

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2008

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP1138-CR

Cir. Ct. No. 2004CF1350

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS JAMES BUMP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 BRIDGE, J. Nicholas Bump appeals the judgment convicting him, following revocation of his probation, of burglary as a party to the crime, and taking and driving a motor vehicle without the owner's consent as a party to the crime. Bump also appeals the order denying his motion for postconviction relief.

He argues that his sentence was based on inaccurate information. In addition, he argues that the circuit court erroneously exercised its sentencing discretion because: (1) it did not adequately explain the sentence it imposed; (2) it did not give sufficient weight to the comments made by the circuit court that originally withheld his sentence; and (3) it utilized a sentencing matrix in the context of imposing a sentence after revocation. We resolve each of these issues against Bump and affirm.

BACKGROUND

¶2 Following guilty pleas, Nicholas Bump was convicted in July 2004 of one count of burglary as a party to the crime in violation of WIS. STAT. § 943.10(1)(a) (2001-02),¹ and one count of operating a motor vehicle without the owner's consent as a party to the crime in violation of WIS. STAT. § 943.23(2).² The charges stemmed from an incident in which two female companions broke into the home of one of the women's grandparents. Bump was parked down the street from the residence at the time and believed that the women were borrowing money from the grandparents, who, he believed, were home at the time. He later learned that the money the women acquired had been stolen. Bump suggested that the women steal two cars which were parked in the grandparents' garage. The following day while Bump waited in his car and served as a lookout, the two women returned to the home a second time and stole one of the vehicles. Bump joined the women in riding in the stolen car.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² An additional count of receiving stolen property as a party to a crime in violation of WIS. STAT. § 943.34(1)(a) was dismissed and read in as a part of Bump's plea agreement.

¶3 The maximum possible period of incarceration for the burglary was twelve and one-half years of confinement and the maximum for the taking and driving a vehicle without consent was six years. The circuit court, the Honorable Judge Christenson presiding, withheld sentence and imposed probation of three years. The conditions of Bump's probation included absolute sobriety and no possession of a firearm.

¶4 In September 2004, Bump was given an alternative to revocation for moving without reporting an address change, drinking alcohol, and shooting a BB gun out of a window in violation of the rules of his probation. As a result of these violations, he was ordered to serve sixty days in jail.

¶5 In February 2006, Bump was charged with battery to a former girlfriend, Melody Kencharek, but the charges were ultimately dismissed. In July 2006, Bump's probation was revoked for failure to report to his probation agent, causing physical injury to Kencharek, changing residence without approval, and writing graffiti on county property.

¶6 At the sentencing after revocation hearing, the State recommended two years of initial confinement to run concurrently followed by extended supervision of a duration to be determined by the court. Bump asked for one year at the House of Corrections to permit him to continue his employment by means of his Huber privileges. The circuit court, the Honorable Judge Dugan presiding, completed a sentencing matrix for the underlying burglary. On the burglary charge, the court sentenced Bump to four years of initial confinement followed by four years of extended supervision, and on the taking and driving a motor vehicle without the owner's consent charge, to two years of initial confinement to run concurrently with the burglary, followed by two years of extended supervision.

Bump filed a motion for postconviction relief seeking a reduction in his sentence, which Judge Dugan denied. Bump appeals.

STANDARDS OF REVIEW

¶7 We review a circuit court’s sentencing decision to determine if there has been an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. There is a strong policy against interference with that discretion. *State v. Cooper*, 117 Wis. 2d 30, 39-40, 344 N.W.2d 194 (Ct. App. 1983) (“If the record contains evidence that discretion was properly exercised when imposing sentence, we must affirm.”) (citation omitted). Sentencing courts are “presumed to have acted reasonably, and the defendant can only rebut the presumption by showing an unreasonable or unjustifiable basis for the sentence in the record.” *State v. Wickstrom*, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984) (citation omitted).

¶8 A sentencing court “misuses its discretion when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one factor in the face of other contravening factors.” *State v. Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112 (citing *State v. Thompson*, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992)). In addition, a circuit court exceeds its discretion as to the length of the sentence only when the sentence is “so 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.” *Id.* (citation omitted).

¶9 A defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717

N.W.2d 1. A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. *Id.*, ¶26. Whether a defendant has been denied his due process right to be sentenced upon accurate information is an issue we review de novo. *Id.*, ¶9.

DISCUSSION

¶10 Bump advances four arguments related to his sentence after revocation. First, he argues that his sentence was based on inaccurate information. In addition, he argues that the circuit court erroneously exercised its sentencing discretion because: (1) it did not adequately explain the sentence it imposed; (2) it did not give sufficient weight to the comments made by the court that originally withheld his sentence; and (3) it improperly made use of a sentencing matrix in the context of imposing a sentence after revocation. We address each in turn.

