

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 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. 2007AP2700-CR

Cir. Ct. No. 2006CF6633

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERENCE ERIK BERNARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and DANIEL L. KONKOL, Judges.¹ *Affirmed.*

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

¹ The Honorable Charles F. Kahn, Jr., presided at the trial and entered the judgment of conviction. The Honorable Daniel L. Konkol heard the postconviction motion and entered the order denying postconviction relief.

¶1 PER CURIAM. Terence Erik Bernard appeals from the judgment of conviction entered against him, and the order denying his motion for postconviction relief. He argues that the circuit court erred when it denied his motion to suppress statements he made to the police, and that the circuit court did not properly exercise its sentencing discretion. Because we conclude that the circuit court properly denied the motion to suppress and exercised its sentencing discretion, we affirm the judgment and order of the circuit court.

¶2 Bernard pled guilty to one count of theft from a person, as a party to a crime. He and a co-actor were charged with having grabbed a purse from a woman's shoulder, causing her to fall to the ground, and then dragging her for ten to fifteen feet. Prior to entering the plea, Bernard moved to suppress statements he made to the police on the grounds that he was "woozy and hung-over" when he made the statements, that he did not knowingly and intelligently waive his *Miranda* rights, and that the statements were coerced.² The circuit court denied the motion.

¶3 The circuit court sentenced Bernard to three years and six months of initial confinement and four years of extended supervision. Bernard brought a motion for postconviction relief, alleging that the circuit court erred when it denied the suppression motion, and that the sentence imposed was excessive. The circuit court denied the motion.

¶4 Bernard first argues that the circuit court erred when it denied his motion to suppress the statements he made to the police. He argues that he was in

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

a compromised physical condition because he was hung-over, ill, and tired, and that consequently he could not provide a legally sufficient knowing, intelligent, and voluntary waiver. He also argues that his statements were coerced because the police told him that he could go home and that he would not be prosecuted if he would just apologize to the victim.

¶5 When we review the voluntariness of a statement, we examine the application of constitutional principles to historical facts. *State v. Hoppe*, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. “We give deference to the circuit court’s findings regarding the factual circumstances that surrounded the making of the statements. However, the application of constitutional principles to those facts is subject to independent appellate review.” *Id.* (citations omitted). “When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness’s testimony.” *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. “When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Id.*

¶6 At the hearing on the suppression motion, the police officer who arrested Bernard and read him the *Miranda* warnings, testified that Bernard did not appear to be hung-over, under the influence of alcohol, or sleepy. Bernard testified that he felt hung-over and woozy. The circuit court found the officer’s testimony to be more credible, and that Bernard had been given and understood his *Miranda* rights.

¶7 Bernard also testified that the officer told him that the victim did not want to press charges if Bernard apologized, and promised him that he could go

home if he apologized. The officer denied that he had made any such statement or promise. Again, the circuit court found the officer's testimony to be more credible. The court concluded that the statements were not coerced. Based on these factual findings, we conclude that the circuit court did not err when it denied Bernard's motion to suppress the statements he made to the police.

¶8 Bernard also argues that the circuit court erred when it sentenced him, and that the sentence was unduly harsh. He argues that the circuit court imposed a sentence that was harsher than the parties' recommendations, and that the court ignored certain mitigating factors. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the 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 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 trial court's discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶9 The record establishes that the circuit court properly exercised its discretion when it sentenced Bernard. The circuit court considered all of the appropriate factors, and imposed a sentence that was within the maximum allowed. Further, the court told Bernard during the plea colloquy that it was not bound by the parties' recommendations and that it could impose the maximum

sentence. We conclude that the circuit court properly exercised its discretion when it sentenced Bernard. We also conclude that the circuit court properly denied Bernard's motion for postconviction relief. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

