

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2012

Diane M. Fremgen
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. 2011AP2042-CR

Cir. Ct. No. 2009CF5703

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HELSON PABON-GONZALEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Helson Pabon-Gonzalez appeals from a judgment convicting him of two counts of armed robbery with threat of force as a party to a

crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (2009-10),¹ and from an order denying his motion for postconviction relief. He argues that the circuit court violated his Fifth Amendment protection against compelled self-incrimination by punishing him during sentencing for refusing to admit guilt. Because the circuit court properly considered Pabon-Gonzalez's refusal to admit guilt as one of a number of sentencing factors, we affirm.

BACKGROUND

¶2 As set forth in the criminal complaint, the charges against Pabon-Gonzalez stem from two robberies occurring within approximately fifteen minutes of each other. The complaint alleged that Pabon-Gonzalez, with his co-defendant, Cesar Rivera-Gonzalez, robbed two men at gunpoint. Minutes after the second robbery was reported, police observed Pabon-Gonzalez and Rivera-Gonzalez fleeing the area of the robberies in a dark blue minivan matching the descriptions given by the victims. As police followed the minivan, they saw the passenger place an object in a barrel located behind a business. The object turned out to be a shotgun. When they were arrested, Rivera-Gonzalez had the wallet of one of the victims and Pabon-Gonzalez had the key to the minivan. Inside the minivan, police found a ski mask along with a jacket belonging to the other victim. In a statement to police, Pabon-Gonzalez admitted he was the driver of the minivan.

¶3 Pabon-Gonzalez was tried separately from Rivera-Gonzalez, who pled guilty to two reduced charges of robbery. A jury found Pabon-Gonzalez

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

guilty of two counts of armed robbery with threat of force as a party to the crime, and the court imposed consecutive sentences of five years of initial confinement and three years of extended supervision on each count.

¶4 In arriving at Pabon-Gonzalez's sentence, the circuit court stated:

These were brutal armed robberies. They were planned. They were planned by you and Mr. Rivera-Gonzalez together.

Your story that you were merely driving [co-defendant Rivera-Gonzalez] is unbelievable. You knew exactly what was going on. It was your van that was identified by both victims, your sister's van, the one that you were driving. So you were there when Rivera-Gonzalez took the shotgun and held these two people up. And Rivera-Gonzalez tells me that he did it because he was afraid of you. He was believable.

And Rivera-Gonzalez also testified that you were going to do the second [robbery], that was the plan, but at the last minute you changed the plan. And I realize that nobody identified you at the scene, other than Rivera-Gonzalez. But I just cannot understand why you take absolutely no responsibility for these two armed robberies.

And you minimize [your criminal record from] Puerto Rico as well. The community needs to be protected from people like you. I would not be doing my job if I allowed somebody like you back on the streets. You had the same opportunity that Rivera-Gonzalez did to come forward and take responsibility for what you did, as deplorable as it was, and you refuse to do that. You have continued to maintain this charade that you did nothing wrong other than drive a friend around. As I say, it's unbelievable.

The presentence writer concluded on page 8 that it was the agent's impression that the defendant was not very honest or forthright during the interview. "On several occasions he became angry or obstinate. He did not or would not answer questions and had a somewhat defensive attitude throughout the interview." I concur with that assessment.

In looking at you, which is the other thing that I have to look at, your character, you've got the record. I

agree it's dated. Frankly, that's not as concerning to me in setting this sentence as your absolute refusal to take responsibility and the absolute ... brutality of the crime.

I watched both of these victims testify. I saw how they tried to relive what happened that night. And the fact is they were scared. There was a loaded shotgun put up to them. They thought they were going to die. And you were part of that.

What's really disturbing to me is that, unlike a lot of the other people that I see here, you have no problems, no drug problems, no alcohol problems. You're a high school graduate. You've done something in college. You came to this state from the Commonwealth of Puerto Rico to better yourself, and you didn't.

I don't know how hard you looked for a job, but the fact is you decided to take the easy way out by taking stuff that didn't belong to you, for no reason, other than greed. You asked me to forgive you. I can't forgive you, not until you take the responsibility and say to me, Judge, you're absolutely right. I was there. I helped this robbery. I knew it was going down. And you didn't do that. You still haven't done that.

The circuit court continued:

Sir, the evidence is overwhelming that your sister's van was at both scenes of the robberies when Rivera-Gonzalez got out with the shotgun, that there was someone in the driver's seat. Who else but you was driving that van? That's why I don't believe you. I don't believe you. You were there when both robberies took place, and your story that you picked him up after is unbelievable.

So I'm sending you to prison.

In its final remarks, the circuit court explained why Pabon-Gonzalez's sentence differed from Rivera-Gonzalez's:

I am treating you different than Mr. Rivera-Gonzalez for two reasons: One, he took responsibility. You didn't. Three reasons, actually. He showed remorse. You don't. And third, he had no record. And you've got a dated record.

¶5 Pabon-Gonzalez subsequently sought postconviction relief, arguing that his sentence was improperly based on his refusal to admit guilt.² The postconviction court denied Pabon-Gonzalez's motion.

DISCUSSION

¶6 The sole issue on appeal is whether the circuit court violated Pabon-Gonzalez's Fifth Amendment rights by improperly considering his refusal to admit guilt during sentencing. Pabon-Gonzalez asserts that "[t]he circuit court's analysis and rationale at sentencing repeatedly demonstrate its commitment to punish [him] because he did not accept responsibility."

