

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 14, 2002

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. 01-3379-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00 CM 8096

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINETTE KENNEDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Antoinette Kennedy appeals from a judgment entered after she pled no contest to one count of theft—movable property, contrary to WIS. STAT. § 943.20(1)(a) (1999-2000).² She also appeals from an order

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

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

denying her postconviction motion requesting that her judgment be vacated. Kennedy claims the trial court erroneously exercised its sentencing discretion by imposing an unduly harsh sentence, and that the trial court should have granted her postconviction motion. Because the sentence imposed was not unduly harsh and because the trial court did not err when it denied her postconviction motion, this court affirms.

I. BACKGROUND

¶2 On August 21, 2000, Kennedy was working as a cashier in a check-out line at a Big Lots store. Kennedy's mother came through her line with a storage bin full of merchandise. Kennedy waived her mother through without requiring payment for either the bin or the items inside the bin. Another employee observed the incident and reported it to the police.

¶3 Kennedy was charged with one count of theft as party to a crime. Kennedy pled not guilty and the case was set for a jury trial. On March 26, 2001, the date the trial was supposed to commence, the parties entered into a plea agreement. In exchange for a plea of no contest, the State agreed that it would move to dismiss the charge if Kennedy completed twenty hours of community service and the retail theft program at UWM. The trial court engaged Kennedy in a plea colloquy. Afterwards, the trial court advised Kennedy that a review date would be set. If Kennedy completed the retail theft program and the community service by the review date, her case would be dismissed. If Kennedy did not complete these requirements, the trial court would proceed with sentencing. Kennedy indicated she understood. The review date was set for May 15, 2001, but was adjourned by stipulation until June 1, 2001.

¶4 The day after the plea was entered, Kennedy was arrested on a new felony charge and was incarcerated pending resolution of that matter. On June 1, 2001, Kennedy appeared in custody for the review date. The trial court was advised that because of the incarceration on the unrelated charge, Kennedy was unable to complete the retail theft program or the community service. Kennedy's counsel requested an adjournment to allow Kennedy to satisfy those requirements. The trial court denied the motion and proceeded to sentencing.

¶5 The State recommended probation. Kennedy's counsel requested a sentence of five days, time served. The trial court sentenced Kennedy to twenty days in the House of Correction, time served.

¶6 In November 2001, Kennedy filed a motion seeking to vacate the conviction. Kennedy asked the court for another chance to complete the retail theft program. The trial court considered the motion as one for reconsideration and it was denied. Kennedy now appeals.

II. DISCUSSION

¶7 Kennedy contends the trial court erroneously exercised its sentencing discretion by imposing an unduly harsh sentence. She argues that the twenty days, time served sentence was unduly harsh because it was contrary to her plea agreement and because, under the circumstances, through no fault of her own, it became impossible for her to comply with the terms of the plea agreement by the review date.

¶8 Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. *State v. Plymesser*, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992). There is a

strong policy against an appellate court interfering with a trial court's sentencing determination and, indeed, an appellate court must presume that the trial court acted reasonably. *State v. Thompson*, 146 Wis. 2d 554, 565, 431 N.W.2d 716 (Ct. App. 1988). When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶9 Kennedy does not argue that the trial court failed to address the three primary sentencing factors; rather, her argument focuses on whether the trial court's sentence was unduly harsh. After reviewing the record in this case, this court cannot conclude that the trial court erroneously exercised its discretion when imposing sentence.

¶10 The transcript clearly reflects the terms required by the trial court in order for the trial court to follow the plea agreement: Kennedy had to complete the retail theft program and community service before the review date. If Kennedy did not, the case would proceed to sentencing. Kennedy did not fulfill the requirements, and accordingly was sentenced. This court cannot say that the sentence imposed was unduly harsh. Kennedy faced a maximum sentence of nine months in jail. She received only twenty days. The trial court acted within its discretion.

¶11 Kennedy makes much of the fact that the trial court should have given her additional time to satisfy the terms of the plea agreement. This court is not persuaded. The trial court provided Kennedy with ample time to complete the

retail theft program and community service. Moreover, the trial court is not bound to follow the plea agreement. *State v. Roubik*, 137 Wis. 2d 301, 305, 404 N.W.2d 105 (Ct. App. 1987). Thus, even if Kennedy had not been incarcerated and had completed the requirements of the plea agreement, the trial court was not bound to follow the recommendation of the State that the case be dismissed. This court cannot conclude that the trial court erroneously exercised its sentencing discretion.

¶12 Similarly, this court is not persuaded by Kennedy's companion argument that the trial court should have granted her postconviction motion. Kennedy still had not completed the retail theft program or community service. There was no meritorious reason for the trial court to reconsider its earlier decision.

By the Court.—Judgment and order affirmed.

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

