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STATE OF WISCONSIN
COURT OF APPEALS

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OF WISCONSIN**

DISTRICT I

Appeal Case No. 2013AP000832-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RODNEY VINCENT MCTOY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING POST CONVICTION RELIEF,
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE JOHN SIEFERT,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the court in deciding this appeal. The appeal can be resolved by applying well-settled case law to the particular facts of this case and it is unlikely that the court's decision will warrant publication.

STATEMENT OF THE CASE

This is an appeal by defendant-appellant Rodney Vincent McToy (“McToy”) from a March 18, 2013, order of the Milwaukee County Circuit court denying his motion for post conviction relief. (R:13:1)

McToy was originally charged with one count of Domestic Violence Battery and three counts of Bail Jumping on April 20, 2012. (R:2:1-3).

According to the criminal complaint, on April 19, 2012, City of Franklin police officers responded to the Plaza Motel on S. 27th Street, in the City of Franklin concerning a domestic violence incident. Officers made contact with the victim, Anita Hill, who was bleeding from a small laceration on the bridge of her nose, suffered abrasions to her forehead and had swelling above both eyes. According to Ms. Hill, McToy punched her several times in the head when she refused to give him money to purchase alcohol. *Id.* At the time of this incident McToy was out on bond in a Waukesha County case. McToy was charged on December 27, 2011, in Waukesha County with felony Domestic Abuse, Strangulation and Suffocation and misdemeanor counts of Intimidation of a Victim and Battery, all counts listed the victim as Anita Hill. *Id.*

On July 9, 2012, the date scheduled for McToy’s jury trial, McToy plead guilty to two counts of Bail Jumping. The Domestic Violence Battery count was dismissed because the victim did not appear for trial. The third count of Bail Jumping was dismissed and read-in. (R:18:1-6). McToy was represented by counsel and signed and filed a Plea Questionnaire/Waiver of Rights and Addendum. (R:5:3; R:6:1).

On August 13, 2012, McToy was sentenced to 200 days incarceration in the House of Correction as to Count Two, Bail Jumping and two years probation consecutive as to Count Three, Bail Jumping. (R:10:4; R:19:26). As a condition of probation, the court ordered McToy to have no contact with the victim, Ms. Hill, attend anger management classes and AODA assessment, treatment and maintain absolute sobriety. *Id.* At the time of McToy’s sentencing the Waukesha County case was awaiting trial on September 18, 2012. *Id.*

On January 28, 2013, McToy filed a motion for Post Conviction Relief. (R:12:5). The motion alleged, inter alia, that the court did not consider the mandatory sentencing factors under *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. McToy argues that the court did not individualize its sentence to the specific facts of McToy's case. McToy requested that the court issue an order vacating his sentence and resentence McToy. (R:12:5).

On March 14, 2013, the trial court held a motion hearing regarding McToy's request for Post Conviction Relief. (R:20:9). On March 18, 2013, the trial court filed an order denying McToy's motion for resentencing. (R:13: 1).

On April 8, 2013, McToy filed a notice of appeal. (R:14:1)

STATEMENT OF FACTS

Additional relevant facts will be set forth as necessary in the State's Argument. See Wis. Stat. § 809.19(3)(a) (respondent may choose to exercise its option not to present a full statement of facts).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN SENTENCING MCTOY.

A. Introduction

The circuit court properly exercised its discretion in sentencing McToy as the sentencing record properly illustrates a rational and explainable basis for the sentence. McToy has not shown that the record reveals an unreasonable or unjustifiable basis for the circuit court's reasoning or that the sentence shocks public sentiment and defies reasonableness.¹

¹ McToy in his brief alleges that the circuit court improperly based its sentence on the then pending Waukesha County case. This argument is without merit. The circuit court is not limited to considering other offenses that can be proved beyond a reasonable doubt. Rather, the court can

Therefore, the judgment of conviction and order denying post conviction relief must be upheld. *State v. Bizzle*, 222 Wis. 2d 100, 104-06, 585 N.W.2d 899 (Ct. App. 1998) (the burden is on the defendant to overcome the presumption that the trial court appropriately exercised its sentencing discretion by establishing that the record does not support the sentencing decision or that the record reveals an unreasonable or unjustifiable basis for that decision).

B. Relevant Law and Standard of Review

To properly exercise discretion in sentencing, the sentencing record must illustrate a rational and explainable basis for the sentence. *State v. Gallion*, 2004 WI 42, ¶¶ 22, 38, 270 Wis. 2d 535, 678 N.W. 2d 1972. Proper exercise of discretion does not require a circuit court to justify the sentence with mathematical precision, rather the court must identify the general objectives of greatest importance and describe how the sentence furthers those objectives in light of the facts of the case and the other sentencing factors considered. *Id.* ¶¶ 41-43.

Sentencing objectives include, but are not limited to, the protection of the community, punishment or rehabilitation of the defendant, and deterrence to others. *Id.* ¶ 41. The circuit court must also consider how sentencing factors fit the objective. *Id.* ¶ 42. The three primary factors that a circuit court should consider are the gravity of the offense, the character of the offender, and the need to protect the public. *Harris v. State*, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977). It is within the court's discretion to consider secondary factors such as:

- (1) [p]ast 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)

consider uncharged or unproved offenses, pending charges, and even charges for which the defendant has been acquitted in order to measure his character and the pattern of his behavior. *State v. Frey*, 2012 WI 99, ¶35, 343 Wis. 2d 358, 817 N.W. 2d 436.

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.

