STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP1294-CR
Waukesha County Circuit Court Case No. 14-CF-815

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.
DAVID H. NINNEMANN,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and the Order Denying Post-Conviction Relief Entered by Branch 9 of the Waukesha County Circuit Court, the Honorable Michael J. Aprahamian, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("State") submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE ISSUES

1. Was the circuit court's discretionary decision to require David H. Ninnemann to register as a sex offender an erroneous exercise of discretion?

Circuit Court answered: No.

2. Did the circuit court erroneously exercise its sentencing discretion when it sentence David H. Ninnemann to thirty-six months jail after his probation was revoked?

Circuit Court answered: No.

STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)(2) (2015-16).

ARGUMENT

An appellate court reviews the discretionary sentencing decision of a trial court using the erroneous exercise of discretion standard. ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). A court properly exercised its discretion if its sentencing record reveals a rational and explainable basis for a sentencing decision. ***State v. Gallion***, 2004 WI 42, ¶¶ 22, 38, 270 Wis. 2d 535, 678 N.W.2d 197. If a court does not effectively explain its rationale in imposing a sentence, a reviewing court is "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

> Sentencing decisions are discretionary; we review only whether the trial court erroneously exercised its discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). A discretionary decision will be affirmed if it is made based upon the facts of record and in reliance on the appropriate law. *Id.* There is a strong public policy against interfering with the trial

> court's sentencing discretion, and we presume the trial court acted reasonably. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

State v. Owens, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187.

It is against strong public policy to interfere with a court's sentence. Interference with a court's sentence should only occur when the Court did not make its decision based upon the facts of record and in reliance of the appropriate law. Ninnemann must overcome the strong presumption that the trial court appropriately exercised its sentencing discretion by showing that the record does not support the sentencing decision, or that the record shows that the trial court relied upon an unreasonable or unjustifiable basis for that decision. ***State v. Bizzle***, 222 Wis. 2d 100, 104-06, 585 N.W.2d 899 (Ct. App. 1998). Ninnemann has not shown that the trial court relied on an unreasonable or unjustifiable basis to make its sentencing decision. Therefore, this Court must presume the trial court acted reasonably and appropriately exercised its sentencing discretion, and the judgment of conviction and order denying post-conviction relief should be affirmed.

I. THE COURT PROPERLY EXERCISED ITS SENTENCING DISCRETION WHEN IT REQUIRED NINNEMANN TO REGISTER AS A SEX OFFENDER.

As the Court stated in its sentencing record, under Wis. Stat. § 973.048, it is within the Court's discretion to order a person to register with the sexual offender registry for a conviction of Lewd and Lascivious Conduct. (R. 34:18; App. 18). To determine whether registration is appropriate, a court must determine that the conduct was "sexually motivated," and find that requiring the defendant to register is in the best interest of the public. (R. 34:17; App. 17). According to the trial court, an act is considered "sexually motivated" if, "one of the purposes of the act is for the sexual arousal or gratification or for the sexual humiliation or degradation of the victim." (R. 34:18; App. 18).

The Court stated it was an "easy" decision to find that the conduct in this case was "sexually motivated." (R. 34:18; App. 18). Ninnemann argues that there is no evidence his conduct was sexually motivated. In finding Ninnemann's conduct as "sexually motivated," the Court reiterated the premise of the purposefulness of this act versus an accidental act, which was stated before in the Court's evaluation of Ninnemann's character. (R. 34:18; App. 18). The court opined that if this case involved only a one-time accident, where the defendant was letting his dogs out of his home and he

happened to be exposed in his backyard, it would be difficult for the court to make the determination that the conduct was sexually motivated. (R. 34:16; App. 16). However, the court stated that because the defendant exposed himself on 40 different occasions, targeting the same victim, finding the conduct as sexually motivated was an easy determination. (R. 34:16; App. 16).

This determination refers back to the Court's discussion of Ninnemann's character, which was discussed immediately before the court determined Ninnemann's conduct was "sexually motivated." (R. 34:17; App. 17). In the evaluation of Ninnemann's character, the court stated, "the fact that [the victim] was a minor . . . goes directly to [Ninnemann's] sexual conduct motivation." (R. 34:17; App. 17). The court then described Ninnemann's conduct as an exposure of himself to the victim, in a targeted manner, "over and over again to humiliate her to the point where she couldn't even go to somebody and tell them about it until she realized that this could happen to . . . other people." (R. 34:17; App. 17).

Therefore, Ninnemann's argument that the (1) amount of occurrences and (2) the fact that the victim was a minor were the Court's only two explanations for why Ninnemann's conduct was sexually motivated is incorrect. The Court's description of Ninnemann's conduct here, described more than once by the Court,

was taken into account in its determination of whether the conduct was sexually motivated. This description included the targeting of the same victim and the humiliation of the victim, to the extent that she did not approach anyone else about the situation until she was worried it could happen to others.

