

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2000

Cornelia G. Clark
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. 00-1574-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH L. KOHLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Joseph Kohls appeals the order denying his postconviction motion requesting re-sentencing. Kohls argues that: (1) his nine-month sentence is excessive; and (2) the circuit court erred by not allowing

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Kohls to call his probation officer as a witness. We reject Kohls' arguments and affirm.

BACKGROUND

¶2 In October 1999, Kohls pled guilty to obstructing an officer contrary to WIS. STAT. § 946.41. The circuit court withheld sentence and placed Kohls on probation for one year. In December 1999, Kohls was placed on a probation hold, pending revocation proceedings. Kohls had allegedly hit someone in Minnesota and used controlled substances. He waived his right to a hearing and his probation was revoked.

¶3 The circuit court sentenced Kohls to the maximum jail term of nine months. During the sentencing hearing, Kohls argued that he waived his right to a revocation hearing because his probation agent promised to recommend a sentence of three months in jail. Kohls attempted to call the probation officer as a witness but the circuit court denied his request.

¶4 Kohls filed a motion for postconviction relief. He requested re-sentencing, arguing that the sentence was excessive and that it was in error because he was denied the opportunity to call his probation officer. The circuit court denied the motion. This appeal follows.

STANDARD OF REVIEW

¶5 There is a strong public policy against interfering with the trial court's sentencing discretion. See *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The record must show that the trial court exercised its discretion and stated its reasons for the sentence it imposed. See *id.* A sentencing decision should be based primarily on the following factors: the

gravity of the offense, the defendant's character and the need to protect the public. *See State v. Paske*, 163 Wis. 2d 52, 62, 471 N.W.2d 55 (1991). Although all relevant factors must be considered, the sentence may be based on any one or more of the three primary factors. *See Anderson v. State*, 76 Wis. 2d 361, 364, 251 N.W.2d 768 (1977). The weight to be accorded to particular factors in sentencing is for the sentencing court, not the appellate court, to determine. *See State v. Spears*, 147 Wis. 2d 429, 446, 433 N.W.2d 595 (Ct. App. 1988). As long as the sentencing court considered the proper factors and the sentence was within statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience. *See State v. Owen*, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996).

DISCUSSION

¶6 Kohls first argues that the considerations for sentencing do not warrant a nine-month sentence for obstructing an officer. He contends that the acts leading to revocation are irrelevant to determining his sentence. In other words, this was new information that would not have been available to the trial court had it not withheld sentencing and placed him on probation. Therefore, it was improper for the circuit court to consider acts that led to revocation because it resulted in a harsher sentence than he would have received had the circuit court not withheld sentencing. We disagree.

¶7 In *State v. Carter*, 208 Wis. 2d 142, 156, 560 N.W.2d 256 (1997), our supreme court held that a circuit court should have available to it all information relevant to determining the appropriate sentence. *See id.* at 146. The role of the sentencing court is the same whether the proceeding is an initial sentencing or a re-sentencing, and therefore the court must have accurate,

complete and current information. *See id.* at 157. Information concerning events that occurred after the initial sentence is relevant and the court can properly consider it at re-sentencing. *See id.* at 157-58.

¶8 The record indicates that the circuit court imposed the nine-month sentence based on the appropriate factors. *See Paske*, 163 Wis. 2d at 62. The circuit court reviewed the criminal complaint to familiarize itself with the circumstances of the underlying conviction. The circuit court also considered Kohls' character and made reference to the new allegations of assaultive behavior in Minnesota, Kohls' absconder status while on probation, an alleged entry into a residence, as well as references to his continued use of alcohol and controlled substances. Further, the circuit court mentioned that all of this occurred within a short time after being placed on probation.

¶9 The circuit court explained to Kohls that probation was an opportunity for people to "assess their lives and to bring their patterns of living into conformity with what's expected for civilized living." Finally, the circuit court addressed the need to protect the public from Kohls' pattern of behavior and imposed the maximum penalty of nine months. We conclude that the trial court did not erroneously exercise its sentencing discretion, as it demonstrated a reasoning process based on the undisputed facts and applied proper legal standards.

¶10 Kohls also argues that denying his request to call his probation officer as a witness resulted in a sentence not based on true and correct information. *See Mosley*, 201 Wis. 2d at 45. Kohls argues that his probation officer would have requested a sentence of three to six months. Kohls further

contends that the circuit court's denial was contrary to WIS. STAT. § 972.14(2).² We disagree.

¶11 Sentencing is within the circuit court's discretion. *See State v. Larsen*, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). The circuit court indicated that calling the probation officer would raise the issue of voluntariness of Kohls' revocation waiver. That issue was for the Department of Corrections to address in the event that Kohls appealed his probation revocation and was not relevant to sentencing.

¶12 Kohls attempted to call his probation officer to inform the circuit court of the probation officer's recommendation. However, Kohls' attorney informed the court of the recommendation and the State did not dispute it. Thus, the court was aware of the recommendation and was free to consider the recommendation if it wished. The record indicates Kohls' purpose in calling the probation officer was to "clarify this three month stuff on the waiver papers." No other offer of proof was made.

¶13 Here, the circuit court was faced with a probation revocation. Kohls was convicted of resisting an officer. Taking into account the relevant factors, the

² WISCONSIN STAT. § 972.14(2) reads as follows:

Before pronouncing sentence, the court shall ask the defendant why sentence should not be pronounced upon him or her and allow the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to the sentence. In addition, if the defendant is under 21 years of age and if the court has not ordered a presentence investigation under s. 972.15, the court shall ask the defendant if he or she has been adjudged delinquent under ch. 48, 1993 stats., or ch. 938 or has had a similar adjudication in any other state in the 4 years immediately preceding the date the criminal complaint relating to the present offense was issued.

circuit court determined that a nine-month sentence was appropriate. Kohls and his attorney were allowed to make arguments. However, under WIS. STAT. § 972.14(2), the circuit court is not required to permit the calling of any and all witnesses. The circuit court expressed its reasons for imposing the maximum terms, and we discern no misuse of the trial court's discretion.

By the Court.—Judgment and order affirmed.

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

