COURT OF APPEALS
DECISION
DATED AND FILED

February 29, 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. 98-2211-CR
98-2542-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JACQUES GIBSON,

DEFENDANT-APPELLANT,

AALLIYAH BASHIR, THEISS L. COLEMAN AND CAMERON A. YOUNGBLOOD,

DEFENDANTS.

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

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Jacques Gibson appeals from a judgment entered after a jury convicted him of possession of a controlled substance with intent to deliver (cocaine), party to a crime, and possession of a controlled substance (THC). He also appeals from an order denying his motion for postconviction relief. Gibson claims that he received ineffective assistance of counsel because counsel failed "to secure the presence of a material witness, Aalliyah Bashir, at the time of trial." He also claims that the trial court erred in sentencing him to a greater period of incarceration than his co-defendant, Theiss Coleman. We affirm.

I. BACKGROUND

¶2 According to the trial testimony, on April 10, 1997, Milwaukee police officers Michael Brhely and Janet Janowski detected a strong odor of marijuana eminating from an apartment on West Highland Avenue. Officer Brhely knocked on the apartment door and, after a short delay, Gibson opened the door and let in the officers. Entering the apartment, Officer Brhely saw blunts in an ashtray. Gibson and the two other male occupants, Cameron Youngblood and Theiss Coleman, admitted that they had been smoking marijuana. The officers then conducted patdown searches of Gibson, Youngblood, Coleman, and Aalliyah Bashir. Gibson had a key ring, $149 in cash, a pager, and a shopping list on his person. Police also found evidence of drug trafficking at the apartment, including a nine millimeter handgun, razors, cash, a cellular phone, and fifty-nine rocks of crack cocaine, many of which had been packaged and tied in the "corner cuts" of sandwich bags.

¶3 At trial, Youngblood implicated Gibson and Coleman in the drug dealing. Youngblood explained that he saw Gibson sell crack to two people who came to the apartment while he was visiting. Gibson testified, denying any

involvement in the day's drug dealing. He claimed the cocaine belonged to Youngblood, and that it was Youngblood who had been packaging it for sale. To substantiate this version, Gibson wanted Bashir to testify. Bashir, however, failed to appear, despite having been subpoenaed on two occasions when the jury trial was scheduled. In response, Gibson requested a body attachment, which the court issued. Bashir, however, was never produced at trial.

¶4 After his conviction, Gibson moved for a new trial, alleging ineffective assistance of counsel, or, in the alternative, for sentence modification. Gibson claimed that counsel was ineffective for failing to secure Bashir's testimony, which he contended would have corroborated his version of the events and thus undermined Youngblood's testimony. After a ***Machner***[1] hearing, the trial court denied his requests.

II. ANALYSIS

¶5 Gibson claims that trial counsel was ineffective for failing to secure Bashir's testimony. Specifically, he contends that counsel should have made additional efforts to ensure that Bashir would testify at his trial. We disagree.

¶6 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

¶7 Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 687, 697.

¶8 Gibson argues that he was prejudiced by counsel's alleged failure to secure the presence of Bashir because her testimony would have undermined Youngblood's credibility. He argues that the case essentially involved a credibility determination between Youngblood and him. Consequently, he claims that counsel's failure to produce Bashir's testimony supporting his version of the events prejudiced him. We disagree.

¶9 First, we note that Gibson offers no authority to support his argument that counsel was deficient for failing to further emphasize his request for the body attachment by making an additional request that the body attachment *be executed*. Thus, Gibson has failed to establish that counsel's performance was deficient.

¶10 Moreover, Gibson has failed to establish that he was prejudiced by the absence of Bashir's testimony. Gibson overlooks the fact that he was charged

with possession of a controlled substance with intent to deliver (cocaine), *party to a crime*. Accordingly, the State was required to prove either that Gibson directly committed the crime or that he aided and abetted someone who committed the crime. Here, the undisputed testimony established that Gibson aided Coleman, Youngblood, or both of them, in the possession and delivery of cocaine.

¶11 Gibson testified that he arrived at the apartment at 10:30 a.m., at Coleman's invitation. Gibson stated that approximately thirty minutes after his arrival, Youngblood came to the apartment and they all started smoking marijuana. Bashir arrived forty-five minutes after Youngblood. Gibson stated that Youngblood had some rock cocaine and began packaging it for sale. Gibson claimed that when the police knocked at the door at 3:30 p.m., he first hid a gun in a couch and then answered the door.

¶12 Undisputed testimony also established that Gibson possessed a key to the apartment and that he had $149 in cash and a pager on his person. Police also found $300 in a closet and a photograph of Gibson and another person with packages of a green plant substance in front of them. Gibson also had a shopping list on his person and the items written on it, including packages of incense and blunts, were found in the apartment.

¶13 Given these facts, and given that Youngblood's testimony was not precise about whether Bashir had been present at the time of the drug sales, Bashir's testimony that she did not see any cocaine and did not see Gibson sell or possess any cocaine would not have been significant. Accordingly, we conclude that Gibson has failed to establish that the absence of Bashir's testimony undermined the confidence in the outcome of his trial.

¶14 Gibson next argues that the trial court erred in denying his motion for sentence modification. Specifically, Gibson claims that the trial court erroneously exercised sentencing discretion by sentencing him ninety months in prison, while sentencing Coleman to only fifty-four months in prison. We disagree.

¶15 The principles governing our review of a court's sentencing decision are well established. *See* ***State v. Larsen***, 141 Wis. 2d 412, 415 N.W.2d 535 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. *See* ***id.*** We will not reverse a sentence absent an erroneous exercise of discretion. *See* ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). In reviewing whether a trial court erroneously exercised sentencing discretion, we consider: (1) whether the trial court considered the appropriate sentencing factors; and (2) whether the trial court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. *See* ***Larsen***, 141 Wis. 2d at 427. The weight to be given each factor, however, is within the sentencing court's discretion. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶16 In imposing sentence, the trial court addressed each of the required sentencing factors, noting that this was Gibson's second drug trafficking offense and that it involved a significant amount of drugs. In addition, the court indicated its displeasure with Gibson's refusal to admit to his continued involvement in drug dealing, particularly in light of the fact that this offense occurred within two years of his prior drug offense. The court also recognized Gibson's role in the offense—

that he was the person who possessed the key to the apartment, indicating that he had control of the premises.

¶17 Despite these facts, Gibson argues that his prior drug offense "should have been offset by the fact that Coleman was on probation at the time of [the] offense." We disagree. First, Gibson cites nothing in the record to substantiate his claim. Second, the weight to be given sentencing factors is for the trial court's determination. *See* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984); *see also* ***Drinkwater v. State***, 73 Wis. 2d 674, 680, 245 N.W.2d 664 (1976) (court need not impose equal sentences on accomplices as long as the disparity is based on factors relevant to the sentencing procedure). Accordingly, we conclude that the trial court did not erroneously exercise discretion in denying Gibson's motion for sentence modification.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).