COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1998-CR **Cir. Ct. No. 01-CF-606**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONNA M. TRAUTMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Donna Trautman appeals a judgment of conviction for assisting suicide contrary to WIS. STAT. § 940.12[1] and an order denying her

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

motion for postconviction relief. Specifically, Trautman challenges the circuit court's exercise of sentencing discretion. She argues that the circumstances of her case mandate a more lenient sentence than that which the court imposed and therefore the circuit court erred by denying her motion for sentence modification. Trautman also contends that the circuit court erroneously exercised its discretion because it sentenced her according to a preconceived sentencing policy. Because the circuit court properly exercised its discretion at the original sentencing, we reject Trautman's arguments and affirm the judgment and order.

Background

¶2 The facts of the case are undisputed. Trautman met and befriended Raymond Krerowicz in October 2000 when she moved into the apartment building in which he resided. Krerowicz had terminal prostate cancer and was under hospice care.

¶3 By November 2000, Krerowicz needed assistance with his daily care. Trautman agreed to help following a meeting with a hospice nurse when it became apparent that Krerowicz's family was unable or unwilling to assume the responsibility. Krerowicz later gave Trautman power of attorney over his medical care, listing his daughter as the alternate agent. Trautman ultimately cared for Krerowicz around the clock.

¶4 Krerowicz's condition, especially his pain, worsened. When he first began hospice care around November 2000, he was prescribed forty milligrams per day of the narcotic analgesic OxyContin. When he died, his prescribed dose was 1,920 milligrams daily. On April 22, 2001, a hospice nurse noted that Krerowicz's condition was indicative of the onset of death. The nurse forecast he would survive, at most, another two weeks. Trautman called a priest to perform

"last rites" for Krerowicz. Trautman claims Krerowicz then told her that he wanted her to help him die. Trautman held a pillow over Krerowicz's face and sat on it until he died, then called the hospice nurse who arrived and pronounced his death.

¶5 On May 14, 2001, Trautman turned herself into the police because she had been "in hell" and could not put the incident out of her mind. Trautman was arrested and charged with assisting suicide, a class D felony. *See* WIS. STAT. § 940.12.[2] Trautman pled no contest to the charge.

¶6 The presentence investigation report recommended the court impose and stay a four- to five-year period of confinement with an extended supervision term of the same length. The State recommended a four-year prison term with two years' supervision, imposed and stayed, with Trautman actually serving five years' probation. Defense counsel argued that the court should withhold sentence and place Trautman on probation. The court sentenced Trautman to two years' imprisonment with six years' extended supervision.

¶7 Trautman was incarcerated at Taycheedah Correctional Institution. She was placed on a no-work restriction because of health problems. She eats her meals in her cell because she is unable to walk to the dining hall and is not permitted to be taken there in a wheelchair. Trautman moved for sentence reconsideration arguing that it was unduly harsh.

¶8 At the motion hearing, the court stated:

[2] WISCONSIN STAT. § 940.12 states: "Whoever with intent that another take his or her own life assists such person to commit suicide is guilty of a Class D felony."

> I am—was not then nor am I now prepared to—to go down that moral slope in which I as a judge asked to administer the law in this case would embark upon a situational analysis that would suggest that the conduct Ms. Trautman engaged in could be sanctioned under a set of circumstances because I think that to embark upon that road would be to invite disaster.

The court then denied the motion. Trautman appeals, renewing her harshness argument and claiming the court's above-quoted statement reveals that the court has a policy of never granting probation in a case such as this.

Discussion

¶9 Sentencing decisions are left to the circuit court's sound discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). When reviewing a sentence imposed by the circuit court, we start with the presumption that the court acted reasonably. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We will not interfere with the circuit court's sentencing decision unless it erroneously exercised its discretion. ***Id.*** at 418-19.

¶10 The exercise of discretion contemplates a reasoning process based on facts of record and a conclusion based on a logical rationale founded upon proper legal standards. ***State v. Wagner***, 191 Wis. 2d 322, 332, 528 N.W.2d 85 (Ct. App. 1995). Thus, a court may impose a sentence within the limits set by statute if it considers appropriate factors. ***Id.*** at 333. An erroneous exercise of discretion will be found where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). An erroneous exercise of discretion may result if the court fails to explain which factors influenced its decision. ***State v. Larsen***, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987).

¶11 The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for protection of the public. ***Wagner***, 191 Wis. 2d at 333. However, there are a number of factors related to the primary factors a circuit court might use in considering the appropriate sentence. ***Spears***, 227 Wis. 2d at 507. These include the defendant's past record of criminal offenses, a history of undesirable behavior, the defendant's personality or character, and the aggravated nature of the crime. ***Id.***

Circuit Court's Alleged Policy

¶12 We start first with Trautman's claim that at the postconviction hearing, the court evinced a policy against granting parole in assisted suicide cases when it refused to embark on a "moral slope." The United States Supreme Court recognized that attorneys' closing arguments are "seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." ***Donnelly v. DeChristoforo***, 416 U.S. 637, 646-47 (1974). This led to a rule that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury … will draw that meaning from a plethora of less damaging interpretations." ***Id.***

¶13 The same rule can be applied to our circuit courts. Judges are rarely able to construct and perfect the text of what they will say before a hearing. This does not mean, however, that we should assume the court meant the most unfair result.

¶14 In any event, we are not convinced the circuit court's statement demonstrates a policy against a grant of probation. In ***State v. Martin***, 100 Wis. 2d 326, 302 N.W.2d 58 (Ct. App. 1981), which Trautman cites in support of her argument, the circuit judge stated he "would never grant straight probation" to

a person convicted of the delivery of a controlled substance. ***Id.*** at 327. The circuit court here said no such thing.

