

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 8, 2000

Cornelia G. Clark  
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-1571**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES F. WEBER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

¶1 CANE, C.J.<sup>1</sup> James Weber appeals from a judgment convicting him of endangering another's safety by the negligent operation or handling of a dangerous weapon, contrary to WIS. STAT. § 941.20(1)(a), and sentencing him to

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31. All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

ninety days in jail. He contends that: (1) he should have been permitted to withdraw his plea of no contest because it was not entered knowingly, freely and voluntarily; (2) the trial court misused its sentencing discretion by imposing a ninety-day jail sentence; and (3) the trial court misused its discretion by denying his postconviction motion for a stay of the sentence pending the appeal. This court rejects his contentions and affirms the judgment and order.

¶2 The State had originally charged Weber with a felony charge of homicide by reckless use of a weapon involving a deer hunting accident. It is undisputed that while deer hunting without a license, Weber shot and killed his hunting partner, Reno Spiegel. Weber maintained that he was shooting at a deer. A jury trial was held in April 1998, on the charge of homicide by the reckless use of a weapon. The result was a hung jury. Just prior to the rescheduled trial in April 1999, the parties reached a plea bargain whereby Weber pled no contest to the reduced misdemeanor charge of endangering another's safety by the negligent operation or handling of a dangerous weapon, a Class A misdemeanor. The State agreed to recommend no more than ninety days in jail. After accepting the no contest plea and hearing arguments from both sides, the trial court imposed a ninety-day jail sentence with work release privileges.

¶3 Weber first contends that his plea was not entered knowingly, freely and voluntarily. He argues that when accepting the plea, the trial court failed to use the standard plea questionnaire and waiver of rights form and instead substituted a short colloquy, which inadequately informed him of his rights. Consequently, he reasons that the trial court erred by not allowing him to withdraw his no contest plea. Noticeably, Weber fails to indicate what rights he did not understand or what he did not understand about the nature of the charge or punishment.

¶4 The relevant part of WIS. STAT. § 971.08 provides in part:

(1) Before the court accepts a plea of guilty or no contest, it shall:

(a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted ....

¶5 The burden is upon a defendant who wishes to withdraw his guilty or no contest plea to show by clear and convincing evidence that the plea was not knowingly and voluntarily entered and that withdrawal is necessary to prevent a manifest injustice. See *Birts v. State*, 68 Wis. 2d 389, 392-93, 228 N.W.2d 351 (1975). In *Birts*, the supreme court listed four factual situations which, if proved by the defendant, justify withdrawal of the plea to correct a manifest injustice. See *id.* In this instance, Weber argues only one of those situations, namely that his plea was not entered knowingly, freely or voluntarily.

¶6 Here, the record shows that the trial court discussed with Weber each element of the charge. Weber indicated that he understood what the State had to prove and had no questions about the nature of the charge. He also had the opportunity to discuss this charge with his attorney before and during the plea. Additionally, the trial court correctly informed Weber of the maximum penalty of a \$10,000 fine and nine months in jail. Weber indicated that he understood the maximum penalty.

¶7 The court also discussed with Weber the various constitutional rights that he was giving up by pleading no contest. At this time, Weber conferred with his attorney and then indicated that he understood the constitutional rights he was giving up by entering his plea. Finally, in response to the trial court's questions,

Weber informed the court of his age, education and mental health and that there were no threats or promises, other than the plea bargain, to induce him to plead. After Weber told the court that he had no questions about the proceedings, his plea was accepted.

¶8 This court is satisfied that Weber has failed to show any manifest injustice to justify withdrawing his plea. He understood the nature of the charge, the maximum punishment and the constitutional rights waived by entering his plea. Because Weber has failed to establish that his plea was not entered knowingly, freely or voluntarily, the trial court properly denied his motion to withdraw the plea.

¶9 Next, Weber argues the trial court erroneously exercised its sentencing discretion by imposing a ninety-day jail sentence. He reasons that this was simply an unfortunate hunting accident and that there is no precedent for criminal prosecution of this type of an incident. This court is not persuaded.

¶10 The maximum punishment for endangering another's safety by the negligent operation or handling of a dangerous weapon, a Class A misdemeanor, is a \$10,000 fine and nine months in the county jail. *See* WIS. STAT. § 939.51(2).

¶11 On appellate review, there is a strong public policy against interfering with the sentencing discretion of a court. *See State v. Perez*, 170 Wis. 2d 130, 142, 487 N.W.2d 630 (Ct. App. 1992). In addition, there is an equally strong presumption that the sentencing court acted reasonably. *See id.* Therefore, the defendant bears the burden of showing that there was some unreasonable or unjustifiable basis for the sentence imposed. *See id.* If the record shows a process of reasoning based upon legally relevant factors, the sentence will be upheld. *See Anderson v. State*, 76 Wis. 2d 361, 364, 251 N.W.2d 768 (1977).

¶12 Also, there must be evidence in the record that the trial court exercised its discretion in imposing sentence. *See id.* at 363-64. The sentencing court is required to state its reasons for imposing the sentence chosen. *See id.* A sentencing decision should be based primarily on the following factors: the gravity of the offense, the character of the offender and the need for protection of the public. *See Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). Although all relevant factors must be considered, the sentence may be based on any one or more of the three primary factors. *See Anderson*, 76 Wis. 2d at 364. Finally, a defendant who requests resentencing must show that specific information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. *See State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990).

¶13 This court's review of the record establishes that the trial court properly exercised its sentencing discretion. The trial court properly considered this incident as a serious offense resulting in the death of a fellow hunter. It occurred while Weber was without a hunting license and arguably shortly after the closed hunting hours. The court weighed the comments from the victim's family, Weber's clear record and background and the seriousness of the charge. These were all legally relevant factors appropriately considered when arriving at the ninety-day jail sentence while Weber was facing a maximum penalty of \$10,000 and nine months in the county jail. The sentence is not excessive or unusual so as to be disproportionate to the conviction.

¶14 Finally, Weber argues the trial court misused its discretion by refusing to release him on bond pending appeal. Because the jail sentence has been served, this issue is now moot. This court is nevertheless satisfied that the trial court properly exercised its discretion by denying bail. The trial court

understandably reasoned that the appeal was for the purpose of delay, as set forth in WIS. STAT. § 809.31(3)(d).<sup>2</sup> The matter was set for retrial on the day when Weber entered his plea. He knew beforehand that a plea bargain had been arrived at and knew the nature of the reduced charge and maximum punishment. He also knew that as part of the plea bargain, the district attorney would be recommending a ninety-day jail sentence out of a possible nine months and a \$10,000 fine. Weber unsuccessfully tested the waters and received a ninety-day jail sentence instead of the proposed fine argued by his attorney. Because the trial court could reasonably conclude under these circumstances that the appeal was taken solely for delay, it was a reasonable exercise of discretion to deny the bail.

¶15 Therefore, the judgment of conviction and order denying the motion to withdraw the plea and denying release on bond pending appeal are affirmed.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

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<sup>2</sup> Under WIS. STAT. § 809.31(3)(d), the trial court may deny release on bond pending appeal if it is satisfied that the postconviction proceedings are taken for purposes of delay.



