

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 8, 2007**

David R. Schanker  
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. 2005AP1600-CR**

**Cir. Ct. No. 2003CF4869**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TERRY R. OWENS,**

**DEFENDANT-APPELLANT.**

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

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

¶1 PER CURIAM. Terry R. Owens appeals from an amended judgment of conviction for delivering cocaine, and from that part of a

postconviction order partially denying his sentence modification motion.<sup>1</sup> The issue is whether Owens is entitled to sentence modification for the alleged absence of explanations by the trial court for the sentence it imposed, for imposing a much lengthier sentence on Owens than on his allegedly more culpable co-defendant, and to correct the trial court's alleged misunderstanding of Owens's admitted role in the offense. We conclude that the trial court's explanation, coupled with the independent review doctrine, justifies the two-year confinement period and six-year total sentence for a repeat offender who facilitated a drug sale. Therefore, we affirm.

¶2 Owens pled guilty to delivering no more than one gram of cocaine as a party to the crime, in violation of WIS. STAT. §§ 961.41(1)(cm)1g. (created Feb. 1, 2003) and 939.05 (2003-04). The trial court imposed a six-year sentence to run consecutive to any other sentence, comprised of two- and four-year respective periods of initial confinement and extended supervision. Owens moved for sentence modification, seeking: (1) sentence credit; (2) a re-determination of his eligibility to participate in the Earned Release Program; and (3) a more lenient sentence in the absence of an explanation pursuant to our holdings in *State v. Gallion*, 2004 WI 42, ¶46, 270 Wis. 2d 535, 678 N.W.2d 197 and *McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). The trial court granted that part of the motion seeking sentence credit, and denied the remainder of the motion, providing postconviction explanations of its decisions on Owens's ineligibility for the Earned Release Program and for the duration of his sentence.

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<sup>1</sup> Owens filed a postconviction motion pursuant to WIS. STAT. RULE 809.30 (2003-04) for sentence modification and sentence credit. The trial court granted that part of the motion seeking sentence credit and amended the judgment accordingly. Consequently, Owens appealed from the judgment, the postconviction order, and the amended judgment.

On appeal, Owens limits his challenge to the third basis, namely that the trial court allegedly failed to explain the duration of the sentence it imposed, and allegedly misunderstood Owens's remarks to the presentence investigator as attempting to minimize his culpability.

¶3 When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

*State v. Lechner*, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶4 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. See *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court assigns to each factor is a discretionary determination. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. See *Larsen*, 141 Wis. 2d at 426-28. The trial court should also explain how the confinement term was the minimum amount of custody necessary to achieve the sentencing considerations ("minimum custody standard"). See *State v. Gallion*, 270 Wis. 2d 535, ¶23. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶5 Owens’s specific complaints were that the trial court failed to explain the duration of the component parts of the sentence, how the confinement term met the minimum custody standard, why it imposed a lengthier sentence on him than on his allegedly more culpable co-defendant, and to afford the trial court the opportunity to correct its misunderstanding of Owens’s admitted role in the commission of the offense. The parties’ sentencing presentations, the facts of record that we review in applying the independent appellate review doctrine, and the trial court’s postconviction reasoning, considered with its remarks at sentencing, render the sentence sufficient to withstand Owens’s challenges.

¶6 Preliminarily, *Gallion* “reinvigorate[d]” and “reaffirm[ed]” the well-established sentencing standards; however, it did not change those standards. *See Gallion*, 270 Wis. 2d 535, ¶¶4, 8; *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. Furthermore, *Gallion* refused to address the application of the independent appellate review doctrine. *See Gallion*, 270 Wis. 2d 535, ¶18 n.6. Stated otherwise, *Gallion* did not change the highly deferential standard of review for sentencing decisions. *See id.*, ¶18.

¶7 The trial court imposed a six-year sentence that included a two-year confinement component for an offense carrying a ten-year maximum potential penalty (with a five-year maximum confinement component). *See* WIS. STAT. §§ 961.41(1)(cm)1g. (created Feb. 1, 2003); 939.50(3)(g) (created Feb. 1, 2003); 973.01(2)(b)7. (amended Feb. 1, 2003). This sentence was consistent with those recommended by the presentence investigator and the prosecutor.<sup>2</sup> The trial court

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<sup>2</sup> The presentence investigator recommended a sentence in the range of four to six years, with a confinement component in the one- to two-year range. The prosecutor recommended a six-year sentence with a two-year confinement component.

recited the three primary sentencing factors; its focus, however, was on Owens's character. It was very troubled by Owens's prior record, which it characterized as "horrible." It recited some of the offenses for which Owens was convicted and the multiple instances that his probation had been revoked. It was mindful that Owens facilitated this drug transaction while on supervised status for committing another offense. In its postconviction order, the trial court explained that it was "heavily" influenced by Owens's repeated failures while on supervision.

¶8 The trial court was not required to state precisely why it imposed a six-year sentence, including a two-year period of confinement. *See Gallion*, 270 Wis. 2d 535, ¶49 ("the exercise of discretion does not lend itself to mathematical precision"); *see also State v. Ramuta*, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483 ("no appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion"). Although it would have been preferable to have commented during sentencing on the severity of cocaine trafficking and its devastating impact on the community, in its postconviction order, the trial court commented that this offense was "very serious because [Owens] was the one who arranged for the sale of the drugs and brought the drug dealer to the buyer. Without the intervention of [Owens], there would have been no deal." Nevertheless, there is ample support in the record that an offense involving cocaine is serious and warrants punishment to protect the community from the drug trafficker. Here, it was Owens's "***substantial***" record, and repeated failures on supervision that "weighed heavily with the court."<sup>3</sup> That was obvious at sentencing, and from the trial court's postconviction order.

