

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 24, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-0016-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIANA L. HERREWIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County:
MICHAEL J. McALPINE, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Diana Herrewig appeals from a judgment convicting her of theft greater than \$2,500 in a business setting, a Class C felony. Section 943.20(1)(b), STATS. The issue on appeal is whether the trial court

properly exercised its sentencing discretion, when it imposed a jail term as a condition of Herrewig's probation. We affirm.

The complaint alleged that Herrewig embezzled between \$26,000 and \$30,000 from her employer, Victor Breitenfield. It was further alleged that Herrewig admitted taking cash or forging checks, using Breitenfield's name on thirty to forty occasions, during a sixteen-month period. The complaint and information charged one count of felony theft and one count of felony forgery.

Herrewig pled no contest to the theft charge. In exchange for her plea, the State dropped the remaining count and agreed to recommend a withheld sentence, with probation and jail as a condition of probation. Herrewig also agreed to pay full restitution, while reserving the right to dispute any amounts claimed above \$27,500. (The trial court eventually set restitution at \$31,000, plus accounting charges.)

The presentence investigation report presented Herrewig's admission that she embezzled the money to finance her compulsive gambling habit. The report further described the crime as serious, involving substantial sums, with an extensive impact on an elderly and infirm victim. However, the writer concluded that the shock of being arrested and subjected to felony proceedings would deter Herrewig from further criminal acts. Consequently, the writer recommended lengthy probation with a stayed jail term, conditioned on successful completion of a gambling addiction treatment program.

At sentencing, the prosecutor asked for a ten-year probation term, with one year in jail as a condition of probation. Herrewig asked the court to

adopt the recommendation in the presentence report. In passing sentence, the court considered as mitigating factors Herrewig's work ethic and general productivity, the support of her family, her attributes as a parent and her first-time involvement in criminal activity. However, the court also considered the special position of trust she held with her elderly employer, who relied on her almost totally to handle his business affairs, the number of the embezzlements, the extended period over which they occurred, and her reason for embezzling. The court concluded that not incarcerating Herrewig would unduly depreciate the seriousness of her offense. The court stated:

I cannot, nor will I send a message to the citizens of Monroe County that they can steal from their employers and do this over a significant period of time, ... where they have the opportunity to stop the conduct and not sentence that person to a period of incarceration.

Consequently, the court placed Herrewig on probation for eight years and imposed a one-year jail sentence, with Huber privileges, as a condition of probation.

Sentencing lies within the circuit court's discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors the court must consider are the gravity of the offense, the character of the offender, and the need for public protection. *Id.* at 426-27, 415 N.W.2d at 541. Other related factors to consider include the defendant's record of offenses and behavior, the presentence investigation report, the nature of the crime, the defendant's guilt, and the defendant's demeanor, traits, remorse, rehabilitative needs, the impact on the victim and the public's needs and rights. *State v. Jones*, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989).

Herrewig contends that the trial court did not sufficiently weigh the many mitigating factors against the limited number of prejudicial factors. According to Herrewig, the only reasonable result of a proper weighing would have been probation but without jail time as a condition of that probation. We disagree. Although it is a misuse of discretion to give too much weight to one factor in the face of contravening considerations, the weight given each factor is particularly within the trial court's discretion. *Larsen*, 141 Wis.2d at 428, 415 N.W.2d at 542. Here, the trial court gave substantial weight to the public interest in deterring others by punishing serious offenses, as Herrewig admits hers was, with meaningful penalties. The court reasonably concluded that this concern outweighed Herrewig's mitigating circumstances. The result, probation and a one-year jail term with Huber privileges, was not outside the realm of reasonable punishment. Additionally, the court fully explained its decision on the record, and showed that it fully considered all of the information favorable to Herrewig presented at the hearing and in the presentence investigation report.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5.,
STATS.

