COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1117-CR **Cir. Ct. No. 2002CF6164**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMONTA J. JONES,

DEFENDANT-APPELLANT.

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

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

¶1 WEDEMEYER, P.J. Damonta J. Jones appeals from a judgment entered after he pled no contest to one count of possession, with intent to deliver, a controlled substance (cocaine), contrary to WIS. STAT. § 961.41(1m)(cm)1 (2003-

04).[1] He also appeals from an order denying his postconviction motion. Jones claims the trial court erroneously exercised its discretion when it sentenced him because the court failed to explain why it imposed a sentence longer than that recommended by the prosecutor which, in turn, compromised the validity of the plea agreement. Because the trial court did not erroneously exercise its discretion in sentencing Jones, we affirm.

BACKGROUND

¶2 On October 29, 2002, at 2205 North 16th Street, Milwaukee, Wisconsin, a police officer observed what he believed to be a drug transaction between a pedestrian and Jones, who was sitting in the driver's seat of a car. When the officer attempted to investigate, he observed Jones making furtive movements, as if attempting to hide something. When the officer returned to his car to run a check on Jones, Jones fled on foot. Jones was eventually apprehended, and the officer discovered marijuana and 1.6 grams of crack cocaine, in fifteen corner-cut packages in Jones's car. Jones was subsequently charged.

¶3 Jones agreed to plead no contest to the charge and the State agreed to recommend a twenty-four month sentence with twelve months' confinement followed by twelve months' extended supervision. The defense was free to argue for the sentence it deemed appropriate. At the plea hearing, the plea agreement was explained to the court. The court directly addressed Jones regarding the length of the State's recommendation and whether Jones understood that the court was not bound by the plea negotiations. The court specifically advised Jones that

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

it could impose the maximum, the minimum, or follow the recommendations. Jones responded that he understood. The court accepted the plea.

¶4 At the sentencing hearing, the court again confirmed the terms of the plea agreement and directly addressed Jones again regarding the court's options. It advised that it was not bound to follow the recommendations agreed to in the plea agreement, but could impose the maximum, the minimum, or follow the recommendations. Jones acknowledged that he understood.

¶5 The State then recommended to the court that it impose a twenty-four month sentence with twelve months' initial confinement followed by twelve months' extended supervision. Defense counsel urged the court to follow the recommendation of the presentence writer and put Jones on probation. The trial court then addressed the three primary sentencing factors, indicated that probation was not appropriate under the circumstances of this case and imposed a fifty-month sentence, with twenty-six months' initial confinement, followed by twenty-four months' extended supervision. Jones filed a postconviction motion seeking sentence modification, which was denied. He now appeals.

DISCUSSION

¶6 Jones claims that the trial court did not provide adequate reasons for the length of the sentence imposed and failed to explain why it imposed a sentence greater than that recommended by the State. Jones cites ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, for the proposition that the trial court is obligated to provide a justification for the length of the sentence imposed and the reasons for not imposing a sentence of lesser duration. ***Id.***, ¶24. The State responds that ***Gallion*** does not govern this case because Jones was sentenced before the ***Gallion*** case was decided. We hold that ***Gallion*** does not control here,

and that the trial court did not erroneously exercise its discretion in imposing Jones's sentence.

¶7 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 v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). 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). A defendant claiming that his or her sentence was unwarranted must "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). A sentence will be deemed harsh and excessive only when the sentence is so excessive, unusual, and disproportionate to the offense committed "as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We will not reverse a particular sentence merely because we would have meted out a different sentence. ***State v. Roubik***, 137 Wis. 2d 301, 310-11, 404 N.W.2d 105 (Ct. App. 1987). "'The sentence imposed in each case should call for the minimum amount of custody or confinement [that] is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" ***McCleary***, 49 Wis. 2d at 276 (citation omitted). To properly exercise its discretion, a sentencing court must provide a rational and explainable basis for the sentence. ***Id.*** It must specify the objectives of the sentence on the record which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of

others. *See* WIS JI—CRIMINAL SM-34 (1999). It must identify the general objectives of greatest importance, which may vary from case to case. ***Id.***

¶8 In addition to the three primary sentencing factors, other relevant factors that the circuit court may consider include: (1) the defendant's past record of criminal offenses; (2) any history of undesirable behavior patterns; (3) the defendant's personality, character, and social traits; (4) the presentence investigation; (5) the nature of the crime; (6) the degree of the defendant's culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, educational background, and employment record; (9) the defendant's remorse and cooperativeness; (10) the defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. ***Harris v. State***, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977). The trial court need discuss only the relevant factors in each case. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The weight given to each of the relevant factors is within the court's discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991).

