

Appeal No. 2024AP1846-CR

Cir. Ct. No. 2022CF191

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS B. SELERSKI,

DEFENDANT-APPELLANT.

FILED

**JUNE 25,
2026**

Samuel A. Christensen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Graham, P.J., Blanchard, and Taylor, J.J.

Pursuant to WIS. STAT. RULE 809.61 (2023-24),¹ this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

This case presents the opportunity to clarify and develop an important area of the law that is implicated in every criminal case that results in a conviction: the factors that circuit courts must consider when sentencing criminal defendants, and the extent to which a court's consideration of those factors must be explicitly stated on the record.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

Prior to the enactment of Wisconsin’s truth-in-sentencing legislation, courts sometimes identified three “primary factors” that a court must consider when determining a criminal defendant’s sentence. *See, e.g., State v. Paske*, 163 Wis. 2d 52, 62, 471 N.W.2d 55 (1991); *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). Some courts identified the primary factors as “the gravity of the offense, the *character and rehabilitative needs of the defendant*, and the need for protection of the public.” *Paske*, 163 Wis. 2d at 62 (emphasis added); *see also State v. Spears*, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). Other courts identified the primary factors as “the gravity of the offense, the *character of the offender*, and the need for protection of the public.” *Elias*, 93 Wis. 2d at 284 (emphasis added); *see also State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). And some courts addressed the concepts of character and rehabilitative needs as if they were one and the same. *See Klimas v. State*, 75 Wis 2d 244, 247, 249 N.W.2d 285 (1977).

When WIS. STAT. § 973.017(2) was enacted as part of truth in sentencing, the legislature codified the primary factors, designating the third factor as the “rehabilitative needs of the defendant.” *See* § 973.017(2) (enacted as part of 2001 Wis. Act 109 § 1135). Section 973.017(2) now provides that a sentencing court “shall consider ... [t]he protection of the public,” “[t]he gravity of the offense,” and “[t]he rehabilitative needs of the defendant,” as well as any other mitigating or aggravating factors. Some may characterize this legislative choice as signaling a shift in the focus of that factor from *character* to *rehabilitative needs*. Nevertheless, following the enactment of § 973.017(2), some courts continued to conflate the consideration of rehabilitative needs and character. *See State v. Gallion*, 2004 WI 42, ¶60, 270 Wis. 2d 535, 678 N.W.2d 197. Other courts

continue to mention character without explicitly mentioning rehabilitative needs. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695.

Of course, it makes sense that sentencing courts can consider facts related to the character of the defendants they sentence, and such consideration is undoubtedly helpful in formulating sentences that are individualized to each defendant. *See Gallion*, 270 Wis. 2d 535, ¶48 (“Individualized sentencing ... has long been a cornerstone to Wisconsin’s criminal justice jurisprudence.”). And in particular, a court’s consideration of a defendant’s character may well be relevant to the court’s consideration of the same defendant’s rehabilitative needs. However, courts and attorneys sometimes still speak of a defendant’s character and rehabilitative needs interchangeably, as if they are one and the same. And sometimes, courts and attorneys suggest that consideration of a defendant’s rehabilitative needs is not actually required, or that any consideration of a defendant’s character necessarily fulfills the statutory mandate of considering a defendant’s rehabilitative needs. The briefing in this case illustrates these points—the defendant here argues that the circuit court erroneously exercised its sentencing discretion by failing to consider his rehabilitative needs, and in response, the State takes the position that “rehabilitation is secondary to the three primary factors.” (Quoting *State v. Fisher*, 2005 WI App 175, ¶27, 285 Wis. 2d 433, 702 N.W.2d 56.) The State also takes the position that, because the court explicitly considered facts related to the defendant’s character, the court necessarily (albeit implicitly) considered the defendant’s rehabilitative needs.

We have concerns with the State’s approach to this issue. WISCONSIN STAT. § 973.017(2) provides that a sentencing court “shall consider” a defendant’s “rehabilitative needs” when making a sentencing decision. Although considerations of a defendant’s character and the defendant’s rehabilitative needs

may often overlap, these concepts are not identical. Accordingly, we are not persuaded that a court necessarily fulfills its obligation to consider a defendant's rehabilitative needs through an on-the-record consideration of a defendant's character. Even so, the State's approach finds some support in Wisconsin opinions that were issued after § 973.017(2) was enacted, and also in the special materials on sentencing issued by Wisconsin's Criminal Jury Instruction Committee.

