

State of Wisconsin: Circuit Court: Milwaukee County

State of Wisconsin,

Plaintiff,

v.

Case No. 2005CF5752

Donte Moss,

Defendant.

Defendant's Postconviction Motion to Modify Sentence filed under Sec. 809.30 Stats.

NOW COMES the above-named defendant, by his attorney, Jeffrey W. Jensen, and pursuant to Sec.809.30, Stats., hereby moves to vacate the court sentence imposed by the court and to order resentencing.

AS GROUNDS, the undersigned shows to the court that at the sentencing hearing the court failed to state sufficient reasons on the record to establish a nexus between the relevant sentencing considerations and the actual sentence imposed. Thus, the court abused its sentencing discretion.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____,
2007.

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By: _____
Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.224.9484

State of Wisconsin,

Plaintiff,

v.

Case No. 2005CF5752

Donte Moss,

Defendant.

**Memorandum in Support of Defendant's Postconviction Motion to Modify Sentence
filed under Sec. 809.30 Stats.**

Introduction

The defendant, Donte Moss ("Moss") was charged with first degree recklessly causing injury. Evidence was presented at trial that Moss and Sidney Blades were with a group of people in the front yard of a house. Edmond Green approached Moss and slugged him in the face. Moss fell to the ground and, when he stood back up, he told Blades, "Shoot him (meaning Green)." Witnesses testified that Blades then pulled out a gun and shot at Green. Green was hit in the arm. The shot severed Green's brachial artery and, as a consequence, Green's arm was amputated.

The case was tried to a jury and the jury found Moss guilty.

The court sentenced Moss to eight years initial confinement and ten years of extended supervision. At the sentencing hearing the court touched on Moss' prior record and the seriousness of the offense and then sentenced Moss as follows:

As to Mr. Moss, the court is going to sentence the defendant . . . to a period of eight years of initial confinement. The court notes that the defendant is not the one that fired the gun, but the court does believe that he was equally responsible by his actions. Again, this was a classic case of party to the crime under the circumstances, and given the relationship that Mr. Moss had with Mr. Blades, the court feels strongly that he was responsible here, as well. The court also believes that he is in need of this supervision, and that is why the court is imposing the ten years of extended supervision, as well.

(Sent. Trans. 2/19/2007 p. 36, 37).

Argument

I. The court never explained on the record why the sentencing factors considered by the court required the period of confinement imposed and, therefore, the court abused its sentencing discretion.

There is no doubt that, in passing sentence on Moss, the court considered relevant factors. The court looked at the nature of the offense and characterized Moss' behavior as serious. The court considered Moss' prior criminal convictions. What the court left unexplained, though, is why those sentencing factors required the length of confinement that was imposed. Put another way, the record contains no nexus between the factors considered and the sentence imposed.

Recently, in, *State v. Taylor*, 2006 WI 22 ¶18 (Wis. 2006) the Wisconsin Supreme Court reaffirmed the traditional sentencing factors but, in the light of "Truth in Sentencing", emphasized the need for trial courts to do more than simply recite the facts, invoke the sentencing factors, and to then decide the sentence. Rather, the trial court must *explain* what factors are being considered and *why* those factors require the sentence being imposed (i.e. to provide the "linkage" between the sentencing factors and the sentence imposed). The court wrote:

The standards governing appellate review of an imposed sentence are well settled. A circuit court exercises its discretion at sentencing, and appellate review is limited to determining if the court's discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, P17, 270 Wis. 2d 535, 678 N.W.2d 197; see also *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) ("It is thus clear that sentencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed."). "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *Id.* at 277.

"The sentencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." *State v. Borrell*, 167 Wis. 2d 749, 781-82, 482 N.W.2d 883 (1992) (citing *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984)). "Therefore, the convicted defendant must show some unreasonable or unjustified basis in the record for the sentence imposed." *Borrell*, 167 Wis. 2d at 782 (citing *Harris*, 119 Wis. 2d at 622-23). "Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence." *McCleary*, 49 Wis. 2d at 281.

Furthermore, "[a] trial judge clearly has discretion in determining the length of a sentence within the permissible range set by statute." *Hanson v. State*, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970). "An abuse of this discretion will be found only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." (internal citations omitted)

In sentencing Moss the court took care to outline all of the factors that the court considered, however, having invoked the sentencing factors, the court never explained *why* the sentence imposed was necessary. Rather, the court merely said, "As to Mr. Moss, the court is going to sentence the defendant . . . to a period of eight years of initial confinement."

In a concurring opinion in *Taylor*, Justice Bradley wrote, "Merely uttering the facts involved, invoking sentencing factors, and pronouncing a sentence is not a sufficient demonstration of the proper exercise of discretion." *Taylor*, 2006 WI 22, ¶54 (Wis. 2006). Rather, as the court explained in *Gallion*, "[W]e require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." *Gallion*, 2004 WI 42, ¶46 (Wis. 2004)

Here, this record contains no explanation from the judge as to why the factors that were considered required that Moss be incarcerated for eight years. Thus, the record does not demonstrate that proper sentencing discretion was exercised.

It is difficult to imagine why the sentencing factors that the court considered would require eight years in prison. As the court noted, Moss was the not shooter. Moreover, though Moss did not have the privilege of adequate provocation or self-defense, there is no doubt that Green was the aggressor and, prior to being shot, had battered Moss for no apparent reason. Besides Moss' prior criminal conviction, his life seemed to be on the right track. He was obtaining an education and he was working.

Under these circumstances the factors considered by the court do not seem to warrant eight years in prison. The record is not helpful in understanding because the sentencing judge did not offer an explanation.

Conclusion

For these reasons it is respectfully requested that the court vacate Moss' sentence and order resentencing.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2007.

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By: _____
Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.224.9484