Inaccurate Information

¶11 Bump contends that the circuit court relied on inaccurate information, both with respect to the prior battery charge against him, and also with respect to the level of his culpability in the burglary. Bump first argues that the circuit court based its sentencing decision in part on the fact that Bump had committed a battery against his former girlfriend, Melody Kencharek. He refers to the following statement which the circuit court made at the sentencing after revocation hearing: “[O]n February 14, you caused physical injury to Melody Kencharek.” He points out that the battery charge was dismissed for lack of prosecution, and contends that, therefore, “[t]he most objective evidence of the situation” is that the battery never occurred. Thus, he argues, the circuit court was

precluded from taking the battery into consideration when it imposed the sentence. We disagree.

¶12 The court was plainly aware of Bump’s position with respect to the battery allegation, given the fact that Kencharek appeared at the revocation hearing and denied that the battery occurred, and Bump did likewise. The fact that Bump was not charged with the battery did not bar the court from considering it. To the contrary: “In determining the character of the defendant and the need for his incarceration and rehabilitation, the court must consider whether the crime is an isolated act or a pattern of conduct. Evidence of unproven offenses involving the defendant may be considered by the court for this purpose.” *State v. Fisher*, 211 Wis. 2d 665, 678, 565 N.W.2d 565 (Ct. App. 1997) (quoting *State v. McQuay*, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990)); *see also State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. Thus, the sentencing court properly considered the behavior underlying the battery charge.

¶13 Bump also argues that the court inaccurately described him as having broken into the home of the elderly couple. He bases this on the following statement by the court: “Here, you broke into the home of an elderly couple and they were gone.” He states that he did not break into the home but was instead outside in his car, unaware of the actions and intentions of the co-actors. Bump argues that his punishment was based in part on this misperception.

¶14 The record does not support Bump’s contention. At the sentencing hearing, the circuit court stated on the record that it had reviewed the underlying criminal charges against Bump, both of which were charged as party to the crime. In addition, in the order denying Bump’s motion for postconviction relief, the court addressed Bump’s argument that it misunderstood his role in the crimes, and

stated that it used the collective “you” when referring to the overall circumstances of the underlying criminal activity. The court declined to modify Bump’s sentence, stating that it did not rely on inaccurate information. We conclude that the record does not support Bump’s claim that the court relied on inaccurate information when sentencing him.

Explanation of Length of Sentence

¶15 Bump contends that the circuit court did not adequately explain how the sentencing objectives were met by the disposition imposed, as required by *Gallion*, 270 Wis. 2d 535, and did not explain why the specific length of sentence imposed was needed to meet the sentencing objectives. Further, he argues that the court did not consider his character, which he contends would have yielded a more positive outcome. We reject each of these arguments.

¶16 To properly exercise its discretion, a circuit court must provide a rational and explainable basis for the sentence. *State v. Stenzel*, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. Discretion contemplates a process of reasoning which depends on the facts of record or that are reasonably derived by inference from the record, and a conclusion based on a logical rationale founded upon proper legal standards. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). When the court has properly exercised its discretion, we follow a consistent and strong policy against interference with the discretion of the circuit court, and we afford a strong presumption of reasonability to the court’s sentencing determination because the court is best suited to consider the relevant factors and demeanor of the convicted defendant. *Gallion*, 270 Wis. 2d 535, ¶18. We may not substitute our judgment for that of the circuit court simply because we might have imposed a different sentence. *Id.*

¶17 The objectives of a sentence include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others. *Id.*, ¶40. A sentencing court should indicate the general objectives of greatest importance and explain how, under the facts of the particular case, the sentence selected advances those objectives. *Id.*, ¶¶41, 42. Besides the objectives of the sentence, the sentencing court must also identify the factors that the court considered in arriving at the sentence and must indicate how those factors fit the objectives and influenced the sentencing decision. *Id.*, ¶43. The primary factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *State v. Davis*, 2005 WI App 98, ¶13, 281 Wis. 2d 118, 698 N.W.2d 823. The weight to be given to each factor is within the discretion of the sentencing court. *Id.*

¶18 The court may also consider a wide range of additional factors including, but not limited to, the defendant's past record or history of undesirable behavior pattern; the defendant's personality, character and social traits; the presentence investigation report; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor before the court; the defendant's age, educational background and employment history; the defendant's remorse, repentance and cooperation; the defendant's need for close rehabilitative control; and the rights of the public. *Gallion*, 270 Wis. 2d 535, ¶43 n.11. The court need not discuss all of these secondary factors, but rather only those relevant to the particular case. *Id.*

¶19 Here, the record demonstrates that the circuit court considered all of the required factors and properly explained the reasons why the sentence it imposed advanced the sentencing objectives. It considered the gravity of the crimes, noting that the crimes underlying Bump's probation are serious offenses.