Even if the Court did not effectively connect its determination that Ninnemann's conduct was sexually motivated to its previous description of Ninnemann's conduct, a reviewing court "must search the sentencing record to determine whether, in the exercise of proper discretion, the decision to require Ninnemann to register can be sustained." ***McCleary,*** 49 Wis. 2d at 282, 182 N.W.2d at 512. To determine whether conduct is "sexually motivated," a court must evaluate whether one of the purposes of Ninnemann's conduct is for the sexual arousal or gratification or for the sexual humiliation or degradation of the victim. (R. 34:18; App. 18).

The Court believed humiliation of the victim was one of the purposes of Ninnemann's conduct. The Court corroborated this view by explaining that when Ninnemann was finally "caught" and spoke to police, "now that [the victim] finally stepped up and had the courage to say something, maybe [it] took [Ninnemann] by surprise, because that's maybe the position, exactly the position, [Ninnemann was] putting her in, to feel powerless." (R. 34:17; App.

17). The defendant stated, "whatever happened, it won't happen again," which the Court viewed as an admission the defendant knew the conduct was "bad." (R. 34:17; App. 17). These statements on the sentencing record, taken together, constitute a rational and explainable basis for the Court to determine that one of the purposes of Ninnemann's conduct was to humiliate the victim, and the conduct was thus "sexually motivated."

Ninnemann also contends that the quantity of read-in counts is irrelevant as to whether Ninnemann should be subject to register. Ninnemann relies on the holding in *State v. Martel* to argue that read-in offenses may not be considered in determining whether a defendant should register. ***See State v. Martel***, 2003 WI 70, 262 Wis. 2d 483, 664 N.W.2d 69.

First, the quantity of the charges is relevant to whether Ninnemann should be subject to register as a sexual offender. The conduct here, as explained by the Court, did not involve a one-time accident; rather, this situation involved very frequently repeated conduct, targeting one particular victim. The Court viewed the fact that this conduct occurred "over and over again" as adding to the humiliation endured by the victim. If a purpose of particular conduct is the humiliation of a victim, the conduct can be considered "sexually motivated." Thus, along with other circumstances noted

by the Court, the repeated nature of this conduct, occurring "over 40 times," was appropriately considered in the court's determination that the conduct was sexually motivated.

Second, Ninnemann's reliance on *Martel* in this situation is misleading and misplaced, as the factual circumstances of this case are significantly dissimilar to those in *Martel*. In *Martel*, the defendant pled to a count of bail jumping, and six counts of sexual assault of a child were dismissed and read in pursuant to the plea agreement. ***Id.*** at ¶¶5, 6. Because bail jumping is not an offense enumerated in Wis. Stat. § 973.048, and a defendant is not sentenced on read-in charges, the Court lacked the authority to order sex-offender registration as a condition of probation. ***See Id.***

Here, Ninnemann pled guilty to Lewd and Lascivious Behavior, which is one of the offenses enumerated in Wis. Stat. § 973.048. Thus, unlike the Court in *Martel*, the Court has the discretion to order sex-offender registration. Additionally, to say that read-in offenses may not be considered in determining a condition of Ninnemann's probation would defeat the very purpose and definition of read-in charges. Read-in charges are "charges that are expected to be considered in sentencing," in exchange for the promise that the State will not prosecute those offenses. ***State v. Sulla***, 369 Wis. 2d 225, 251-52, 880 N.W.2d 659, 671-72 (2016).

The Court here considered the read-in charges when making its sentencing decision. In making a probationary sentence decision, a Court must evaluate whether certain conditions of probation are appropriate and order conditions of probation accordingly. Here, the Court evaluated whether Ninnemann's registration as a sexual offender was an appropriate condition of his probation, and properly considered the read-in charges in this evaluation. Ultimately, the Court found registration appropriate, and ordered registration as a condition of probation.

Lastly, the Court correctly determined it was in the best interest of the public to have Ninnemann register as a sexual offender. The Court stated that it was "concerned" for the protection of the community. (R. 34:17; App. 17). Requiring Ninnemann register would offer protection to the public, would "make sure this doesn't happen again," and Ninnemann's community would then know what kind of person he is. (R. 34:18; App. 18). Ninnemann does not have a prior record; however, the Court viewed Ninnemann's conduct in this particular case as serious. (R. 34:17; App. 17). The victim only reported Ninnemann's conduct after she realized that Ninnemann could expose himself to her sister or other people. (R. 34:17; App. 17). This is a clear example that the public is concerned about Ninnemann's conduct happening again, and the

public would like to be protected from this particular conduct. Therefore, using its sentencing discretion, the Court correctly determined that it is in the best interest of the public to have Ninnemann register with the sexual offender registry.

