

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 24, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP452-CR**

**Cir. Ct. No. 1997CF971464**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHARLES JOHNSON III,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Charles Johnson III appeals from a judgment of conviction after his probation was revoked for criminal damage to property, and

from a postconviction order denying his resentencing motion.<sup>1</sup> The issue is whether the trial court erroneously exercised its discretion for failing to provide specific reasons for imposing the maximum sentence after revocation of Johnson's probation. We conclude that the trial court considered the purposes for which the original sentence was withheld, the primary sentencing factors, and the reasons Johnson had been returned to the trial court for sentencing, and imposed a reasoned and reasonable sentence after revocation of Johnson's probation. Therefore, we affirm.

¶2 This case originated in 1997 from Johnson's criminal conduct in reaction to his former girlfriend's decision to discontinue their relationship. Johnson pled guilty to first-degree recklessly endangering safety while armed, operating a motor vehicle without the owner's consent, and criminal damage to property. For the reckless endangerment conviction, the trial court imposed a forty-month sentence; for the motor vehicle conviction, the trial court imposed a twenty-four-month consecutive sentence. For the criminal damage to property conviction, the trial court withheld sentence and imposed a three-year probationary term to run consecutive to the prison sentence. Johnson's probation was conditioned upon payment of \$2,131.74 in restitution and additional court costs.

¶3 Johnson stipulated to a three-year extension of his probation to fulfill the unsatisfied term of paying the remaining \$2,113.74 in restitution. Johnson's

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<sup>1</sup> The Honorable Michael J. Barron imposed the original sentence for the related charges of recklessly endangering safety while armed, and operating a motor vehicle without the owner's consent, and withheld sentence and imposed probation for criminal damage to property. The Honorable Jean W. DiMotto imposed the sentence after revocation, and denied Johnson's postconviction motion.

probation was revoked for violations arising from his harassing, threatening and behaving violently toward a woman and her father, which occurred in late March and early April of 2003. Johnson was returned to court for sentencing after revocation; the trial court imposed a five-year sentence. Johnson moved for resentencing, which was denied. Johnson appeals, challenging the sentence imposed after revocation and the denial of his resentencing motion.

¶4 Johnson claims that the trial court erroneously exercised its sentencing discretion in: (1) failing to explain why it imposed the maximum five-year sentence, and how that sentence was the minimum amount of custody necessary to achieve the sentencing considerations (“minimum custody standard”), and failing to account for the purpose of the original sentence; and (2) failing to adhere to the reason underlying the probation extension. Incident to the last consideration, Johnson also claims that he received ineffective assistance of counsel for failing to properly advise the court of the sole purpose for the probation extension.

¶5 Sentencing after revocation involves many of the same considerations involved in the original sentencing. *See State v. Schordie*, 214 Wis. 2d 229, 233-35, 570 N.W.2d 881 (Ct. App. 1997).

At sentencing, a trial court is required to consider (1) the gravity of the offense, (2) the character of the offender, and (3) the need to protect the public. Proper sentencing discretion can exist without a delineation of sentencing factors; what is required is a *consideration* of the sentencing factors. If a trial judge does not delineate the sentencing factors, we are obliged to search the record to determine whether the sentence imposed is sustainable as a proper discretionary act. We will review the two sentencing proceedings on a global basis, treating the latter sentencing as a continuum of the first.

*State v. Wegner*, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289 (footnotes and citations omitted). As summarized in *Wegner*, “[a]s long as the sentencing court considered the proper factors and the sentence was within the statutory limits, the sentence will not be reversed unless it is so excessive as to shock the public conscience.” *Id.*, ¶12. In fact, *Wegner* interpreted *McCleary v. State*, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971), the case on which Johnson relies, as imposing the duty to affirm a sentence under these circumstances. *See Wegner*, 239 Wis. 2d 96, ¶12 (citing *McCleary*, 49 Wis. 2d at 282).

