COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3363-CR **Cir. Ct. No. 02CF005272**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONSHEA L. TROTTER,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Donshea L. Trotter appeals from the judgment of conviction entered against him after a jury trial and the order denying his motion for postconviction relief. He argues that the circuit court erred when sentencing him by considering his refusal to accept responsibility for the crime charged. Because we conclude that the circuit court did not impermissibly consider

Trotter's refusal to accept responsibility for his actions, we affirm the judgment and order of the circuit court.

¶2 Trotter was charged with delivering five grams or less of cocaine. He was convicted after a jury trial and the court sentenced him to forty months of initial confinement and twenty-four months of extended supervision. Trotter brought a motion for postconviction relief asserting that the court impermissibly considered Trotter's failure to incriminate himself when fashioning the sentence, and that the court did not adequately explain its reasons for the sentence. The circuit court denied the motion and Trotter appeals.

¶3 Trotter once again asserts that the circuit court impermissibly considered his refusal to accept responsibility for the crime of which he was convicted. Trotter relies on certain statements the court made when it sentenced him. He argues that one comment in particular establishes that the court erred when sentencing him. During the sentencing hearing, the circuit court stated: "One could reduce, Mr. Trotter, all of the criminal justice system to a basic equation, and that is an individual taking responsibility for their actions or not doing so."

¶4 Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. ***Id.*** The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender, and the need for the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The discretion of the sentencing judge

must be exercised on a rational and explainable basis. ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶5 When a defendant refuses to admit guilt, "that fact alone cannot be used to justify incarceration rather than probation." ***State v. Scales***, 64 Wis. 2d 485, 497, 219 N.W.2d 286 (1974). "[A] defendant must not be subject to greater penalties for having exercised his [or her] right against self-incrimination." ***State v. Baldwin***, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981). The trial court does, however, have an obligation to consider such factors as "the defendant's demeanor, his [or her] need for rehabilitation, and the extent to which the public might be endangered.… A defendant's attitude toward the crime may well be relevant in considering these things." ***Id.*** (citation omitted). The question, therefore, becomes whether the trial court gave "undue or overwhelming weight" to any one factor. *See* ***id.*** We conclude that it did not.

¶6 In this case, the sentencing court considered all the appropriate factors. First it considered the nature of the offense and found that the crime was "of an intermediate offense severity." Next, the court considered Trotter's character, specifically his age, his previous convictions, his level of maturity, his family background and upbringing, his education and reading ability, and his refusal to accept responsibility for his actions. The court also considered the need to protect the community, specifically noting that Trotter's previous adjustment to probation supervision had been poor. Based on this record, we conclude that the sentencing court considered the appropriate factors, and did not give undue weight to the fact that Trotter did not accept responsibility for the crime.

¶7 Trotter also argues that the court did not adequately explain the reasons for the length of confinement it imposed, citing ***Gallion***, 270 Wis. 2d 535, ¶28. We disagree. The State first argues that ***Gallion*** does not apply to this case. Without deciding whether it does apply, we agree with the State that the ***Gallion*** criteria were met. The supreme court in ***Gallion*** did not require that sentencing courts explain sentences with "mathematical precision." ***Id.***, ¶49. The sentencing court here considered the range of sentences suggested by the State and the PSI writer. Further, the court explained why it rejected Trotter's suggestion of probation. We conclude that the court adequately explained its exercise of discretion. We affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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