¶9 Jones's complaint is based on the premise that under ***Gallion***, the trial court was required to provide a better explanation for the sentence imposed. Specifically, he argues the trial court should have provided a reason to directly explain the duration of the sentence, the duration of the confinement and supervision components, and should have directly addressed the recommendations in the record to explain why the court was not following those recommendations. Although we agree with Jones that the sentencing dictates of ***McCleary*** were recently reinvigorated in ***Gallion***, we disagree with Jones that ***Gallion*** applies to

his case. ***Gallion*** *in haec verba* applies only to "future cases." *See* ***id.***, 270 Wis. 2d 535, ¶¶8, 76.[2] *See also* ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20 ("While *Gallion* revitalizes sentencing jurisprudence, it does not make any momentous changes."). It is clear from this pronouncement that the "reinvigoration" of ***McCleary*** only applies to sentences imposed after April 15, 2004 (the date ***Gallion*** was handed down). Jones was sentenced on July 23, 2003, and thus ***Gallion*** is inapplicable to him.

¶10 In turning to the sentencing in this case, it is clear that the trial court properly exercised its discretion. The trial court specifically addressed each of the primary factors. In discussing the severity of the crime, the court stated that it was "of an intermediate to slightly higher intermediate nature for this offense." Jones was found to be in possession of 1.6 grams of cocaine, packaged into fifteen corner-cut packages. The court also noted that Jones fled from the officer and had to be chased down and apprehended. The trial court further observed that by entering a "no contest" plea, Jones was accepting responsibility, but to a lower degree.

[2] Jones argues that we should not follow this bright-line standard for prospective application. Rather, he contends that any cases that are not "final," that is, any cases where the sentencing occurred before April 15, 2004, but are still in the direct appeal "pipeline" post-***Gallion*** should be controlled by the principles enunciated in ***Gallion***. We disagree with Jones's suggestion. We acknowledge that the concurrence in ***Gallion*** uses the term "final" and cites "generally" to ***State v. Lagundoye***, 2004 WI 4, ¶12, 268 Wis. 2d 77, 674 N.W.2d 526, which refers to the "pipeline" language. ***Gallion***, 270 Wis. 2d 535, ¶95 (J. Wilcox concurring). This, however, does not convince us that ***Gallion*** should be applied to cases, such as Jones's, where the sentencing occurred before ***Gallion*** was decided, but were still in the "pipeline" post-***Gallion***. Our conclusion is based on a variety of factors. First, the clear language in ***Gallion*** dictates that it applies only to "future cases." Second, the concurrence was emphasizing the importance of applying ***Gallion*** *only* to future cases, and in no way was suggesting that cases in the "pipeline" should receive post-***Gallion*** analysis. Third, as the State points out, our supreme court did not apply ***Gallion***'s "reinvigoration analysis" to Gallion himself. He certainly was still in the "pipeline." Accordingly, we conclude that the supreme court specifically ruled that the ***Gallion*** analysis applies only to cases wherein the sentencing occurred *after* April 15, 2004.

¶11 Next, the trial court discussed Jones's character and previous convictions. Jones served a ten-day sentence for possession of marijuana, and a year later served 150 days for carrying a concealed weapon. The trial court noted Jones's employment history, his attempt to work, his self-employment, his lack of education and need to obtain consistent employment. The court found that Jones's character was "truly mixed" between positive and negative. The court acknowledged that Jones was in a committed relationship and attempted to remain employed, but the court was troubled by the previous convictions and lack of acceptance of responsibility.

¶12 Finally, the trial court addressed the need to protect the community as "intermediate to lower intermediate." The court credited Jones's adherence to the proceedings and the fact that he avoided trouble during the pendency of this case. However, the trial court was concerned that the amount of cocaine and packaging suggested Jones was a "retail" seller of a controlled substance.

¶13 The court then addressed the request by the defense and the presentence author that probation would be an appropriate disposition. The trial court rejected probation as a viable option: "I don't believe, given the amount of cocaine at issue, what was going on here, the nature and number of his previous convictions, that a probation disposition is proper, rather, the Court does believe that a shorter prison term is proper for Mr. Jones."

