

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2007

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. 2006AP2710-CR

Cir. Ct. No. 2005CF6391

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JERRY LEE PEARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Fine, JJ.

¶1 PER CURIAM. Jerry Lee Pearson pled guilty to second-degree reckless homicide. *See WIS. STAT. § 940.06(1) (2005-06).*¹ The court imposed a

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

fifteen-year bifurcated sentence comprised of seven years' initial confinement and eight years' extended supervision. The sole issue on appeal is whether the circuit court erroneously exercised its sentencing discretion by failing to acknowledge Pearson's apology on the record. Because the court is required to discuss only those factors it believes are relevant, we affirm.

Background

¶2 Pearson encountered two men trespassing in his father's yard. A fight ensued, and Pearson struck one of the men on the head with a two-by-four. The State initially charged Pearson with first-degree reckless injury;² after the victim died, the State amended the charge and Pearson entered a guilty plea to second-degree reckless homicide.

¶3 At sentencing, the State highlighted Pearson's troubled background and the violence of the crime. Pearson's attorney noted the defendant's long-standing drug problem and severe learning disability. Pearson exercised his right to allocution, stating: "I just want to say I didn't mean for this to happen, and that I'm saying sorry to the family. That is all I have to say." In passing sentence, the circuit court did not discuss Pearson's apology.

¶4 Pearson brought a postconviction motion, asserting that the circuit court erroneously exercised its discretion by failing to acknowledge Pearson's remorse, attitude and demeanor. The court denied the motion without a hearing and this appeal followed.

² See Wis. STAT. § 940.23(1).

Discussion

¶5 This court will uphold a sentence unless the circuit court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We presume that the court acted reasonably and the defendant must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. *Id.*, ¶¶17-18.

¶6 *Gallion* requires the court to specify the objectives of the sentence and the facts relevant to those objectives. *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. The court must also identify the factors considered in arriving at the sentence and state how those factors influenced the sentencing decision. *Id.*

¶7 Pearson argues that the circuit court erred in not expressly acknowledging his apology because it thereby failed to consider his attitude, demeanor and remorse. The court was not required to do so.

¶8 Numerous factors are potentially relevant at sentencing. See *Gallion*, 270 Wis. 2d 535, ¶43 & n.11. Remorse, attitude and demeanor are three of those factors. *Id.* The court is not required to discuss every potential factor, however, but “need discuss only the relevant factors in each case.” *Id.*, ¶43 n.11 (citing *State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993)).

¶9 In *Echols*, as here, the defendant advanced an argument that sentencing courts are always required to address the same specific factors. *Echols*, 175 Wis. 2d at 683. The *Echols* court rejected the contention. *Id.* *Echols* determined that “[t]he trial court is in the best position to determine the relevant

factors in each particular case.” *Id.* *Gallion* reaffirms the vitality of the *Echols* analysis. *See Gallion*, 270 Wis. 2d 535, ¶43 & n.11.

¶10 Pearson cites neither *Echols* nor *Gallion*. He relies instead on an earlier decision, *State v. Paske*, 163 Wis. 2d 52, 471 N.W.2d 55 (1991). His reliance is misplaced.

¶11 *Paske* provides that a sentencing court “must consider” remorse, attitude and demeanor, some of the factors enumerated in a still earlier case, *State v. Evers*, 139 Wis. 2d 424, 451-52, 407 N.W.2d 256 (1987). *Paske*, 163 Wis. 2d at 62. *Evers* states: “[t]he judge must consider, in the course of deciding what sentence to impose, such factors as the defendant’s criminal record, his attitude and demeanor, whether he shows remorse, the length of time needed for rehabilitation, and the need for protection of society.” *Evers*, 139 Wis. 2d at 451-52. We conclude that neither *Paske* nor *Evers* mandates consideration of specific factors in every sentencing proceeding. Rather, these cases require the circuit court to reference those sentencing factors relevant to the particular case. Our conclusion is informed by *Gallion* and *Echols*, which unequivocally afford the circuit court discretion to select the factors that it deems relevant in pronouncing sentence. *See Gallion*, 270 Wis. 2d 535, ¶43 & n.11;³ *Echols*, 175 Wis. 2d at 683.

³ Were we to conclude that earlier decisions circumscribe the circuit court’s sentencing discretion by mandating consideration of remorse, attitude and demeanor, we would reject those mandates as inconsistent with later authority. “When the decisions of our supreme court appear to be inconsistent, we follow its most recent pronouncement.” *Spacesaver Corp. v. DOR*, 140 Wis. 2d 498, 502, 410 N.W.2d 646 (Ct. App. 1987).

¶12 The circuit court properly exercised its discretion here. It appropriately selected punishment and deterrence as the primary objectives of the sentence. *See Gallion*, 270 Wis. 2d 535, ¶41 (punishment and deterrence may be the objectives of greatest importance). The court considered the aggravated nature of the offense as a relevant factor in choosing those objectives. *See id.*, ¶43 n.11 (aggravated nature of the offense is an appropriate consideration).

¶13 The court noted and discussed many additional relevant factors. The court recognized Pearson's need for treatment both within a structured facility and upon release, given his intellectual limitations and psychological problems. *See id.*, ¶¶43, 60 n.11 (defendant's character and need for close rehabilitative control are appropriate considerations). The court expressly took into account that absent such treatment, Pearson remained a danger to the public. *See id.*, ¶40 (protection of the public a relevant sentencing objective). It observed that the offense created substantial misery. *See Id.*, ¶43 n.11 (effect of the crime on the victim is an appropriate consideration). At the same time, the court acknowledged the mitigating factors of Pearson's entering a plea and his cooperativeness in recognizing that his actions were unjustifiable.

¶14 The court balanced the various factors it selected as relevant to impose a sentence well below the potential maximum twenty-five year term of imprisonment. Although the court may not have viewed Pearson's apology as a mitigating factor in structuring the sentence, the court provided a "rational and explainable basis" for its sentence and we therefore uphold the court's discretionary decision. *See id.*, ¶39 (citation omitted).

By the Court.—Judgment and order affirmed.

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

