

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2010AP2417-CR

Cir. Ct. No. 2009CF82

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRYSTYNA GRUSZCZYNSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Krystyna Gruszczynski appeals a judgment convicting her of five counts of felony theft of an amount between \$2,500 and \$5,000 and an order denying postconviction relief. At sentencing, the circuit court rejected a plea agreement's recommendation and imposed the maximum

confinement allowed. Gruszczynski claims her due process rights were violated because the sentencing court relied on inaccurate information and was objectively biased. She also claims the sentencing court erroneously exercised its discretion by failing to consider the sentencing objectives and by imposing an unduly harsh and excessive sentence. We affirm.

BACKGROUND

¶2 The criminal complaint alleged that Gruszczynski embezzled from four businesses and a church. While employed at a payroll services firm, Gruszczynski stole \$57,901.47 from Hideaway Builders; \$15,756.30 from Quick Stop Ltd.; \$27,255.86 from J&T of Crivitz, Inc.; and \$10,505.63 from Paris in Pembine, Inc. Gruszczynski also volunteered as a bookkeeper for the Faith Presbyterian Church, from which she stole \$50,419.90.

¶3 The State charged Gruszczynski with five counts of felony theft of an amount between \$2,500 and \$5,000, a Class I felony punishable by imprisonment not to exceed three years and six months. *See* WIS. STAT. §§ 943.20(3)(bf); 939.50(3)(i).¹ Gruszczynski pled guilty and the parties jointly recommended a sentence of three years, six months on one count—one year and six months' initial confinement and two years' extended supervision—and probation on the remaining counts. The parties also recommended that the court order Gruszczynski to pay all lawful restitution claims.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 The circuit court first dealt with restitution. Gruszczynski agreed to most of the amounts owed, but disputed \$273.75 of J&T's claimed loss. That total represented attorney fees owed to the sentencing judge's father for a small amount of work for the victim. The sentencing judge declined to award restitution for the attorney fees.

¶5 After determining the amount of restitution, the court considered Gruszczynski's ability to pay. Its reviewed the file from Gruszczynski's recent divorce, finding it relevant to that "crucial issue." The court expressed concern that Gruszczynski's ex-husband received a disproportionate share of assets in the divorce. Many of the victims who spoke at sentencing echoed that concern, noting that they endured severe financial hardship and that Gruszczynski's divorce left her financially incapable of providing full restitution. After the parties agreed to consider the issue at a later hearing, the court remarked that it believed the property division was "a sham."

¶6 The court then rendered its sentence. It discussed Gruszczynski's abuse of the victims' trust. It indicated that Gruszczynski's conduct potentially affected hundreds of others who needed to conduct audits to determine whether they were also victims. Some victims could not pay bills and had trouble obtaining credit. The court noted that Gruszczynski discussed these problems with the victims in the course of her employment, concluding that she "had to know the pain that these people were feeling and you sat there and you watched them suffer while you took their money."

¶7 The court ultimately rejected the joint sentence recommendation. It concluded the recommendation did not adequately protect the public or punish Gruszczynski. Accordingly, it imposed the maximum amount of confinement on

each count—three years and six months—with one year and six months’ initial confinement and two years’ extended supervision. The court also ordered the sentences be served consecutively.

¶8 Gruszczynski sought postconviction relief on the grounds set forth in this appeal. She claimed the circuit court violated her due process rights by relying on inaccurate information about her divorce at sentencing. She also claimed the sentencing judge was objectively biased because his father represented one of the victims. Gruszczynski challenged the court’s exercise of its sentencing discretion, asserting that the court failed to explain how her sentence achieved the sentencing objectives and imposed an unduly harsh and excessive sentence.

¶9 The court denied Gruszczynski’s postconviction motion. It explained that it considered Gruszczynski’s divorce only as it related to her ability to pay restitution. It also rejected Gruszczynski’s objective bias claim, noting that the judge’s father “never appeared in this court case, never filed a motion, never filed a petition, [and] was never in here. He was not the person setting forth the restitution claim for [J&T].” With respect to its exercise of sentencing discretion, the court stated it would “stand by the sentencing transcript. I read it. I certainly know that the Court of Appeals will read it, [and] I believe I have considered what is appropriate to consider.”

