

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-3032-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL E. LEARMONT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

CANE, C.J. Michael Learmont appeals his sentence for violating a temporary restraining order as a repeat offender. He argues that the sentencing court violated his due process rights by considering a sexual assault allegation that he expressly denied committing. The State claims that Learmont failed to make this argument to the sentencing court and therefore waived it. Alternatively, the State contends that the sentencing court properly considered the sexual assault

allegation. This court concludes that Learmont preserved the issue for appeal and that the sentencing court properly considered the sexual assault allegation as a basis for sentencing. Accordingly, the judgment is affirmed.

I. PROCEDURAL BACKGROUND

In 1997, Learmont was convicted of knowingly violating a temporary restraining order, as a repeat offender, contrary to §§ 813.12(8) and 939.62(1)(a), STATS. The court withheld sentence and placed him on two years' probation. In May 1998, a probation violation investigation report alleged that Learmont had violated his probation both by changing his residence without notifying his probation agent and sexually assaulting a nine-year-old girl. In a written statement, Learmont admitted his notification failure, but he denied committing the sexual assault. While the revocation summary stresses the sexual assault as a basis for revocation, it also mentions his notification failure. Learmont's probation was revoked on May 11, and Learmont was sentenced the next day. The record contains no presentence investigation report.

At sentencing, the State requested a minimum one-year sentence, arguing that his criminal record showed a pattern of violent behavior. Learmont's counsel stressed Learmont's denial of the sexual assault allegation, his steady employment, and his successful completion of domestic abuse and alcohol treatment. While Learmont's counsel acknowledged that the sentencing court could consider the assault allegation, counsel opined that the allegation was "most appropriately taken up in the separate forum, namely in a trial." Counsel further indicated that Learmont had consented to the revocation based on his failure to maintain contact with his probation officer, not based on the sexual assault allegations. When Learmont addressed the sentencing court, he explained that he

had failed to report his address change to his probation officer because he was embarrassed about his financial situation. In his statement to the sentencing court, Learmont did not address the sexual assault allegation.

Following the attorneys' arguments and Learmont's statement, the court stated that Learmont's probation had not been revoked due to his notification failure, but because the "administrative judge" who revoked his probation found that he had sexually assaulted the nine-year-old girl. The court then stated that if the parties disputed the reason for the revocation, it would "wait and hold this case back" or "even adjourn the proceedings." Relying on the probation officer's report, the court declared that it likewise believed the assault occurred and further commented that Learmont's denial was "of no value." When Learmont's counsel pointed out that Learmont signed waiver documents in which he denied committing the sexual assault, the court replied:

The way I look at it we have a sexual assault of a nine year old girl that took place. We have a gentlemen here who has [prior convictions]. His probation has been revoked. And we have a nine year old daughter of the person he has been associated with who[m], I reviewed the file, in my opinion I think there is at least at the very most, at very least there is probable cause that he has committed a felony of sexually assaulting this child.

The court continued, stressing Learmont's criminal record and discussing his lack of credibility:

He is back before the court for sentencing with that record, with that reputation, and he simply indicates to the court he thinks this is all about his not telling his probation agent where he is at. That's not what this is all about. In my opinion the jail is not appropriate for people like Mr. Learmont. Mr. Learmont is subject to ... nine months up to three years, and the court believes the three year prison term is appropriate for [his] probation behavior. People like that don't belong in the community. ... He is causing

more damage than good. And whether ... he is charged that's not my responsibility [or] concern. Anything less would depreciate the seriousness of the conduct, depreciate his record and depreciate the credibility of this young girl as opposed to his credibility.

With that, the court sentenced Learmont to three years in prison, reiterating that Learmont was not credible, especially given his criminal record, including one perjury conviction. After the court passed sentence, Learmont's counsel did not further address the allegation's accuracy or reliability. This appeal followed.¹

II. ANALYSIS

Learmont contends that the sentencing court violated his due process rights when it relied on inaccurate information, an alleged sexual assault he expressly denied committing. He asserts that the sentencing court switched the burden of proof regarding whether evidence of the sexual assault was accurate and reliable. To that end, he claims, without citation to authority,² that the State has

¹ Although Learmont filed a notice of intent to pursue postconviction relief, he neither filed a postconviction motion nor a motion to modify his sentence. Instead, he filed a notice of appeal with this court. By a November 1998 order, this court ordered briefs regarding whether Learmont had properly preserved the appropriateness of his sentence for appeal given that he neither filed a postconviction motion nor a motion to modify his sentence. In December, this court concluded that Learmont could have reviewed on appeal any issue that he had adequately raised during sentencing; however, in the order, this court expressed no opinion regarding whether Learmont had adequately raised the issue. On appeal, this court concludes that by denying the sexual assault allegation at sentencing, at least through his counsel, Learmont adequately raised the issue of whether the court improperly relied on the allegation as a basis for his sentence.

