

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 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. 98-1027-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL M. WAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Affirmed.*

SNYDER, P.J. Paul M. Way appeals from the prison sentence imposed after he was convicted of possession of tetrahydrocannabinol (THC) contrary to § 961.41(3g)(e), STATS. He contends that the trial court erroneously exercised its discretion by imposing the sentence and that the court was biased against him. Because the record does not support Way's contentions, we affirm the judgment and sentence.

On September 30, 1997, Way pled guilty to a misdemeanor drug possession charge carrying a penalty of not more than six months in jail and a fine of not more than \$1000. Because of a prior criminal conviction, the incarceration was enhanced to imprisonment for not more than three years. *See § 939.62(1)(a), STATS.* The trial court ordered a presentence investigation report (PSI) and on November 18, 1997, sentenced Way to the maximum term of three years in prison consecutive to any other existing sentence of incarceration.

Way argues that the trial court erroneously exercised its discretion because it gave too much weight to his prior sexual assault conviction. He contends that because the trial court “unduly aggravated the [minor drug] crime” by characterizing the prior sexual assault as “[a] very serious, serious charge,” it erroneously exercised its discretion and we should reverse and remand the matter for sentencing on “the charge the court failed to recognize, possession of THC, 1 count, maximum penalty 6 months.”¹

In reviewing a sentence, we look to the record to determine if the trial court erroneously exercised its discretion. *See State v. Smith*, 100 Wis.2d 317, 323, 302 N.W.2d 54, 57 (Ct. App. 1981). There is a presumption that the trial court acted reasonably and properly exercised its discretion and the defendant bears the heavy burden of rebutting that presumption. *See id.* In exercising its discretion, the trial court considers the gravity of the offense, the character of the offender and the need to protect the public. *See id.* at 325, 302 N.W.2d at 58. The weight to be attributed to each of the above factors falls within the discretion of

¹ Way does not contend that he was unaware of the enhancer provision or the maximum sentence of three years in prison at his plea hearing.

the sentencing judge. *See State v. Paske*, 163 Wis.2d 52, 64 n.6, 471 N.W.2d 55, 59 (1991).

The sentencing record reveals that Way was convicted of first-degree sexual assault of an eight-year-old child and sentenced to fifteen years' imprisonment on June 29, 1989. He was paroled on March 24, 1997. The possession of THC occurred on June 6, 1997, less than three months after his parole. Way contends that he has been wrongly sentenced a second time for the sexual offense rather than for the misdemeanor drug conviction. The sentencing record, however, discloses that the trial court considered other factors besides the prior sexual assault conviction.

In addition to Way's sexual assault conviction, the trial court was presented with his criminal record of carrying a concealed weapon, breaking and entering, burglary, receiving stolen property and battery to a police officer. The trial court acknowledged that the THC possession charge was not "particularly aggravated" and recognized that Way had admitted his guilt and showed "a certain amount of remorse, repentance and cooperativeness." The court also remarked that "[Way] apparently does work steadily." Way concedes that these were positive sentencing factors considered by the sentencing court.

Way complains, however, that contrary to the positive sentencing factors and the minor degree of the drug offense itself, the trial court considered inappropriate factors, including his past sexual assault conviction, his history of drug and alcohol abuse, and the PSI prison recommendation. The PSI revealed that Way possessed and masturbated with girl's underwear, and that those activities, coupled with his drug possession, indicated a high risk of his sexually reoffending in the community. The trial court balanced the factors and concluded

that Way was dangerous and presented a substantial public threat. It decided that a substantial prison term for the drug offense was necessary to protect the public. We are satisfied that the trial court's exercise of sentencing discretion is supported by the record and is not erroneous.

We now turn to Way's contention that the trial court was biased. A litigant has a right to an unbiased and impartial sentencing judge. *See State v. Rochelt*, 165 Wis.2d 373, 378, 477 N.W.2d 659, 661 (Ct. App. 1991). A litigant challenging a judge's impartiality has the burden of establishing bias, *see State v. McBride*, 187 Wis.2d 409, 419, 523 N.W.2d 106, 111 (Ct. App. 1994), and that claim is waived by not raising the issue of bias before the sentencing court, *see State v. Marhal*, 172 Wis.2d 491, 504-05, 493 N.W.2d 758, 764-65 (Ct. App. 1992). The due process right to sentencing by an impartial and unbiased judge is determined subjectively on the judge's own determination of his or her impartiality and objectively based upon whether impartiality can reasonably be questioned. *See State v. Walberg*, 109 Wis.2d 96, 106, 325 N.W.2d 687, 692 (1982).

As in his earlier contention, Way argues that the trial court's bias is evident because his sentence was based upon the prior sexual assault rather than the present drug offense and because “[p]robation here was the appropriate measure, not the [prison sentence] dispensed by the trial court for past crimes.” Way has failed to meet his burden of establishing bias merely because he was not placed on probation. The sentencing record supports a conclusion that the trial court properly exercised its discretion by fully considering the sentencing criteria, by balancing the positive and negative sentencing factors and in finding that Way's past sexual behavior, coupled with his present sexual propensities and drug possession, supported a high risk of his sexually reoffending in the community.

Way was sent to prison, rather than to jail or placed on probation, based upon appropriate sentencing factors. We agree with the State that the record, rather than indicating an improper sentencing agenda, reflects sound judgment and proper exercise of discretion by the trial court in imposing sentence upon Way.

By the Court.—Judgment affirmed.

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