DISCUSSION

¶10 Sentencing is left to the discretion of the court and appellate review is limited to determining whether there was an erroneous exercise of that discretion. *State v. Patino*, 177 Wis. 2d 348, 384, 502 N.W.2d 601 (Ct. App. 1993). Sentencing decisions are presumptively reasonable consistent with “our strong public policy against interference with the circuit court’s discretion.” *State*

v. Harris, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. The defendant bears the burden of showing some “unreasonable or unjustifiable basis in the record for the sentence.” *Patino*, 177 Wis. 2d at 384. A sentencing court erroneously exercises its discretion, as a matter of law, when it sentences in contravention of a defendant’s due process rights. See *State v. J.E.B.*, 161 Wis. 2d 655, 663, 469 N.W.2d 192 (Ct. App. 1991).

I. Inaccurate Information

¶11 A defendant has a constitutionally protected due process right to be sentenced upon accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶9. “A defendant who requests resentencing due to the circuit court’s use of inaccurate information at the sentencing hearing ‘must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.’” *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998) (quoting *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990)). Whether a defendant has been denied this due process right is a constitutional issue that we review de novo. *Tiepelman*, 291 Wis. 2d 179, ¶9.

¶12 Even if the information regarding Gruszczynski’s recent divorce was inaccurate, Gruszczynski has not persuaded us that the sentencing court actually relied on it. A sentencing court relies on inaccurate information by giving that information “specific consideration” during sentencing. *Id.*, ¶¶13-14, 29 (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972) and *Welch v. Lane*, 738 F.2d 863, 866 (7th Cir. 1984)). The defendant must demonstrate such reliance by clear and convincing evidence—that is, to a “highly probable or reasonable certainty.” *Harris*, 326 Wis. 2d 685, ¶¶34-35.

¶13 Reviewing the sentencing record to determine whether the court relied on inaccurate information can be difficult. *See Welch*, 738 F.2d at 866; *see also Harris*, 326 Wis. 2d 685, ¶34. Sentencing courts may consider many factors, and we must view the sentencing transcript as a whole when assessing reliance. *See Harris*, 326 Wis. 2d 685, ¶45. However, sometimes reliance is clear from the record. In *Welch*, for example, the sentencing court explicitly relied on an inaccurate prior conviction by noting the conviction was a “significant factor” in its sentencing decision. *Welch*, 738 F.2d at 866. And in *Tiepelman*, the sentencing court emphasized its mistaken impression that the defendant had “over twenty prior convictions at the time of the commission of this offense,” when in fact he had only five. *Tiepelman*, 291 Wis. 2d 179, ¶¶6, 29. Although the sentencing court did not explicitly say so, it was obvious from the record that the purported “well-established pattern of criminal behavior” was a significant factor for the court’s decision. *Id.*, ¶29.

¶14 The record here does not demonstrate to a “highly probable or reasonable certaint[y]” that the sentencing court relied on the inaccurate divorce information. *See Harris*, 326 Wis. 2d 685, ¶35. Early in the sentencing hearing, the court noted that it had reviewed the divorce file and concluded that Gruszczynski’s ex-husband “got all of the assets of the family and Miss Gruszczynski got essentially nothing.” However, that observation occurred immediately following the court’s restitution discussion and before the court pronounced its sentence. More importantly, the court stated that it was discussing the property division only as it related to the “crucial issue” of Gruszczynski’s ability to pay restitution. When defense counsel stated he was not prepared to discuss Gruszczynski’s ability to pay, both defense counsel and the court agreed to resurrect the issue at a later hearing.

¶15 The circuit court later stated it believed the property division was a “sham.” Gruszczynski contends the court’s statement indicates it was considering the divorce as it relates to her character, not her ability to pay. We disagree. We review the sentencing transcript as a whole, and review potentially inappropriate comments in context. *See Id.*, ¶45. When viewed in context, the court’s “sham” comment was clearly meant to convey the court’s displeasure that Gruszczynski was likely unable to pay full restitution. The comment occurred before the court began discussing Gruszczynski’s character. The court made the comment while summarizing the victims’ statements that Gruszczynski’s divorce was intended to hide marital assets that could be used to pay restitution. And the record shows the court’s only stated reason for discussing Gruszczynski’s divorce was her ability to pay. The court did not indicate the divorce was relevant for any other purpose at sentencing. Thus, Gruszczynski has not demonstrated to a highly probable or reasonable certainty that the court relied on any inaccurate information regarding her divorce.

