

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2009

David R. Schanker
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. 2008AP195-CR

Cir. Ct. No. 2006CF948

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY T. WADE, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Henry T. Wade III has appealed from a judgment convicting him of being a felon in possession of a firearm in violation of WIS.

STAT. § 941.29(2)(a) (2007-08),¹ and from an order denying postconviction relief. The trial court sentenced Wade to six years, consisting of three years of initial confinement and three years of extended supervision, consecutive to sentences he was then serving. Wade moved for sentence modification and the trial court denied the motion. We affirm the judgment and the order denying sentence modification.

¶2 Wade's conviction arose from his conduct in the early hours of August 31, 2006, when he fired a gun from a moving vehicle as it drove down a street in the city of Kenosha. Nearby police heard the shot being fired and observed a flash of light coming from the passenger side of the vehicle. One of the officers observed Wade, who was the passenger in the front seat of the car, holding his arm in the air. A spent bullet was found near the area where officers had observed the gun being fired. After the vehicle was stopped by the police, the driver admitted that Wade had fired a gun from the car. Wade indicated that he did not recall firing the gun. However, he also stated that because of his level of intoxication, he did not recall anything regarding the ride.

¶3 At the time of this offense, Wade was on probation in two other Wisconsin cases, including another case in which he had been convicted of being a felon in possession of firearm. His supervision had been transferred to Arkansas. He had traveled to Kenosha in August 2006 without permission in violation of his rules of probation. Prior to sentencing in this case, his probation was revoked in the other two cases. The sentence in this case was made consecutive to the five years of initial confinement that had been ordered in the other two cases.

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

¶4 The issues on appeal relate solely to sentencing. Wade contends that the trial court erroneously exercised its discretion by unduly emphasizing certain factors to the exclusion of positive factors. He also contends that the trial court violated his constitutional rights by penalizing him for procreating, reflecting the trial court's personal bias against him. In addition, he contends that his alcohol problems warranted treatment rather than punishment, and that the trial court erroneously exercised its discretion by declaring him ineligible for the challenge incarceration program and the earned release program. None of these arguments have merit.

¶5 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, this court follows a strong and consistent policy of refraining from interference with the trial court's decision. *State v. Ziegler*, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. We afford a strong presumption of reasonability to the trial court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the convicted defendant. *Id.*

¶6 To properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. It must specify the objectives of the sentence on the record, which include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *Id.* The primary sentencing factors that a trial court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *Ziegler*, 289 Wis. 2d 594, ¶23. Other factors which may be relevant include, but are not limited to, the defendant's past record or history of

undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation report (PSI); the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor before the court; the defendant's age, educational background and employment history; the defendant's remorse, repentance and cooperation; the defendant's need for close rehabilitative control; and the rights of the public. *Id.* The trial court need not discuss all of these secondary factors, but rather only those relevant to the particular case. *Id.*

¶7 An erroneous exercise of discretion may occur if the trial court gives undue weight to one factor in the face of other contravening factors. *Ocanas v. State*, 70 Wis. 2d 179, 187, 233 N.W.2d 457 (1975). However, in general, the weight to be given each of the sentencing factors is within the wide discretion of the trial court. *Stenzel*, 276 Wis. 2d 224, ¶9.

¶8 Applying these standards, no basis exists to disturb the trial court's sentence. The trial court's statements at sentencing establish that it was primarily concerned with the seriousness of the crime, Wade's history of prior offenses and irresponsible behavior, and the danger posed by him to the public. The trial court commenced sentencing by noting that "what really concern[ed]" it was the fact that Wade fired a weapon and did not even recall doing it. It discussed the danger inherent in the crime and Wade's total lack of control, reflected in his statement that he was so intoxicated that he could not recall or explain how he came to fire the gun from the car. The trial court considered the danger such conduct posed to the public, noting that "it's only one's imagination that would limit what might have happened, who might have been shot."

¶9 In assessing Wade's character, the trial court considered his criminal record, particularly his prior conviction for being a felon in possession of a firearm. It considered that Wade knew that he could not possess a firearm, just as he knew he should not have been drinking. It considered that he had multiple convictions in Wisconsin and, when given the privilege of having his probation transferred to Arkansas, returned to Wisconsin and committed a new crime by use of a firearm. The trial court viewed this conduct as reflecting an irresponsible character, which was a conclusion the trial court was entitled to draw.

