

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 4, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2012AP393-CR**

**Cir. Ct. No. 2009CF459**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CORTEZ LORENZO TOLIVER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Cortez Lorenzo Toliver appeals a circuit court judgment convicting him of first-degree reckless injury and attempted robbery with threat of force, both involving the use of a dangerous weapon. He also

appeals the order denying his motion for postconviction relief. Toliver was sixteen years old at the time of the offenses. He argues that the circuit court erroneously exercised its discretion in denying his request for a “reverse waiver” into juvenile court. He also argues that the court erroneously exercised its discretion at sentencing. We reject Toliver’s arguments and affirm.

## BACKGROUND

¶2 According to the criminal complaint, the victim of Toliver’s crimes had been shooting dice with Toliver and won most of Toliver’s money. Toliver told the victim he needed the money back, but the victim refused this request. Toliver produced a handgun and “racked the slide,” which manually loads the chamber and cocks a semi-automatic pistol. The victim told Toliver that Toliver could have the money. The victim then hesitated for a moment and, believing that Toliver would not shoot, attempted to run away. Toliver shot the victim in the middle of the back as the victim ran from him, then fled the scene. The victim was permanently paralyzed from the waist down as a result of the shooting.

¶3 The State initially charged Toliver with attempted first-degree intentional homicide and possession of a dangerous weapon by a person under eighteen. Based on the homicide charge, Toliver was subject to original adult (criminal) court jurisdiction. *See* WIS. STAT. §§ 970.032, 938.183(1)(am), and 940.01 (2011-12).<sup>1</sup> However, Toliver requested a “reverse waiver” into juvenile court pursuant to § 970.032(2). The court denied that request. Pursuant to a plea agreement, Toliver then pled guilty to charges of first-degree reckless injury and

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

attempted robbery with threat of force, both involving the use of a dangerous weapon.

¶4 The maximum prison sentence for the reckless injury charge was twenty years of initial confinement followed by ten years of extended supervision. The maximum prison sentence for the attempted robbery charge was ten years of initial confinement followed by two and one-half years of extended supervision. The court imposed the maximum sentence on the reckless injury charge. On the attempted robbery charge, the court imposed a consecutive sentence of seven years of initial confinement and two and one-half years of extended supervision.

¶5 We reference additional facts as needed in our discussion below.

## DISCUSSION

¶6 As indicated above, Toliver argues that the circuit court erroneously exercised its discretion in denying his request for reverse waiver and erroneously exercised its discretion at sentencing. We address each argument in separate sections below.<sup>2</sup>

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<sup>2</sup> The State argues, in part, that Toliver's guilty plea waived his reverse waiver argument. It points to case law stating that a guilty plea waives all "non-jurisdictional" defects. *See State v. Schroeder*, 224 Wis. 2d 706, 711, 593 N.W.2d 76 (Ct. App. 1999). Assuming, without deciding, that the guilty-plea-waiver rule could be appropriate to apply in a reverse waiver context, we choose to address Toliver's reverse waiver argument on the merits. *See State v. Riekkoff*, 112 Wis. 2d 119, 123-24, 332 N.W.2d 744 (1983) (the guilty-plea-waiver rule does not deprive appellate courts of subject matter jurisdiction; it is a rule of judicial administration, not judicial power).

### ***A. Reverse Waiver***

¶7 Criminal courts have “exclusive original jurisdiction” over juveniles alleged to have committed certain qualifying offenses, including attempted first-degree intentional homicide. *See* WIS. STAT. §§ 970.032(1), 938.183(1)(am), and 940.01. In such cases, if the circuit court determines after a preliminary examination that there is probable cause to believe that the juvenile has committed the qualifying offense of which the juvenile is accused, the court then determines whether to retain jurisdiction or to instead transfer jurisdiction to juvenile court, in what is referred to as “reverse waiver.” *See* § 970.032(1) and (2); *State v. Kleser*, 2010 WI 88, ¶¶1, 57, 67, 328 Wis. 2d 42, 786 N.W.2d 144. The court must retain criminal court jurisdiction over the juvenile “unless the juvenile proves by a preponderance of the evidence all of the following:”

(a) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.

