COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP591-CR **Cir. Ct. No. 2004CF5064**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK L. MCCREE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Derrick McCree appeals from a judgment convicting him of one count of being a felon in possession of a firearm. The circuit court sentenced McCree to thirteen months of initial confinement followed by twenty months of extended supervision, to be served concurrently to a sentence

he was already serving. McCree also appeals from the circuit court's order denying his motion for sentence modification. Because we conclude that the circuit court did not erroneously exercise discretion at McCree's sentencing, we affirm the judgment and order.

¶2 Certain facts underlying McCree's guilty plea were undisputed. McCree accompanied his estranged wife to a gun shop where she allegedly intended to purchase a handgun for protection. McCree insisted that his sole purpose in going to the shop was to help his estranged wife choose a handgun for her use. A clerk at the store alerted uniformed police who were present that he believed that McCree was involved in a "straw purchase" by his wife. The uniformed police officers observed McCree holding a handgun. When the officers inquired of McCree whether he was a convicted felon, he told them he was.

¶3 Following sentencing, McCree moved the circuit for sentence modification, arguing that the sentence imposed was excessive and failed to adequately weigh mitigating factors like McCree's cooperation with authorities, his brief possession of the handgun, his five months of steady employment prior to the incident and his many years of crime-free life between his conviction for armed robbery in 1992 and the instant offense. The circuit court denied the motion and this appeal followed.

¶4 McCree's appeal turns on a single dispositive issue: did the circuit court erroneously exercise discretion when it imposed a two-year and nine-month sentence on McCree? Accordingly, we confine our remarks to this issue. ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

¶5 Sentencing is a matter of discretion for the circuit court. ***State v. Macemon***, 113 Wis. 2d 662, 667, 335 N.W.2d 402 (1983). Appellate review of sentencing is limited to a two-step inquiry. The first question is whether the circuit court properly exercised its discretion in imposing the sentence and, secondly, if it did, whether the circuit court erroneously exercised discretion by imposing an excessive sentence. ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984).

¶6 A circuit court must take into consideration "the gravity of the offense, the character of the offender, and the need for protection of the public." ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The weight to be given each factor lies within the discretion of the circuit court, ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981), but the court must state its reasons for imposing a particular sentence on the record, ***McCleary v. State***, 49 Wis. 2d 263, 277-82, 182 N.W.2d 512 (1971).

¶7 The Wisconsin Supreme Court recently reinvigorated ***McCleary*** in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. The majority in ***Gallion*** observed, "How much explanation is necessary, of course, will vary from case to case." ***Id.***, ¶39. It recognized that sentences could not be explained with "mathematical precision," ***id.***, ¶49, but it expressed its purpose, "in the wake of truth-in-sentencing legislation, [to] reinvigorate the ***McCleary*** directive that the exercise of sentencing discretion must be set forth on the record," ***id.***, ¶4.

¶8 At the sentencing hearing in this case, the circuit court first addressed the seriousness of McCree's criminal conduct. The circuit court reasoned that McCree's decision to go to a gun store with his estranged wife to help her pick out a handgun for protection was "poor." The court also concluded

that McCree knew that he was "to stay away from all firearms." At the same time, the court recognized that "this was not an aggravated case … this is not a circumstance where you're going armed with a loaded pistol in your waistband, being pulled over in a car or walking down the street." In light of these factors, the court concluded that the seriousness of McCree's criminal conduct fell in the "minimal range."

¶9 The court then turned to the issue of McCree's character. The court found the record concerning McCree's character was "mixed with both poor and good aspects." The court noted that McCree was convicted of disorderly conduct in 1990, armed robbery in 1992 and domestic violence battery in 2004. The circuit court noted that McCree was on probation for the domestic violence battery when the instant offense occurred. The court also acknowledged that McCree seemed to be an "honest individual," was willing to cooperate with authorities and was "employed and was doing relatively well on supervision until this occurred." Still, the court was concerned about the nature of the crime since McCree was on probation for domestic violence, a crime he committed only months before the instant offense.

¶10 The court weighed the need to protect the community as "intermediate," expressing its concern that McCree committed this crime while on probation and noting that he accepted responsibility for his actions and concluding that the severity of the crime itself was of a "more minimal nature."

¶11 We are satisfied that the circuit court considered the relevant facts including the seriousness of the offense, the community's interest in deterring this crime and McCree's background and character. The circuit court explained its

reasoning and relied on the relevant law. We conclude that no misuse of discretion occurred at McCree's sentencing hearing.

¶12 We also conclude that the sentence imposed is not unduly harsh or excessive. An unduly harsh and excessive sentence must be "so … unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The offense McCree committed carries a maximum potential penalty of ten years of imprisonment and a $25,000 fine. We conclude that the sentence imposed in this case was not unduly harsh or excessive within the meaning of ***Ocanas***.

By the Court.—Judgment and order affirmed.

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