

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 20, 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. 2005AP973-CR

Cir. Ct. No. 2004CM51

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES R. WOLFE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County:
MARK A. MANGERSON, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ On November 23, 2004, as part of a plea agreement, James Wolfe pled guilty to misdemeanor bail jumping as a repeater, contrary to WIS. STAT. §§ 946.49(1)(a) and 939.62(1)(a). The court imposed and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

stayed the maximum sentence of two years. Wolfe appeals arguing the trial court erred by imposing the maximum sentence.

Background

¶2 Wolfe was initially charged with attempting to obtain a prescription drug by fraud, contrary to WIS. STAT. § 450.11(7)(a), and obstructing an officer as a repeater, contrary to WIS. STAT. §§ 946.41(1) and 939.62(1)(a). At Wolfe's initial appearance, the court authorized a \$1,500 signature bond. Wolfe failed to appear for a status conference on June 22, 2004, at which point his attorney stated that he was unaware of Wolfe's whereabouts. The judge stated that he would issue a warrant. However, the warrant was not issued because Wolfe appeared after the status conference and the parties agreed to an adjournment. The case was later set for a jury trial on November 5, 2004, and Wolfe again was absent. The court issued a warrant for Wolfe's arrest.

¶3 On November 23, 2004, pursuant to a plea agreement, the prescription drug count was dismissed and the obstructing count was amended to misdemeanor bail jumping as a repeater. The parties stipulated that Wolfe had been convicted of three misdemeanors in the last five years, and Wolfe pled no contest to the enhanced bail jumping charge. The court placed Wolfe on probation for two years and imposed and stayed a two-year sentence, consisting of fourteen months' initial confinement and ten months' extended supervision. Two years was the maximum sentence for misdemeanor bail jumping as a repeater. *See* WIS. STAT. § 939.62(1)(a).

Discussion

¶4 Wolfe argues that the court failed to exercise its discretion in sentencing him to the maximum sentence of two years. He argues that the court's statements at sentencing were directed toward its decision to impose and stay a sentence, but not toward the length of the sentence. Wolfe further argues that there is no independent basis in the record for a two-year sentence. This court disagrees and therefore affirms.

¶5 Sentencing is a discretionary act and is reviewed in the same manner as other discretionary acts. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). An appellate court will only interfere with a sentencing decision where the circuit court erroneously exercised its discretion. *Id.* at 278. Such error can be found where a sentencing court fails to exercise any discretion or where such discretion is exercised without an explained judicial reasoning process. *Id.* A sentencing judge should state the facts upon which a judgment is predicated and the reasons for that conclusion. *Id.* at 281. If the facts are fairly inferable from the record, and the reasons indicate consideration of the relevant factors, a sentence should ordinarily be affirmed. *Id.* The *McCleary* holding was recently reaffirmed in *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197.

¶6 In *McCleary*, the twenty-two-year-old defendant, Richard McCleary, was charged with forging and uttering a fifty-dollar check. *McCleary*, 49 Wis. 2d at 266-67. McCleary's previous record included only traffic violations. *Id.* In pronouncing sentence, the judge read portions of a presentence report into the record, which noted that McCleary's political ideology influenced his propensity to violate the law. *Id.* at 268. The report noted that McCleary's ideals were not compatible with the laws of society, and he had no desire to change. *Id.* The

court sentenced McCleary to the maximum sentence of ten years' imprisonment, which it later changed to nine years plus six months already served. *Id.* at 268, 270.

¶7 Our supreme court concluded that the near maximum sentence was not supported by the facts in the record. *Id.* at 282. The court noted, among other things, that McCleary was a first-time offender. *Id.* at 283. The court also noted that the probation officer who wrote the presentence report and commented on McCleary's political ideology was new and inexperienced, having no prior experience in probation work. *Id.*

¶8 Wolfe argues that, as in *McCleary*, there are no facts in the record that support imposing the maximum sentence. The record, however, indicates that the court relied heavily upon Wolfe's prior criminal history. In *Brown v. State*, 52 Wis. 2d 496, 190 N.W.2d 497 (1971), the facts were very similar to those in *McCleary*: the defendant was charged with forgery and was sentenced to ten years' imprisonment. *See id.* at 497. However, the defendant also had a criminal history. *Id.* In upholding the ten-year sentence and distinguishing *McCleary*, our supreme court stated, "McCleary's forgery was his first offense – therein lies the difference." *Id.* at 500. As in *Brown*, Wolfe has a significant criminal history.

¶9 At Wolfe's sentencing hearing, the prosecutor listed Wolfe's nine prior criminal convictions, dating back as far as 1986. Wolfe argues that these should not be considered because no evidence of these convictions was offered into the record at sentencing. This court disagrees. When describing Wolfe's prior convictions, the prosecutor was referring to a teletype provided by the Crime Information Bureau. This teletype was attached to the complaint and was therefore already in the record. Wolfe did not object to the teletype at, or before,

sentencing. This court's review of the record indicates that all nine convictions mentioned by the prosecutor are reflected in the teletype. Therefore, the court was justified in considering Wolfe's prior convictions.

¶10 Wolfe also argues that the court's reasoning was not directed toward the length of sentence, but rather, toward the decision to impose and stay, rather than withhold, a sentence. This court disagrees with Wolfe's characterization of the circuit court's reasoning. While the circuit court discussed staying the sentence and giving Wolfe probation, there is no indication that it was considering withholding, as opposed to imposing and staying, a sentence. Wolfe bases his argument on court comments, such as the following:

I'm going to place you on probation and if you steal more things, if you get involved with illegal possession of a controlled substance, any criminal activity, you will go right to prison, and I think I can justify that based on your history and the fact that you have done jail in the past and jail hasn't stopped you from reoffending.

Contrary to Wolfe's argument, this language explains why Wolfe received a stayed prison sentence. Further, to the extent that this language can be read to explain why the court did not withhold a sentence, it does not support Wolfe's overall argument. If this language is read as Wolfe argues, then it suggests that because Wolfe's conduct and criminal history were serious enough to warrant a maximum sentence, there was no need to withhold a sentence because the manner in which Wolfe violated his probation would not affect the outcome. Both interpretations indicate that the court's two-year sentence was based upon Wolfe's criminal history and propensity to reoffend.

¶11 Altogether, the record indicates that the court exercised its discretion in pronouncing Wolfe's sentence. The court considered Wolfe's prior criminal

behavior in reaching its decision. As in *Brown*, Wolfe’s criminal history distinguishes his case from *McCleary*. As the court stated to Wolfe, “the bottom line is, you have been involved in the criminal court for a number of years, we have tried jail, it hasn’t worked” Further, Wolfe’s criminal history is reflected in the record and is sufficient to justify a two-year sentence. Therefore, the court did not erroneously exercise its sentencing discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

