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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT II

Appeal No. 2016AP002386-CR
Waukesha County Circuit Court Case No. 2014CM002093

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARNIE L. COUTINO a/k/a Marnie L. Spiezer

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND
ORDER DENYING MOTION FOR POSTCONVICTION
RELIEF ENTERED IN THE CIRCUIT COURT FOR
WAUKESHA COUNTY THE HONORABLE MICHAEL
APRAHAMIAN PRESIDING

Brief of the Plaintiff-Respondent

Submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUE.....	1
STATEMENT ON ORAL ARGUMENT.....	2
STATEMENT ON PUBLICATION.....	2
STATEMENT OF THE FACTS.....	3
ARGUMENT.....	4
I. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN IMPOSING THE SENTENCE IN THIS CASE.	
A. STANDARD OF REVIEW	
B. FACTORS THE CIRCUIT COURT NEEDS TO CONSIDER AT SENTENCING.	
C. THE CIRCUIT COURT APPROPRIATELY USED ITS DISCRETION AT SENTENCING.	
CONCLUSION.....	10
CERTIFICATION	11
CERTIFICATION FOR RULE 809.19(12)	12

TABLE OF AUTHORITIES

WISCONSIN STATUTES:

Wis. Stats. §973.017(2) 5

WISCONSIN CASES:

Bastian v. State, 54 Wis.2d 240, 194 N.W.2d 687 (1972) 6

State v. Borrell, 167 Wis.2d 749, 482 N.W.2d 883 (1992).....4

State v. C.V.C., 153 Wis.2d 145, 450 N.W.2d 463 (1989) 5,6

State v. Gallion, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197

(2004) 4, 6

State v. Harris, 119 Wis.2d 612, 350 N.W.2d 633 (1984)..... 4

McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971) 4, 6

Ocanas v. State, 70 Wis.2d 179, 233 N.W.2d 457 (1975) 5,6

STATEMENT OF THE ISSUE

Did the circuit court properly exercise its sentencing
discretion as required by law?

Trial Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE FACTS

The State does not dispute the facts as recited in the Defendant-Appellant's brief and will reference the record as needed in argument.

ARGUMENT

I. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN IMPOSING THE SENTENCE IN THIS CASE

A. STANDARD OF REVIEW

It is well settled law that a circuit court exercises discretion when sentencing a criminal defendant. *St. v. Gallion*, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197 (citing *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971)) . On appeal, “review is limited to determining if discretion was erroneously exercised.” *Id.* at ¶ 17. Instances where a sentence is based on clearly irrelevant or improper factors would be an example of erroneous exercise of discretion. *Id.* When the trial court has properly exercised its discretion, the appellate court “follows a consistent and strong policy against interference with the discretion of the trial court in passing sentence. *Id.* at ¶ 18. “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. *Id.* (citing *State v. Borrell*, 167 Wis.2d 749, 781, 482 N.W.2d 883 (1992), and *State v. Harris*, 119

Wis.2d 612, 622, 350 N.W.2d 633 (1984)). Appellate judges may not substitute their judgement for that of the trial court just because they may have imposed a different sentence. *Id.* at ¶ 18.

Further, “[a]n abuse of discretion will be found only where the sentence is 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”. *State v. C.V.C.*, 153 Wis.2d 145, 163, 450 N.W.2d 463, 470 (1989), (citing *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975)).

B. FACTORS THE CIRCUIT COURT NEEDS TO CONSIDER AT SENTENCING.

The general requirements for what a court needs to consider for sentencing can be found in Wisconsin Statute Section 973.017(2). That section states,

General Requirement. When a court makes a sentencing decision concerning a person convicted of a criminal offense committed on or after February 1, 2003, the court shall consider all of the following:

- (ad) the protection of the public.
- (ag) the gravity of the offense.
- (ak) The rehabilitative needs of the defendant.
- (b) Any applicable mitigating and any applicable aggravating factors, including the aggravating factors specified in subs (3) to (8).