Id. at 519-20. "The weight to be attached to each above factor is a determination particularly within the wide discretion of the trial court." *Id.* at 520. A failure to address secondary factors is not an erroneous exercise of discretion. *State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993).

When reviewing a sentencing decision, the appellate court reviews for erroneous exercise of discretion. *State v. Stenzel*, 2004 WI App 181, ¶ 7, 276 Wis. 2d 224, 688 N.W.2d 20. Sentencing decisions are strongly presumed reasonable as the circuit court is in the best position to weigh the sentencing factors and to assess the character of the defendant. *Gallion*, 270 Wis. 2d 535, ¶ 18.

To warrant a finding of erroneous exercise of discretion, McToy has the burden of establishing that the record reveals an unreasonable or unjustifiable basis for the circuit court's reasoning. *Bizzle*, 222 Wis. 2d at 106. An unreasonable or unjustifiable basis occurs when the circuit court bases the sentence on irrelevant or improper factors, or when the record is void of an explainable basis for the sentence. *Gallion*, 270 Wis. 2d 535, ¶¶ 17, 38. Due to this presumption of reasonableness, the burden to prove an erroneous exercise of sentencing discretion is a heavy one, *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409, and must be established by clear and convincing evidence. *Id.* ¶ 34.

II. THE SENTENCING RECORD ESTABLISHES A RATIONAL AND EXPLAINABLE BASIS FOR THE PROBATIONARY TERM IMPOSED.

As acknowledged by McToy in his brief, the circuit court accurately recited the mandatory sentencing factors in *Gallion*: "there are three primary factors that a Court has to consider while imposing sentence. One is the character of the defendant. Two is the need to protect the public. Three is the seriousness of the offense." (McToy's Brief at 7). (R:19:15).

Prior to the court's imposition of sentence, the prosecutor outlined the serious facts of the charged criminal conduct against McToy in Milwaukee and Waukesha County. The prosecutor also outlined the multiple previous arrests, convictions and revocations of probation for McToy. (R:19:4-11). In pronouncing McToy's sentence, the circuit court determined that the charge of domestic violence and bail jumping were serious, that McToy had probationary needs and that confinement was necessary to protect the community, and victim. (R:19:11-12, 17).

In assessing the defendant's character, the court noted that McToy's had an extensive criminal record. (R:19:11). The defense at sentencing acknowledged McToy's, "significant alcohol usage." *Id.* When imposing sentence the Court indicated that "he (McToy) has treatment needs," and that the court would, "need to fashion a sentence to deal with the alcohol problem," because it was causing problems in the life of Mr. McToy and the victim. *Id.* The court, in reviewing the past violent conduct of McToy against the victim, was concerned with the level of violence in the pending cases, which involved strangulation and suffocation and attempts to dissuade the victim from testifying. (R:19:17). The court felt strongly that any sentence should protect the victim, and that the best way to do that would be to ensure McToy was in custody up until his next trial date. (R:19:16-18). Based upon these concerns, the court rejected the parties recommendation of time served as to Count Two. (R:19:18).

McToy, however, argues that the circuit court did not identify the sentencing objective of greatest importance and did not explain how the duration of the sentence advanced the court's objectives (McToy's Brief at 7). McToy's argument is misguided. What the law requires is a "delineation of the primary sentencing factors to the particular facts of the case." *Gallion*, 270 Wis. 2d 535, ¶ 58 (citing *State v. Hall*, 2002 WI App 108, ¶ 17, 255 Wis. 2d 662, 648 N.W.2d 41). The circuit court clearly established that the protection of the community and victim and McToy's long history of alcohol related violent behavior with the victim were the primary sentencing objectives.

Furthermore, the circuit court is not required to explain why it chose to sentence McToy to two years probation as opposed to the time served disposition requested by McToy. As the *Gallion* court explained:

We are mindful that the exercise of discretion does not lend itself to mathematical precision. The exercise of discretion, by its very nature, is not amenable to such a task. As a result, we do not expect circuit courts to explain, for instance, the difference between sentences of 15 and 17 years. We do expect, however, an explanation for the general range of the sentence imposed. This explanation is not intended to be a semantic trap for circuit courts. It is also not intended to be a call for more “magic words.” Rather, the requirement of an on-the-record explanation will serve to fulfill the *McCleary* mandate that discretion of a sentencing judge be exercised on a rational and explainable basis.

Gallion, 270 Wis. 2d 535, ¶ 49 (internal quotations omitted). Here, the circuit court complied with *Gallion* by clearly establishing a rational and explainable basis on the record which applied the facts of this case to sentencing factors it considered.² The record establishes that the circuit court determined that due to McToy’s propensity for recidivism, his failure to follow previous probationary rules and the need to protect the public and the victim, incarceration was necessary (R:19: 16-20). In determining the length of the sentence for each count, the circuit court considered the recommendations of the defense attorney and the prosecutor. But ultimately, the court decided to reject the parties request for a time served disposition and explained that the court felt it necessary to impose a longer sentence of incarceration to be followed by probation due to serious nature of the defendants conduct, the need to protect the victim and the alcohol and anger management needs of McToy. (R:19:16-23).

² Significantly, McToy does not argue that the sentence was excessive or so unusual to shock the public sentiment. McToys’s only argument is that the circuit court did not sufficiently explain the length of the probationary sentence and relate it to his probationary needs.

CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court’s denial of McToy’s motion for post conviction relief and should affirm the judgment of conviction.

Dated this _____ day of August, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,098.

Date

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**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 s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

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