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<sup>3</sup> The trial court emphasized "substantial" by bolding and italicizing it in its postconviction order.

¶9 Owens also criticizes the trial court for failing to explain how its sentence met the minimum custody standard. The trial court’s overriding concerns were Owens’s “horrible” record, and his repeated failures on supervision, such as his having committed this offense while on supervision for another offense. The trial court explained that Owens’s “prior record means that [he is] not a candidate for probation. [The trial court] think[s] that this is a prison sentence ... case.” It also “th[ought] that [Owens’s] drug addiction can best be dealt with in a confined setting. Therefore, [the trial court is] going to follow the recommendation of the state.” These are reasonable reasons that a two-year confinement component meets the minimum custody standard in this case.

¶10 Owens also contends that the trial court misunderstood the facts and Owens’s role in the incident as evidenced by the disparately harsh sentence he received, as compared to that of his accomplice.

Disparity alone does not amount to a denial of equal protection. The sentence imposed upon the defendant was based upon relevant factors with no improper considerations on the part of the trial court. The sentence was not excessive. “Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one.”

*Ocanas*, 70 Wis. 2d at 189 (footnote omitted). The trial court is not obliged to consider the sentence imposed on an accomplice. *See id.* at 188-89.

¶11 Owens’s accomplice received a two-year sentence divided equally into two one-year periods of initial confinement and extended supervision. The prosecutor emphasized, however, “that Mr. Owens [wa]s the primary actor in terms of having arranged the transaction ... thereby scripting the drug deal. [Owens’s accomplice] also had no prior record and [Owens,] to [the prosecutor’s] understanding[,] had at least eight prior convictions.” The prosecutor then

remarked that the presentence investigator noted that Owens had seventeen convictions including “a lot of them are serious felony type offenses” including burglaries, batteries, “violent type offenses or weapons offenses.” At sentencing, the trial court did not expressly refer to the sentence imposed on Owens’s accomplice, nor was it required to. *See id.* Nevertheless, there were ample independent bases to distinguish Owens from his accomplice including their respective degrees of culpability and their prior records (or the lack of a prior record in the instance of Owens’s accomplice).

¶12 Owens’s final complaint was that the trial court misunderstood his degree of culpability, and unfairly punished him for allegedly minimizing his role in this incident to the presentence investigator. The trial court in its postconviction order,

found [Owens]’s conduct to be very serious because he was the one who arranged for the sale of the drugs and brought the drug dealer to the buyer. Without the intervention of [Owens], there would have been no deal. The court did not believe [Owens] was taking responsibility for his actions and was frankly disturbed by his minimizing of responsibility.

To demonstrate how accurately he described the incident, Owens urges us to review the complaint’s allegations to note that they are consistent with his description of the incident to the presentence investigator.

¶13 The trial court did not rely on a factual inaccuracy; it interpreted the significance of Owens’s role in the incident differently than Owens did. Owens contends that he was on his porch when he was approached by an undercover officer seeking to buy cocaine, and that he merely arranged the transaction between the undercover officer and Owens’s accomplice. The trial court interpreted the allegations in the complaint as urged by the prosecutor: that

Owens had arranged the transaction. Moreover, the trial court stated at sentencing and restated in its postconviction order, that its principal concerns were Owens’s “horrible” and “*substantial*” record, and his repeated failures on supervision.<sup>4</sup> The trial court’s interpretation was supported by the allegations; it was not inaccurate. Consequently, Owens’s disagreement with the trial court’s reasonable characterization of the incident does not warrant sentence modification.

¶14 We consequently conclude that the trial court’s sentencing comments, coupled with its postconviction explanation and our independent review of the record are sufficient to satisfy the *Gallion* and *McCleary* requirements. See *Gallion*, 270 Wis. 2d 535, ¶49 (“the exercise of discretion does not lend itself to mathematical precision”); *McCleary*, 49 Wis. 2d at 277-78. The trial court is not required to consider, much less explain, why it imposed different sentences on co-defendants who committed the same crime. See *Ocanas*, 70 Wis. 2d at 187-89. The trial court characterized Owens’s culpability more seriously than Owens did. That reasonable difference in characterization,

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<sup>4</sup> Following the trial court’s characterization of Owens as having minimized his responsibility, the trial court continued,

[m]ore important was [Owens]’s *substantial* prior record, which included violent offenses and weapons offenses. The court was not impressed with his inability to conform his conduct while on supervision with the Department of Corrections (testing positive for drug use, absconding, committing new offenses, violating the rules of supervision, failing to attend programs) or the multiple revocations of his supervision, and the fact that he was on supervision when he committed the instant offense weighed heavily with the court. These factors were articulated by the court in support of its sentencing decision and properly satisfy both the *McCleary* and *Gallion* criteria.

(Underlining added; bold and italics in original.)



however, was interpretive not inaccurate, and does not warrant sentence modification.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

