

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 20, 2011

A. John Voelker
Acting 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. 2011AP934-CR

Cir. Ct. No. 2010CM5362

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON D. SPEARS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Reversed and cause remanded for resentencing.*

¶1 KESSLER, J.¹ Jason D. Spears appeals his judgment of conviction and an order denying his motion to modify sentence. Spears argues that the trial court erroneously exercised its discretion by failing to identify how the gravity of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

his offense, his character and rehabilitative needs and the need to protect the public warranted consecutive sentences. Because the circuit court's sentencing statements and postconviction order do not demonstrate compliance with the requirements of *State v. Gallion*, 2004 WI 42, ¶¶44-49, 270 Wis. 2d 535, 678 N.W.2d 197, and *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971), we must reverse and remand for resentencing.

BACKGROUND

¶2 The underlying facts are not complicated. Spears and a companion stole electronic equipment from a locked parked car, triggering the car's alarm. The owner of the vehicle heard the alarm, noticed a truck moving near her car, and then pursued the truck. The owner of the vehicle called the police during her pursuit and Spears and his companion were promptly captured by police. Pieces of the stolen property were still in the truck in which Spears was apprehended. Spears was charged with entry into a locked vehicle, criminal damage to property, and theft of movable property, all as a party to a crime. Spears signed a plea questionnaire/waiver of rights form, indicating that he intended to plead guilty to criminal damage to property and theft of movable property, both as a party to a crime.² The form indicates that the State would recommend six months of incarceration and twelve months of extended supervision consecutive for each charge, consecutive to each other, and consecutive to any other sentence.

¶3 Spears ultimately pled guilty to the two charges and was sentenced to two consecutive sentences of six months each in the House of Correction. These sentences were consecutive to each other and to the sentence he was serving

² The entry into a locked vehicle charge was dropped and read-in.

at the time of sentencing.³ Spears moved to modify the sentence imposed in this case alleging that the sentence had not been adequately explained as required by *Gallion* and *McCleary*. The circuit court denied the motion. This appeal follows.

DISCUSSION

¶4 Our review to determine whether a circuit court has properly sentenced a defendant is limited to determining if the circuit court’s discretion was erroneously exercised. See *McCleary*, 49 Wis. 2d at 278. There is an erroneous exercise of discretion when sentencing discretion is based on “irrelevant or improper factors.” *Id.* In *Gallion*, our supreme court reminded us that judges are required “to explain the reasons for the particular sentence they impose” and “to provide a ‘rational and explainable basis’ for the sentence.” *Id.*, 270 Wis. 2d 535, ¶39 (citation omitted). When such an explanation is not provided in the record, discretion is not properly exercised. See *id.*, ¶38 (circuit court decisions cannot be reviewed by an appellate court unless the reasons for the decisions are available for examination).

¶5 The State concedes that the sentencing explanation does not establish the proper exercise of sentencing discretion required by *Gallion* and *McCleary* and that Spears is thus entitled to be resentenced. At sentencing, the circuit court began by identifying the factors to be considered in its decision: the gravity of the offense, the character of the defendant, and the need to protect the public. The court then discussed Spears’s criminal background:

³ At the time of this offense, Spears was serving a period of probation in relation to a two-year sentence for a prior offense which had been imposed and stayed with probation imposed. His probation was revoked, and Spears began serving the previously imposed two-year sentence before being sentenced for this offense.

You have a record as a juvenile. You have in 2002, juvenile entry into a locked coin box.

You have as an adult, a conviction for resisting, obstructing in [2009], possession of a controlled substance. I don't recall what it was for, but I'm assuming it was THC, and then the [2009] case, hit-and-run, causing great bodily harm[.]

You're going to be serving two years in prison, and you've already started that prison sentence as you've been revoked, and then you will have two years extended supervision.

¶6 The court moved on to discuss the conditions of Spears's original probation:

By starting with the second factor, the character of the defendant, because I am going to rely on some of the conditions you have for your extended supervision in the [2009] case. I think those conditions are ample, and I am going to talk about the length of sentence I'm going to give you and how it's to be served, but in terms of extra probation, I really find it's not necessary in this case, and the terms of condition in the [2009] case are sufficient to meet your many needs.

I asked the question about the CJRC [Community Justice Resource Center] because I was interested to see if that was a possibility, but ... [i]t is not likely that you are going to be eligible to have any CJRC ability or ability to have any part of the sentence at the CJRC.

