

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 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. 98-0070-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOBY J. VANDENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

CANE, P.J. Toby VanDenBerg appeals a judgment of conviction for disorderly conduct as a repeater, in violation of §§ 947.01 and 939.62(1)(a), STATS., and an order denying his motion for postconviction relief. He was sentenced to three years' imprisonment, consecutive to time he was serving due to parole revocation. VanDenBerg contends the trial court erroneously exercised its sentencing discretion by imposing an excessive sentence in reliance on irrelevant

and immaterial information. He also contends he was denied his constitutional right to effective assistance of counsel because his trial counsel failed to object to the State's offer of irrelevant and immaterial information. This court rejects VanDenBerg's arguments and, therefore, affirms the order and judgment of conviction.

Following an incident at VanDenBerg's ex-wife's residence, where VanDenBerg caused a disturbance and assaulted his ex-wife, he was charged with battery and disorderly conduct. VanDenBerg was charged as a repeat offender based on a prior felony conviction within the previous five years. He entered into a plea agreement, pleading guilty to one count of disorderly conduct as a repeater; the battery charge was dismissed and read into the record. The court sentenced VanDenBerg to the maximum sentence of three years' imprisonment, consecutive to any other sentence he was then serving.

VanDenBerg asserts the trial court unreasonably exercised its discretion by imposing an excessive sentence based on irrelevant and immaterial information. Specifically, he argues that his due process right to be sentenced on the basis of true and correct information was violated. During the sentencing proceedings, the district attorney stated that he had spoken with John Choudoir, VanDenBerg's parole officer, who requested the court to impose a jail sentence concurrent with VanDenBerg's parole revocation. Choudoir's request was based on the Department of Corrections' desire to conserve prison resources.

VanDenBerg contends the State's reference to Choudoir's comments was inaccurate, irrelevant and immaterial information, and that the court's consideration of this information constituted an improper exercise of sentencing

discretion. The record does not support his contentions; rather, the record shows a proper basis for the court's sentence.

First, the record does not support VanDenBerg's contention that the State incorporated Choudoir's comments into its recommendation or that the trial court erroneously relied on the comments. After bringing the conversation to the court's attention, the district attorney specifically stated that he informed Choudoir that "that was not going to be my recommendation." Furthermore, the trial court unequivocally rejected the DOC's preference for conserving prison resources as a completely improper basis for sentencing. It also stated that the credit it gave to Choudoir's suggestions was "about how much water can be carried in a colander." At the postconviction hearing, the trial court reiterated that it gave no weight at all to Choudoir's comments and did not consider them as a factor in sentencing.

Second, the record supports a proper exercise of sentencing discretion. It is well settled in Wisconsin that sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there has been an erroneous exercise of discretion. *State v. Jones*, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989). A sentence will be upheld if the record shows the trial court employed a reasoning process based on legally relevant factors. *Bastian v. State*, 54 Wis.2d 240, 248, 194 N.W.2d 687, 691 (1972).

There are three primary factors the trial court must consider in sentencing: the gravity of the offense, the character of the offender, and the protection of the public. *Jones*, 151 Wis.2d at 495, 444 N.W.2d at 763. The court may also consider the defendant's past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of

the crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for close rehabilitative control; the rights of the public, and the length of pretrial detention. *Id.* The weight given to each factor is particularly within the discretion of the trial court. *Id.* at 495, 444 N.W.2d at 763-64.

The record shows the trial court properly considered appropriate sentencing factors in imposing sentence, including the need to protect the public from VanDenBerg's violent conduct, his extensive prior record, and VanDenBerg's character and rehabilitative needs. VanDenBerg's criminal record included numerous convictions starting in 1986, which resulted in jail and prison time, often imposed after revocation of probation or parole. Based on VanDenBerg's extensive criminal record and continued criminal conduct, the trial court considered him a substantial danger to the public. The court also considered VanDenBerg's inability to conform his conduct to the law, as evidenced by his continued criminal behavior after conviction and imprisonment, and concluded that probation, anger management, and other alternatives to imprisonment were not appropriate in VanDenBerg's case.

This court concludes the trial court's exercise of sentencing discretion was proper. The record demonstrates the trial court rejected the parole officer's comments and did not consider the comments at all in fashioning its sentence. The record also shows the trial court engaged in a rational reasoning process based on appropriate factors in arriving at its sentence. This court therefore affirms the trial court.

VanDenBerg also contends he was denied his right to the effective assistance of counsel because his trial counsel did not object to presentation of Choudoir's comments. He argues the information was inaccurate, irrelevant and immaterial to sentencing, and that trial counsel's failure to object to the presentation of such information, combined with his later incorporation of the information in its sentencing argument to the court, was deficient performance. We are not persuaded.

In order to establish ineffective assistance of counsel, VanDenBerg must demonstrate that his trial counsel's performance was deficient and that he was prejudiced by the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The question whether counsel's conduct violated the defendant's right to effective assistance of counsel is a question of law this court reviews de novo. *State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985). We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *Strickland*, 466 U.S. at 687-88. In order to prove deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688.

This court is not persuaded that trial counsel's performance was either deficient or that VanDenBerg suffered prejudice. Counsel's failure to object to the presentation of Choudoir's comments is not outside the wide range of professionally competent representation. Furthermore, it was reasonable trial strategy for counsel to attempt to gain a favorable sentence for VanDenBerg, which was the basis for asking the court to consider Choudoir's suggestion that the court impose a sentence concurrent to the jail time VanDenBerg was serving for revocation. Even if counsel's performance was deficient, however, VanDenBerg fails to demonstrate he suffered any prejudice. The court rejected Choudoir's

comments, did not give them any weight whatsoever in deciding sentence, and based its decision on appropriate sentencing factors. Because VanDenBerg has not met his burden of showing deficient performance and prejudice, his claim of ineffective assistance of counsel must fail.

By the Court.—Judgment and order affirmed.

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