II. Objective Bias

¶16 A defendant has a due process right to an impartial judge. *State v. Goodson*, 2009 WI App 107, ¶¶7-8, 320 Wis. 2d 166, 771 N.W.2d 385. We presume that judges are fair, impartial, and capable of ignoring any biasing influences, but the presumption is rebuttable. *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. Whether a circuit court’s partiality can be questioned is a matter of law that we decide independently. *Goodson*, 320 Wis. 2d 166, ¶7.

¶17 In evaluating whether the defendant has rebutted the presumption in favor of the court’s impartiality, we apply two tests, one subjective and one

objective. *Id.*, ¶8. Gruszczynski concedes she cannot show that the sentencing court was subjectively biased. However, she claims the court was objectively biased because the presiding judge’s father briefly represented a victim seeking criminal restitution from Gruszczynski.

¶18 Gruszczynski’s claim is essentially that the circuit court’s action created an impermissible appearance of bias. The appearance of bias offends constitutional due process principles whenever “a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to hold the balance ‘nice, clear and true’ under all the circumstances.” *Gudgeon*, 295 Wis. 2d 189, ¶24; *see also Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2264 (2009).

¶19 The sentencing judge’s consideration of whether to award nominal attorney fees to a victim represented by his father did not violate due process under the circumstances of this case. The father did not litigate the restitution claim for J&T, did not appear in court, and never filed a motion or other document. Further, the father apparently conducted minimal work related to the representation, as the total bill was only \$273. As the court noted during the postconviction hearing, that amount likely represents only an hour or two of billed time. Moreover, the court ultimately denied to award restitution for the attorney fees. In short, we are not persuaded that a reasonable observer would believe that the sentencing judge was in any way tempted not to hold the balance nice, clear and true.

III. Failure to Consider the Sentencing Objectives

¶20 A circuit court must exercise its discretion on the record at sentencing. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

Discretion is not synonymous with decision-making. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). “[Discretion] contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” *Id.* The record must indicate the reasons—a rational and explainable basis—for selecting the sentence imposed. *Gallion*, 270 Wis. 2d 535, ¶¶22, 24, 28, 39.

¶21 In *Gallion*, our supreme court set forth a “basic framework for this process of reasoning.” *Id.*, ¶40. Sentencing courts must specify the objectives of the sentence on the record, including protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others. *Id.* The courts must “identify the general objectives of greatest importance,” and then “describe the facts relevant to [those] objectives.” *Id.*, ¶¶41-42. They should then “identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision.” *Id.*, ¶43. A sentence should call for the minimum amount of custody or confinement that is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. *Id.*, ¶¶23, 44. In short, the sentencing court must “explain how the sentence’s component parts promote the sentencing objectives.”² *Id.*, ¶46.

² The court correctly summarized the basic *Gallion* framework as it began issuing its sentence. It stated, “I have to keep in mind the general objectives of the criminal justice system. I need to identify those that are most applicable and then I need to fashion a sentence that meets them.” *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

¶22 Gruszczynski claims the court’s sentencing decision fails to reflect a proper exercise of discretion. She concedes the court engaged in an “extensive discussion of Ms. Gruszczynski’s behavior and other factors,” but argues it “failed to connect this discussion to its ultimate decision to reject the joint recommendation” She further argues the court “did not explain why the sentence imposed was the minimum necessary to accomplish its objectives.” We conclude Gruszczynski’s arguments have no basis in the sentencing transcript.

¶23 The court first recited the sentencing objectives, emphasizing those of greatest importance. It stated that punishment and rehabilitation were appropriate objectives, but particularly stressed the need to protect the community from Gruszczynski’s deception. The court also emphasized deterrence as an objective, noting that Gruszczynski’s thefts were particularly egregious because she abused a position of trust. In the court’s view, its sentence would need to convey to others that abusing a position of trust for pecuniary benefit is unacceptable.

¶24 The court then discussed the facts relevant to the protection of the public and personal deterrence objectives. The court noted that Gruszczynski continued to steal after being caught several years earlier. It emphasized Gruszczynski’s indifference to others’ suffering, observing that Gruszczynski “had to know the pain that these people were feeling” as they tried to figure out why their businesses were struggling. The thefts occurred over a lengthy period of ten years, prompting the court to observe that the full extent of Gruszczynski’s criminal activity might never be known.

