COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2651-CR **Cir. Ct. No. 01CF000830**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CESAR DIAZ DELEON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Cesar Diaz Deleon has appealed from a judgment convicting him of three counts of kidnapping, party to the crime, in violation of WIS. STAT. §§ 939.05 and 940.31(1)(a) (1999-2000), and from an order denying his motion for sentence modification. He was sentenced to concurrent thirty-year bifurcated sentences, consisting of fifteen years of confinement followed by

fifteen years of extended supervision. The sentences were made consecutive to Milwaukee county sentences which totaled forty years of confinement followed by twenty years of extended supervision.

¶2 The only issues on appeal relate to sentencing. Deleon contends that the trial court erroneously exercised its discretion by failing to consider appropriate sentencing factors, and by failing to provide an adequate explanation for making the sentences consecutive to the Milwaukee county sentences. We disagree with Deleon's contentions, and conclude that the trial court acted within the scope of its discretion. We therefore affirm the judgment and order.

¶3 In ***State v. Gallion***, 2004 WI 42, ¶8, 270 Wis. 2d 535, 678 N.W.2d 197, the Wisconsin Supreme Court recently reaffirmed the sentencing standards established in ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), and determined that the application of those standards, demonstrating the exercise of discretion, must be set forth on the record at sentencing. Although it did not change the appellate standard of review, it emphasized that appellate courts are required to more closely scrutinize the record to ensure that discretion was in fact exercised, and that the basis for the exercise of discretion is set forth. ***Gallion***, 270 Wis. 2d 535, ¶4.

¶4 In ***Gallion***, the court reiterated that sentencing is left to the discretion of the trial court, and that appellate review is limited to determining whether discretion was erroneously exercised. ***Id.***, ¶17. When the exercise of discretion has been demonstrated at sentencing, appellate courts follow a strong policy against interference with that discretion. ***Id.***, ¶18. A trial court's sentencing decision is generally afforded a strong presumption of reasonability

because that court is best suited to consider the relevant factors and the defendant's demeanor. ***Id.***

¶5 An erroneous exercise of discretion occurs when a sentence is based on irrelevant or improper factors. ***Id.***, ¶17. In addition, to properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. ***Id.***, ¶39. It must specify the objectives of the sentence on the record, which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. ***Id.***, ¶40. It must identify the general objectives of greatest importance, which may vary from case to case. ***Id.***, ¶41. The trial court must also describe the facts relevant to the sentencing objectives and explain, in light of these facts, why the particular component parts of the sentence imposed advance the specified objectives. ***Id.***, ¶42. Similarly, it must identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the sentencing decision. ***Id.***, ¶43.

¶6 The sentence imposed should be 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.[1] ***Id.***, ¶44. Relevant factors which may be considered in arriving at the sentence include the defendant's past criminal record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence

[1] As used in this standard, "'minimum' does not mean 'exiguously minimal,' that is, 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, *review denied*, 2004 WI 114, ___ Wis. 2d ___, 684 N.W.2d 136 (Wis. May 12, 2004) (No. 02-1431-CR) (citation omitted).

investigation; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor, age, educational background, and employment record; the defendant's remorse and cooperativeness; the need for close rehabilitative control of the defendant; the rights of the public; the effect of the crime on the victim; and any other offenses that were read-in for sentencing purposes. ***Id.***, ¶43 n.11. The weight to be given each factor is a determination within the wide discretion of the sentencing judge. ***Anderson v. State***, 76 Wis. 2d 361, 364, 251 N.W.2d 768 (1977).

¶7 While a meaningful, on-the-record explanation of a sentence is required, the exercise of discretion does not lend itself to mathematical precision. ***Gallion***, 270 Wis. 2d 535, ¶¶49-50. A trial court must provide an explanation for the general range of the sentence imposed, not for the precise number of years chosen. *See* ***id.***, ¶49. Moreover, when we review a sentence, we look to the totality of the court's remarks and the entire record, including any postconviction proceedings. *See* ***State v. Santana***, 220 Wis. 2d 674, 683, 584 N.W.2d 151 (Ct. App. 1998) ("The transcripts of the sentencing hearing as well as several postconviction hearings make an extensive record of the trial court's comments at sentencing and its explanation for what was considered.").