With this backdrop in mind, a decision from the Wisconsin Supreme Court would provide helpful guidance on the relationship between character and rehabilitative needs in the sentencing context. Additionally, a decision by the Wisconsin Supreme Court would provide helpful guidance on the related dispute between the parties regarding the extent to which a circuit court's consideration of a defendant's rehabilitative needs can be based on implied reasoning. Sentencing is an everyday issue in circuit courts across the state and sentencing discretion is an area of the law that generates a high volume of appeals. An authoritative decision from this court would provide helpful guidance to the bench and bar.

BACKGROUND OF THE APPEAL

Nicholas Selerski was charged with multiple sexual assaults against a 10-year-old child, and he pled guilty to repeated sexual assault of a child contrary to WIS. STAT. §§ 948.025(1)(d) and 948.02(1). Despite his guilty plea, some of Selerski's post-plea remarks suggested that he was minimizing his culpability and deflecting blame onto the child victim.

At the sentencing hearing, the circuit court began its remarks by identifying the objectives of criminal sentencing. As the court explained, “[w]henever the Court fashions the appropriate sentence, the Court needs to

consider the protection of the community, punishment, rehabilitation and deterrence.” However, apart from this initial statement, the court did not explicitly reference the rehabilitation objective or Selerski’s rehabilitative needs throughout the remainder of the hearing.

To be sure, the circuit court’s sentencing remarks were robust, and the court considered a variety of facts that could be relevant to a consideration of Selerski’s rehabilitative needs. For instance, the court discussed, among other things, Selerski’s lack of prior criminal history, statements he made that minimized his culpability, his inconsistent history of taking accountability for his crime, and his “wrong thinking” with respect to attempting to shift responsibility to the child victim. But at no point did the court expressly link its discussion of these topics to the concept of rehabilitation or rehabilitative needs.

With respect to probation, the circuit court indicated that “[t]his is obviously not a case where probation is appropriate,” and that “to do anything but to confine [Selerski in prison] would unduly depreciate the seriousness of this offense.” As pertinent here, the court also indicated that it had “looked at” the factors from *Gallion*, and had “mentioned many” of those factors as part of formulating Selerski’s sentence, and that it had “obviously considered all of those factors, some of which [the court] did not highlight here today.” The court imposed a sentence of sixteen years of initial confinement and five years of extended supervision.

Selerski filed a postconviction motion, arguing that the circuit court erroneously exercised its discretion when it imposed his sentence. Specifically, Selerski argued that sentencing courts are required to consider a defendant’s rehabilitative needs on the record when they impose sentences, and he argued that

there is “no evidence” in the record that the court did so here. Although Selerski acknowledged that the court considered his character, he argued that rehabilitative needs and character are “separate considerations” that are often erroneously “treated as the same.”

Following a hearing, the circuit court denied Selerski’s motion. The court explained that, “although ... [it] did not specifically lay out the logic” on the record, Selerski’s rehabilitative needs were of “clear concern” and were “dealt with” by the court.

DISCUSSION OF CERTIFIED ISSUES

Selerski cites WIS. STAT. § 973.017(2), *Gallion*, 270 Wis. 2d 535, and *State v. Bolstad*, 2021 WI App 81, 399 Wis. 2d 815, 967 N.W.2d 164, for the proposition that the sentencing court was required to consider his rehabilitative needs, and to expressly do so on the record. Although Selerski acknowledges that there is “often” reasonable overlap between a sentencing court’s assessment of a defendant’s character and the court’s assessment of the defendant’s rehabilitative needs, he contends that character and rehabilitative needs are “two distinct concepts.” According to Selerski, consideration of a defendant’s character requires the court to assess “the positive and negative personal attributes of a defendant,” and considering a defendant’s rehabilitative needs requires the court to assess what is needed in order for “the defendant’s behavior [to] be conformed to the requirements of the law.” Here, Selerski contends, although the court expressly considered his positive and negative attributes, that did not “fulfill the mandate of considering [his] rehabilitative needs.”

By contrast, the State takes the position that the circuit court was not required to consider Selerski’s rehabilitative needs, at least not explicitly on the

record. According to the State, the record shows that the circuit court considered the gravity of the offense, the need to protect the public, and the character of the defendant. The State takes the position that “rehabilitation is secondary to the three primary factors” (citing *Fisher*, 285 Wis. 2d 433, ¶27), and that, because the court explicitly considered facts related to Selerski’s character, the court necessarily (albeit implicitly) considered his rehabilitative needs.

