

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 27, 2005

Cornelia G. Clark
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. 2004AP2578-CR

Cir. Ct. No. 2002CF6277

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEYUN UTSEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Keyun Utsey appeals from a judgment entered after a jury convicted him of one count of maintaining a drug trafficking place,

contrary to WIS. STAT. § 961.42(1) (2003-04).¹ He also appeals from an order denying his motion seeking sentence modification. Utsey claims the trial court erroneously exercised its sentencing discretion by: (1) relying on inaccurate information when it imposed sentence; and (2) imposing the maximum sentence for the crime because the court believed Utsey was guilty of the two counts on which the jury acquitted him. Because the trial court did not erroneously exercise its sentencing discretion, we affirm.

BACKGROUND

¶2 This case has a somewhat protracted procedural history, which is unnecessary to recite for the purposes of this appeal. What is necessary to note is that Utsey's case proceeded to trial on an information charging him with delivery of marijuana, possession with intent to deliver marijuana while armed, and keeping a drug house. The jury acquitted him of the first two counts and found him guilty only of keeping a drug house.

¶3 Utsey was sentenced on October 20, 2003, to two years in prison, with eighteen months' initial confinement followed by six months of extended supervision. Utsey filed a postconviction motion seeking sentence modification. The trial court denied the motion. Utsey now appeals.

DISCUSSION

¶4 Utsey raises two claims related to his sentencing. First, he argues the trial court relied on inaccurate information in imposing the maximum sentence.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Specifically, he points to the trial court's reference to "cocaine" when this case involved marijuana. Second, he argues that the trial court erred by substituting its belief that Utsey was guilty of the two counts on which the jury acquitted him. He contends that the trial court's belief that he was guilty resulted in its decision to impose the maximum penalty for the keeping a drug house charge. We reject each argument in turn.

¶5 There is a consistent and strong policy against interference with the discretion of the trial court in passing sentence. *State v. Paske*, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991) (citing *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Furthermore, "the trial court is presumed to have acted reasonably, and the burden is on the appellant to 'show some unreasonable or unjustifiable basis in the record for the sentence complained of.'" *State v. Thompson*, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992) (citation omitted). A trial court's sentence is reviewed for an erroneous exercise of discretion. *Paske*, 163 Wis. 2d at 70.

¶6 It is similarly well established and undisputed by the parties in this case, that trial courts must consider three primary factors in passing sentence. Those factors are "the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public." *Id.* at 62 (citing *State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984)). The weight to be given to each of the factors is a determination particularly within the discretion of the trial court. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). After consideration of all relevant factors, the sentence may be based on any one of the

three primary factors. *State v. Krueger*, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶7 Because the trial court is in the best position to determine the relevant factors in each case, we allow the trial court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing it to be unreasonable or unjustifiable. *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶8 The exercise of a sentencing court's discretion requires a demonstrated process of reasoning based on the facts of the record and a conclusion based on a logical rationale. *McCleary*, 49 Wis. 2d at 277. The trial court must engage in an explained judicial reasoning process and explain the reasons for its actions. However, even if the trial court fails to adequately set forth its reasons for imposing a particular sentence, the reviewing court will not set aside the sentence for that reason. The reviewing court is "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *Id.* at 282.

A. Trial Court's Reference to Cocaine.

¶9 Utsey's first claim is that the trial court sentenced him based on the inaccurate fact that the drug involved here was cocaine, when in fact the drug at issue was marijuana. He bases this claim on the following statement by the trial court during the sentencing hearing:

We live in a community that is scarred by drugs. Cocaine is a tremendous problem and is implicated in virtually every crime that comes before our courts. It is a terrible and addictive poison that's put into our community. And when you became a keeper of a drug house, you

implicated yourself in that kind of conduct and now you have to live with the consequences of that.

¶10 The trial court proceeded to sentence Utsey to the maximum term for this crime, two years. The record then reflects that Utsey informed the trial court that the drug involved here was marijuana, not cocaine. The trial court then apologized for the misstatement, and noted that, “The drug involved here is marijuana.” The prosecutor, in follow-up of the misstatement, then asked the following question: “Just so the record’s clear. The court did not sentence the defendant to the maximum because the court thought this was a cocaine house. Correct?” The trial court replied: “Oh no, no, absolutely not.”

¶11 The record also reflects that the sentencing transcript prior to the trial court’s misstatement repeatedly refers to the drug involved here as “marijuana.” Finally, in the order denying the postconviction motion, the trial court explained its reference to cocaine was simply a misstatement: “I corrected my misstatement and indicated that [I] had not sentenced defendant on the basis of a belief that he was dealing cocaine.... Given the lengthy history of this case, and that I presided over the trial, it would seem clear that I simply misspoke and placed no weight on an erroneous fact.”

¶12 Based on the foregoing, we conclude that the trial court did not erroneously exercise its sentencing discretion. The erroneous reference to cocaine, rather than marijuana, was a misstatement. It did not result in the trial court imposing a greater sentence because it thought that Utsey was keeping a cocaine house, rather than a marijuana house. It is clear from the part of the sentencing transcript that precedes the erroneous “cocaine” reference that the trial court knew this case was about marijuana. It is also clear from the part of the sentencing transcript following the erroneous “cocaine” reference that the trial court knew

this case was about marijuana. It is clear from the trial court's explanation in its postconviction order that the trial court knew this case was about marijuana. Because the trial court knew this case involved marijuana and imposed a sentence based upon that knowledge, it did not rely on inaccurate information. Accordingly, we can only conclude that the misstatement was simply a mistaken reference, which was almost immediately corrected, and therefore did not undermine the validity of the court's sentencing decision.

B. Sentencing Based on Crimes the Jury Acquitted Utsey.

¶13 Utsey's second contention is that the trial court erroneously exercised its sentencing discretion by sentencing him to the maximum penalty on the crime for which he was convicted because it believed he was guilty of the two crimes on which the jury acquitted. We reject his contention.

¶14 It is clear from a review of the sentencing transcript that the trial court personally believed that Utsey was guilty of the two crimes for which he was acquitted. However, we cannot conclude that the trial court erroneously imposed the maximum penalty because it was trying to replace the jury's acquittal on the drug possession and delivery charges with its own determination that he was guilty of those charges.

¶15 A full examination of the transcript reveals that the maximum sentence was imposed because of the serious nature of the crime, and the need to protect the public. The trial court stated that putting aside all of its concerns about what it believed was Utsey's false testimony, and the fact that he was not convicted of the other two counts, "I've got a very serious crime here." The trial court then explained why it imposed the maximum sentence: "I am choosing the maximum sentence here because frankly, the record in its entirety indicates that a

significant period of removal from the community is consistent with the need to protect the community, the seriousness of the crime, and your character.”

¶16 Based on our review, we conclude that the trial court did not impose the maximum sentence because it wanted to punish Utsey for crimes for which he was acquitted. Rather, the trial court’s focus was on the seriousness of the crime and the negative effect drug houses have on the community. The trial court’s rationale reflects an appropriate decision that was made based on the pertinent sentencing factors and not upon factors related to the acquittal. Accordingly, we conclude that the trial court did not erroneously exercise its sentencing discretion.

By the Court.—Judgment and order affirmed.

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