¶8 Applying these standards here, we conclude that the trial court properly exercised its discretion in sentencing Deleon. Deleon's convictions arose from a crime spree on August 15 and 16, 2001. Deleon told the writer of the presentence investigation report that he was at a picnic earlier in the day on August 15, 2001, and consumed beer, cocaine, marijuana, and valium. He and a friend, Genix Hernandez, then traveled to Milwaukee and committed numerous offenses, which ultimately resulted in convictions for three counts of armed

robbery, one count of armed burglary, two counts of substantial battery, and one count of false imprisonment.

¶9 After leaving Milwaukee county, Deleon and Hernandez went to the site of the Metro Milwaukee Auto Auction in the town of Raymond in Racine county. There, they entered the guard shack and, at gunpoint, demanded a car from the three unarmed guards. They subsequently compelled the guards to drive with them to Chicago in a Suburban belonging to one of the guards. During the trip, they held guns to the heads of the guards and threatened to kill them. Ultimately, they robbed the guards and dropped them off in unfamiliar surroundings in Chicago in the early morning hours of August 16, 2001. Deleon and Hernandez were arrested a short time later after a police chase in which they crashed the Suburban into a parked car and attempted to flee on foot.

¶10 Deleon received sentences totaling forty years of confinement and twenty years of extended supervision for the Milwaukee county convictions. He was subsequently sentenced in this case to fifteen years of confinement and fifteen years of extended supervision for the Racine county kidnappings, consecutive to the Milwaukee county sentences.

¶11 The maximum sentence for each of the kidnappings was sixty years. *See* WIS. STAT. §§ 939.50(3)(b) and 940.31(1)(a) (1999-2000). Prior to sentencing Deleon, the trial court listened to arguments from the prosecutor and defense counsel, and a statement by Deleon. It reviewed the presentence investigation report, which recommended that Deleon be sentenced to thirty-five to forty years of initial confinement, followed by twenty to twenty-five years of extended supervision. In addition, it was aware that charges of armed burglary, armed robbery, carjacking, and possession of a firearm by a felon had been

dismissed and read-in for purposes of sentencing, as were the "armed" portions of the original armed kidnapping charges.

¶12 In sentencing Deleon, the trial court expressly addressed the gravity of the offense, Deleon's character and rehabilitative needs, and the need for protection of the public. It concluded that the kidnappings were very serious offenses, and that Deleon posed a great risk to the public, necessitating confinement consecutive to the Milwaukee county sentences.

¶13 No basis exists to disturb the sentences imposed by the trial court. It addressed the facts and factors relevant to sentencing Deleon, and applied them in a reasoned and reasonable manner. It considered that kidnapping, by its very nature, is a crime against the person and one of the most serious crimes that can be committed short of murder. It noted that the seriousness of the offenses was aggravated in this case by the defendants' possession of guns and their repeated threats to kill the guards. It considered the effect on the guards of the kidnapping and the journey to Chicago, including the terror of being threatened at gunpoint by defendants who were driving under the influence of alcohol and drugs.

¶14 The trial court also considered Deleon's history and personal characteristics, concluding that he posed a great danger to the community and that society needed to be protected from him. In reaching these conclusions, it noted that Deleon, who was only nineteen years old at the time of these offenses, had a lengthy and serious juvenile record which began at age twelve. He had been committed to Ethan Allen School three times, had committed multiple serious offenses in Milwaukee on the night preceding the kidnappings, and faced pending charges related to an escape and assault of a deputy which occurred while being transferred between institutions after the Milwaukee county convictions.

¶15 The trial court also noted that Deleon had not graduated from high school, that he lacked an education and job skills, and that he had a drug and alcohol problem which affected his judgment, as evidenced by his consumption of alcohol and controlled substances on the day of these crimes. While acknowledging that Deleon had rehabilitative needs, the trial court concluded that rehabilitative treatment could best be provided in a confined setting. Based on his history and personal characteristics, the trial court also concluded that Deleon would commit further criminal activity "in a heartbeat" if he had the opportunity, and that confinement was necessary to protect society from him.

¶16 The record clearly establishes that the trial court discussed the relevant sentencing factors and objectives, and applied them in a reasoned and reasonable manner in assessing the gravity of the offense and the risk posed by Deleon to the community. Contrary to Deleon's argument, the trial court could reasonably conclude that he posed an extreme danger to the public, and that sentences of fifteen years in prison, followed by fifteen years of extended supervision, were appropriate.[2] Moreover, because the sentences were well within the limits of the 180 years to which Deleon could have been sentenced for the three kidnappings, they do not shock the public sentiment or violate the judgment

[2] In his reply brief, Deleon argues that the trial court focused nearly all of its attention on the secondary sentencing factors, and neglected the three primary sentencing factors. This is simply not true, as evidenced by the trial court's thorough analysis of the gravity of the offense, the character of the defendant, and the need to protect the public. In any event, the secondary sentencing factors are related to the primary factors. ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). They are in effect subfactors that may be considered in weighing the primary factors. A trial court may consider the secondary factors that it deems relevant and, ultimately, may base the sentence on one or more of the three primary factors after all relevant factors have been considered. ***Id.*** at 507-08.