The court observed that the crimes are serious not only because the legislature has provided lengthy terms of imprisonment for these offenses, but also because of the impact the crimes had on Bump's victims as well as on the victims' neighbors, who remained fearful of having their homes burglarized in the future.

¶20 The court went on to address Bump's character. The court noted that Bump was "a product of a CHIPS case"; however, the court also stated that Bump's background did not give him a free pass to violate the law. It observed that at the time of the original offenses, Bump had a stable residence, was employed, had a history of being a good worker, and that Bump attributed his bad judgment to being intoxicated at the time of the offense.

¶21 The court also stated that by staying Bump's sentence and imposing probation, the court had given him a chance to turn his life around, but that he had failed to do so. It determined that Bump's "rehabilitative needs have to be addressed in a structured, confined setting." The court concluded that Bump's repeated violations while on probation posed a risk to the community, and the public needed protection from him.

¶22 Contrary to Bump's assertion, the sentencing court was not required to explain in detail why it sentenced Bump to the precise number of years it did. *See State v. Taylor*, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466. Instead, *Gallion* requires "an explanation for the general range of the sentence imposed." *Gallion*, 270 Wis. 2d 535, ¶49. As noted above, the court considered the relevant sentencing objectives and factors, and explained the reasons for the sentence given. We conclude that the court satisfied the standard articulated in *Gallion*.

¶23 We also reject Bump's argument that the court did not give enough credit to mitigating factors. To the extent the court gave mitigating factors less

weight than aggravating factors, it acted within its discretion. *See Steele*, 246 Wis. 2d 744, ¶10. We conclude that the circuit court’s reasoning amply justified the term of imprisonment the court imposed, and therefore conclude that the circuit court did not erroneously exercise its discretion in imposing the sentence it did.

Sentence After Revocation As A Continuum Of Initial Sentencing

¶24 Bump cites to *State v. Carter*, 208 Wis. 2d 142, 158, 560 N.W.2d 256 (1997), for the proposition that “a circuit court should, in imposing a sentence at resentencing, consider all information relevant about a defendant, including information about events and circumstances either that the sentencing court was unaware of at the initial sentencing or that occurred after the initial sentencing.” Citing *State v. Wegner*, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289, he contends that two sentencings are to be viewed globally, treating the latter sentencing as a continuum of the first. In the present case, however, Judge Christenson did not sentence Bump; instead, the court withheld the sentence. Thus, Judge Dugan sentenced Bump for the first time. Accordingly, the “continuum” analysis does not apply.

¶25 The circuit court’s duty at sentencing after revocation of parole, and the court’s duty at the original sentencing are the same. *See State v. Brown*, 2006 WI 131, ¶20, 298 Wis. 2d 37, 725 N.W.2d 262. As we have discussed, Judge Dugan considered the relevant sentencing objectives and applied the proper sentencing factors in explaining its decision, thus satisfying that duty.

Use of the Sentencing Guidelines

¶26 Bump contends that, because a sentencing after revocation is not a “sentencing decision” within the meaning of WIS. STAT. § 973.017(1), the

sentencing court should not have used the sentencing matrix. We disagree. Pursuant to § 973.017(1), a “sentencing decision” is a decision as to whether to impose a bifurcated sentence or to place the person on probation, and a decision as to the length of the bifurcated sentence, including the length of each component of the bifurcated sentence, the amount of a fine, and the length of a term of probation. Here, after revocation, the circuit court sentenced Bump to a bifurcated sentence.

¶27 Bump points out that the Wisconsin Sentencing Commission issued an error sheet which identifies common errors experienced by circuit courts in imposing sentence. One such error is described as “[w]orksheets submitted for sentence revocations.” Because a sentence is never “revoked,” it is not clear what a “sentence revocation” is. However, regardless what the Commission meant to refer to, it could not have intended to refer to a sentencing that occurs after revocation.

CONCLUSION

¶28 For the above reasons, we conclude that the circuit court did not rely on incorrect information when it sentenced Bump. We also conclude that it exercised its discretion based on facts that are of record, and that it imposed a sentence that is founded on proper legal standards.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