¶7 Finally, the court discussed the offenses to which Spears pled:

The court looks at the criminal damage to property and the theft, Counts 2 and Counts 3. The court considers the facts of the entry into locked vehicle in Count 1.

Criminal damage to property is a classic property crime. We spend a lot of time talking about the elements and what you did as an actor to be involved in this, and now I have up to two years to sentence you. Likewise, in Count 3, theft, that's stealing some property. That's pretty obvious as to what happened there. We talked at length about those elements, and what it is that you did to be involved.

You're going to be serving two years in jail on the [2009] case, and while the [S]tate's recommendation involved a prison sentence and the like and there are various sort of concomitance that go with that earned release, risk reduction, boot camp, things like that, I'm going to let the prison authorities on that case deal with you on that case, and I'm going to protect the public with this following sentence.

¶8 Without explaining its reasoning, the circuit court sentenced Spears to two consecutive six month terms in the House of Correction, which were also consecutive to the two-year sentence from Spears's earlier offense. Spears moved for sentence modification or resentencing. In the Decision and Order denying the motion, the circuit court offered the following additional explanation for the sentence imposed:

The defendant was a repeat offender, was on probation when he committed the current offenses, and had an unfavorable criminal history. The court considered the nature of the offense, the defendant's particular character ... and the need to protect the public....

The State recommended 18 months of consecutive prison time on each count. The court imposed two six month terms, reducing his exposure significantly from what the State sought. A concurrent sentence in this case would have unduly depreciated the seriousness of the offenses. The court perceives no abuse of sentencing discretion in this case and declines to modify [the] sentence in any respect.

¶9 Our supreme court in *Gallion* provided sentencing courts with a checklist of various factors to consider when making sentencing decisions and noted that “[c]ourts are to identify the general objectives of greatest importance” when sentencing. *See id.*, 270 Wis. 2d 535, ¶41. “Courts are to describe the facts relevant to these objectives. Courts must explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives.” *Id.*, ¶42. “Courts must also identify the factors that were considered

in arriving at the sentence and indicate how those factors fit the objectives and influence the decision.” *Id.*, ¶43. In each case, the sentence imposed shall “call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.”” *Id.*, ¶44 (citation omitted).

¶10 The *Gallion* court also reminded us of many detailed factors the trial court *may* take into account when exercising discretion. These include:

(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant’s personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant’s culpability; (7) defendant’s demeanor at trial; (8) defendant’s age, educational background and employment record; (9) defendant’s remorse, repentance and cooperativeness; (10) defendant’s need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. Additional factors have been recognized as appropriate considerations and the effect of the crime on the victim.

Id., ¶43 n.11 (citations and one set of quotation marks omitted).

¶11 Here, the circuit court did not explain how Spears’s criminal history impacted its sentencing decision, or what other factors it considered in arriving at the sentence. We are left to guess why the circuit court rejected probation.⁴ Nor did the circuit court explain how the sentence imposed related to its statement that it was going to protect the public, or how the sentence would affect Spears’s rehabilitative needs.

⁴ The fact that Spears failed previously on probation was obviously known to the circuit court. The court mentioned several times the fact that Spears was now serving a sentence because his probation had been revoked. A prior failure on probation, especially when that failure and this criminal activity arise from the same conduct, could be an appropriate factor to consider in rejecting probation. The problem here is that the record does not connect those dots.

¶12 In its Decision and Order denying the motion for sentence modification or resentencing, rather than explain the rationale behind the particular sentence given, the circuit court noted that it “reduc[ed] [Spears’s] exposure significantly from what the State sought.” While defense attorneys may well consider such reduction a victory of sorts, we are unaware of any Wisconsin case that has ever held that imposing a lesser sentence than the State’s recommendation is sufficient to show that discretion was properly exercised.

¶13 We are cognizant of the very high volume of cases and the resulting time pressures faced by busy urban courts. We nonetheless are compelled by existing law to require more of an explanation of the reasoning process used by the circuit court at sentencing than can be found in the transcript and the postconviction Decision and Order in this case. Consequently, we must reverse and remand for resentencing consistent with the requirements of *Gallion* and *McCleary*.

By the Court.—Judgment and order reversed and cause remanded for resentencing.

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