¶6 Johnson’s first contentions are interrelated; he challenges the trial court’s exercise of sentencing discretion for failing to: (1) identify the precise reason it imposed a five-year sentence, and (2) consider the purpose of the original sentence.<sup>2</sup> The trial court, which imposed the five-year maximum sentence for criminal damage to property after revocation, considered the primary sentencing factors. It referred to the gravity of the offense and the original trial court’s characterization of Johnson’s “trash[ing]” of his former girlfriend’s property as “[s]ound[ing] pretty sick ... someone urinating on someone’s property, in addition to cutting up cables and doing other things to her property, and then taking her car in addition.” It recounted his conduct, the violence involved, and “the terror and emotional trauma that [Johnson] caused [his former girlfriend] and [her father].” The current trial court was unimpressed with Johnson’s character. It characterized Johnson’s conduct in criminally damaging his former girlfriend’s property as

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<sup>2</sup> In contending that the trial court failed to explain the reasons for its sentence, Johnson extensively cites to and quotes from *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, while recognizing that *Gallion* post-dates this sentence. We do not cite *Gallion* because it does not apply to sentences imposed before it was decided. *See State v. Trigueros*, 2005 WI App 112, ¶4 n.1, 282 Wis. 2d 445, 701 N.W.2d 54.

“sick” and “criminal.” It viewed his efforts toward restitution as “pathetic.” It was distressed that Johnson failed to take advantage of “the privilege of probation.” It concluded that “[t]he community, particularly the women in this community, clearly need protection from you.” Ultimately, the current trial court was convinced that Johnson “need[ed] both treatment and punishment.”

¶7 The behavior resulting in revocation involved violence and extreme harassment toward a woman with whom Johnson was involved (including threatening to kill both the woman and her father, whom he thought was interfering with their relationship). Although the trial court did not specify either the necessity of imposing the maximum sentence, or why that met the minimum custody standard, it described Johnson’s original behavior as “sick” and “criminal,” and was mindful that Johnson was engaged in “strikingly familiar behavior” six years later, which resulted in the current revocation of his probation.

¶8 The clear implication was that Johnson was a danger to women with whom he had been involved. In imposing sentence after revocation, the trial court cited to and quoted from sections of the sentencing transcript, providing both the connection between the current and original conduct, and demonstrating its familiarity with and consideration of the trial court’s original purpose. Ultimately, the current trial court imposed the maximum sentence, which was also consistent with the prosecutor’s recommendation – one year less than the interval between the “strikingly familiar behavior” for which Johnson was convicted and for which his probation was later revoked. Although the trial court did not specifically identify why it imposed the five-year maximum sentence as opposed to a lesser sentence, it was not required to specify its reasons with the precision Johnson suggests. Its reasoning is more than sufficient to demonstrate a proper exercise of discretion. See *State v. Ramuta*, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661

N.W.2d 483 (“no appellate-court-imposed tuner can ever modulate with exacting precision the exercise of sentencing discretion”).

¶9 The remaining challenge is to the trial court’s failure to consider that the extended probationary term was imposed to ensure the payment of restitution. Preliminarily, trial counsel advised the court during his sentencing presentation that Johnson stipulated to the extension of his probationary period, which “was to merely collect a debt, not to serve either rehabilitation needs or any punitive interests.” Insofar as Johnson is contending that his trial counsel was ineffective for failing to advise the trial court of that claimed purpose of probation, his contention is belied by the record. Although the trial court was not persuaded, it was not for lack of zealous advocacy.

¶10 Johnson’s contention—that probation was imposed and extended strictly to enforce payment of restitution—is arguable, and perhaps persuasive, but not conclusive. Originally, the trial court withheld sentence on the criminal damage to property conviction because it sought to impose a collective sentence of five years and four months for the three related offenses for which Johnson was convicted. One of the convictions carried a presumptive minimum sentence. It imposed the sentences and probationary term to impose punishment and compel restitution payments. It was not required to withhold sentence; it elected not to impose and stay the sentence for criminal damage to property.

¶11 When Johnson’s probation was revoked for “strikingly familiar behavior” to that for which he was originally convicted, the trial court was obliged to impose sentence on the conviction for which sentence had been withheld. The trial court, in imposing sentence after revocation, was not required to consider the probationary term imposed for the criminal damage to property in isolation. *See*

*Schordie*, 214 Wis. 2d at 233-35. Although it is arguable that probation was imposed as a mechanism to enforce payment of restitution, it is equally arguable that the current trial court concluded that a five-year sentence was warranted for a man whose probation was revoked for “strikingly familiar behavior” six years earlier. The trial court properly exercised its discretion. That it did so differently than trial counsel had suggested does not warrant resentencing. See *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

