

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 3, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1902-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. RUPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed.*

¶1 SNYDER, J.¹ John A. Rupp appeals from a judgment of conviction and a postconviction order for violations of WIS. ADMIN. CODE ch. ATCP § 110.05(2)(d) relating to home improvement contracts. Rupp argues that the trial

¹ This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

court relied on erroneous information when it sentenced him to the maximum sentence available pursuant to WIS. STAT. § 100.26(3). We disagree and affirm the judgment and the order of the trial court.

FACTS

¶2 On October 19, 1994, Rupp was charged with two counts of failure to provide a start and completion date on a home improvement contract in violation of WIS. ADMIN. CODE ch. ATCP § 110.05(2)(d). On December 2, 1996, Rupp entered pleas of no contest to both charges. At sentencing on January 22, 1997, the trial court withheld sentence and placed Rupp on probation for two years, each count concurrent to the other, with six months in the county jail and payment of restitution as conditions of probation. At the sentencing hearing, the district attorney informed the trial court that the amount of restitution was \$21,271.96; however, Rupp disputed that amount. The trial court stated that Rupp would have an opportunity to refute the amount of restitution as determined by the district attorney.

¶3 In April 1997, the district attorney's office submitted to the trial court a stipulation and order as to restitution, signed by Rupp and Assistant District Attorney John Daniels. The stipulation indicated that the restitution amount was \$8,868.96.

¶4 Rupp's probation was ultimately revoked, and he appeared before the trial court for sentencing after revocation on May 25, 1999. At this hearing, the trial court sentenced Rupp to one year in jail on each count, to be served consecutive to one another, the maximum penalty available, with credit for time served. The trial court also granted Rupp Huber privileges during this sentence. Initially, the trial court ordered a judgment of restitution in the amount of

\$21,271.96. Rupp reminded the court, and the district attorney confirmed, that a restitution stipulation and order had been reached, with \$8,868.96 the agreed-upon amount of restitution. The court then entered a judgment of restitution in the amount of \$8,868.96.

¶5 On June 30, 1999, in an unrelated Fond du Lac county case, Rupp was sentenced to six years in the Wisconsin prison system, a sentence to run consecutive to the two-year jail sentence imposed earlier.

¶6 On April 26, 2000, Rupp filed a postconviction motion in the matter at hand, asking for sentence modification on two grounds. Rupp argued that because he was subsequently sentenced to prison in the Fond du Lac county case, pursuant to WIS. STAT. § 973.03(2) he had to serve all of his sentences in the state prison system, which obviated the trial court's allowance of Huber privileges in the Winnebago county case. Rupp alleged that the denial of Huber privileges constituted a new factor allowing for sentence modification. In addition, he alleged that the court relied upon incorrect information in imposing sentence. Specifically, Rupp alleged that when the trial court initially imposed sentence, it did so under the mistaken impression that restitution was in the amount of \$21,271.96.

¶7 A hearing was held on this issue on June 20, 2000. After hearing arguments from both sides, the trial court denied the motion for sentence modification. Rupp appeals the May 28, 1999 judgment of conviction and the June 30, 2000 order denying his motion for postconviction relief.

DISCUSSION

¶8 Sentencing is committed to the discretion of the sentencing court and appellate review is limited to determining whether there was an erroneous exercise of that discretion. See *State v. Petrone*, 161 Wis. 2d 530, 563, 468 N.W.2d 676 (1991). A strong presumption of reasonableness is afforded sentencing decisions because the trial court is in the best position to consider the relevant factors and assess the defendant's demeanor. See *State v. Setagord*, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997). The weight to be given the various sentencing factors is a determination particularly within the wide discretion of the sentencing court. See *State v. J.E.B.*, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). The appellant must show some unreasonable or unjustifiable basis in the record for the sentence complained of. See *Petrone*, 161 Wis. 2d at 563.

¶9 Rupp argues that the trial court misused its discretion when it relied upon erroneous restitution information during sentencing.² We disagree.

¶10 The record indicates that when the trial court initially sentenced Rupp, it had been informed that restitution exceeded \$21,000. However, Rupp interjected and informed the court, and the district attorney agreed, that the restitution amount had been modified and stipulated to \$8,868.96. The trial court then entered a judgment of restitution in the correct amount, \$8,868.96, and reaffirmed its earlier sentence of two years in jail. Thus, the court's sentencing decision was not based upon erroneous information.

² During the postconviction hearing, Rupp also argued that because he was subsequently sentenced to prison in the Fond du Lac county case and thus had to serve all of his sentences in the state prison system, the trial court's allowance of Huber privileges in the Winnebago county case was obviated and this denial of Huber privileges constituted a new factor allowing for sentence modification. Rupp abandons this argument on appeal.

¶11 Furthermore, at the postconviction hearing, the trial court indicated that it was not the amount of restitution that dictated the maximum sentence but the fact that Rupp had not paid “a nickel of the restitution from the time he was sentenced until he was sentenced on the revocation.” Whether the amount of restitution was \$21,000 or \$8,000, it was Rupp’s abject failure to provide any compensation to his victims upon which the judge relied when imposing sentence.

¶12 Furthermore, at the original sentencing hearing, the trial court stated: “The message needs to be sent that [Rupp’s] days of taking advantage of people through his self-employment jobs are over.” In addition, at the postconviction hearing, the trial court properly listed the appropriate sentencing factors—the gravity of the offense, the character of the offender, and the need to protect the public—and noted that Rupp had a lengthy history of prior criminal convictions and that the convictions at hand were for victimizing the elderly. The trial court also commented that Rupp had not demonstrated any remorse for the crimes at hand.

¶13 Based upon the aforementioned reasons, the trial court’s decision was not an erroneous exercise of discretion and in fact was proper under the circumstances.

CONCLUSION

¶14 Rupp has not demonstrated an unreasonable or unjustifiable basis for his sentence. The trial court did not rely upon erroneous information and thus did not misuse its discretion in sentencing Rupp to the maximum sentence available. The judgment and the order of the trial court are therefore affirmed.

By the Court.—Judgment and order affirmed.

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