² Learmont's "argument" consists of lengthy block quotes from cases he contends contain conflicting statements regarding the burden of proof. As such, he fails to develop his argument or tell us how the cases apply to the facts. RULE 809.19(1)(e), STATS., requires that an appellant's brief contain proper argument, and block quotes from numerous cases do not constitute proper argument. This court has often said that it may decline to address undeveloped and unsupported arguments. *See, e.g., State v. Waste Management*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

the initial burden to prove that the sexual assault allegation is accurate and reliable. If the State meets its burden, Learmont maintains, the defendant must prove by clear and convincing evidence that the sentence was improperly based on unreliable information.

The State disagrees with Learmont's allocation of the burden of proof. It argues that under *State v. Johnson*, 158 Wis.2d 458, 470, 463 N.W.2d 352, 358 (Ct. App. 1990), a defendant has the initial burden to challenge the accuracy of the information upon which the sentencing court relies. It further contends that the defendant must show by clear and convincing evidence that his due process rights were violated during sentencing. See *State v. Littrup*, 164 Wis.2d 120, 124, 473 N.W.2d 164, 165 (Ct. App. 1991). The State correctly sets forth the applicable standard of review, and based on this standard, this court holds that the sentencing court did not violate Learmont's due process rights.

An appellate court measures the propriety of any sentence under the erroneous exercise of discretion standard. See *Johnson*, 158 Wis.2d at 469, 463 N.W.2d at 357. There is a strong public policy against interfering with the sentencing court's discretion. See *State v. Perez*, 170 Wis.2d 130, 142, 487 N.W.2d 630, 634 (Ct. App. 1992). The primary factors a sentencing court should consider are the gravity of the offense, the character of the defendant, and the need to protect the public. See *Elias v. State*, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980). The court may base its sentence on one or more of the three primary factors, and the weight given to each factor is also within the sentencing court's discretion. See *Anderson v. State*, 76 Wis.2d 361, 364, 251 N.W.2d 768, 770 (1977). A defendant's prior conduct is relevant in determining the defendant's character and need for rehabilitation and incarceration. See *State v. McQuay*, 154 Wis.2d 116, 126, 452 N.W.2d 377, 381 (1990).

The trial court's wide sentencing discretion is tempered by the defendant's due process right to be sentenced based on true and accurate information. *See United States v. Tucker*, 404 U.S. 443, 446-47 (1972); *see also Perez*, 170 Wis.2d at 140, 487 N.W.2d at 633. Our supreme court has expressly held that a sentencing court may consider uncharged and unproven offenses because they indicate whether the crime was an isolated act or a pattern of conduct. *Elias*, 93 Wis.2d at 284, 286 N.W.2d at 562. A defendant who requests resentencing must show, by clear and convincing evidence, that specific information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. *Littrup*, 164 Wis.2d at 131-32, 473 N.W.2d at 168.

Matters a sentencing court properly considers need not be "restricted to [evidence] given in open court by witnesses subject to cross-examination," but the defendant must have the opportunity to rebut the evidence. *State v. Damaske*, 212 Wis.2d 169, 196, 567 N.W.2d 905, 917 (Ct. App. 1997) (quoting *Williams v. New York*, 337 U.S. 241, 250 (1949)). Whether Learmont's due process rights were violated and whether he met his burden of proof present questions of law this court reviews de novo. *See Littrup*, 164 Wis.2d at 126, 473 N.W.2d at 166.

Learmont's due process right to be sentenced based on true and accurate information was not violated. First, the sentencing court indicated that if necessary, it would "hold the case back" or adjourn the proceedings if the parties disputed whether Learmont committed the sexual assault. Thus, it offered Learmont an opportunity to rebut the charge, *see Damaske*, 212 Wis.2d at 196, 567 N.W.2d at 917, but Learmont never requested an adjournment or a hearing on the allegation's accuracy or reliability. Second, when a defendant's probation has been revoked, a sentencing court may impose sentence based on the revocation. *See State v. Verstoppen*, 185 Wis.2d 728, 739, 519 N.W.2d 653, 657 (Ct. App.

1994). Learmont's counsel conceded that the sentencing court could consider the allegation, and Learmont himself never addressed the allegation in his statement to the sentencing court. Although Learmont was aware that his probation was revoked in part because of the sexual assault allegation, he chose to offer his own denial as his rebuttal of that allegation's accuracy and reliability. Such denial did not in and of itself preclude the sentencing court from considering the allegation.

Third, the court determined, based in part on his perjury conviction, that Learmont was not a credible witness; therefore, the court did not believe his denial. *See* § 805.17(2), STATS.; *see also Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979) (trial court is ultimate arbiter of the credibility of witnesses and the weight to be given their testimony). The court's finding that Learmont lacked credibility also was significant to its assessment of his character.

This court concludes that Learmont failed to meet his burden to show that the sexual assault allegation was inaccurate. Further, the record reflects that the sentencing court considered appropriate factors when it sentenced Learmont. It considered his criminal record, his conduct on probation, and the protection of the public. *See Elias*, 93 Wis.2d at 284, 286 N.W.2d at 561. Because the sentencing court appropriately exercised its discretion, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

