

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 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. 2004AP3134-CR

Cir. Ct. No. 2003CF3676

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIK J. MOORE,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Erik Moore appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the trial court erred when it sentenced him because it imposed a harsher sentence on him than had been imposed on his co-

actor, the trial court improperly emphasized one sentencing factor, the court did not fully explain why it imposed the sentence it did, and the court erred when it denied Moore's motion for postconviction relief. Because we conclude that the trial court properly exercised its discretion when it sentenced Moore and denied his motion for postconviction relief, we affirm the judgment and order.

¶2 Moore was convicted of one count of first-degree reckless injury, and one count of possession of marijuana, more than 200 grams. The court sentenced him to fifteen years of initial confinement and ten years of extended supervision. The underlying incident occurred when Moore and his co-actor, Charles Jones, went into a drug house. Both Moore and Jones eventually fired guns, and a man was shot and injured. Jones was ultimately sentenced to ten years of initial confinement and six years of extended supervision.

¶3 Moore argues that the trial court erred when it imposed a harsher sentence on him than on Jones. Sentencing lies within the sound discretion of the trial 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 trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). 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 trial court's discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶4 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 codefendants 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). To establish that the disparity was improper, the defendant must show that “the trial court based its determination upon factors not proper in or irrelevant to sentencing, or was influenced by motives inconsistent with impartiality.” *Jung v. State*, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966).

¶5 We conclude that Moore has not made this showing. The trial court considered all of the appropriate factors when it sentenced Moore. The court considered, among other things, that Moore had a pattern of criminal behavior, and that the offense was of the type that could lead to innocent victims being hurt. The court also considered the circumstances of the incident and determined that Moore was not just an innocent person in the wrong place at the wrong time. The court explained the reasons for the sentence it imposed and imposed a sentence that was within the maximum allowed. Moore has not demonstrated that the court based its decision on improper factors or “was influenced by motives inconsistent with impartiality.” *Id.*

¶6 Moore also argues that the court erred by not considering certain mitigating factors. Moore suggests that the sentence was not individualized to meet the needs and circumstances of the particular defendant. We disagree. The trial court must consider the three primary factors and the weight to be given to each factor is a matter within that court’s discretion. *See Cunningham*, 76 Wis. 2d at 282. The court fashioned a sentence that addressed the factors as they

applied to Moore. The court was not obligated to consider the particular factors Moore thought were important. Moore has not established that the court erred.

¶7 Moore next argues that the court did not properly explain its reasons for imposing the maximum sentence as required by *Gallion*, 270 Wis. 2d 535, ¶76. We again disagree. At the sentencing hearing, the trial court stated:

And the connection between you and violence and drugs and drug dealing and weapons is just too great and too clearly established not to have this be a maximum or near maximum case.

There is nothing in your background that suggests otherwise. There's no compelling life circumstance or no particular character evidence that outweighs the weight of this criminal activity and prior record.

The court explained its reasons for imposing the sentence it did.

¶8 Moore's final argument is that the trial court erred when it denied his motion for postconviction relief. Because we have concluded that the trial court did not err when it sentenced Moore, we also conclude that the trial court did not err when it denied his motion for postconviction relief. For the reasons stated, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

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