Reviewing the facts of record and the applicable law, the Court had a rational and explainable basis for determining that Ninnemann's conduct was "sexually motivated," and that it was in the best interest of the public to require Ninnemann to register as a sexual offender. Thus, the Court properly exercised its sentencing discretion when it ordered Ninnemann to register under Wis. Stat. § 973.048. Ninnemann did not overcome the presumption that the circuit court appropriately exercised its sentencing discretion in requiring Ninnemann to register with the sexual offender registry and this Court should affirm the circuit court's decision.

II. THE COURT PROPERLY EXERCISED ITS SENTENCING DISCRETION WHEN IT IMPOSED ITS SENTENCE AFTER REVOCATION.

The court properly exercised its discretion in sentencing Ninnemann, as the sentencing record properly illustrates a rational and explainable basis for the sentence. Ninnemann has not shown that the record reveals an unreasonable or unjustifiable basis in sentencing Ninnemann, or that the sentence is so excessive that it

shocks the public conscience. Therefore, Ninnemann has not overcome the presumption that the Court properly exercised its sentencing discretion, and the sentencing decision of the Court must be upheld.

Ninnemann correctly illustrates the applicable law. A criminal sentence should represent the minimum amount of custody consistent with the factors of the gravity of the offense, the character of the offender, and the need to protect the public. ***State v. Setagord***, 211 Wis. 2d 397, 416, 556 N.W.2d 506, 514 (1997). Probation *was* considered as the first alternative in this case. Ninnemann failed to comply with a condition of his probation explicitly set out by the Court, which was to comply with all treatment requirements recommended by his probation officer (including sexual offender treatment). Thus, Ninnemann's probation was revoked, and probation was no longer a consideration by the Court, as Ninnemann demonstrated that he would not comply with his conditional treatment requirements.

A reviewing court must view the sentencing after revocation as a continuum of the first sentencing hearing, and consider the proceedings on a global basis. ***State v. Wegner***, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 101, 619 N.W.2d 289, 291. When the same judge presides over the original sentencing proceeding and the

sentencing after revocation, "the judge does not have to restate the reasons supporting the original sentencing; the court will consider the original sentencing reasons to be implicitly adopted." ***Id.*** at ¶9. The judge may rely on the entire record in making its sentencing decision. ***Id.***

In a sentencing proceeding, if a court does not clearly delineate the factors of gravity of the offense, the character of the offender, and the need to protect the public, the reviewing court is "obliged to search the record to determine whether the sentence imposed is sustainable as a proper discretionary act." ***Id.*** at ¶7. When the facts relied upon by the judge are fairly inferable from the record, and the reasons for a particular sentence indicate a consideration of the relevant factors, the sentence should be affirmed. ***Id.*** at ¶10. If the court considered the proper factors and the sentence was a proper discretionary act, the sentence cannot be reversed unless it "is so excessive so as to shock the public conscience." ***Id.*** at ¶12.

Ninnemann has a due process right to be sentenced based on accurate information. ***State v. Anderson***, 222 Wis. 2d 403, 408, 588 N.W.2d 75, 77 (Ct. App. 1998). However, the record of a court's sentence after revocation "is not inaccurate because it does not list all of a defendant's positive adjustments." ***Id.*** at ¶11. A sentence

after revocation is not a pre-sentence investigation. ***Id.*** A sentence after revocation is equivalent to a pleading, and a court is not required to express all existing positive and negative circumstances. ***Id.*** Rather, it is the obligation of the defendant to inform the court about positive adjustments. ***Id.***

In sentencing Ninnemann to probation, the court expressly warned Ninnemann to "make sure it never happens again or else [the Court has] 45 months" of confinement in the county jail to consider in sentencing Ninnemann after revocation. (R. 34:22; App. 22). In sentencing Ninnemann after revocation, both Ninnemann's probation officer and the State recommended the maximum term of 45 months, as the period of probation contemplated three years of supervision. (R. 48:4; App. 28). The State argued that 45 months was appropriate to provide the three years of protection the victim was afforded when the Court sentenced Ninnemann to probation. (R. 48:5; App. 29).

In both sentencing proceedings, the court applied the factors of the protection of the community, seriousness of the offense, and Ninnemann's character and rehabilitation in determining a proper sentence. (R. 34:15; App. 15/R. 48:18; App. 42). The Court's application of these factors in both proceedings should be considered

globally, especially because the same judge presided over both sentencing proceedings.