¶15 We perceive that the court in this case simply expressed its refusal to second-guess the legislative penalty structure established for the crime of assisted suicide by engaging in an analysis to determine whether, contrary to the plain statutory language, assisted suicide was sometimes justified. *See* WIS. STAT. § 940.12. Admittedly, the court's explanation could have been more precise. When compared to the unambiguous statement in ***Martin***, however, we remain unpersuaded that the court here indicated it had any preconceived sentencing scheme.

¶16 Moreover, the sentencing transcript demonstrates that the court struggled to arrive at a fair decision. It went to great lengths to carefully weigh all relevant factors in crafting the sentence it imposed and tailored its considerations to the facts and circumstances presented by this defendant and this crime. Based on its analysis of the factors, the court determined that probation alone was inappropriate. Such a decision is supported by the record and is within the court's sound discretion.

Harshness of the Sentence

¶17 The circuit court first correctly identified the primary factors it must consider: the character of the offender, the gravity of the offense, and the protection of the public. The court commented that Trautman had a "checkered" life involving prostitution, alcoholism and convictions for forgery and theft. While the court stated that the last fifteen years of Trautman's life had been positive, it observed, "when you're good, you're good, but when you're bad, you're very bad."

¶18 Considering the protection of the public, the court noted that although Trautman expressed remorse and sympathy, she was also impulsive. The court believed she killed Krerowicz without thinking her actions through and even though she knew it was wrong. This concern is reflected in the terms of Trautman's sentence, which prohibit her from assuming any care-giving duties.

¶19 In considering the gravity of the crime, the court remarked:

> Life is what we've been talking about … the right to be born and the right to progress to death untouched and undisturbed. … There is no civilized society [or organized religion] that I know of that doesn't hold the sanctity of life above all other things. ...
>
> The gravity of this offense is that a life has been taken. … [T]he gravity of the offense in my opinion is that no one … can conclude they have a right to take [a] life ….

Additionally, while Trautman argued that Krerowicz's condition was a mitigating factor, the court viewed her manner of "assisting" his suicide as an aggravating factor. The court observed that Trautman did not assist Krerowicz in any manner but, rather, executed him with the pillow. The court also pointed out that Trautman herself was surprised she was only charged with assisted suicide because according to the police report, she said she knew she had killed Krerowicz.[3]

¶20 The court stated that Trautman knew Krerowicz for approximately eight months—"a little bit in life." Continuing, the court found it difficult to conclude that in such a narrow period of time, Trautman "could believe that

[3] At the postconviction hearing, the State noted it probably could have charged Trautman with first-degree intentional homicide.

whatever [she] rendered to him acquired in [her] the right to decide whether he should live or die …."

¶21 Trautman relies on ***Bastian v. State***, 54 Wis. 2d 240, 194 N.W.2d 687 (1972), when she argues for probation. She claims it would be the most appropriate sentence "because it constituted the least degree of custody consistent with the relevant factors in this case" and would be consistent with the American Bar Association's standards on probation.

¶22 Bastian was convicted of a sex crime against a five-year-old. It was his first criminal offense, and defense counsel emphasized his cooperation with law enforcement and that he was employed. On appeal to our supreme court, Bastian's counsel cited the ABA's STANDARDS RELATING TO PROBATION (approved draft 1970). Specifically, counsel referred to § 1.3, "Criteria for granting probation." ***Bastian***, 54 Wis. 2d at 247-48. The standard reads in relevant part:

> (a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> ….
>
> (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.

Id. at 248 n.1. The supreme court adopted the standard, concluding that the circuit court's decision implicitly tracked part (i) and, when the standard was properly

applied, the facts indeed dictated the result the circuit court reached: probation was inappropriate. ***Id.*** at 247-48.

¶23 In Trautman's case, the court was most concerned about part (iii)—that probation would unduly depreciate the seriousness of the offense. First, the court emphasized the nature of the offense—that Trautman had killed another person—characterizing the crime as an execution of Krerowicz rather than an assisted suicide. Second, the court stated explicitly that the parties' probation recommendations would indicate the court was somehow "sanctioning or endorsing or applauding or commending" Trautman's actions. Third, the court noted, "I haven't been able to glean even … when Raymond [Krerowicz] was born … and I find that to be very sad …. … [T]he family should be having the benefit of celebrating when he was born and all he brought into the world and not how he left the world," indicating its concern that the victim's rights were being neglected. Finally, the court expressed its consternation that Trautman could somehow think she had a right to determine when Krerowicz would die when she had known him for merely eight months.

¶24 All of these observations, adequately supported by the record, indicate that the court believed a probation-only sentence would depreciate the seriousness of Trautman's crime. Under the ABA standards she cites, the record indicates that probation would be inappropriate.

¶25 More importantly, however, the record supports the court's exercise of discretion. The court explicitly considered all of the relevant factors. The weight to be given to each factor is within the court's discretion. ***Wagner***, 191 Wis. 2d at 333. Here, the court emphasized the gravity of the offense, giving it the greatest weight but not relying on it as the sole factor. Trautman faced a

maximum possible sentence of ten years, *see* WIS. STAT. § 939.50(3)(d), five of which could be spent in prison. *See* WIS. STAT. § 973.01(2)(b)4. She was given an eight-year sentence and will be incarcerated for two of those years. Her sentence is not so disproportionate as to shock public sentiment. *See* ***Ocanas***, 70 Wis. 2d at 185.

By the Court.—Judgment and order affirmed.

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