As noted, following the enactment of truth in sentencing, the governing statute specifies that courts must consider “the rehabilitative needs of the defendant” in addition to “[t]he gravity of the offense” and “[t]he protection of the public.” See WIS. STAT. § 973.017(2). The shift in focus to rehabilitative needs can be understood in light of the significant changes that the truth-in-sentencing legislation ushered in with respect to how sentences are imposed and served. Prior to truth in sentencing, the executive branch (including prison officials and parole boards) was “thought to be in a position to determine if the rehabilitative efforts [of a sentence] had been successful,” *Gallion*, 270 Wis. 2d 535, ¶32, and the executive branch was charged with making determinations about whether a defendant’s rehabilitative needs had been met in the months and years after a court imposed the sentence. But the truth-in-sentencing legislation abolished parole, *id.*, ¶33, and as a result, the sentencing court would bear greater responsibility to anticipate a defendant’s rehabilitative needs at the time a sentence is imposed.

It has been 25 years since this legislative change, but many courts and advocates continue to repeat language from pre-truth-in-sentencing cases when identifying the defendant’s character as one of the three primary factors, instead of the statutory requirement of considering the defendant’s rehabilitative needs. One frequently cited case is *Odom*, which states that “[t]he primary factors

for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public’s need for protection.” *Odom*, 294 Wis. 2d 844, ¶7 (citing *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987)).² *Odom* makes no reference to rehabilitation except as part of a long list of secondary factors that a court “may also consider,” which include whether the defendant has a “need for close rehabilitative control.” *Id.* (citing *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984)). Another frequently cited case is *Dodson*, which cites *Gallion* for the same premise. *See State v. Dodson*, 2022 WI 5, ¶9, 400 Wis. 2d 313, 969 N.W.2d 225 (citing *Gallion*, 270 Wis. 2d 535, ¶44, for the proposition that character is a “[p]rimary” factor and a defendant’s need for close rehabilitative control is a “[s]econdary factor”); *see also Fisher*, 285 Wis. 2d 433, ¶¶20, 24-27 (citing *State v. Jones*, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989), for the proposition that “rehabilitation is secondary to the three primary factors,” which include character); *State v. Williams*, 2018 WI 59, ¶46, 381 Wis. 2d 661, 912 N.W.2d 373 (identifying character as one of three “main factors” and a defendant’s need for close rehabilitative control as a “secondary factor[.]”).

We frequently review sentencing transcripts that do not explicitly reference a defendant’s rehabilitative needs—at least not in express terms. This may be unsurprising, given the guidance offered in the special materials on sentencing that are included as part of Wisconsin’s pattern jury instructions. *See*

² *Odom*’s sentences were for convictions that occurred in 2000 and 2004. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The sentence for the 2000 conviction was not subject to WIS. STAT. § 973.017(2), which applies to crimes that were committed on or after February 1, 2003, but the sentence for the 2004 conviction was for a crime that occurred after the effective date of § 973.017(2). Regardless, to this day, courts continue to cite *Odom* for the relevant sentencing standards.

WIS JI—CRIMINAL SM-34 (1999).³ The special materials mention rehabilitation as an objective of sentencing decisions, SM-34 at 8, and they cite *Neely v. State*, 47 Wis. 2d 330, 334 n.8, 177 N.W.2d 79 (1970), and *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971), for the premise that “[t]he sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant,” SM-34 at 2. Yet, when it comes to the “primary factors” a court must consider, the special materials identify those factors as “the gravity of the offense, the character of the offender, and the need for protection of the public.” SM-34 at 2 (citing *Elias*, 93 Wis. 2d 278). The special materials also include “A Sample Sentencing Pattern,” which the jury instruction committee offers as “a logical and complete sequence in covering all the essential steps in the sound exercise of sentencing discretion.” SM-34 at 8. The sample sentencing pattern, which is reproduced in its entirety as an exhibit to this certification, includes references to the “seriousness of the offense,” the defendant’s “character,” and the “needs of society,” but not specifically to the defendant’s “rehabilitative needs.” SM-34 at 9.

Accordingly, there is at least some tension between the unambiguous language of WIS. STAT. § 973.017(2) and the wealth of case law and guidance following its enactment that mention character, but not rehabilitative needs, as a primary factor. And, as shown, this tension comes to a head in this appeal. In

³ WISCONSIN JI—CRIMINAL SM-34 does not appear to have been revised, at least not substantially, since 1999. The special materials do not cite to WIS. STAT. § 973.017(2), *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, or indeed to any case law that was issued after 1998.

light of this backdrop, we ask the Wisconsin Supreme Court to accept this certification and issue a decision resolving Selerski's appeal.

