

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 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. 00-2621-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES TERRY II,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed.*

¶1 DYKMAN, P.J.¹ James Terry appeals from a judgment of conviction for criminal damage to property. He contends that the trial court erroneously exercised its discretion by sentencing him to nine months, the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

maximum sentence for the charge. Terry specifically argues that it was improper for the trial court to weigh his knowledge of Terry's character gleaned from a prior trial on unrelated charges in determining the sentence for the criminal damage to property. We conclude that the trial court properly exercised its discretion and therefore affirm the judgment.

FACTS

¶2 The incidents relevant to this appeal took place while Terry was incarcerated in the Dane County Jail. On September 1, 1999, Terry became upset because some of his applesauce had become mixed with his vegetables at lunch, and threw his plate at the deputy on duty. Later that afternoon, still angry over the food, Terry flooded his cell. He then shook the sink loose from the cell wall, ultimately breaking it.

¶3 Terry was charged with criminal damage to property in violation of WIS. STAT. § 943.01(1) (1997-98),² and with disorderly conduct under WIS. STAT. § 947.01, both as a repeat offender. Pursuant to a plea agreement, the disorderly conduct charge and the penalty enhancement were dropped, and Terry pleaded no contest to the charge of damage to property.

¶4 The trial court sentenced Terry to nine months in prison, to be served consecutively to other sentences. In determining Terry's sentence, the judge said:

The Court is well familiar with Mr. Terry's character, based upon the prior trial to the Court on unrelated charges, and I am satisfied in this case, given the

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

intentional nature, the total disregard once again for the rights of others, that nine months is appropriate.

It is this comment which serves as the basis for Terry's appeal.

DISCUSSION

¶5 Sentencing is committed to the sound discretion of the trial court; our review of a criminal sentence is limited to determining whether there has been a "clear" erroneous exercise of that discretion. *McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). Our limited review in this area reflects the strong public policy against interference with sentencing discretion; we presume that the trial court acted reasonably, and we assign to the defendant the burden of "show[ing] some unreasonable or unjustified basis in the record for the sentence complained of." *State v. Harris*, 119 Wis. 2d 612, 622-23, 350 N.W.2d 633 (1984). We do so, at least in part, because the trial court "has a great advantage in considering the relevant factors and the defendant's demeanor." *State v. Roubik*, 137 Wis. 2d 301, 310, 404 N.W.2d 105 (Ct. App. 1987).

When imposing sentence, a trial court must consider: the gravity of the offense, the offender's character, and the public's need for protection. The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's 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 or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; and, the needs and rights of the public.

State v. Thompson, 172 Wis. 2d 257, 264-65, 493 N.W.2d 729 (Ct. App. 1992) (citation omitted).

A trial court [erroneously exercises] its sentencing discretion when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one sentencing factor in the face of other contravening considerations. The weight given to each sentencing factor, however, is left to the trial court's broad discretion.

Id. at 264 (citations omitted).

¶6 The trial court considered several relevant factors in coming to its conclusion, including Terry's prior offenses, his character, and the aggravated nature of the crime. The fact that the judge's knowledge of Terry's prior convictions and character came from his actual presence at the previous trial, rather than from reading about those convictions in a presentence report, is immaterial. Terry contends that the facts considered by the judge were neither part of the record, nor could they be inferred from the record. This is not true. The criminal complaint contains a description of the previous charges brought against him, from which character can be inferred even in the absence of personal knowledge of the circumstances of the offenses. The complaint would have been available to the sentencing judge even if he had not presided over Terry's previous trial.

¶7 Terry attempts to minimize the gravity of the offense involved by repeatedly noting that at the time he was angry and stressed out, and arguing that the deputy's response to his demand for a new plate of food was lacking in "understanding of [his] stress." These arguments are unavailing. Very few, if any, incidents involving destruction of property do not result from some degree of stress or anger. It is evident that the trial court did not agree that Terry's stress mitigated his aggressive and violent reaction to his applesauce touching his vegetables.

¶8 Finally, Terry contends that the sentence was excessive because the incident in Terry's jail cell did not infringe upon "the rights of others" because it

occurred behind bars. We reject this argument because it implies that those who live and work in Wisconsin's prisons are less in need, or less deserving of protection from such behavior than "the public in general."

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).