(b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.

(c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183(1) (a), (am), (ar), (b) or (c), whichever is applicable.

§ 970.032(2). In other words, the juvenile has the burden to show that a reverse waiver is appropriate, under these three factors.

¶8 As Toliver recognizes, we review a circuit court’s decision on reverse waiver for an erroneous exercise of discretion. *See Kleser*, 328 Wis. 2d 42, ¶37. We affirm a discretionary decision if the circuit court “examined the

relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Id.*

¶9 Thus, the question here is not whether we agree with the circuit court’s reverse waiver decision or whether we would have made the same decision. *See State v. Mainiero*, 189 Wis. 2d 80, 94-95, 525 N.W.2d 304 (Ct. App. 1994). Rather, the question is limited to whether that court in fact exercised its discretion and did so reasonably. *See id.*

¶10 Toliver does not dispute that the circuit court considered each of the three required factors and provided reasoning relevant to each. Rather, he argues that the circuit court ignored certain evidence and made inaccurate fact findings. We are not persuaded. When we scrutinize Toliver’s more specific arguments and compare them to the court’s reasoning, it is apparent that Toliver’s arguments boil down to an attempt to have this court reweigh the evidence. This is not a persuasive approach under our standard of review.

¶11 For example, Toliver argues that the circuit court erred in applying the first factor, whether he could receive adequate treatment in a criminal facility, because the court ignored evidence that the programs and staff in such facilities are less extensive than in the juvenile justice system. However, the court’s decision shows that it recognized potential program differences between the two systems and concluded that, despite those differences, Toliver could receive adequate treatment in the criminal system. The court relied on evidence that the criminal prison facilities likely to house Toliver if he was treated as an adult offered specific educational programs that could serve Toliver’s needs. The court acknowledged evidence that some of the treatment programs at the criminal

facilities were in effect nonexistent because of budget cuts, but concluded that the programs available could be adequate for Toliver.

¶12 We note that many of Toliver’s arguments seem to assume, without citation to authority, that a circuit court making a reverse waiver decision must summarize all the evidence on the record, or address every detail of that evidence on the record, in order to demonstrate that the court considered the evidence and reasonably exercised its discretion. This assumption is wrong. Here, the court provided a reasoned explanation for its decision, expressly addressing the three required statutory factors and applying those factors to relevant evidence before it. We therefore uphold the court’s exercise of discretion to deny Toliver’s request for reverse waiver.

### ***B. Sentencing***

¶13 We turn to Toliver’s argument, actually a series of arguments, that the circuit court erroneously exercised its discretion at sentencing.<sup>3</sup> As indicated above, the court sentenced Toliver to the maximum sentence on the reckless injury charge, sentenced Toliver to somewhat less than the maximum sentence on the attempted robbery charge, and made the sentences consecutive to one another.

¶14 When reviewing a circuit court’s sentencing decision, we generally afford a strong presumption of reasonability to the sentence imposed because that court is in the best position to consider the relevant factors. *State v. Gallion*, 2004

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<sup>3</sup> Toliver separately argues that the circuit court erroneously exercised its discretion in denying his post-conviction motion for resentencing. We do not address this argument separately because Toliver’s sub-arguments on this topic simply repeat sub-arguments he makes in support of his argument that the court erroneously exercised its discretion at sentencing.

WI 42, ¶18, 270 Wis.2d 535, 678 N.W.2d 197. We do not substitute our preferences for those of the sentencing court. *Id.* We do, however, scrutinize the record to ensure that the court in fact exercised its discretion, setting forth a reasonable basis for the sentence imposed. *See id.*, ¶4. “Circuit courts are required to specify the objectives of the sentence on the record.” *Id.*, ¶40. In addition, “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).

