

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 1997

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. 97-1554-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHEILA L. HARDNETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
JAMES WELKER, Judge. *Reversed and cause remanded.*

VERGERONT, J.¹ Sheila Hardnett appeals her judgment of conviction and sentence for possession of drug paraphernalia with the intent to use it to ingest controlled substances in violation of § 161.573(1), STATS., 1993-94,²

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

² Section 161.573(1), STATS., 1993-94, is now § 961.573, STATS.

and the order denying her postconviction relief. After accepting her plea of guilty, the trial court imposed a sentence of thirty days in jail, the maximum jail term for that offense.³ On appeal, Hardnett contends that the trial court erroneously exercised its discretion in sentencing her because the trial court did not discuss the three primary factors that underlie the proper exercise of sentencing discretion, did not explain its reason for imposing the maximum term of imprisonment, and considered improper factors. Because we are unable to tell what factors the court relied on, and whether the court did rely on an improper factor, we reverse the sentence and remand for resentencing.

BACKGROUND

The complaint alleged that on May 24, 1996, after City of Beloit police officers entered the residence at 1004 Harvey pursuant to a search warrant, they found Hardnett and another female in the bedroom. Hardnett had items in her hand and said they belonged to her. Those items were a stem, a crack pipe and a tissue.

Hardnett appeared before the trial court pro se and entered a plea of guilty. The trial court informed Hardnett that she had a right to be represented by an attorney and to the appointment of an attorney at no cost if she could not afford an attorney because of poverty. The court also explained the maximum term of imprisonment and the maximum fine it could impose. The court then engaged in a detailed plea colloquy, at the conclusion of which it accepted the plea.

³ The penalty for violation of § 161.573(1), STATS., 1993-94, is a fine of not more than \$500 or imprisonment of not more than thirty days in jail or both. Section 161.573(1), STATS., 1993-94.

The court asked for the prosecutor's comments regarding sentencing. The prosecutor stated that normally she would be asking the court to impose a fine, but she had concerns with Hardnett's record—specifically two prior convictions, undated, from Illinois for dangerous drugs; a disorderly conduct conviction from the 1980s in Milwaukee County; and a possession of controlled substance misdemeanor from October 1990, in Milwaukee County, for which Hardnett received a fine. The prosecutor stated that this record raised questions whether a fine was appropriate, and she left that to the sentencing discretion of the court. When the court asked whether there were other arrests that grew out of the execution of the search warrant, the prosecutor responded that there were three or four others arrested and charged. She gave their names but did not state the charges or describe the nature of the search warrant.

The court then gave Hardnett the opportunity to address the court on sentencing. Hardnett explained that the Illinois charges went back twenty years and that the others mentioned were seven or eight years old and she had served her time or “done whatever she was supposed to do” on those charges. When the court asked her how she was employed, she explained she was not working; she was receiving Supplemental Security Income for a disability—a severe drug and alcohol problem—which had been diagnosed twelve years ago. Additional interchange on this topic will be discussed in more detail later in this opinion.

The trial court next questioned her on her relationship to the persons the prosecutor had mentioned who were also arrested. Hardnett explained that one was her sister, one her sister's husband, and one was her nephew. The trial court expressed its assumption that the search warrant and arrests meant there was drug dealing going on in the house. Hardnett twice said she did not know if there was drug dealing going on in the house; at one point she stated she had just arrived ten

minutes before the officers came in with the search warrant. The trial court pointed out that she had been involved with drugs for twenty years and asked her why, to which she answered she did not know. When the court asked her what it would take to get her to obey the law, she responded that she “guess[ed] it would be to get [her] life in order.” The court pointed out the danger of drugs for her young nephew, and the danger of being around drug dealers for her. The court stated that if she wanted to be protected from that kind of thing, “what you ought to do is quit fooling around with drugs, quit possessing drugs, quit possessing drug paraphernalia, and quit hanging out in drug houses. That would make a big difference, wouldn’t it?” Directly after Hardnett answered, “it really would, yes,” the court announced its sentence—thirty days in the Rock County Jail—without further comment or explanation.