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).

¶17 We also reject Deleon's argument that the trial court failed to provide an adequate explanation for making these sentences consecutive to the Milwaukee county sentences. Whether to impose a consecutive, as opposed to a concurrent, sentence is committed to the sound discretion of the trial court. ***State v. Ramuta***, 2003 WI App 80, ¶24, 261 Wis. 2d 784, 661 N.W.2d 483, *review denied*, 2004 WI 114, ___ Wis. 2d ___, 684 N.W.2d 136 (Wis. May 12, 2004) (No. 02-1431-CR). "In sentencing a defendant to consecutive sentences, the trial court must provide sufficient justification for such sentences and apply the same factors concerning the length of a sentence to its determination of whether sentences should be served concurrently or consecutively." ***State v. Hall***, 2002 WI App 108, ¶8, 255 Wis. 2d 662, 648 N.W.2d 41.[3]

¶18 As already discussed, the trial court considered and weighed proper sentencing factors when it imposed the sentences. Moreover, in making the sentences consecutive to the Milwaukee county sentences, the trial court emphasized the fact that kidnapping the guards constituted a separate volitional act on the part of Deleon and Hernandez, and was not simply part of their Milwaukee county crime spree. The trial court reasonably concluded that Deleon and Hernandez could have simply returned to Chicago after committing the Milwaukee crimes, but instead chose to commit additional crimes in Racine

[3] In challenging the trial court's decision to impose consecutive sentences, Deleon relies on American Bar Association (ABA) standards for imposing consecutive sentences. However, the Wisconsin courts have repeatedly refused to adopt the ABA guidelines for the imposition of consecutive sentences. *See, e.g.,* ***State v. Paske***, 163 Wis. 2d 52, 66-67, 471 N.W.2d 55 (1991).

county. It expressed its concern that if it imposed concurrent time, Deleon would suffer no punishment for the harm he did to the three innocent victims in this case.

¶19 Because crimes were committed against the three guards which were separate and distinct from the Milwaukee county crimes, the trial court's decision to make the sentences consecutive to the Milwaukee county sentences was appropriate. *See* ***State v. LaTender***, 86 Wis. 2d 410, 434, 273 N.W.2d 260 (1979). In upholding the trial court's decision, we also note that the trial court was aware of pending charges for escape and battery, crimes which were committed by Deleon after the Milwaukee county sentences were imposed. The trial court was entitled to consider these pending charges as an additional indication that Deleon was a danger to the public and would prey on society if not confined for an extensive time. *See* ***Handel v. State***, 74 Wis. 2d 699, 701-02, 247 N.W.2d 711 (1976).

¶20 Deleon objects that, because the sentences were made consecutive to the Milwaukee county sentences, he will remain confined until he is seventy-four years old, and will thereafter be subject to extended supervision. However, the trial court was cognizant of Deleon's age and the effect of making the sentences consecutive, but elected to do so anyway, reasoning that to do otherwise would mean Deleon would suffer no meaningful punishment for what he and Hernandez did to the three guards. The punishment of a defendant is a permissible objective of sentencing. ***Gallion***, 270 Wis. 2d 535, ¶40.

¶21 Moreover, while Deleon's age could have been viewed as a factor warranting a shorter or concurrent sentence, the weight that is attached to a relevant factor at sentencing remains within the wide discretion of the sentencing court. ***State v. Perez***, 170 Wis. 2d 130, 143, 487 N.W.2d 630 (Ct. App. 1992). In

making the sentences of Deleon and Hernandez consecutive to the Milwaukee county sentences, the trial court stated: "[F]rankly I think they ought to spend the rest of their lives locked up." Based upon the seriousness of the offenses, Deleon's history, and the trial court's determination that he posed a great danger to the public, the trial court was entitled to conclude that he needed to be incarcerated until old age, and to make the sentences consecutive to ensure a lengthy incarceration. *See* ***Ramuta***, 261 Wis. 2d 784, ¶24.

¶22 Because the record supports the trial court's choice of sentence and its decision to make the sentences consecutive to the Milwaukee county sentences, no basis exists to disturb the judgment or the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).