In the original sentencing proceeding, the Court spoke at length to the issue of the character of the defendant. The Court acknowledged Ninnemann's lack of a prior record, the letters attesting to Ninnemann's character, and acceptance of responsibility for his actions by entering a plea to his offenses. (R. 34:15-17; App. 15-17). The Court still found the defendant's character "lacking," because of the particular circumstances of Ninnemann's conduct and Ninnemann's admission that he knew the conduct was "bad." (R. 34:17; App. 17). After Ninnemann was revoked, the Court expressed additional concern in that Ninnemann refused to comply with his expressly required treatment, he denied he committed the offense to his agent and his attorney, and he did not realize the inappropriateness of his conduct. (R. 48:15, 18-19; App. 39, 42-43). The Court considered these new factors in its re-evaluation of Ninnemann's character, as well as the pre-existing factors expressly stated in the original sentencing proceeding. The Court again found the character of Ninnemann "lacking," and "the fact that [Ninnemann] didn't comply with the probation sentence" further undermined his character. (R. 48:18; App. 42).

As to the protection of the community, the Court stated its concern. The Court's determination that it was appropriate to require Ninnemann to register exemplifies the Court's view that the public should be protected from this particular conduct. (R. 34:17-18; App. 17-18). Ninnemann argues that he should not be required to register, which is contradictory to his contention that additional protection is afforded to the public through his registration as a sexual offender. Further, Ninnemann is correct in that the victim and the victim's family can seek a restraining order. However, protection of the public is a relevant factor in sentencing Ninnemann for his conduct, and the victim's ability to seek additional protection through other means should not undercut this factor.

In Ninneman's sentencing after revocation proceeding, the Court expressly stated that, in the Court's view, there was an increased risk Ninnemann would engage in similar conduct in the future because he refused the acknowledge what he did and that it was wrong. (R. 48:16; App. 40). The Court evaluated the need to protect the public from Ninnemann, "who [didn't] seem to realize the inappropriateness of [his] conduct." (R. 48:19; App. 43).

Ninnemann's lewd and lascivious conduct did not continue throughout probation, but Ninnemann was subject to strict supervision. Ninnemann argued for a time-served disposition, which

would have relieved Ninnemann from any additional supervision and protection for the victim after only six months of supervision. Thus, after his probation was revoked for non-compliance with treatment and refusals to admit he committed the offenses, the victim would have been denied any further protection. This disposition has no reasonable or explainable basis, as it would offer less protection for the public than the previous sentence, with which Ninnemann did not comply.

In both proceedings, the Court expressly stated the offense was serious. (R. 34:17; App. 17/R. 48:18; App. 42). In sentencing Ninneman after revocation, the court reiterated Ninneman's admission that the 80 counts in the criminal complaint were substantially true and correct, and that the conduct was sexually motivated. (R. 48:14-15; App. 38-39).

It was Ninnemann's obligation to present the Court with mitigating factors, such as positive adjustments during probation. Ninnemann and his counsel explained Ninnemann's positive adjustments during his probation to the Court. The Court had no obligation to reiterate all of the positive and negative circumstances of the case, and the Court's sentence is not inaccurate because the Court did not list all of the positive aspects of Ninnemann's probation. The Court ultimately did not sentence Ninnemann to the

45 months recommended by the State and Ninnemann's probation agent, but to 36 months. Thus, one can fairly infer that the mitigating factors stated by Ninnemann and his counsel were considered in sentencing Ninnemann to 36 months of county jail time.

The Court was not obliged to consider whether the defendant substantially complied with probation. Ninnemann refused to comply with his expressly required treatment, denied he committed the offense to his agent and his attorney, and did not realize the inappropriateness of the conduct, and was revoked in result. If he properly complied with his conditions of probation, he would not have been revoked. Therefore, the Court's statement that Ninnemann "just didn't comply" with probation was accurate.

The Court again considered the relevant factors in sentencing Ninnemann after revocation, adding its concern about the circumstances of the defendant's revocation. The records of the original sentencing and sentencing after revocation show that the Court had a reasonable and justifiable basis for imposing a sentence of 36 months. Ninnemann has not shown that this sentence is so excessive so as to shock the public conscience. Therefore, the sentence after revocation should be upheld.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's decision requiring David H. Ninnemann to register with the sexual offender registry and affirm the circuit court's sentences after revocation.

Dated this 23rd day of October, 2016.

Respectfully,

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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with proportional serif font. The length of this brief is 3,307 words long.

Dated this 24th day of October, 2016.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of October, 2016.

Respectfully,

_____

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of October, 2016.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 24th day of October, 2016.

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. § 809.80(4) that, on the 15th day of July, 2016, I mailed 10 copies of the Brief of the Plaintiff-Respondent, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Dated this 24th day of October, 2016.

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