After entry of the judgment of conviction and sentence, Hardnett moved to withdraw her plea and, alternatively, to modify her sentence. The grounds for the latter motion were that the trial court considered improper factors in sentencing and erroneously exercised its discretion. After a hearing, the trial court denied both motions. It explained the basis for denying the motion to withdraw the plea, but did not explain the basis for denying the motion to modify the sentence.

On appeal,⁴ Hardnett argues that the trial court erroneously exercised its discretion because it did not explain its reason for imposing the sentence it did, did not consider the three primary sentencing factors, and relied on improper factors—specifically its disapproval of Hardnett’ receipt of SSI and its assumption

⁴ The trial court granted Hardnett’s motion for release on bail pending appeal.

that there was drug dealing going on in the house when Hardnett was arrested, an assumption that Hardnett claims is not supported by the record.

After the State filed its brief in response to Hardnett's brief, Hardnett moved to strike the State's brief because the deputy district attorney who filed the brief for the State had previously represented Hardnett when he was an assistant state public defender. We granted the motion and ordered that the State's brief be stricken from the record and that the appeal be taken under submission without a respondent's brief. Accordingly, we review this appeal without the assistance of a brief from the State.

DISCUSSION

Sentencing is committed to the sound discretion of the trial court, and our review is limited to determining whether there was an erroneous exercise of that discretion. *McCleary v. State*, 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). In any instance where the exercise of discretion has been demonstrated, there is a strong public policy against interference with the trial court in passing sentence. *Id.* at 281, 182 N.W.2d at 522.

In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend upon facts that are 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.... There should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.

Id. at 277, 182 N.W.2d at 519.

In *McCleary*, the supreme court adopted the requirement that sentencing judges state the reason for selecting the particular sentence imposed. *Id.* The purpose of this statement is to aid in appellate review and to facilitate the trial judge's rationale of the sentence. *Id.* at 282, 182 N.W.2d at 522. When the trial court fails to set forth the reasons for the sentence imposed, that, on its face, is an erroneous exercise of discretion. *Id.* However, we do not set aside a sentence for that reason; rather, we search the record to determine whether in the proper exercise of discretion the sentence imposed can be sustained. *Id.*

The primary factors a court considers in fashioning a sentence are the gravity of the offense, the character of the offender, and the need for public protection. *State v. Iglesias*, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994). As part of these primary factors, the sentencing court may consider, among other things, the defendant's criminal record; history of undesirable behavior patterns; personality, character and social traits; results of a presentence investigation; vicious or aggravated nature of the crime; degree of culpability; demeanor at trial; age, educational background and employment record; remorse, repentance and cooperativeness; need for close rehabilitative control; rights of the public and length of pretrial detention. *Id.* This list is not exclusive. *Id.* The weight of the factors is within the trial court's discretion. *Id.* However, when the judicial sentencing discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion. *McCleary*, 49 Wis.2d at 278, 182 N.W.2d at 520.

We agree with Hardnett that the trial court at sentencing did not explain its reason for the sentence it imposed. We also do not have the benefit of the court's explanation at the time the court denied the postconviction motion. We have therefore searched the record to determine whether we can affirm the

sentence imposed as a proper exercise of discretion. We conclude that the record could support Hardnett's position that the trial court considered an improper factor in sentencing, and without an explanation from the court of its reason for the sentence, we are unable to rule this out.

With respect to Hardnett's receipt of SSI, after Hardnett explained that she received this because she had "a very severe drug and alcohol problem," the following interchange took place:

THE COURT: Are you asking somebody to pay you money to get drugs and alcohol?

THE DEFENDANT: No. That's what my doctors and counselors decided. They decided that 12 years ago.

THE COURT: That you had a drug and alcohol problem?