Another reason review by the Wisconsin Supreme Court may be appropriate is that it could provide an opportunity for clarification on an argument about implied reasoning that is advanced by the State. The State argues that, even if consideration of the defendant's rehabilitative needs is required, we can affirm the circuit court's exercise of sentencing discretion based on our review of the sentencing hearing transcript. According to the State, this is because the court made remarks that were directed at Selerski's failure to take responsibility for his crime. That is, if Selerski had not yet accepted his role in causing the assaults and was instead shifting blame to the child victim, as the court considered to be the case, the court might have reasoned that Selerski's rehabilitative needs were substantial, and the court may have determined that it would require a substantial prison sentence for Selerski to conform his behavior to the requirements of the law.

To be clear, the circuit court did not explicitly connect its discussion of acceptance of responsibility to Selerski's rehabilitative needs in the manner we have laid out above (or in any other manner). However, the State argues that we can affirm the court's exercise of discretion on the ground that the court's discussion here shows "implicit[]" consideration of Selerski's rehabilitative needs. As we understand it, the argument appears to be that, even when the sentencing court fails to address a mandatory sentencing factor, an appellate court can affirm the court's exercise of discretion if the appellate court can itself identify a connection between the sentencing court's remarks and the missing factor. In other words, it does not matter if no such connection was made on the record by

the circuit court if an appellate court can discern a connection between the sentencing court's remarks and the required factor.

It is of course true that appellate courts often “search the record” to sustain a circuit court’s exercise of discretion. *See Bolstad*, 399 Wis. 2d 815, ¶19. This principle is generally applicable in the sentencing context. *Id.*; *see also McCleary*, 49 Wis. 2d at 282 (when circuit court “failed to give [] reasons why a lengthy, near-maximum sentence was appropriate,” “we are obligated to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained”); *State v. Hall*, 2002 WI App 108, ¶19, 255 Wis. 2d 662, 648 N.W.2d 41 (citing *McCleary*, 49 Wis. 2d at 282). But there is some tension between the State’s argument about implied reasoning and some statements in *Gallion*. On the one hand, the *Gallion* court stated that “[w]hat has previously been satisfied with implied rationale must now be set forth on the record,” *Gallion*, 270 Wis. 2d 535, ¶38, and on the other hand, the *Gallion* court stated that its directives were “not intended to be a semantic trap” or a call for “magic words,” *id.*, ¶49. A decision from the Wisconsin Supreme Court on this topic would provide helpful guidance.

For all of these reasons, we certify this appeal to the Wisconsin Supreme Court.

Excerpted from SM-34, “A Sample Sentencing Pattern”

The following is a sentencing pattern that, in the Committee’s judgment, employs a logical and complete sequence in covering all the essential steps in the sound exercise of sentencing discretion.

In the case of State versus _____, Case No. _____, the defendant has been convicted of the crime of _____ upon a (guilty verdict by the jury) (trial by the court) (plea of guilty). Defendant is now before the court for the purposes of sentencing.

The maximum penalty for _____ is _____. The presentence author recommends _____. The defendant requests _____.

On sentencing the following witnesses for the state appeared: _____.
_____. The following witnesses for the defense appeared: _____
_____. (Identify letters or other material submitted to the court.) (Identify information relating to impact of the crime on the victim.) (No corrections to the presentence report were noted.) (Corrections to the presentence report are as follows: _____.)

(State summary of the offense.)

In deciding the defendant's sentence (disposition), the court considers the following:

- (A) Seriousness of the offense
 - 1. Dangerousness — actual/potential
 - 2. Injuries
 - 3. Effects of the crime — temporary/permanent
 - 4. Amounts involved
- (B) Character of the defendant
 - 1. Age, education, and health of defendant
 - 2. Record — juvenile record, adult record, and pending charges
 - 3. Status — married, children
 - 4. Demeanor, remorse, personality, truthfulness (defendant as a witness)
- (C) Needs of society
 - 1. Is defendant good risk?
 - 2. Does community need protection?
 - 3. Deterrent effect of sentence
 - 4. Moral need for punishment

(a) You are hereby sentenced to the Wisconsin State Prisons for an indeterminate period not more than _____ years, or

(b) You are hereby sentenced to the Wisconsin State Prisons for an indeterminate term not more than _____ years, stayed for _____ years during which time you are on probation with the following terms.

(c) Sentence is withheld and you are hereby placed on probation for a period of _____ years under the following conditions.

Fine, if any, costs, and surcharges.

_____ is entitled to sentence credit under § 973.155 in the amount of _____ days. _____ is ordered to pay restitution in the amount of _____.

For felonies, advise the defendant that § 941.29 makes it a Class E felony for a person convicted of a felony to possess a firearm. [footnote omitted]

If applicable, inform the defendant of the restrictions on child sex offenders working with children under § 973.034 and sex offender reporting requirements under § 973.048. [footnote omitted]

Advise on the right to seek postconviction relief. [Footnote omitted.]

