

RECEIVED

05-04-2010

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2010AP000387-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY K. NIELSEN,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and Denial of
Postconviction Relief, Entered in the Circuit Court for Racine
County, the Honorable Faye M. Flancher, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

DEVON M. LEE
Assistant State Public Defender
State Bar No. 1037605

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
leede@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ISSUE PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	5
The Court Failed to Fulfill the Mandate Articulated in <i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, to Explain the Rationale for the Particular Sentence Imposed.	5
A. Introduction and standard of review	5
B. The court erroneously exercised its discretion when it failed to clearly explain why it gave Mr. Nielsen the sentence that it did.....	6
CONCLUSION	10
APPENDIX	100

CASES CITED

<i>McCleary v. State</i> , 49 Wis. 2d 263, 182 N.W.2d 512 (1971)	5 passim
---	----------

State v. Gallion,
2004 WI 42, 270 Wis. 2d 535,
678 N.W.2d 197 1 passim

State v. Steele,
2001 WI App 160, 246 Wis. 2d 744,
632 N.W.2d 112 6

State v. Taylor,
2006 WI 22, 289 Wis. 2d 34,
710 N.W.2d 466 6

STATUTES CITED

Wisconsin Statutes

940.09(1)(a)..... 1

946.41 1

ISSUE PRESENTED

1. Did the trial court fulfill the mandate articulated in *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, to explain its rationale for the particular sentence it imposed?

The trial court answered: yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case requires the application of well-established legal and constitutional principles to the particular facts of the case. Neither oral argument nor publication is warranted.

STATEMENT OF THE CASE AND FACTS

This appeal is taken from a judgment of conviction and order denying postconviction relief entered in Racine County, the Honorable Faye M. Flancher, presiding. (18, App. 101-102; 39, App. 106).

Mr. Nielsen was charged by criminal complaint with one count of homicide by intoxicated use of a vehicle, contrary to Wis. Stat. § 940.09(1)(a) a Class D felony; one count of obstructing an officer, contrary to Wis. Stat. § 946.41 a Class A misdemeanor; and one count of homicide by use of a vehicle with a prohibited alcohol concentration. Each charge included a repeater enhancement. (1; 2; 3).

Mr. Nielsen entered into a plea agreement in which he would plead to count 1 without the repeater enhancement, count 2 would be dismissed and read-in, and count 3 would

be outright dismissed. There would be a joint recommendation for a twenty year sentence, with 12 years of initial confinement and 8 years of extended supervision. (33:2). The court took Mr. Nielsen's plea and ordered a presentence investigation. (33:3-12).

A stipulation and order for new counsel was subsequently filed and granted. (11; 34:2-3). Mr. Nielsen's new trial counsel filed a motion to withdraw Mr. Nielsen's pleas, which was granted without objection. (13; 35:2).

On April 17, 2009, pursuant to a new plea agreement, Mr. Nielsen entered a no contest plea to the homicide by intoxicated use of a vehicle without the repeater enhancement. Count 2 was dismissed and read-in to the record, and count 3 was dismissed outright. The court proceeded to sentencing the same day. (37). Before hearing the parties' sentencing arguments, the court noted that it had reviewed the PSI, a sentencing memorandum prepared by the defense, and letters submitted on behalf of the victim's family and Mr. Nielsen's family. (37:13-14). The court also heard statements from the victim's family.

The state argued that Mr. Nielsen should receive a twenty-year sentence. (37:26). Mr. Nielsen's father asked the court to adopt the recommendation of the PSI. (37:28-29). Mr. Nielsen's trial counsel also asked the court to adopt the sentence recommended by the PSI, without specifically mentioning the recommended sentence, explaining that he thought the PSI was thoughtful and fair. (37:34-35; 9).

The court began its sentencing remarks by explaining that this was the kind of sentencing that the court spends "a tremendous amount of time considering..." (37:37). The court reviewed Mr. Nielsen's character, noting that Mr. Nielsen had no juvenile record and was only 21 years old.

(37:38). The court reviewed Mr. Nielsen's adult criminal history and its concern about Mr. Nielsen's truthfulness when he was on probation. (37:38-39). The court noted that Mr. Nielsen had recently been diagnosed with a bipolar condition and had begun taking medication. (37:40) The court noted that Mr. Nielsen had obtained an HSED and had been working prior to the accident. (37:40). The court concluded that Mr. Nielsen was sincerely remorseful for his actions. (37:41).

The remainder of the court's sentencing remarks follow. Regarding protection of the community, the court stated:

The Court considers first and foremost protection of the community, and it is imperative that our community be protected from drunk drivers, especially under-aged drunk drivers.