These factors are also specified in *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971). *McCleary* found that “[t]he sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant”. *Id.* at 276. Further, “the weight to be given to each of the relevant factors is particularly within the wide discretion of the trial court. *C.V.C.*, 153 Wis.2d at 163 (citing *Ocanas* 70 Wis.2d at 185).

The Court in *Gallion* stated that “[c]ourts are to describe the facts relevant to these objectives. Courts must explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specific objectives. *Gallion*, 270 Wis.2d at ¶ 42.

Different sentencing options are also discussed by the Court in *Gallion*.

Accordingly, the circuit courts should consider probation as the first alternative. Probation should be the disposition unless: confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or it would unduly depreciate the seriousness of the offense. *Gallion*, 270 Wis.2d at ¶ 44, (citing *Bastian v. State*, 54 Wis.2d 240, 194 N.W.2d 687 (1972).

C. THE CIRCUIT COURT APPROPRIATELY USED ITS DISCRETION AT SENTENCING.

In this case, the circuit court discussed the facts upon which it relied on in imposing the sentence. The court stated, “[w]hen I impose my sentence I need to look at protection of the community, the gravity of the offense and the character and rehabilitative needs to the defendant”. (R:40-6; A9). The court then goes through each one. “As to the offense I think it’s a serious offense. It’s been reduced down to a disorderly conduct. I think it is a theft.” *Id.* This clearly shows that the court considered this a serious offense, even though the charge was amended. It shows the court was considering the facts of the case and conduct of the defendant.

The court also discusses the defendant’s character. The court gives the defendant credit for what she had previously done for the victims in the case. The court goes on to say, “[b]ut it doesn’t give you the right to take advantage of them which is what I believe you did. I don’t believe your story that this was part of a plot to get money from Hector to give to Norma so that she can leave. I don’t believe that.” *Id.* The court says:

I think that’s what you are saying to minimize your conduct. And you went to great lengths to take advantage of these people who were in a desperate situation and they needed that money and you wouldn’t provide them the money and according to the complaint you even printed up a receipt for US customs, USCIS.

...

It's a very serious offense particularly as somebody who looked to you as a friend, it sounds like, and you took advantage of them. And I don't think you've accepted responsibility for this. Not once.

It would be one thing that you accepted responsibility and you haven't. You keep denying your conduct and that speaks poorly of your character and the protection of the community.

(R:40-7; A10).

The court gives the defendant a sentence of 30 days jail and a \$250 fine. *Id.* The court says, "I could have given you ninety days and I was inclined to go something higher than that. But I don't think a fine only is appropriate." *Id.* This shows that the court put thought into the amount of jail time that he pronounced in the sentence. The court thought that something more than a fine was necessary.

As for any issue regarding probation, although the court did not specifically address it at the sentencing hearing, it was addressed at the motion hearing held November 14, 2016. (R:50). The court said,

I think a probationary sentence would have put her, made it potentially more cumbersome for her given her situation and I think I would have given her jail time with probation if I would have considered probation. So in lieu of probation I didn't see probationary needs. I just thought the jail time was sufficient and it wasn't an extended period of jail time. It was enough not to depreciate the seriousness of the offense which is what I did, the 30 days.

(R:50-5; A4).

The sentence imposed in this case did not constitute an abuse of discretion. The circuit court gave consideration to all the relevant factors. The sentencing courts comments show that the court thought that the defendant did not take responsibility for the incident and that her minimizing the conduct did not sit well for the protection of the community. As the court stated it could have given more jail time than he did and he did not think that a fine only would be appropriate.

CONCLUSION

For all the reasons stated above, the State respectfully requests the Court affirm the trial court's decision and deny the defendant's request for a new sentencing hearing.

Dated this ____ day of May, 2017.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief with a proportional serif font. The length of this brief is 1,790 words.

Dated this ____ day of May, 2017.

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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. § (Rule) 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 certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of May, 2017.

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