COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2386-CR **Cir. Ct. No. 2014CM2093**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARNIE L. COUTINO A/K/A MARNIE L. SPIEZER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] Marnie L. Coutino appeals from a judgment of conviction for disorderly conduct and a postconviction order denying her relief

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

from that judgment based on her contention that the circuit court erroneously exercised its discretion in sentencing her. We affirm.

Background

¶2 Coutino was charged with two counts of misdemeanor theft related to a scheme she devised to defraud a married couple out of funds, which Coutino had wrongly represented were for the purpose of providing the couple with assistance with immigration needs. She ultimately pled to one count of disorderly conduct. The circuit court sentenced her to thirty days of jail, with Huber privileges, and imposed a $250 fine plus court costs.

¶3 Coutino filed a postconviction motion, arguing the circuit court erroneously exercised its discretion in sentencing her. The court denied the motion, and Coutino appeals.

Discussion

¶4 Coutino asserts she is entitled to a new sentencing hearing because "probation was not even considered as an alternative at the original sentencing hearing."[2] We conclude the circuit court did not err in imposing sentence.

[2] In her brief-in-chief, Coutino criticizes multiple aspects of the circuit court's explanation of its sentence at the sentencing hearing. She then states that at the postconviction hearing, the court "did clarify, and perhaps rehabilitate to some extent some of the deficiencies in the original sentencing hearing," and she goes on to identify ways in which the court properly clarified the reasons for the sentence it imposed. Coutino then states, "Nevertheless, the Defendant is entitled to a new sentencing hearing because the court admitted that it did not consider probation at the time of the original sentencing hearing." We thus consider Coutino to only be challenging on appeal the court's consideration, or lack thereof, of a probationary disposition as the basis for the court's purportedly erroneous sentencing. This reading of her appeal is also consistent with a statement by her counsel, the same counsel as on appeal, at the conclusion of the postconviction hearing that Coutino would appeal because "she feels that the Court erred in not even considering probation as a first alternative at the sentencing hearing."

¶5 "Sentencing decisions are discretionary." ***State v. Owens***, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187 (citation omitted). "On appeal, review is limited to determining if discretion was erroneously exercised." ***State v. Gallion***, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197. Thus, a circuit court's discretionary sentencing "will be affirmed if it is made upon the facts of record and in reliance on the appropriate law." ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999).

¶6 In ***Gallion***, our supreme court stated:

> In each case, the sentence imposed shall "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." Accordingly, the circuit courts should consider probation as the first alternative. Probation should be the disposition unless: confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or it would unduly depreciate the seriousness of the offense.

Gallion, 270 Wis. 2d 535, ¶44 (citations omitted).

¶7 Coutino bases her appeal on the circuit court's failure to reference probation at the sentencing hearing and its statement at the postconviction hearing that it did not consider probation at the sentencing hearing:

> [B]ut because the recommendation was a fine only, I think a probationary sentence would have … made it potentially more cumbersome for her given her situation and I think I would have given her jail time with probation if I would have considered probation.
>
> So, in lieu of probation I didn't see probationary needs. I just thought the jail time was sufficient and it wasn't an extended period of jail time. It was enough not to depreciate the seriousness of the offense which is what I did, the 30 days.

Coutino insists resentencing is required because "the court admitted that it did not consider probation at the time of the original sentencing hearing." She claims "[t]he law is clear that a circuit court *must* consider probation as the first alternative, but may reject probation if it finds that it would unduly depreciate the seriousness of the offense." We note that while Coutino claims the law "is clear" that a circuit court "must" consider probation as the first alternative, ***Gallion*** says a sentencing court "*should* consider probation as the first alternative." ***Id.***, ¶44; *but see* ***State v. Klubertanz***, 2006 WI App 71, ¶19, 291 Wis. 2d 751, 713 N.W.2d 116 (using the word "must" instead of "should").

¶8 As a practical matter, every circuit court engaged in the sentencing of a defendant is aware that, except in limited circumstances, probation is an option. Here, the fact that the court indicated that jail time, here thirty days, was necessary to address Coutino's conduct and character—"I could have given you ninety days and I was inclined to go something higher"—clearly indicates the court believed confinement was a necessary component of the sentence. This necessarily means the court rejected the possibility of probation without confinement. As our supreme court stated in ***Anderson v. State***, 76 Wis. 2d 361, 366, 251 N.W.2d 768 (1977), "Rejection of probation is a necessary predicate to a determination that incarceration is required in a particular case."

¶9 At Coutino's sentencing, the circuit court considered the gravity of her offense, her character, and protection of the community. The court found Coutino's offense to be "serious" in that even though she pled to a disorderly conduct count, the court considered it to be "a theft" and noted that Coutino "took advantage" of the victims, who Coutino had known for years and who were "in a desperate situation." Regarding Coutino's character, the circuit court gave her "credit" for various ways in which she—other than stealing from them in this

case—had provided assistance to the victims and also served the community. The court, however, viewed Coutino as "minimiz[ing]" her conduct, failing to accept responsibility for her crime, and lying to the court about the circumstances of the case. The court was also concerned that Coutino's continued denial of her conduct not only spoke poorly of her character but also placed the community in jeopardy. "While any one of these [sentencing] factors would have been sufficient [to support Coutino's sentence], the others were given consideration." *See* ***Anderson***, 76 Wis. 2d at 368.

¶10 Here, the circuit court clearly determined that at least thirty days of confinement in jail was an appropriate and necessary sentence so as not to depreciate the seriousness of Coutino's crime; a disposition of probation without any meaningful period of confinement would not suffice. Furthermore, the court expressed at the postconviction hearing that at the time of the sentencing hearing, it "didn't see probationary needs." It added that "I just thought the jail time was sufficient and it wasn't an extended period of time. It was enough not to depreciate the seriousness of the offense which is what I did, the 30 days."

¶11 "Sentencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***Gallion***, 270 Wis. 2d 535, ¶18 (citation omitted). Coutino has failed to convince us the circuit court erroneously exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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