¶10 In determining that Wade was irresponsible, the trial court also considered the fact that he lacked a substantial history of employment. While acknowledging that Wade had major drug and alcohol issues, it concluded that any rehabilitation of Wade had to occur in a confined setting, and that failing to confine Wade would unduly depreciate the seriousness of the offense, particularly in light of his criminal history. Based on the offense and Wade's history, the trial court also concluded that confinement was necessary to protect the public. It further concluded that failing to impose an additional sentence would unduly depreciate the seriousness of the offense, and therefore made its sentence consecutive to the sentences Wade was then serving.

¶11 Contrary to Wade's contentions, the trial court neither considered improper factors in violation of his constitutional rights, nor ignored positive factors to which it was required to give weight. Contrary to Wade's argument, the trial court did not penalize him for procreating. Rather, in the context of discussing the reasons for its conclusion that Wade was irresponsible, the trial court stated:

[Y]ou're going out, as the presentence writer indicates here, creating more children. And I understand from what I'm

told here you may be current in your support so that's to your credit but there's a paternity matter pending as well as one child in existence and one on the way, at least that's what the presentence said, which, again, doesn't say a lot for your responsibility.

¶12 The trial court made this statement while discussing all of the other facts that led it to conclude that Wade was an irresponsible person, including his continued consumption of alcohol, his violation of his rules of probation, and his engagement in new criminal activity even after being given opportunities to remain in the community. Based on the PSI² and counsels' discussion at sentencing, the trial court was also aware that Wade engaged in this criminal conduct and misbehavior while being the father of one child, expecting another child with his long-term girlfriend, and facing a pending paternity action in another case. The trial court could reasonably conclude that Wade's history and behavior, viewed in its entirety, indicated that he was not exercising responsibility for his offspring in a meaningful way, and that his failure to do so was further evidence of his poor character.³ This is not the equivalent of penalizing a defendant simply because he has chosen to father children. Wade's contention that the trial court was biased against him and violated his constitutional rights by commenting on his procreation therefore lacks merit, and will be addressed no further.

² The record includes a PSI prepared in 2006, and an update to the PSI prepared in 2007.

³ Although not dispositive, the trial court's comments in denying postconviction relief also reflect that its concern at sentencing was that Wade's conduct evinced his general lack of responsibility. The trial court accurately noted that the reference to fathering children was only a small part of its discussion of Wade's character. It clarified that it did not intend to penalize Wade for exercising his right to have children, but recognized that having children also brings the responsibility to care for them, and Wade's conduct did not reflect that he fulfilled that responsibility.

¶13 Wade also contends that the trial court ignored that he worked odd jobs, educated himself, contributed to the moral well being and education of his children, and lived with them and actively raised them. He contends that these were positive factors that the trial court was required to consider to mitigate his sentence.⁴

¶14 The mere fact that the trial court failed to give particular factors the weight that Wade wished does not constitute an erroneous exercise of discretion. *See id.*, ¶16. Wade contended that he lived with his daughter's mother, volunteered at his daughter's school, enrolled in school himself, and worked odd jobs. However, the trial court was not required to accord those factors significant weight in light of the information in the record indicating that Wade had no history of regular employment, had a history of intermittently living with and caring for his daughter, and put his relationship with his daughter and expected offspring at risk by violating probation, committing new crimes, and continuing to abuse alcohol. Most importantly, the record establishes that the trial court's primary concerns at sentencing were the seriousness of the offense and the risk posed by Wade to the public, as shown by his prior record, his alcohol abuse, his shooting of a gun under dangerous circumstances and while completely intoxicated, and his commission of a new firearms offense after previously being convicted of being a felon in possession of a firearm. These were clearly relevant sentencing facts and factors, which were considered by the trial court in a reasoned and reasonable

⁴ Wade also complains that his sentence exceeded the recommendation of the PSI writer. However, it is well-established that "[t]rial courts ... are not required to blindly accept or adopt sentencing recommendations from any source." *State v. Trigueros*, 2005 WI App 112, ¶9, 282 Wis. 2d 445, 701 N.W.2d 54. In addition, a trial court has no obligation to explain its reasons for failing to follow the PSI recommendation. *State v. Brown*, 2006 WI 131, ¶24, 298 Wis. 2d 37, 725 N.W.2d 262.

manner in assessing the gravity of the offense, Wade's character and rehabilitative needs, and the risk posed by Wade to the community.