(37:41; App. 103). Regarding punishment, the court stated:

Punishment. You killed a man. Punishment is clearly an appropriate factor for this Court to consider.

(37:41; App. 103). The court continued:

Rehabilitation. I believe that you do have some rehabilitative needs. I think in the past you have minimized your alcohol use and abuse, and I think you need treatment for that and you have to understand, Mr. Nielsen, that the fact that you have been incarcerated now for a significant period of time and the fact that you haven't been using alcohol doesn't mean that you don't need treatment.

(37:41; App. 103). The court moved on to deterrence:

And certainly deterrence of others. It is imperative that this Court does send a message to under-aged people who are thinking they are going to get into a car and drive without any culpability. All important factors for the Court to consider.

(37:42; App. 104).

The court then noted that the state was recommending a sentence of twenty years in prison, with ten years of initial confinement and ten years of extended supervision. The court then incorrectly noted that the PSI was recommending seven to eight years of initial confinement. (37:42; App. 104). Defense counsel corrected the court. After reading aloud from the PSI, the court explained it had misspoken and agreed that the recommendation was actually for four years of initial confinement. (Id.).

The court then stated that “Based on all the factors that I’m required to consider, Mr. Nielsen, I am sentencing you to 15 years in prison and that will be bifurcated nine years of initial confinement and six years of extended supervision.” (37:43; App. 105).

Undersigned counsel filed a postconviction motion alleging that the circuit court erred when it failed to explain the rationale for the particular sentence it imposed. (25). The motion further alleged that the court failed to explain why it rejected the recommendation of the presentence investigation for four years of initial incarceration and that the court’s failure to properly exercise its discretion at sentencing rendered Nielsen’s sentence excessive.

At the postconviction hearing, the court stated it had considered the PSI and that although it had misstated the recommendation at sentencing, it had merely misspoken. The court stated that it wanted to make clear that it did understand the recommendation. (40:7). The court explained that it had reviewed its original sentencing remarks and concluded that it had properly considered the required factors. (*Id.*). Following the hearing, the court denied the motion. (39).

Nielsen appeals.

ARGUMENT

The Court Failed to Fulfill the Mandate Articulated in *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, to Explain the Rationale for the Particular Sentence Imposed.

A. Introduction and standard of review

Sentencing is within the discretion of the circuit court, and this court's review is limited to determining whether the circuit court erroneously exercised that discretion. *McCleary v. State*, 49 Wis. 2d 263, 277-278, 182 N.W.2d 512 (1971); *see also State v. Gallion*, 2004 WI 42, ¶ 68, 270 Wis. 2d 535, 678 N.W.2d 197 (noting that the circuit court has wide discretion in determining what factors are relevant to its sentencing decision). Although *Gallion* did not change the standard of review, it does require this court to “more closely scrutinize the record” to make sure that the trial court did exercise its discretion and set forth the basis for its discretion. *Id.*, ¶ 76.

The sentencing court properly exercises its discretion when it orders a sentence “within the range provided by the legislature which reflects the circumstances of the situation

and the particular characteristics of the offender.” *State v. Steele*, 2001 WI App 160, 246 Wis. 2d 744, 632 N.W.2d 112. When imposing sentence, the court has three primary factors it must consider: the gravity of the offense; the character of the offender; and the protection of the public. *Id.*

In addition, the sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the three primary factors. *Gallion* at ¶ 44 (citing *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)). The exercise of sentencing discretion “does not lend itself to mathematical precision.” *Gallion*, ¶ 49. Therefore, the circuit court is not required to explain the precise number of years chosen. *State v. Taylor*, 2006 WI 22, ¶ 30, 289 Wis. 2d 34, 710 N.W.2d 466. Rather, the circuit court must provide “an explanation for the general range of the sentence imposed.” *Gallion* ¶ 49.

Finally, the circuit court must “specify the objectives of the sentence on the record.” *Gallion*, ¶ 40. This includes explaining the linkage between the sentencing objectives and the sentence imposed. *Id.*, ¶ 46. The circuit court must detail his or her reasons for selecting the particular sentence. *McCleary* at 280-81. Because the circuit court failed here to explain its sentencing rationale, it erroneously exercised its discretion.

- B. The court erroneously exercised its discretion when it failed to clearly explain why it gave Mr. Nielsen the sentence that it did.

The circuit court erroneously exercised its discretion at sentencing because it did little more than refer generally to the primary factors to be considered at sentencing before imposing a fifteen-year prison sentence. *Gallion* requires more. Not only must there be evidence that discretion was

exercised, the basis for that exercise must be evident. *Gallion* at ¶ 4 (citing *McCleary*).