¶14 The trial court proceeded to sentence Jones to twenty-six months' initial confinement followed by twenty-four months' extended supervision. We cannot state that the trial court's sentencing analysis here constituted an erroneous exercise of discretion under ***McCleary*** and its progeny. The trial court addressed each of the primary factors, analyzed them in light of the particular facts of this

case, and then reached a reasonable determination as to the sentence it believed the analysis called for.

¶15 Jones complains that the trial court did not specifically explain why a fifty-month sentence was more appropriate than the twenty-four months recommended by the prosecutor. Although we can understand Jones's complaint, the bottom line is the sentencing court was not required to engage in such an explanation. *See* ***State v. Grindemann***, 2002 WI App 106, ¶28, 255 Wis. 2d 632, 648 N.W.2d 507 (as long as the sentencing court explicates a rationale for the sentence imposed, it is not required to specify why it imposed a sentence substantially in excess of the plea agreement). Here, the trial court's rationale was set forth for each primary factor. Based on those factors, it concluded that the State's recommendation was not long enough and imposed a sentence of greater duration. Indeed, the trial court could have imposed the maximum potential penalty of fifteen years for this crime.

¶16 Moreover, the record demonstrates that the trial court specifically advised Jones on two occasions that it was not bound by the recommendations agreed to in the plea agreement. Jones acknowledged that he understood the trial court was free to sentence him to the maximum potential penalty. Although it certainly would have been preferable for the trial court to directly state why it did not follow the State's sentencing recommendation, the law did not require the trial court to do so. As the trial court stated in the order denying the postconviction motion: "Just because the Court did not follow the plea negotiations does not mean that the Court did not consider them." It is clear from the record that the trial court was aware of the plea agreement and the sentencing recommendation of the State. Further, it can reasonably be inferred that the trial court believed the length of the State's recommendation would not satisfy the primary factors, which

were each specially addressed and explained by the trial court before it imposed sentence. Thus, based on the foregoing, we cannot conclude that the trial court's failure to specifically explain why it was not imposing the State's sentencing recommendation constituted an erroneous exercise of discretion.

¶17 Jones also complains that the trial court failed to sufficiently explain why probation was not appropriate. We disagree. The sentencing transcript demonstrates that the trial court specifically addressed probation and the reason why it could not be ordered in this case.

¶18 Finally, Jones argues that the trial court undermined the plea-agreement process by depriving Jones of the benefit he bargained for when it failed to directly explain why it was not imposing the sentence recommended by the State. We disagree.

¶19 The record demonstrates that the trial court expressly recognized the sentence recommended by the State. Jones concedes that the trial court noted this fact at the outset of the sentencing hearing. The trial court stated that it considered the terms of the plea agreement, including the sentencing recommendation by the State. Based on its analysis, however, the trial court did not conclude that the State's recommendation would be sufficient based on the primary sentencing factors. Jones argues that the trial court should have specifically stated: "'I conclude that the 12 months recommended by the prosecutor is insufficient because…'" and "'I think you need to be confined for at least 26 months, and supervised for at least 24 months because…[.]'" Without those statements, Jones claims there is an insufficient link between the primary factors analysis and the imposition of the ultimate sentence, and the plea agreement was undermined.

¶20 Although we do not disagree with Jones that such specific statements would offer additional support for the trial court's ultimate sentence, the law did not require the trial court to make such an explanation. *See* ***Grindemann***, 255 Wis. 2d 632, ¶28. Accordingly, Jones's argument to the contrary fails. Here, proper sentencing discretion was exercised. Moreover, based on ***Grindemann***, it was unreasonable for Jones to expect the trial court to specifically explain why it did not follow the State's sentencing recommendation. That was not part of the benefit of the bargain.

¶21 Jones knew the trial court was not bound to follow the State's recommendation. He acknowledged twice during direct colloquy with the court, and once on the written plea questionnaire, that he knew the trial court was not obligated to follow the plea agreement. The trial court considered the terms of the plea agreement, engaged in an analysis of the primary sentencing factors and offered an explanation as to how each factor related to Jones's case. Then, based on that analysis, the trial court imposed the sentence it believed would adequately address that analysis. The trial court's sentencing did not constitute an erroneous exercise of discretion. Jones was not entitled to more.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.