¶15 Wade also contends that the trial court failed to provide adequate reasons for the particular length of the sentence imposed. While a trial court must provide its sentencing rationale on the record, a defendant is not entitled to a mathematical breakdown of how each sentencing factor translates into a specific term of confinement. *State v. Fisher*, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56. *Gallion* requires an explanation but not mathematical precision. *Ziegler*, 289 Wis. 2d 594, ¶25. The trial court fulfilled its duty here.

¶16 Wade also contends that the trial court failed to impose the minimum sentence necessary to achieve sentencing goals. However, in imposing the minimum amount of custody consistent with appropriate sentencing factors, "minimum" does not mean "exiguously minimal," or insufficient to accomplish the goals of the criminal justice system. *State v. Ramuta*, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. Based upon the facts of this case and the sentencing factors addressed by it, the trial court could reasonably conclude that a sentence consisting of three years of initial confinement and three years of extended supervision was appropriate.

¶17 In reaching this conclusion we note that the sentence imposed was well within the maximum limit, and does not shock the public sentiment or violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). The mere fact that Wade was already serving five years of initial incarceration based on his probation revocation in two other cases did not compel the trial court to impose a shorter sentence or make this sentence concurrent.

¶18 Whether to make a sentence concurrent or consecutive is committed to the sound discretion of the trial court. *Ramuta*, 261 Wis. 2d 784, ¶24. Because the trial court reasonably concluded that this was a separate offense which warranted a separate sentence, it acted within the scope of its discretion by making the sentence consecutive. See *State v. LaTender*, 86 Wis. 2d 410, 434, 273 N.W.2d 260 (1979). It considered proper sentencing factors and explained its rationale for the overall sentence, and therefore was not required to discuss in greater detail why the sentence was made consecutive. See *State v. Matke*, 2005 WI App 4, ¶¶19-20, 278 Wis. 2d 403, 692 N.W.2d 265.

¶19 We also reject Wade's argument that the trial court erroneously exercised its discretion by refusing to declare him eligible for the challenge incarceration or earned release programs. Even if a defendant meets all of the Department of Corrections' eligibility requirements for the challenge incarceration program, the circuit court has discretion under WIS. STAT. § 973.01(3m) to declare the defendant ineligible. *State v. Steele*, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112. When determining eligibility for the challenge incarceration and earned release programs, the trial court must consider the same factors it considers for sentencing. See *id.*, ¶¶9-11; see also *State v. Owens*, 2006 WI App 75, ¶¶8-9, 291 Wis. 2d 229, 713 N.W.2d 187.

¶20 Wade appears to contend that the trial court committed an error by determining that he was ineligible for the programs under the statutory criteria for them. Nothing in the record supports this argument. The PSI stated that Wade was statutorily eligible for both programs, and the trial court indicated at the postconviction hearing that it was aware of Wade's statutory eligibility. However, it exercised its discretion to prohibit his participation in the programs.

¶21 In excluding Wade from the challenge incarceration and earned release programs, the trial court relied upon the violent nature of this offense and the fact that it involved a firearm. Those factors justified the trial court's decision, as did the trial court's discussion of Wade's lengthy criminal record, his previous failures on probation, and the need to confine him to protect the public. *See Owens*, 291 Wis. 2d 229, ¶¶10-11; *see also Steele*, 246 Wis. 2d 744, ¶11. Contrary to Wade's argument, the trial court was not required to conclude that his interest in or need for alcohol treatment outweighed the trial court's concern with protecting the public, and its conclusion that any rehabilitation or counseling had to occur within the prison setting. *See Owens*, 291 Wis. 2d 229, ¶10. Because the trial court considered proper factors when it chose to declare Wade ineligible for the earned release and challenge incarceration programs, no arguable basis exists to disturb its decision.

¶22 Because the trial court's sentencing decision was reasoned and reasonable, and founded on proper sentencing factors, no basis exists to conclude that it erroneously exercised its discretion in sentencing Wade or denying his motion to modify his sentence. The judgment of conviction and order denying postconviction relief are affirmed.

By the Court.—Judgment and order affirmed.

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