¶25 The court then discussed the factors it considered in arriving at its sentence, including the serious nature of the crimes; Gruszczynski’s age,

educational background, and employment record; her personality, character, degree of culpability, and remorse; and the rights of the public. *See Gallion*, 270 Wis. 2d 535, ¶43 n.11.

¶26 The court observed that Gruszczynski's crimes were especially egregious because she had abused positions of trust to steal substantial amounts. It noted that Gruszczynski could have been charged with multiple Class G felonies for theft, which are each punishable by up to ten years' imprisonment. *See WIS. STAT. § 939.50(3)(g)*. The court discussed the severe and prolonged financial hardship endured by the victims; one business shut down, another seemingly profitable business was sold for a loss, and others needed to lay off employees. Suppliers for one victim would only accept cash on delivery, and some owners needed to "pump their own private capital back into the businesses ... just to keep their heads afloat." The court compared Gruszczynski to a young man it had recently sentenced for burglarizing dozens of dwellings over several months, but noted that Gruszczynski, unlike that defendant, "broke something more valuable and that's [the victims'] trust."

¶27 The court then considered Gruszczynski's age, educational background and employment record. It observed that Gruszczynski's actions were inexplicable for a well-educated and consistently employed fifty-six-year-old.

¶28 The court also evaluated Gruszczynski's personality, character, degree of culpability, and remorse. Although Gruszczynski had no prior record, the thefts had occurred over a ten-year period. The court believed Gruszczynski felt remorse, but expressed concern at the deceptive nature of the crimes and the fact that Gruszczynski was not immediately forthcoming when questioned about the thefts.

¶29 Finally, considering the rights of the public, the court concluded Gruszczynski posed a substantial risk of reoffending:

[I]t's virtually impossible for me to say you are a good risk at this point. It happened for such a long period of time that there's no reason for me to think just because you've been caught—you've been caught once before and it didn't stop. I suppose now more people know about it, but there's no reason for me to suspect that ... it's going to completely change just because of this. I know you said ["I don't steal anymore.[]"] Well, you're asking me to take you at your word and, frankly, your word is no good at this point.

¶30 The court then restated the sentencing objectives, concluding the factors it considered warranted a sentence that would protect the public, deter Gruszczynski and others from engaging in similar conduct, and punish Gruszczynski:

I do think the community needs protection. I don't want to have another courtroom full of people sitting here two years from now or three years from now.

I think there does need to be a deterrent effect to this sentence, and I think there is a moral need for punishment here as well.

¶31 Gruszczynski argues that the circuit court failed to offer “an explanation for the general range of the sentence imposed.” See *Gallion*, 270 Wis. 2d 535, ¶49. We disagree. The court need not determine a sentence using mathematical formulas. *Id.* The circuit court was clearly concerned that sentencing Gruszczynski in accordance with the joint recommendation would unnecessarily jeopardize the public. Its discussion of the sentencing factors also shows that the court was troubled by the deceptive nature of Gruszczynski's crimes, their duration, and the fact that Gruszczynski victimized individuals who considered her a friend. The record sets forth an adequate basis for the sentence.

IV. Harsh and Excessive Sentence

¶32 A sentencing court erroneously exercises its discretion when 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). Sentences well within statutory maximums are presumed not to be unduly harsh or unconscionable. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

¶33 Gruszczynski’s sentence does not shock the public sentiment. Gruszczynski received the maximum possible sentence for the charged offenses, but the court noted she could have been charged with crimes carrying a much higher penalty. Further, the court discussed its concern for the public welfare, as well as the need to punish Gruszczynski and deter others from similar breaches of trust.

¶34 Gruszczynski also argues that her sentence is unduly harsh because it is disproportionate to other sentences for similar crimes. Specifically, Gruszczynski contends her sentence was much more severe than that given to the young man convicted of multiple burglaries the court mentioned at Gruszczynski’s sentencing. However, “[t]here is no requirement that defendants convicted of committing similar crimes must receive equal or similar sentences.” *Lechner*, 217 Wis. 2d at 427. The court found Gruszczynski’s offenses more severe because she took advantage of the victims’ trust for years. The court reasonably concluded that Gruszczynski deserved a longer prison sentence based on the nature of her offenses.

By the Court.—Judgment and order affirmed.

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