¶15 “The primary sentencing factors that a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.” *See State v. Klubertanz*, 2006 WI App 71, ¶18, 291 Wis. 2d 751, 713 N.W.2d 116. Other relevant factors include, but are not limited to, the defendant’s age, the aggravated or mitigated nature of the crime, and the defendant’s prior record. *See id.* “The weight to be given to each factor is within the discretion of the sentencing court.” *Id.*

¶16 Many of Toliver’s sentencing arguments, much like his reverse waiver arguments, effectively ask this court to reweigh the evidence or the relative importance of various sentencing factors. As in the reverse waiver context, this approach is not persuasive, given our standard of review.

¶17 For example, Toliver argues that the circuit court failed to consider his age, character, and other mitigating factors, such as his lack of a drug or alcohol problem, his diagnosis of ADHD, and his completion of certain programs. Toliver focuses on an isolated comment in the court’s sentencing decision in which the court stated: “The court also considers any mitigating or aggravated

factors. Really there are no mitigating factors here. I don't consider your age a mitigating factor.”

¶18 However, when we read the court's statement in light of its other sentencing remarks, we are satisfied that the court adequately considered Toliver's age, character, and other potential mitigating factors. The most reasonable reading of the court's comment above, when read in context, is that the court was explaining its view that Toliver's age and other potential mitigating factors did not outweigh the gravity of Toliver's conduct, the need to protect the public, and the appropriateness of a harsh punishment. The court expressly noted its view that Toliver was old enough to appreciate the severe consequences of firing a gun at another human being. The court referenced a number of serious aggravating factors, including that Toliver shot the victim in the back as the victim fled; that Toliver fled the scene after shooting the victim; that Toliver had a significant juvenile record; that Toliver demonstrated a lack of remorse; and that Toliver was at a high risk to reoffend. The record makes clear that the court recognized that it was imposing a harsh sentence and provided a reasonable explanation on the record for doing so.

¶19 To the extent Toliver develops other types of sentencing arguments, none of those arguments persuades us that the circuit court erroneously exercised its discretion. We address those arguments in the paragraphs that follow.

### *1. Accurate Information*

¶20 Although Toliver does not expressly frame it as such, he appears to argue that the court relied on inaccurate information at sentencing. “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis.2d 179, 717

N.W.2d 1. The defendant has the burden to show that the court relied on information that was inaccurate. *Id.*, ¶26.

¶21 Toliver argues that the court misunderstood a key fact relevant to the gravity of his crime when the court made the following statement in its sentencing remarks:

You had an opportunity, Mr. Toliver, and this is what makes the case so egregious, the victim ran away, he ran. He left all of the money on the table and he ran. You could have stopped it right there. Yeah, you still would have been in trouble, you still would have been in trouble, but you had to get up; you had to chase after him and you had to fire the gun.

Toliver argues in his principal brief that “[t]here was no mention in the preliminary hearing or the information that [the victim] had placed any money on a table or that money was offered to or taken by Toliver.”

¶22 In response, the State points to the allegation in the criminal complaint that the victim told Toliver he could have the money back after Toliver produced a gun and “racked the slide.” More specifically, the complaint alleges that, after Toliver produced a gun and racked the slide, “[the victim] felt that he was about to be robbed so he told [Toliver] that he could have the money.... [The victim] thought for a moment and figured, ‘Dude ain’t gonna shoot me,’ so he ran ... and tried to flee.”

¶23 We first note that the circuit court stated at Toliver’s plea hearing that it was relying on the criminal complaint to supply the factual basis for

Toliver's plea.<sup>4</sup> Indeed, in his reply brief, Toliver acknowledges the complaint allegations, but argues that they are at odds with the court's view of the facts. Toliver argues that the complaint shows that the victim fled with the money rather than "leaving it on the table."