The court opened its sentencing remarks by noting that this case involved a horrible accident and that Mr. Nielsen was too young to have been drinking. The court reviewed the information contained in the PSI about Mr. Nielsen's personal and criminal history, noting both the positive and negative aspects of Mr. Nielsen's character. The court concluded that Mr. Nielsen was sincerely remorseful for what happened. Although the court spent more time reviewing Mr. Nielsen's character than it spent on any other factor, the court did little more than read the information from the PSI and note his remorse. The court never explained what its view of Mr. Nielsen's character actually was, or how it influenced the court's sentence.

The court's remarks as to the remaining factors are completely generic, and shed no light on how the court arrived at the sentence it did:

The Court considers first and foremost protection of the community, and it is imperative that our community be protected from drunk drivers, especially under-aged drunk drivers.

Punishment. You killed a man. Punishment is clearly an appropriate factor for this Court to consider.

Rehabilitation. I believe that you do have some rehabilitative needs. I think in the past you have minimized your alcohol use and abuse, and I think you need treatment for that and you have to understand, Mr. Nielsen, that the fact that you have been incarcerated now for a significant period of time and the fact that you haven't been using alcohol doesn't mean that you don't need treatment.

(37:41). The court mentioned deterrence:

And certainly deterrence of others. It is imperative that this Court does send a message to under-aged people who are thinking they are going to get into a car and drive without any culpability. All important factors for the Court to consider.

(37:42).

The court's review of Mr. Nielsen's character and these brief remarks constitute the entirety of the court's explanation for the sentence it gave. The court's comments do not explain how or why the court arrived at the sentence it did. Nielsen does not argue that a court must be long-winded in reviewing the required factors, but the court must provide at least some insight into how it arrived at its sentencing decision.

In *McCleary*, the court made very clear that a court must explain how it arrived at its sentencing decision:

Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards...[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.

Id. at 277.

The court's remarks do not explain, in the context of all the factors it mentioned, how or why a nine-year period of initial confinement was necessary to meet the court's

sentencing goals. Instead, the court detailed Mr. Nielsen's character, recited the relevant factors, mentioned the need to protect the community from drunk drivers, and then pronounced its sentence. Wisconsin sentencing law requires more than "boilerplate generalities" as to why the court decided on the particular sentence being imposed. *State v. Gallion*, 2002 WI App 265, ¶ 9, 258 Wis. 2d 473, 654 N.W.2d 446 (citing *McCleary*, 49 Wis. 2d at 277).

When the Court explained that "it is imperative that our community be protected from drunk drivers, especially under-aged drunk drivers" and "You killed a man. Punishment is clearly an appropriate factor for this Court to consider" the court was speaking in "boilerplate generalities." In using such generic language, this court failed to carry out its duty to create an individualized sentence. *Gallion*, 2004 WI 42, ¶ 48.

In addition, the court did not explain why nine years was the minimum amount of confinement necessary to achieve its sentencing goals. *Gallion* at ¶ 44 (citing *McCleary v. State* 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)). The PSI was recommending four years, less than half of the time the court gave. Although sentencing courts are not required to explain why they chose the particular length of the sentence, they should explain the general range of the sentence imposed. *Gallion* ¶ 49. The court here did not explain in any terms how it arrived at nine years of initial confinement.

Overall, the court did not do what the supreme court requires under *Gallion*:

In short, we require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By

stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion.

Gallion at ¶ 46.

Because the court did not explain how the sentence promoted the court's sentencing objectives, the court failed to produce a sentence that demonstrates that the court exercised its discretion. There is no indication from the court's sentencing remarks how the sentence's component parts promote the sentencing objectives. There is no indication from the court's sentencing remarks how or why the court sentenced Mr. Nielsen the way it did.

CONCLUSION

For the reasons argued above, Nielsen requests that this court vacate his sentence and remand for a new sentencing hearing.

Dated this 3rd day of May, 2010.

Respectfully submitted,

DEVON M. LEE
Assistant State Public Defender
State Bar No. 1037605

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
leede@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,321 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of May, 2010.

Signed:

DEVON M. LEE
Assistant State Public Defender
State Bar No. 1037605

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
leede@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

**I N D E X
T O
A P P E N D I X**

	Page
Judgment of Conviction	101-102
Excerpt of Transcript.....	103-105
Order Denying Defendant's Postconviction Motion	106

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 3rd day of May, 2010.

Signed:

DEVON M. LEE
Assistant State Public Defender
State Bar No. 1037605

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
leede@opd.wi.gov

Attorney for Defendant-Appellant