginning to dawn on [Neal]” that his actions have “real consequences for other people. For a person to be able to live outside of themselves and see life through the eyes of another person, that’s the kind of thing we need out of people in our community.” Neal’s claim that the circuit court failed to consider his character lacks merit.

¶9 Next, Neal contends that the circuit court failed to explain the reason for the length of the sentences imposed. *See Gallion*, 270 Wis. 2d 535, ¶49. He further contends that the circuit court did not fulfill its obligation to explain the linkage between the sentences selected and the sentencing factors and objectives considered. *See id.*, ¶46. We reject both contentions.

¶10 The record in this case reflects that the circuit court selected sentences in light of the totality of the factors considered. The circuit court discussed the three primary factors at length. In addition to the extensive discussion of Neal’s character that we have already reviewed, the circuit court considered the seriousness of the offense, stating that the criminal conduct was “worse than average” because Neal both displayed and fired a gun and did so in front of a vulnerable young witness. The circuit court further took into account that the offenses in this case involved threats and violence. The circuit court considered the need to protect the public, assessing the likelihood that Neal would reoffend as “above average” in light of his “serious record [a]nd the fact that [he had] been to prison before and still didn’t get the lesson.” The circuit court also considered mitigating factors. The circuit court observed that Neal, twenty-three

years old, was a relatively young man with supportive family members who could help him follow the law in the future.

¶11 The circuit court identified punishment as the primary sentencing goal. The circuit court explained that the sentences imposed must be sufficient to ensure that Neal “learned his lesson” and “pa[id] the price for what [he] did.”

¶12 Neal faced maximum prison sentences of fifteen years for robbery and ten years for endangering safety. *See* WIS. STAT. §§ 943.32(1) (2009-10)¹; 941.20(2)(a); 939.50(3)(e); 939.50(3)(g). The circuit court determined that Neal did not deserve a sentence “at the low end of the [statutory] range” in light of his culpability, need for punishment, and chances of reoffending. Accordingly, the circuit court imposed six years of initial confinement and three years of extended supervision “to pay for this type of conduct in these circumstances.”

¶13 A circuit court is not required to explain a sentence with mathematical precision. *Gallion*, 270 Wis. 2d 535, ¶49. Rather, the circuit court must explain “the general range of the sentence imposed.” *Id.* The circuit court’s sentencing remarks here amply fulfill that mandate.

¶14 Neal next asserts that the circuit court erred by imposing a \$250 DNA surcharge. We disagree. Pursuant to WIS. STAT. § 973.046(1g), the circuit court has discretion to impose a DNA surcharge when sentencing a defendant for any felony that does not involve certain sex crimes. *See State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. When exercising discretion on

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

this issue, the circuit court may rely on “any ... factors the [circuit] court finds pertinent.” *Id.*, ¶10. Here, the circuit court explained that the gravity of the crimes Neal committed and his potential for recidivism warranted requiring him “to pay for the cost of taking and keeping” a DNA sample. Because the circuit court considered relevant factors and reached a reasonable conclusion, no basis exists to disturb the circuit court’s exercise of discretion. See *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶15 We turn to Neal’s contention that the circuit court improperly refused to vacate the DNA surcharge. The circuit court advised Neal that it would vacate the surcharge imposed in this case if Neal had paid a DNA surcharge in connection with any earlier conviction. The circuit court explained that Neal could write a letter to the court “with proof that you’ve paid [the surcharge] before and then I’ll vacate that part of the costs.” Neal does not challenge the circuit court’s authority to impose a contingent surcharge. Rather, he contends that he satisfied the contingency by providing proof of prior payment to the circuit court. His contention is not supported by the record.

¶16 Neal, acting *pro se*, moved the circuit court for an order vacating the DNA surcharge, but the sole ground for his request was that he had previously provided a DNA sample. In response, a circuit court staff attorney sent Neal a letter explaining that he must submit proof that he previously paid a DNA surcharge in order to obtain relief. Neal made no further *pro se* submission. Instead, his postconviction counsel, who is also his appellate counsel, filed a motion on Neal’s behalf seeking relief from the DNA surcharge. Counsel’s motion contained no supporting documentation of any kind. Rather, counsel merely asserted that Neal provided a DNA sample pursuant to a circuit court order entered in a prior case. Counsel concluded: “under these circumstances, the DNA

surcharge of \$250 should be vacated.” The circuit court denied the motion, pointing out that, like Neal’s earlier *pro se* submission, the claim submitted by counsel was grounded solely on a contention that Neal previously provided a DNA sample. The circuit court offered to reconsider its decision “if the defendant can show that he previously paid the surcharge.”

¶17 In Neal’s briefs filed in this court, appellate counsel insists that the circuit court rejected Neal’s proof of paying a DNA surcharge. Counsel states in the brief-in-chief: “Neal explained in his written [postconviction] motion that he had previously paid a DNA surcharge upon a prior conviction.” Counsel states in the reply brief that Neal “wrote the court and stated he paid the surcharge collected in his 2005 case which is all the court required him to do.” Counsel also states in the reply brief that Neal “filed a letter subsequent to [the sentencing] hearing seeking a vacation of the surcharge and a motion [sic], explaining he had paid for the surcharge in his earlier conviction.”

¶18 Appellate counsel’s description of the record is not accurate. Neither Neal’s *pro se* submission to the circuit court nor his attorney’s postconviction motion asserts—let alone proves—that Neal paid a surcharge in connection with a prior conviction. The documents state only that Neal previously

provided a DNA sample. Accordingly, we reject Neal’s claim on appeal that the circuit court disregarded his proof of paying a DNA surcharge.²

¶19 Finally, we reject Neal’s claim that the circuit court erred by denying his postconviction motion for sentence modification because he “identified several misuses of the court’s discretion entitling him to relief.” We have concluded that the circuit court properly exercised its sentencing discretion, so this claim must fail.

By the Court.—Judgment and order affirmed.

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

² We have grave concerns as to whether Attorney Eileen Miller Carter filed appellant’s briefs that meet her obligation of candor towards this court. See SCR 20:3.3(a)(1) (lawyer shall not knowingly make a false statement of fact to a tribunal). At the very least, Attorney Miller Carter seriously mischaracterized the contents of both Neal’s *pro se* submission and the postconviction motion to vacate the DNA surcharge filed in the circuit court. Moreover, Attorney Miller Carter omitted those documents from the appellant’s appendix, although they are the very documents on which counsel relies to support a claim that Neal should be relieved from his obligation to pay a DNA surcharge. The omission hampered our efforts to assess Neal’s claim and delayed our resolution of this case. We observe that Attorney Miller Carter submitted with the brief-in-chief the required certification that the appendix contains “portions of the record essential to an understanding of the issues raised.” See WIS. STAT. RULE 809.19(2)(a). Because Neal’s *pro se* circuit court submission and his postconviction motion are plainly key to Neal’s claims on appeal, we direct that Attorney Miller Carter shall, within thirty days of the date of this opinion, show cause to this court in writing why she should not pay \$100 to the clerk of this court as a sanction for filing a false certification. See WIS. STAT. RULE 809.83(2); see also *State v. Bons*, 2007 WI App 124, ¶25, 301 Wis. 2d 227, 731 N.W.2d 367 (false certification and omission of essential record documents from the appendix place unwarranted burden on this court and constitute grounds for penalty). Counsel may alternatively pay the \$100 sanction to the clerk of this court within thirty days of this opinion without showing cause why she should be relieved of the obligation. The sanction is the obligation of Attorney Miller Carter and is not an obligation of the appellant.

