

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 1997

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-1010-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARCHIE F. GILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Archie F. Gill appeals from a judgment of conviction for cocaine possession and being a party to the crime of cocaine delivery, and from an order denying his motion for postconviction relief based on a claim of ineffective assistance of trial counsel. There are two issues on appeal: whether trial counsel was deficient for not moving to suppress evidence of tape-

recorded conversations and whether the trial court erroneously exercised its sentencing discretion. We affirm the judgment and the order.

A police informant wore a hidden body wire when conducting a drug buy from Gill. Additionally, two telephone conversations between the informant and Gill were tape recorded. No motion to suppress the tape recordings of the conversations was made by trial counsel. However, in response to Gill's pro se motion for suppression, the trial court conducted a nonevidentiary hearing on whether the evidence was admissible. The court concluded that the evidence was admissible. At trial, a police officer played the audio tape of the conversations.

Gill claims that trial counsel was constitutionally deficient for not moving to exclude the tape-recorded conversations. "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." *State v. Smith*, 207 Wis.2d 259, 274, 558 N.W.2d 379, 386 (1997) (citation omitted).

Gill's claim is disposed of by the principle that if the motion would have been unsuccessful, trial counsel is not deficient for not filing it. *See State v. Simpson*, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994). "It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." *State v. Cummings*, 199 Wis.2d 721, 747 n.10, 546 N.W.2d 406, 416 (1996).

Tape recording a conversation when one party gives consent is lawful. *See* § 968.31(2)(b), STATS. The informant testified at trial that he gave his consent. Under § 968.29(3)(b), STATS., a one-party consent recording is

admissible evidence to prove a felony drug charge. *See State v. Gil*, 208 Wis.2d 531, 534, 561 N.W.2d 760, 761 (Ct. App. 1997). Even if counsel had sought an evidentiary hearing, the motion to suppress would have been without merit. Additionally, it is speculation to suggest that a proper motion could have been the impetus for having the Wisconsin Supreme Court carve out an exception to the express statutory authorization for one-party consent recordings. That change is for the legislature and not the supreme court.

Gill was sentenced to a six-year prison term on the delivery conviction to be followed by a two-year term of probation for the possession conviction. Gill claims that the sentence was improperly influenced by the trial court's misunderstanding that Gill was a repeat offender and therefore subject to a maximum term of sixteen rather than ten years. Although the trial court was apprised before sentence was imposed that Gill did not stand before it as a repeat offender, Gill contends that the predisposition could not be eliminated from the court's mind.

Sentencing is a discretionary function of the trial court. *See State v. Cooper*, 117 Wis.2d 30, 39, 344 N.W.2d 194, 199 (Ct. App. 1983). If the record contains evidence that discretion was properly exercised when imposing sentence, this court must affirm. *See id.* at 40, 344 N.W.2d at 199. The three primary factors to be considered are the gravity of the offense, including the effect on the victim, the character of the offender, including his or her rehabilitative needs and the interests of deterrence, and the need for protecting the public. *See State v. Setagord*, 211 Wis.2d 397, 416, 565 N.W.2d 506, 514 (1997). A strong presumption of reasonableness is afforded sentencing decisions because the trial court is in the best position to consider the relevant factors and assess the defendant's demeanor. *See id.* at 418, 565 N.W.2d at 514. To overturn a

sentence, a defendant must show some unreasonable or unjustifiable basis for the sentence in the record. Unjustifiable bases for a sentence include irrelevant or improper considerations. *See State v. J.E.B.*, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991).

The record belies Gill's contention that the trial court was predisposed to any particular length of sentence based on the belief that Gill faced a maximum of sixteen years. The parties corrected the trial court's statement that Gill faced sentencing as a repeat offender. After that the trial court made clear that it was not confused about the maximum penalty. The court was even willing to "pare back" the eight-year recommendation in the presentence report in case the report's author had erroneously assumed that the maximum was sixteen years. (The trial court was informed that the presentence report author used the correct maximum term.) The court found the present offense serious independent of any impression that Gill was a repeat offender.

Gill also contends that the trial court relied on an unproven fact that Gill had been engaged in a series of drug dealing activities. The informant testified that he had purchased drugs from Gill on five occasions. The trial court noted that Gill had no visible means of support and yet he was able to support himself. Therefore, the record supports the reasonable inference that Gill was a dealer and that the offense did not involve an isolated sale.

Finally, Gill suggests that the disparity between his sentence and the sentence of his codefendant demonstrates that the trial court erroneously exercised its discretion. A mere disparity between the sentences of codefendants is not improper if the sentences are individualized based upon individual culpability and the consideration of the appropriate factors. *See State v. Toliver*, 187 Wis.2d 346,

362, 523 N.W.2d 113, 119 (Ct. App. 1994). The trial court made a finding that Gill was more culpable than his codefendant. This finding is not clearly erroneous in light of the evidence that the informant called Gill directly and made the arrangements with Gill personally. The trial court clarified at the postconviction motion hearing that the difference in the criminal records of Gill and his codefendant also justified the difference in the sentences. Nothing in the record detracts from the court's finding that the criminal records of the two were different. Because the trial court individualized Gill's sentence based on proper considerations, the sentence imposed must be sustained as a proper exercise of discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

