

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 3, 2008

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. 2007AP1381-CR

Cir. Ct. No. 2006CF6774

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RASHAD SAMAD NEALY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Rashad Samad Nealy pled guilty to two counts of burglary to a building or dwelling as a party to a crime. The circuit court imposed concurrent six-year prison sentences, with Nealy to serve a minimum of three years in initial confinement and a maximum of three years on extended

supervision. Nealy sought sentence modification, arguing that the circuit court erroneously exercised its sentencing discretion by: (1) failing to apply the appropriate sentencing factors; (2) failing to adequately explain its use of applicable sentencing guidelines; and (3) imposing a significantly harsher, and therefore unreasonable, sentence on him than on his co-actor. The circuit court denied Nealy's motion, and Nealy appeals. We conclude that Nealy's arguments are without merit, and we therefore affirm the judgment of conviction and the postconviction order.

¶2 In December 2006, Nealy and Jamal El-Campbell burglarized a liquor store four separate times. Nealy and El-Campbell each accepted the same plea bargain offered by the State: in exchange for their guilty pleas on two of the burglaries, the other two counts would be dismissed, but could be considered by the circuit court at sentencing. Nealy was sentenced to concurrent six-year sentences, of which he was to serve a minimum of three years in initial confinement. About one month later, the same judge imposed the same concurrent six-year sentences on El-Campbell, but the circuit court stayed El-Campbell's sentences and placed him on probation for three years.

¶3 The disparity between Nealy's and El-Campbell's sentence was part of the basis for Nealy's sentence modification motion. Nealy argued that he and El-Campbell should have received the same sentence given that they acted together in the burglaries. He also argued that the circuit court failed to give adequate consideration to mitigating factors, such as his cooperation with police, his decision to enter a plea agreement, and his acceptance of responsibility. Throughout the motion, Nealy argued that the circuit court had erroneously exercised its sentencing discretion by failing to explain its reasoning and the specific reasons underlying his sentence.

¶4 Sentencing lies within the sound discretion of the circuit court, and a strong policy exists against appellate interference with that discretion. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The circuit court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* “The primary considerations in imposing a sentence are the gravity and nature of the offense (including the effect on the victim), the character of the defendant and public safety.” *State v. Carter*, 208 Wis. 2d 142, 156, 560 N.W.2d 256 (1997). The discretion of the sentencing judge must be exercised on a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the circuit court’s discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶5 In *Gallion*, the supreme court stated that judges must explain the reasons for the particular sentence they impose. *Gallion*, 270 Wis. 2d 535, ¶39. “How much explanation is necessary, of course, will vary from case to case.” *Id.* The court went on: “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.” *Id.*, ¶46. The court went on to state that it did not require mathematical precision. *Id.*, ¶49. “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.’” *Id.* The court concluded: “The rule of law suffers when the sentencing judge’s discretion is unguided and unchecked. The rationale for sentencing decisions must be made knowable and subject to review.” *Id.*, ¶51.

¶6 In this case, the record shows that the circuit court considered all of the required factors and thoroughly explained its reasons for imposing the

sentence it did. The circuit court indicated that it was sentencing Nealy on the basis of the impact his crimes had on the community and, in particular, the businesses in the community. It noted that Nealy had burglarized the same business four times in less than three weeks. The court further noted that Nealy had a substantial juvenile record, including a burglary, and that apparently his involvement in the juvenile system had not convinced him to obey the law. In addition, the court commented on Nealy's admitted alcohol-abuse issues and his need for rehabilitation in "a structured, confined setting" because he was not treating those issues while in the community. Finally, the court noted Nealy's lack of education, in particular his inability to read and write at adult levels. After indicating that it had considered the sentencing guidelines, the circuit court sentenced Nealy. The record clearly shows that the circuit court considered the appropriate sentencing factors and explained its reasons for the sentences imposed on Nealy.

¶7 Nealy also argued that he should be resentenced because the circuit court failed to consider the applicable sentencing guidelines. The record shows, however, that the circuit court considered the guidelines when it imposed sentence. *See State v. Grady*, 2007 WI 81, ¶30, 302 Wis. 2d 80, 734 N.W.2d 364 ("a sentencing court satisfies its § 973.017(2)(a) obligation when the record of the sentencing hearing demonstrates that the court actually considered the sentencing guidelines and so stated on the record").

¶8 Finally, Nealy argues that the circuit court erroneously exercised its discretion by failing to explain the differences between his sentence and that of El-Campbell. It is well-settled that the imposition of different sentences on persons convicted of the same offense does not, in and of itself, constitute an erroneous exercise of discretion. *State v. McClanahan*, 54 Wis. 2d 751, 757, 196 N.W.2d

700 (1972). “A mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation.” *State v. Toliver*, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). Here, Nealy and El-Campbell received the same sentences, but the circuit court stayed El-Campbell’s sentences and placed him on probation. The circuit court explained the reasons for the disparity, however, noting in its postconviction order that it stayed El-Campbell’s sentence because he had “no prior criminal record,” while Nealy had a rather lengthy record of juvenile adjudications. The circuit court also noted that El-Campbell “demonstrated to the court that he had taken significant steps to rehabilitate himself and turn his life around.” The court concluded that, even though Nealy had “appraised the court of the various mitigating factors in his case,” such as his cooperation with authorities, his employment history, and his lack of contact with police since he turned fifteen years old, El-Campbell’s history “distinguished him from defendant Nealy in terms of his rehabilitative needs and the relative risk that he posed to the community.” Nealy’s argument on this point is without merit.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