¶7 Sentencing lies within the circuit court's discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." *State v. Stenzel*, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. We presume the circuit court acted reasonably, and the burden is on the defendant to show that the sentence was unreasonable or unjustifiable. *State v. Davis*, 2005 WI App 98, ¶12, 281 Wis. 2d 118, 698 N.W.2d 823. "Unjustifiable bases for a sentence include irrelevant or improper considerations." *State v. Fuerst*, 181 Wis. 2d 903, 910, 512 N.W.2d 243 (Ct. App. 1994) (citation omitted).

² Pabon-Gonzalez also argued that information pertaining to his prior convictions in Puerto Rico constituted a new factor. He does not pursue this issue on appeal.

¶8 A circuit court’s *sole* reliance on a defendant’s refusal to admit guilt amounts to an improper consideration. *Id.* at 915. In *Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286 (1974), the supreme court explained:

The exercise of the right against self-incrimination is a one-way street. If the defendant exercises that right, he may not be penalized for it, even after a jury’s determination of guilt. On the other hand, in the expectation of leniency, he may waive that right and acknowledge his guilt and express his contrition and remorse.

Id. at 496. While a circuit court cannot punish a defendant during sentencing for maintaining his innocence or compel an admission of guilt, it is, however, permitted to note a defendant’s lack of remorse. *See State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶9 In *State v. Baldwin*, 101 Wis. 2d 441, 304 N.W.2d 742 (1981), the supreme court indicated that the circuit court’s “mention of the defendant’s lack of remorse and refusal to admit guilt ... clearly was a factor, among ... several ..., which contributed in part to the judge’s sentencing decision.” *Id.* at 458. It went on to distinguish Baldwin’s case from *Scales*, and the Fifth Circuit Court of Appeals case upon which it relied, by indicating that in *Scales*, “the [circuit] court’s consideration of the defendant’s lack of remorse was not one among many other factors” and “Scales [was] given the maximum sentence possible for the offenses of which [Scales] had been convicted.” *Baldwin*, 101 Wis. 2d at 458. The supreme court ultimately concluded:

There is a distinction ... between the evil which *Scales* seeks to avoid and the [circuit] court’s obligation to consider factors such as the defendant’s demeanor, his need for rehabilitation, and the extent to which the public might be endangered by his being at large. A defendant’s attitude toward the crime may well be relevant in considering these things. In this case we believe the [circuit] court considered a variety of factors, giving no undue or

overwhelming weight to any one in particular. The sentence imposed was well within the maximum for which the defendant might have been sentenced, and while it is evident that the defendant's failure to admit his guilt and his lack of remorse were factors in the sentencing decision, we do not believe it was improper or an [erroneous exercise] of discretion.

Baldwin, 101 Wis. 2d at 459 (citation omitted); see also *State v. Carrizales*, 191 Wis. 2d 85, 96, 528 N.W.2d 29 (“A [circuit] court does not erroneously exercise its discretion when it considers a defendant’s refusal to admit guilt as one of a number of factors at sentencing, so long as the court does not give one factor undue weight.”).

¶10 As in *Baldwin*, the circuit court considered a number of factors and did not rely solely on Pabon-Gonzalez’s refusal to admit guilt. While the circuit court considered that factor, it also took into account the aggravated nature of the robberies and the effect they had on the victims, Pabon-Gonzalez’s past record of criminal offenses, and other aspects of Pabon-Gonzalez’s character. See *Gallion*, 270 Wis. 2d 535, ¶43 n.11 (identifying relevant sentencing factors). In addition, Pabon-Gonzalez’s sentence was well within the maximum given that each armed robbery charge carried a maximum initial confinement period of twenty-five years and a maximum extended supervision period of fifteen years. See WIS. STAT. §§ 943.32(2), 939.50(3)(c), 973.01(2)(b)3. & (d)2.

¶11 As to the differing sentences received by Pabon-Gonzalez and Rivera-Gonzalez, we note that disparity among co-defendants’ sentences “is not improper if the individual sentences are based upon individual culpability and the

need for rehabilitation.”³ See *State v. Toliver*, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994); see also *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 435-36, 351 N.W.2d 758 (Ct. App. 1984) (each defendant should have individualized sentences even though they may have committed the same offense). Here, the circuit court’s sentencing remarks clearly convey the distinctions it drew between Pabon-Gonzalez and Rivera-Gonzalez, which prompted it to impose the sentences that it did: namely, Rivera-Gonzalez’s decision to come forward and accept responsibility; his remorse; and his lack of a prior record.

¶12 We conclude that the circuit court did not erroneously exercise its discretion when it sentenced Pabon-Gonzalez.⁴

By the Court.—Judgment and order affirmed.

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

³ According to comments made by Pabon-Gonzalez’s counsel during the sentencing hearing, Rivera-Gonzalez received concurrent sentences of five years of initial confinement and three years of extended supervision on each of the two robbery charges to which he pled. Defense counsel requested the same sentences for Pabon-Gonzalez.

⁴ Because we are affirming on this basis, we need not address the State’s contention that Pabon-Gonzalez waived his right to a review of this claim by not contemporaneously objecting at sentencing. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (If this court affirms a circuit court order based on one ground, it need not address others.).