¶24 We are not persuaded by this argument. It is apparent from other remarks the court made at sentencing that the court understood that the victim did not necessarily literally leave money on the table but that, before the victim fled, the victim told Toliver that Toliver could have the money. The gist of the court's reasoning on this topic was that Toliver chose to escalate matters and took the ultimate extreme step of shooting the fleeing victim in the back as he ran, even though the victim indicated a willingness to return the money. The obvious significance of this is that the victim was not physically threatening Toliver or putting up a fight of any kind that might have represented a provocation serving to mitigate the severity of the offense. The complaint supports the court's view about the lack of any such provocation and is sufficient to defeat any claim that the court relied on inaccurate information.

## 2. *Reasons for Consecutive Sentences*

¶25 Toliver argues that the circuit court was required, but failed, to state its reasons for making the sentences on the two charges consecutive to one another. He relies on *State v. Hall*, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41, and case law citing it. See *State v. Ziegler*, 2006 WI App 49, ¶31, 289

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<sup>4</sup> The court also referred to the amended information in addressing the factual basis, but the amended information provided no additional factual allegations, only the specific charges to which Toliver pled.

Wis. 2d 594, 712 N.W.2d 76 (“consecutive sentence must be supported by ‘a statement of reasons for the selection of consecutive terms’” (quoting *Hall*, 255 Wis. 2d 662, ¶14 (citation omitted))).

¶26 However, contrary to what Toliver appears to be arguing, “*Hall* did not ... establish a new procedural requirement at sentencing that the trial court state separately why it chose a consecutive rather than a concurrent sentence.” *State v. Berggren*, 2009 WI App 82, ¶45, 320 Wis. 2d 209, 769 N.W.2d 110. “Rather, *Hall* emphasized the well-settled right of defendants to have the relevant and material factors influencing their sentences explained on the record.” *Id.* Here, the court’s sentencing remarks satisfied this standard.

### 3. *Reasons for Maximum or Near-Maximum Sentence*

¶27 For similar reasons, we reject Toliver’s argument that the circuit court was required, but failed, to state its reasons for imposing maximum or near-maximum sentences. While it is true that courts are required to state reasons why a maximum or near-maximum sentence is appropriate, see *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971), we do not interpret this requirement to mean that the court must separately state why it chose a maximum or near-maximum sentence. In other words, the court is not required to use magic words such as, “I am imposing the maximum sentence because ....” Rather, as explained in *Gallion*, the court’s duty is to provide “an explanation for the general range of the sentence imposed. This explanation is not intended to be a semantic trap for circuit courts.” *Gallion*, 270 Wis. 2d 535, ¶49. Here, based on our discussion above, we conclude that the court’s sentencing remarks were sufficient to demonstrate the court’s reasons for imposing the maximum sentence on the reckless injury charge and a somewhat less than maximum sentence on the

attempted robbery charge. As suggested by our discussion above, the circuit court clearly articulated the view, based on accurate information, that each of the two offenses was especially aggravated.

#### 4. Toliver's Sentencing Recommendation

¶28 Finally, Toliver argues that the circuit court “did not address [his sentencing] recommendation or explain any reason for rejecting all aspects of it.” This argument is not persuasive because a sentencing court is not obligated to explicitly address such recommendations. *See Klubertanz*, 291 Wis. 2d 751, ¶19.

### CONCLUSION

¶29 In sum, for all of the reasons stated, we affirm the judgment of conviction and the order denying Toliver's motion for postconviction relief.<sup>5</sup>

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

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

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<sup>5</sup> For the first time in his reply brief, Toliver argues that the circuit court failed to comply with WIS. STAT. § 970.032 because the court did not make the type of specific probable cause determination the statute requires. The record shows that the court determined at the preliminary examination that “there is probable cause to believe *a felony* has been committed,” (emphasis added) but the court did not explicitly determine that there was probable cause to believe that Toliver committed first-degree intentional homicide or any other qualifying offense. *See* § 970.032(1) and (2); *see also* ¶7, *supra*. We generally do not address arguments raised for the first time in a reply brief. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). We therefore decline to address Toliver's argument that the court failed at the preliminary examination to make the specific probable cause determination required by § 970.032.