THE DEFENDANT: Yeah.

THE COURT: And you think people ought to pay you money for that?

THE DEFENDANT: No. I didn't say that.

The court's questions could suggest a disapproval of disability benefits based on drug and alcohol problems. We agree with Hardnett that disapproval of receipt of SSI benefits for a drug and alcohol problem is not a proper sentencing factor. The record does not indicate that Hardnett had not been diagnosed with severe alcohol and drug problems, as she testified, nor does the record indicate she is ineligible for those benefits. The applicable federal regulations recognize that addiction to alcohol or drugs, while not itself a basis for a disability determination, may result in symptoms, signs and laboratory findings that are considered disabling. *See* 20 C.F.R. § 404.1525(e) (1997) and 20 C.F.R. § 404.1525 (1997) guidelines. Since the record does not give rise to a reasonable inference that Hardnett is not entitled to SSI benefits, her receipt of them because

of a drug and alcohol problem, in and of itself, should not be held against her at sentencing.

We do not mean that the court may not in any way consider the reason for Hardnett's receipt of SSI benefits. Hardnett testified that she was diagnosed twelve years ago with severe drug and alcohol problems and apparently she was receiving SSI benefits as a result of those problems for that time period. During the twelve years, she had a conviction for possession of a controlled substance, and this conviction is for possession of paraphernalia for the purpose of ingesting a controlled substance. Therefore, the court could properly consider whether she has taken the necessary steps to deal with her problems, since this goes to her character, one of the primary sentencing factors, and to undesirable behavior patterns, personality, social traits, cooperativeness and rehabilitative needs—all proper sentencing factors. The trial court could reasonably view the existence of a severe drug and alcohol problem as not excusing Hardnett from responsibility for treating or addressing that problem. However, we are unable to determine from this record if and how Hardnett's receipt of SSI benefits factored into the court's decision on the sentence.

With respect to the court's comments on a drug house and drug dealing, we agree with Hardnett that the record does not show what the search warrant was for or the offenses for which the others in the house were arrested. Hardnett denied knowledge of any drug dealing at the house, and, since it was her sister's house, she had a legitimate explanation for being there. On the other hand, it is a reasonable inference from her presence at the house with drug paraphernalia in her hand, from her presence there with others, and from the arrest of the others, that others in the house were, at a minimum, using or possessing controlled substances, and Hardnett does not deny this. She also does not assert that she did

not know her sister's family was involved with drugs, and the record supports a reasonable inference that she did know. Her point seems to be that while there was evidence that she was in a house where others possessed drugs, there was no evidence that she was in a house where others were dealing drugs, and it was therefore error for the trial court to consider her association with drug dealers in sentencing her.

Hardnett's association with others who possess and/or use drugs, particularly since she knows that she has a long-standing drug problem, is a relevant sentencing factor and is supported by the record. It may be that the trial court considered the significant factor here to be that Hardnett was associating with persons who had some involvement with drugs, and the distinction between possessing/using drugs on the one hand, and dealing drugs on the other hand, was not significant to the court's decision. It is true that the court specifically commented on the violence associated with drug dealing. These comments may have been in response to Hardnett's statement to the court, at the plea portion of the hearing, that when the police officers came into her sister's house, they had three guns pointed toward her head and "she did not appreciate that." It appears the trial court may have inferred that the execution of a search warrant by armed police officers indicated that the warrant and subsequent arrest were for drug dealing as opposed to simply possession.

If this question of the court's consideration of association with drug dealers versus drug possessors/users was the only challenge to the sentence, we would be inclined to affirm the sentence, since either would be a proper sentencing factor and at least one is supported by the record. However, because we cannot conclude on this record that the court did not improperly consider the receipt of SSI benefits for a drug and alcohol problem, in itself, to be a negative factor for

purposes of sentencing, we are unable to affirm the sentence as a proper exercise of discretion. We are persuaded that we must remand to the trial court for resentencing.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

